

IN THE SUPREME COURT OF THE STATE OF OREGON

PHILIP C. LANG, personal representative of the Estate of Ruth M.
Plaintiff-Appellant
Petitioner on Review

v.

ROGUE VALLEY MEDICAL CENTER/ASANTE; ALISON SAVAGE, M.D.;
and CANCER CARE OF SOUTHERN OREGON, LLC,
Defendants-Respondents
Repondents on Review

Jackson County Circuit Court
113198L2

A158182

S064053

RESPONDENTS' JOINT BRIEF ON THE MERITS ON REVIEW

Review of the Decision of the Court of Appeals on Appeal from the Judgment of
Hon. Ronald Grensky, Judge.

Affirmed without Opinion: February 18, 2016
Before Duncan, Presiding Judge, Devore, Judge and Flynn, Judge

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1. Statement of the legal questions presented on review

To the extent that a motion to dismiss under ORCP 54 B(1) depends on facts, does the moving party have the burden of proof?

Is a motion to dismiss under ORCP 54 B(1) addressed to the discretion of the trial court?

On appeal, does the court review the trial court's findings to determine whether they are supported by any evidence?

On appeal does the court review the trial court's order for abuse of discretion?

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

Did plaintiff fail to preserve his position that a dismissal pursuant to ORCP 54 B(1) requires a finding of prejudice to the opposing party or to the operation of the legal system?

In granting a motion to dismiss under ORCP 54 B(1) is a trial court required to make a finding of prejudice to the opposing party or to the operation of the legal system?

Did plaintiff fail to preserve his position that the trial court failed to explain why the sanction of dismissal is “just” in view of the other available sanctions?

Did the trial court explain its analytical process as to why a lesser sanction is not warranted?

Did plaintiff fail to preserve an objection to paragraph 4 of the order of dismissal?

Did plaintiff fail to preserve his position that the trial court erred in denying plaintiff’s motion to set aside the dismissal?

Where the petition for review does not claim that the trial court erred in denying plaintiff’s motion to set aside the order of dismissal, is the question before the court?

Did plaintiff fail to demonstrate excusable neglect?

Where plaintiff’s motion to set aside the order of dismissal was not accompanied by a response to the motion to dismiss, did plaintiff fail to demonstrate excusable neglect as a matter of law?

2. Nature of the action and the relief sought in the trial court.

Defendants reject plaintiff’s statement of the nature of the action, the relief sought in the trial court, and the nature of the judgment rendered by the trial court, and submit the following.

This is an action for damages for wrongful death. The theory of recovery is medical malpractice. The defendants are Rogue Regional Medical Center and Asante (“hospital defendants”); and Alison Savage, M.D. and Cancer Care of Southern Oregon, L.L.C. (“defendant Savage”).

3. Nature of the judgment rendered by the trial court.

The trial court entered an order of dismissal of plaintiff’s complaint. Plaintiff filed an objection to the order of dismissal which included a motion to set aside the order of dismissal. The trial court denied plaintiff’s objection and motion to set aside, and entered a general judgment of dismissal with prejudice.

4. Facts material to determination of the review.

In November, 2012, defendants filed motions for summary judgment. On January 8, 2013, the trial court entered an order. The court held that the defendant hospital was not vicariously liable for the conduct of defendant Savage. The allegations of negligence at sub-paragraphs 8., 10., 11., 12., 14., 15., and 16. of paragraph 42. of the second amended complaint survived the motion for summary judgment. Order on defendants’ motions for summary judgment, SER-2.

On December 12, 2012, plaintiff filed a motion to extend discovery, to continue the scheduled trial date, and for leave to file a third amended complaint. On January 25, 2013, the trial court entered an order which vacated the current

trial date and provided that plaintiff was to file a motion seeking leave to file a third amended complaint upon completion of discovery.

