IN THE SUPREME COURT OF THE STATE OF OREGON

UNION LUMBER CO.• an Oregon, Corporation, dba Bronson Lumber Company, Plaintiff-Respondent Petitioner on Review, V. RON R. MJLLER and LrNDA MILLER, Defendants-Appellants Respondent on Review.	Union County Circuit Court No. 10-07-46539 CA No. A152241 SC No. S062459

RESPONDENTS' BRIEF ON THE MERITS ON REVIEW

Review of the decision of Court of Appeals on appeal from judgment of the Circuit Court t(>l' Union County, Honorable Russell B. West, Judge. and supplemental judgment of Honorable Brian Dretke, Judge.

Opinion tiled: July 18, 2014
Author of Opinion: Timothy J. Sercombe. Judge. Concurring Judges: Darlene Ortega, Presiding; Erika Hadlock, Judge.

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RESPONDENTS' BRIEF ON THE MERITS ON REVIEW

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I. STATEMENT OF THE CASE

A. Response to Statement of Legal Questions.

1. Respondents-Defendants' agree that ORCP 9 was the basis of the Court of Appeals' ORCP 71 B ruling. However, Defendants' disagree with the characterization of framing the issue as a matter of reliance on the part of Plaintiff, the trial court, and the Arbitrator.

The term "reliance" was not addressed by the Court of Appeals nor did Appellant-Plaintiff invoke that term in its Petition for Review and accordingly, it should not be considered here. Defendants instead propose the following legal question:

"Does the failure of a party to comply with the express service requirements of ORCP 9 constitute a sufficient mistake entitling the other party to relief under ORCP 71 B?"

2. Defendants have no objection to the phraseology of the second legal question.

B. Response to Statement of the Nature of the Action or Proceeding.

Defendants' concur with Plaintiff's statement of the nature of the action.

C. Response to Statement of Facts of the Case.

Defendants' concur with the Court of Appeals' statement of facts. Plaintiff has faithfully reproduced those facts except in the following particulars:

1. Plaintiff omits in the body of its facts statement one of the grounds of relief Defendants' sought below: Misconduct by Plaintiff's counsel in

failing to send pleadings, notices, and correspondence to them as required by court rules. App 5-6.

2. Plaintiff omits the following relevant facts that were included in the Court of Appeals opinion after Plaintiff's recitation of facts concluded:

> There is no question here that Defendants' acted with reasonable diligence and possess meritorious defenses to [Plaintiffs] claims. App 8.
>
> The answer [filed by Ean] was not signed by Defendants, and it did not state the address of the Defendants in Burlington, Wisconsin, where they reside and were served with the summons and the Complaint. Instead, the answer set out Ean's address. App 10.
>
> [D]efendants' last known address was not Ean's address, despite what was listed in the answer. Plaintiff served its summons and complaint on defendant Linda Miller by personal service at her residence on McHenry Street, in Burlington, Wisconsin, on August 3, 2010. The answer was filed by Ean on August 30 [, 2010] and contained the inaccurate listing of 'Defendant's Address.' But defendant Ron Miller was served by substituted service on defendant Linda Miller in November 2010 at the Wisconsin address. Plaintiffs counsel filed a notice of substituted services with the court, asserting that the Wisconsin address was defendant Ron Miller's 'usual place of abode.' Thus, by the end of 2010--after the filing of the answer--defendants' 'last known address,' as reflected in the court's file, was at their Wisconsin residence. As noted, the referral of the case to arbitration occurred later, on March 2, 2011. None of Plaintiff's 2011 filings in connection with the litigation were mailed to Defendants at their last known address. Instead, those documents were mailed to Ean at his address. The documents that were not properly served included Plaintiffs prehearing statement of proof, proposed judgment, attorney fee

> petition, and cost bill. Nor were the orders relating to the arbitration properly served on Defendants. The arbitrator's letters to the parties announcing his appointment, soliciting hearing dates, and setting the time and place of the hearing were sent to Ean at the La Grande address. App 12-13.
>
> As with Plaintiff's filings, the arbitrator's decision and award were not mailed to Defendants' last known address as shown in the court's files. App 13.