On March 19, 2014, plaintiff filed a ‘notice’ for an order allowing plaintiff to file a third amended complaint. A proposed third amended complaint accompanied the motion. The proposed complaint contained multiple new allegations of fact, contained multiple new allegations of negligence, and alleged claims for punitive damages. Defendants filed objections to plaintiff’s motion.

Plaintiff’s motion was orally argued on April 14, 2014. The trial court ruled from the bench that the motion to amend was denied; that plaintiff’s motion to amend to assert a claim for punitive damages was denied; that within ten days, plaintiff was to file a third amended complaint that conformed to the court’s order on defendants’ motions for summary judgment; and that plaintiff could file a motion for an order granting leave to file an amended complaint which added new allegations of fact and new allegations of negligence. Tr 141-42, 147 (punitive damages); tr 145 (motion to file third amended complaint denied); tr 147-48 (plaintiff to file a motion to file his next amended complaint in conformity with court’s order on defendants’ motions for summary judgment within ten days).

On April 15, 2014, David Landis (Landis), counsel for the hospital defendants, sent a copy of the proposed order to Thomas Dimitre (Dimitre),

plaintiff's attorney, by e-mail. SER-6. The proposed order provides that the ten days runs from the trial court's order from the bench. On April 17, 2014, Landis served the proposed order by mail. ER 11-14.¹ On the same date, Landis sent an e-mail to Dimitre which asked him to confirm that he had received a copy of the proposed order, and requested that he advise whether he agreed with the form of the proposed order. SER 14.

On April 18, 2014, Dimitre confirmed that he had received a copy of the proposed order and promised to respond to the question by e-mail "over the weekend." *Id.*

Dimitre did not respond as promised. On April 22, 2014, Landis submitted the proposed order to the trial court. ER 4. On April 23, 2014, Dimitre stated in an e-mail: "I think this is fine, but the ten days to refile should be from the date that the order is signed." SER-15. By return e-mail the same date, Landis advised plaintiff's counsel that he had sent the proposed order to the court, and suggested that if he objected to the order, he could file an objection. *Id.*

On April 28, 2014, plaintiff filed a motion to file a third amended complaint. ER 5. The motion was accompanied by a memorandum and a (new)

¹The references to "ER" in this brief are to the Excerpt of Record in Appellant's Corrected Opening Brief.

proposed third amended complaint. The (new) proposed third amended complaint added 44 new allegations of fact and two new allegations of negligence.

On May 1, 2014, the trial court signed the proposed order. It provides that the ten days ran from April 14, 2014, the date that the trial court ruled from the bench. ER-11. Later in the day on May 1, 2014, plaintiff filed an objection to the proposed order. ER-7.

On May 16, 2014, the defendant hospital served its motion to dismiss plaintiff's action and response to plaintiff's motion for leave to file a (new) third amended complaint. ER-15. On May 20, 2014, defendant Savage filed a joinder in the hospital's motion to dismiss and response. SER-21.

On June 2, 2014, the court issued an e-mail notice that argument of the hospital defendants' motion to enlarge time and motion to dismiss were scheduled for argument on June 23, 2014. SER-24. On the same date the court entered a notice on OJIN that the motions were scheduled for argument on June 23. SER-26.

On June 23, 2014, oral argument was heard on plaintiff's (new) motion for leave to file a third amended complaint, plaintiff's objection to the proposed order (on plaintiff's motion for an order allowing plaintiff to file a third amended complaint), and on defendants' motions to dismiss plaintiff's action. Plaintiff did not file a memorandum in response to defendants' motions to dismiss plaintiff's

action and Dimitre did not appear. Tr 150-55.