D. Summary of Arguments.

1. The Court of Appeals was right for the right reason. Failure to serve Defendants with notices and other court filings as required by ORCP 9 is the kind of mistake that justifies setting aside the judgment pursuant to ORCP 71 B.

2. The Court of Appeals was right for the wrong reason. Any of the following reasons would support a holding affirming the judgment of the Court of Appeals:

> 1. Inadvertence, surprise, or excusable neglect, rather than mistake, justifies setting aside the judgment under ORCP 71 8(1)(a).
>
> 2. The failure of Plaintiff to properly serve Defendants is better characterized as fraud, misrepresentation, or misconduct under ORCP 71 8(1)(c).
>
> 3. The judgment was void and thus should be set aside under ORCP 71 8(1)(d)

3. No violence to the regular disposition of litigation would occur if the judgment is set aside. There is long-standing precedent holding that the court is to construe ORCP 71 8 liberally to allow Defendants their day in court. Moreover, the express wording of ORCP 71 8 states the additional

parameters required for relief, i.e., that the motion is filed within a reasonable period of time and there is a meritorious defense. Because case law supports that rule, no further analysis is needed. In any event, equity lies with Defendants who have acted diligently, have a meritorious defense, and only seek their day in court.

II. ARGUMENT

A. Setting the Record Straight.

Before setting forth Defendants' arguments, it is important to keep in mind the operative facts. The facts are correctly set forth in the Court of Appeals' opinion. Plaintiff has, inexplicably, added to those facts without citation or evidence of any kind.

Thus on page eight of Plaintiff's brief, Plaintiff states:

> Defendants, although residing out of state, had always used a local Union County, Oregon mailing address in dealing with Plaintiff, as well as using their son Ean Miller in all their dealings with Plaintiff. Proof of this fact can be seen on the Defendants' credit application given to Plaintiff when the account was set up (that address was P.O. Box 111, Elgin, Oregon, 97827) and is where the Plaintiff mailed all invoices and billing materials ordered and delivered to Defendants over the years.

There is no evidence in the record supporting these assertions. Moreover, they are untrue.

In the same paragraph, Plaintiff further states:

> No notices or copies of pleadings were ever returned to Plaintiff or the arbitrator to put them on notice that the N 2"d Street address might not be a proper mailing address.

Again, this is just a blind assertion by Plaintiff without supporting

evidence.[1]

Finally, Plaintiff states that Defendants' "asserted under their filed documents that [the La Grande address] was theirs." Plaintiff's Brief, page 8-9. Defendants made no such assertion. The address in the Answer filed by Ean was his own which, until now, Plaintiff acknowledged. Proof of this can be seen in each of Plaintiff's certificates of service which are addressed to Ean (not Defendants) in La Grande. See ER 17 (Plaintiff's Prehearing Statement of Proof Certificate of Service); ER 19 (General Judgment Certificate of Service).

Moreover, as the Court of Appeals' opinion points out, Plaintiff's attorney served Defendant Ron Miller at his house in Wisconsin after Ean filed the Answer and Plaintiff's attorney represented in his Notice of Substituted Service that this was Defendant Ron Miller's "usual place of abode."

All of these mischaracterizations by Plaintiff are vexing especially in light of the well-established rule that the court views "the facts in the light most favorable to the party seeking relief from the default." App 3.

B. The Court of Appeals was Right for the Right Reason.

The Court of Appeals held that the failure of Plaintiff's counsel and the arbitrator to serve Defendants with significant orders and filings as required by ORCP 9 were the type of mistakes under ORCP 71 8(1)(a) that required the court to set aside the judgment.

In arriving at this conclusion, the court noted the following:

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[1] Plaintiff repeated this assertion at the trial court and Court of Appeals, but has never provided evidence of this fact.

1. The Answer filed by Ean was defective under ORCP 17 A because it was not signed by the Defendants and did not state the address of the Defendants but instead gave the address of Ean;

2. The last known address of Defendants in the court file was in Wisconsin; and

3. The failure of such service inhibited Defendants' exercise of their right to seek a *de novo* trial of the action under ORS 36.425(2)(a).

These statements are, of course, true but they fail to convey the underlying machinations of the failure of process in this case. It will be remembered that in this case, the first thing that Plaintiff's counsel did at arbitration was have the Answer stricken for the reasons that it was not signed by a party or a licensed attorney. Thus, Plaintiff was under no delusion that the document was a valid pleading under Oregon law. Yet Plaintiff now complains that they are entitled to rely on that very same document.

This procedural move by Plaintiff set the stage for the very judgment Plaintiff is now trying to reinstate.[2] Thus, Plaintiff is attempting to have its cake and eat it too.

The situation is further compounded because even after Ean's

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[2] At the Circuit Court level, Plaintiff's attorney explained that because the Answer was stricken, all of Plaintiff's claims were deemed to be true (TR 12).

Answer was stricken, Plaintiff and the arbitrator continued to serve Ean, not the Defendants.

Had Plaintiff timely served Defendants, Defendants could have timely raised an objection to the order and judgment and could have and would have timely requested a *de novo* appeal in the Circuit Court. In fact, by reviewing the trail court record, it may be seen that Defendants missed their 30-day window under ORS 36.425(2)(a) by only a matter of weeks.

The ruling by the Court of Appeals comports with the rule set forth in Saldivar v. Roberts, 240 Or App 371, 375 (2011) which states:

> When considering a motion for relief from default, it is the court's responsibility to liberally construe ORCP 71 8(1){a) so as to avoid the harsh result of depriving a party of its day in court. As an aspect of that liberal construction, the court views the facts in the light most favorable to the party seeking relief from the default. A motion under ORCP 71 8(1)(a) may be granted if:
>
> (1) [T]he judgment was entered by virtue of mistake, inadvertence, surprise, or excusable neglect; {2) the defendant acted with reasonable diligence after knowledge of the judgment; and (3) the defendant possesses a meritorious defense to the action.

By the mistake of not properly serving Defendants, Defendants were not alerted that the case was proceeding until after a final judgment was entered to their surprise. This prevented Defendants from having their day in court, which is all they are asking for.[3]

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[3] The Court of Appeals specifically found that there is no question that Defendants acted with reasonable diligence and possess meritorious defenses to Plaintiff's claims.

Affirming would also be consistent with this court's recent rulings in Ann Sacks Tile and Stone. Inc. v. Department of Revenue, 352 Or 380 (2012) (Taxpayers attempt to preform service of notice of appeal by e-mail failed to comply with service requirements under ORCP 9 even though department acknowledged timely receipt of such service) and Heikkila v. Heikkila, 335 Or 753 (2014) (Husband's service of notice of appeal on wife alone when wife was represented by an attorney failed to comply with service requirements under ORCP 9). Although neither case construed the interplay between ORCP 71 and ORCP 9, the relevance here is that both of these Supreme Court decisions required strict adherence to the service requirements of ORCP 9, which is precisely where Plaintiff failed here.

C. Even if the Court of Appeals was not Right for the Right Reason, it was Right for the Wrong Reason.

There are alternative bases by which this court may affirm that have been already argued below. ORCP 9.20(2) provides in part that "the questions before the Supreme Court include all questions properly before . the Court of Appeals...."

These are set out separately below.

1. Inadvertence, Surprise, or Excusable Neglect, Rather than Mistake, Justifies Setting Aside the Judgment Under ORCP 71 B(1)(a).

Inadvertence, surprise, or excusable neglect justifies setting aside the

judgment.

This argument takes two forms. The first is simpler: Rather than the mistake of Plaintiff misdelivering filings and other important court documents, it could be deemed that not receiving those documents is justifiable inadvertence, surprise, or excusable neglect. That is, the failure of Defendants to receive documents that were not mailed to them at their last known address should be enough. *See* Trucke v. Baughman, 210 Or App 448 (2007) (error to not set aside judgment against mother in custody proceedings on the grounds of "mistake, inadvertence, surprise, or excusable neglect" under ORCP 71 B when the court mistakenly failed to notify mother of the time and place of hearing).

The second form is the reprise of Defendants' argument below. That is, that Defendants' conduct was excusable under the test articulated in Johnson v. Sunriver Resort Limited Partnership, 252 Or App 299, 306 (2012), holding:

> Generally speaking, neglect that leads to a default will be deemed "excusable" when a defendant, or a person acting on the defendant's behalf, took reasonable initial steps to ensure that an appropriate response would be filed to a complaint, even though the process later broke down.