The order that the Court entered recites that plaintiff did not file a memorandum in response to the motions to dismiss and did not appear at oral argument. It provides:

- “1. On April 14, 2014, the Court ordered that within ten days plaintiff file a third amended complaint which conforms to the Court’s order dated January 8, 2013, on defendants’ motions for summary judgment; and that plaintiff was permitted to file a motion for an order granting leave to file an amended complaint which adds new allegations of fact and new allegations of negligence within ten days.
- “2. Plaintiff willfully failed to comply with the Court’s order in that: on April 28, 2014, plaintiff filed a (new) motion for leave to file a third amended complaint. The motion was not timely filed. The (new) proposed third amended complaint did not comply with the Court’s order in that it purportedly conforms to the Court’s January 8, 2013 order and it also adds 44 new allegations of fact and new allegations or negligence against the hospital defendant and defendant Savage.
- “3. The conduct of plaintiff described in paragraph 2., *supra*, was in bad faith in that plaintiff took the position in his objection to the proposed order that he believed that the Court ordered that the (new) third amended complaint and the new motion be filed within ten days of the date that the order was signed. The 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.
- “4. The sanction of dismissal of plaintiff’s action is just. This

is plaintiff's second successive willful violation of the court's order with respect to filing a motion for leave to file an amended complaint. In the hearing on April 14, 2004, the evidence was that 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 ten 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 9, 2014, five months after it was due." ER-34 through 36.

The court denied plaintiff's motion for leave to file a (new) third amended complaint, denied plaintiff's objection to the proposed order (on plaintiff's motion for an order allowing plaintiff to file a third amended complaint), and granted defendants' motions to dismiss plaintiff's action. *Id.*

On June 27, 2014, plaintiff filed an objection to the proposed order which included a motion to set aside the dismissal of the action. ER 27. Plaintiff's objection and motion to set aside were supported by Dimitre's declaration. ER 30. The theory of plaintiff's objection and motion to set aside was that Dimitre did not file a response to the motion to dismiss because he did not receive a copy of it; and did not appear at oral argument because he did not receive notice of the hearing. Plaintiff's objection to the proposed order did not specify an objection to the findings in paragraph 4. of the proposed order.

On July 16, 2014, the hospital defendants filed a response to plaintiff's

objection to the proposed order of dismissal and to plaintiff's motion to set aside the dismissal of the action. On July 18, 2014, defendant Savage filed a response to plaintiff's objection to the proposed order and to plaintiff's motion to set aside the dismissal of the action.

On July 24, 2014, plaintiff filed a reply memorandum in support of plaintiff's motion to set aside the dismissal. SER 32. Plaintiff's reply memorandum relied on case law interpreting ORCP 71 B(1)(a). On the same date plaintiff filed a request for leave to file another amended complaint.

On the same date, July 24, 2014, the trial court heard oral argument on plaintiff's motion to set aside the order of dismissal of plaintiff's action and on plaintiff's objection to the proposed order dismissing plaintiff's action. Tr 156-226. The court ruled from the bench that it was denying plaintiff's objection to the proposed order and motion to set aside the dismissal. The court's remarks included the following:

"Every time Mr. Dimitre's filed an amended complaint, it's been radically different than the one before. That's why I told him he had 10 days to clean this thing up so we could get to a trial date." Tr 213

"I felt like his not showing up for that motion to dismiss was a tacit, basically, agreement that he hadn't complied with the order that was entered." Tr 214

"[H]ow abusive is it to these defendants and the people that they're

paying to represent them, to continually make concessions to plaintiff's lawyer who doesn't want to act like a lawyer?" Tr 217

The court rejected plaintiff's proposal that it disqualify Mr. Dimitre from trying the case. The court stated:

"I'm not telling a plaintiff that they should or shouldn't hire Mr. Dimitre. I'm just saying that he's not on top of this particular case, based on what I've seen, and somebody is going to get penalized here no matter what I do." Tr 217.

"[M]y ruling is***that the Motion to Dismiss***had merit and that the order that I entered at the time orally was intended to have Mr. Dimitre file a third amended complaint within 10 days***of the date that I made that order. That's what I intended, and I remember it because of the weird facts of this case and the fact that it was medical malpractice and the trial date wasn't that far away in the terms of that kind of a deal." Tr 218

"I believe Mr. Dimitre knew that he had 10 days and I think that he just figured nobody would call him on it***I don't think he was confused when he walked out of here." Tr 220,

The court commented that Mr. Dimitre objected to the proposed order because he hadn't prepared the (new) third amended complaint within ten days as required by the court's order "and he wanted to enlarge the time to buy himself some more time, just like all the rest of these things. It's like a thousand excuses." Tr 220-21.

"[B]ased on what's occurred in this case so far, I don't see that I have any choice." Tr 222.

“I don’t find this to be excusable neglect or inadvertence.” Tr 223.

“I felt there was a knowing violation of a Court order. I thought I made it clear that he had 10 days to file an amended complaint and he simply didn’t do it.***I did not want to keep going down this road over and over again with a trial date coming and with the expensive experts that have to be prepared for trial, and calendaring issues and what not.

“And one of the big issues was these were not minor complaint amendments; these were huge changes. That’s what everybody was concerned about. If it had been minor, that would be different; we’ll allow that the morning of trial.

“But***these were changes that were so big that they were having to talk to different people about how to defend the case.” Tr 224-25.

The order that the court entered included the following the following findings:

- “1. On April 14, 2014, the Court ordered that within ten days plaintiff file a third amended complaint which conforms to the Court’s order dated January 8, 2013 on defendants’ motions for summary judgment.
- “2. The Court intended that the ten days run from the date that the Court orally announced its ruling from the bench.
- “3. The Court believes that Thomas Dimitre, plaintiff’s attorney, knew that the ten days ran from the date that the Court ruled.
- “4. Mr. Dimitre wilfully failed to comply with the Court’s order.
- “5. The defendants then filed and served motions to dismiss. Oral argument of the motions to dismiss was scheduled for June 23, 2014. The defendants, through their

attorney, appeared at the oral argument. Mr. Dimitre did not appear. The Court ordered that plaintiff's action be dismissed. Mr. Dimitre contends that the motions to dismiss were not served on him, and that he did not receive notice from the court that the motions to dismiss were scheduled for June 23, 2014.

- "6. Mr. Dimitre had notice that defendants had filed motions to dismiss, and there is an inference that the motions to dismiss were served on Mr. Dimitre by mail.
- "7. Even if the motions to dismiss were not served on Mr. Dimitre, he had notice of the motions to dismiss. It was inexcusable neglect for him to fail to investigate and determine that the defendants had filed motions to dismiss.
- "8. Mr. Dimitre had notice that the Court intended to schedule oral argument of the motions to dismiss on June 23, 2014.
- "9. There is an inference that Mr. Dimitre received notice from the Court that oral argument was scheduled for June 23, 2014.
- "10. Even if Mr. Dimitre did not receive actual notice from the Court that oral argument was scheduled on June 23, 2014, Mr. Dimitre had sufficient notice of the Court's intent to schedule oral argument on June 23, 2014 to give rise to a duty to investigate and determine when the motions to dismiss had been scheduled for argument." ER 37-39.

The court denied plaintiff's motion to set aside the dismissal of plaintiff's action and denied plaintiff's objection to the proposed order dismissing plaintiff's action. *Id.* The trial court entered a general judgment dismissal based on the

orders. ER 2-3.

On appeal, plaintiff assigned the trial court's order of dismissal as error, and also assigned the trial court's order denying plaintiff's motion to set aside the order of dismissal as error. The Court of Appeals affirmed without opinion.

5. Summary of argument

To the extent that a motion to dismiss under ORCP 54 B(1) depends on facts, the moving party has the burden of proof by a preponderance of the evidence.

A motion to dismiss under ORCP 54 B(1) is addressed to the discretion of the trial court.

The trial court found that plaintiff's conduct was willful and in bad faith.

The trial court's findings are supported by competent evidence.

The trial court's ruling is within the range of lawful alternatives.

Plaintiff failed to preserve his position that a dismissal pursuant to ORCP 54 B(1) requires a finding of prejudice to the opposing party or to the operation of the legal system.