As more fully argued below, Defendants' conduct should be deemed excusable. Defendants took steps to respond to the complaint through their son. However, for reasons uncertain to Defendants and their son, the process later broke down because Defendants' son did not get the notices that were being sent to him at his old address.

This is especially true since the notices and filings seem to have been

lost in the mail. *See* Wagner v. Prudential Insurance Co., 276 Or 827 (1976) (finding excusable neglect when service was lost in the mail).

The Court of Appeals held that the trial court did not abuse its discretion by not setting aside the judgment based on excusable neglect because the Defendants' chose to proceed *pro se* and thereby embraced the risk of error due to lack of expertise, and for failing to adequately monitor the progress of the litigation. App 11.

This was error by the Court of Appeals. The Answer filed by Defendants would indicate that they acted reasonably and timely.

According to Plaintiff, the credit account opened by Defendants was in 2002. Complaint, paragraph 3. Defendants moved to Wisconsin shortly thereafter.

According to the Answer filed by Ean, Defendants had nothing to do with the charges, Ean did not have actual or apparent authority to charge materials to Defendants account, and the materials purchased by Ean did not benefit Defendants in any way. Moreover, a representative of Plaintiff, Ce Ce, told Defendants that she was aware that these facts were true "but thought we [Plaintiff] would try anyways." Plaintiffs Answering Brief (CA) ER 1-2.

It was reasonable, therefore, for Defendants to rely on their son to defend this matter. They signed a power of attorney to their son and assumed they would be notified of the progress of their relatively small lawsuit. This is especially true when it appears from the Answer that Ean had taken out bankruptcy and that this was the reason Defendants were

named as parties in the first place.

2. The Failure of Plaintiff to Properly Serve Defendants is Better Characterized as Fraud, Misrepresentation, or Misconduct under ORCP 71 8(1)(c).

As argued below, Defendants' believe Plaintiff's conduct constitutes extrinsic fraud.

ORCP 9 requires Plaintiff to serve the Defendants unless the Defendants are represented by an attorney. Defendants were not represented by an attorney and were not served with notices or filings which would have apprised them of the status of the case, including the fact that the case had scheduled for arbitration. The failure of Plaintiff to properly serve Defendants kept Defendants in ignorance of the action and prevented them from appearing at the arbitration.

Keeping a party in ignorance of the action "justifies relief from the judgment because there has been in effect, no real trial of the issues". JRD Development Joint Venture v. Catlin, 116 Or App 182, 185 (1992).

3. The Judgment was Void.

Defendants also reprise their argument that the judgment was void.

Defendants' Answer was stricken or dismissed at arbitration. At oral argument of the circuit court level, Plaintiff's attorney explained that because the answer was stricken, all of Plaintiff's claims were deemed to be true (TR 12). A judgment was subsequently entered in favor of Plaintiff.

Interestingly, Plaintiff admits on page eight of its brief that "the

purported Answer [filed by Ean] clearly showed Defendants Ron and Linda Miller intended to file an appearance." Accordingly, this shows that Defendants did not, in fact, file an appearance, by Plaintiff's own admission, but that they clearly intended to.

The appropriate procedure in that situation is to file a 10-day notice of intent to take a default as provided in ORCP 69(a)(1), which Plaintiff failed to do.[4] That failure renders he judgment void, justifying setting aside the judgment under ORPC 71 8(1)(d). Unifund CCR Partners v. Kelley, 240 Or App 23, 28 (2010). Denkers v. Durham Leasing Co. Inc., 299 Or 544, 550 (1985).

D. No Violence to the Regular Disposition of Litigation Would Occur if the Judgment is Set Aside.

Plaintiff complains that setting aside the judgment would do violence

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[4] ORCP 69(a)(1) provides: "When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, the party seeking affirmative relief may apply for an order of default. If the party against whom an order of default is sought has filed an appearance in the action, or has provided written notice of intent to file an appearance to the party seeking an order of default, notice, in the form prescribed by Uniform Trial Court Rule 2.010, of the intent to apply for an order of default must be filed and served upon the party against whom an order of default is sought at least 10 days, unless shortened by the court, prior to entry of the order of default. These facts, along with the fact that the party against whom the order of default is sought has failed to plead or otherwise defend as provided in these rules, shall be made to appear by affidavit, declaration, or otherwise, and, upon such a showing, the clerk or the court shall enter the order of default."

to the regular disposition of litigation because "Plaintiff must start from square one some four years later." Plaintiff's Brief, page nine.

Plaintiff has only itself to blame. Had Plaintiff properly served Defendants with the notices and other court documents, this matter would have been put to rest at arbitration. Indeed, if Plaintiff had not resisted the motion to set aside the judgment in the first place, which was filed on August 31, 2011, almost three years of the delay would have been abated.

Any inequity lies with Defendants not having their day in court.

As for the expression "violence to the regular disposition of litigation" is concerned, Defendants' concede that there has not been much guidance by the courts as to what exactly that means. The origin of the phase, at least in Oregon, seems to be in McFarlane v. McFarlane, 45 Or 360, 363 (1904) where the court stated:

> Ordinarily, if [a Defendant] presents reasonable grounds excusing his default, the courts are liberal in granting relief, for the policy of law is to afford a trial upon the merits when it can be done without doing violence to the statute and established rules of practice that have grown up promotive of the regular disposition of litigation.

There the court went on to hold:

> When [Defendants] have acted conscientiously and in perfect good faith * * * it does not stand to reason that they * * * should be punished or suffer because it subsequently develops by judgment of the court that they were mistaken in their views of the law and the proper procedure to be adopted. *Id.* @ 364.

In National Mortgage Company v. Robert C. Wyatt. Inc., 173 Or App 16, 20 (2001), cited by the Court of Appeals below, the court held:

> We note at the outset of our analysis that the setting aside of default judgments on the ground of neglect under ORCP 71 is predicated on the underlying policy that defaulted parties are entitled to have their day in court, when it can be done without doing violence to the regular disposition of litigation. Thus, ORCP 71 B is to be liberally construed to accomplish that goal.
>
> When the ground of excusable neglect is asserted, the defaulted party must show, in addition to excusable neglect, that the motion to set aside the judgment was brought within a reasonable time, not to exceed one year, and that the party has a meritorious defense.

Defendants' submit that the meaning of "violence to the regular deposition of litigation" is stated there. That is, no violence to the regular deposition of litigation will occur when a motion to set aside is 1) made within a reasonable time not to exceed a year and 2) there is a meritorious defense. This, of course, comports with the rule itself. Part of ORCP 71 B(1) states, "A motion for reasons (a), (b), and (c) shall be accompanied by a pleading or motion under Rule 21 A which contains an assertion of a claim or defense. The motion shall be made within a reasonable time, and for reasons (a), (b), and (c) not more than one year after receipt of notice by the moving party of the judgment."

Because Defendants' met these requirements, and because the long standing precedent of the court is to construe the rules liberally to allow Defendants their day in court, (as stated in both McFarlane and National Mortgage Company), the Court of Appeals should be affirmed.

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III. CONCLUSION

The Court of Appeals' opinion should be affirmed. Defendants' failed to have their day in court because of the failure of Plaintiff and arbitrator to properly serve them with notices and other court filings. Whether this should be deemed mistake or excusable neglect is left to the wisdom of the court. Alternatively, the court should find the judgment is void. No violence to the regular disposition of litigation would occur if the Court of Appeals is affirmed.

RESPECTFULLY SUBMITTED this 10th day of December, 2014.

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CERTIFICATE OF SERVICE

I certify that on December 10, 2014, I directed the original RESPONDENTS' BRIEF ON THE MERITS ON REVIEW, to be electronically filed with the Appellate Court Administrator, Appellate Records Section, by using the court's electronic filing system pursuant to ORAP 16.

I further certify that on December 10, 2014, I mailed two true and correct copies of Respondents' Brief on the Merits on Review, to attorney for Plaintiff- Petitioner on review, with postage prepaid, in an envelope addressed to:

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 3,767 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(d){ii).

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