The trial court was not required to make a finding of prejudice to the defendants or to the operation of the legal system.

Plaintiff failed to preserve his position that the trial court failed to explain why the sanction of dismissal is "just" in view of the other available sanctions.

The trial court adequately explained its analytical process as to why a lesser sanction is not warranted.

Plaintiff failed to preserve an objection to paragraph 4 of the order of dismissal.

Plaintiff failed to preserve his position that the trial court erred in denying plaintiff's motion to set aside the dismissal.

Where plaintiff's assignment of error of the trial court's order denying plaintiff's motion to set aside the order of dismissal failed to identify the applicable standards of review and the petition for review does not claim that the trial court erred in denying the plaintiff's motion to set aside, the question is not before this court.

Where plaintiff's motion to set aside the order of dismissal was not accompanied by a response to the motion to dismiss, plaintiff failed to demonstrate excusable neglect as a matter of law.

6. Argument

a. Burden of proof and standard of review

The court has asked that the parties address the issues of what standards and procedures, including burdens of proof, the trial court must employ in determining whether to grant a motion to dismiss under ORCP 54 B(1) and the standard of

review of a trial court's ruling on a motion to dismiss under ORCP 54 B(1).

Research has disclosed no relevant Oregon case law which addresses the issue of the burden of proof on a motion to dismiss under ORCP 54 B(1).

Defendants accept that to the extent that a motion to dismiss under ORCP 54 B(1) depends on facts, the proponent of the motion has the burden of proof by a preponderance of the evidence.

In *Bock v. Portland Gas & Coke Co.*, 202 Or 609, 616, 277 P2d 758 (1954), the court held that defendant's motion to dismiss for want of prosecution was addressed to the discretion of the trial court and that the trial court's decision would be affirmed in the absence of a showing of manifest abuse of discretion. The Court of Appeals has held that a motion to dismiss for want of prosecution is addressed to the discretion of the trial court and is reviewed for abuse of discretion. *Lambert v. American Dream Homes Corp.*, 148 Or App 371, 375, 939 P2d 661 (1997). When the court's exercise of discretion is based on findings of fact, the court accepts those findings if there is evidence to support them. *Matchey v. Staffing Network Holdings, Inc.*, 195 Or App 576, 579, 98 P3d 1174 (2004) (so holding on motion to set aside a default judgment).

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- b. 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 plaintiff.**

Plaintiff proposes as a rule of law that “[d]ismissal pursuant to ORCP 54 B requires a finding of willfulness, bad faith, or fault of a similar degree on the part of the disobedient party.” Petitioner’s Brief, p. 19. Defendants agree.

Pamplin v. Victoria, 319 Or 429, 877 P2d 1196 (1994), arose out of a dismissal under ORCP 46 B(2)(c) (sanction for failure to provide discovery). The court noted that ORCP 46 B(2)(c) was based on FRCP 37(b)(2)(C), and held that decisions of the Supreme Court of the United States concerning FRCP 37(b)(2)(C) that predated the adoption of the Oregon counterpart inform this court as to the intent of the Oregon legislature. *Id.* at 433.

The court, relying on *Societe Internationale v. Rogers*, 357 US 197, 78 S Ct 1087, 2 L Ed 2d 1255 (1958), held that under ORCP 46 B(2)(c), a finding of willfulness, bad faith, or fault of a similar degree on the part of the disobedient party is required. *Pamplin*, 319 Or at 434.

In *Lambert*, 148 Or App 371, the trial court dismissed a case for want of prosecution. On appeal, the court applied the standards articulated in *Pamplin*, *i.e.*, that a trial court may order dismissal only after explaining the analytical process by

which it concluded that dismissal is just in view of the other sanctions that are available. 148 Or App at 375-76.

Johnson v. Eugene Emergency Physicians, P.C., 159 Or App 167, 974 P2d 803 (1999), arose out of a motion to dismiss under either ORCP 46 B(2) or ORCP 54 B(1). The parties and the trial court assumed that the standards applicable to a sanction for a discovery violation under ORCP 46 B(2) are also applicable to ORCP 54 B(1).

In the instant case, the defendants argued that the standards applicable to a sanction for a discovery violation under ORCP 46 B(2) are applicable to ORCP 54 B(1), and plaintiff did not argue otherwise. *See* hospital defendant's motion to dismiss, ER 15 at 20-21; plaintiff's objection to proposed order and memorandum in support of motion to set aside, ER 27-29; and plaintiff's reply memorandum in support of motion to set aside dismissal, SER 32-40.

The trial court found that plaintiff's conduct was willful, and in bad faith. ER 36.

- c. Plaintiff failed to preserve his position that a dismissal pursuant to ORCP 54 B requires a finding of prejudice to the opposing party or to the operation of the legal system.**

Plaintiff argues that the court should hold that a dismissal pursuant to ORCP

54 B(1) requires a finding of prejudice to the opposing party or, in the alternative, prejudice to the operation of the legal system. Petitioner's Brief, p. 24. As noted above, plaintiff filed an objection to the proposed order of dismissal combined with a motion to set aside the dismissal of the action. Plaintiff also filed a reply in support of the motion to set aside. Plaintiff did not argue in either memorandum that he filed that the trial court findings were inadequate because there was no finding of prejudice to the defendants or to the operation of the legal system.

Ordinarily, the court will not consider an issue unless it was first presented to the trial court. ORAP 5.45(1). The questions before this court include all questions properly before the Court of Appeals that the petition claims were erroneously decided by that court. ORAP 9.20(2).²

The rules of preservation apply to a claim that the trial court failed to make special findings as required by the case law. *Peeples v. Lampert*, 345 Or 209, 218, 222-23, 191 P3d 637 (2008). Plaintiff's objection to the dismissal order and motion to set aside the dismissal order did not raise the issue of the adequacy of the

²ORAP 9.20(2) provides in applicable part: "If the Supreme Court allows a petition for review***the questions before the Supreme Court include all questions properly before the Court of Appeals that the petition***claims were erroneously decided by that court. The Supreme Court's opinion need not address each such question. The court may consider other issues that were before the Court of Appeals."

trial court's findings. Plaintiff did not raise the issue in his reply memorandum in support of the motion to set aside the order of dismissal. Plaintiff did not raise the issue at the hearing on his objection to the dismissal order. Tr 156-226.

Accordingly, plaintiff failed to preserve his argument that dismissal pursuant to ORCP 54 B(1) requires a finding of prejudice to the opposing party or prejudice to the operation of the legal system, and this court should decline review of the claimed error. ORAP 5.45(1); *Peeples*, 345 Or at 222-23.

d. In granting a motion to dismiss under ORCP 54 B(1) a trial court is not required to make a finding of prejudice to the opposing party or to the operation of the legal system.

Plaintiff's argument that ORCP 54 B(1) requires a finding of prejudice to the opposing party or to the operation of the legal system is contrary to established case law.

In *Pamplin* plaintiffs argued that in order to justify dismissal under ORCP 46 B(2)(c), the party seeking discovery must show prejudice to it. This court held that a finding of prejudice to the party seeking discovery is not required. 319 Or at 434-36. In so holding, the court concluded that ORCP 46 B(2)(c) is concerned with prejudice to the operation of the legal system rather than with prejudice to the party seeking discovery. *Id.* at 345.

The court stated:

“The Supreme Court’s emphasis on the deterrent effect of FRCP 37 sanctions suggests that the rule itself is concerned with prejudice to the operation of the legal system, rather than with prejudice to the party seeking discovery. Moreover, in those two cases, the focus of the Court’s discussion was on the conduct of the disobedient party, to the exclusion of the effect of that conduct on the party seeking discovery. Additionally, the passage just quoted stressed the need for flexibility and discretion on the part of the trial judge. Finally, the words of the rule allow the sanction of dismissal to be applied whenever it is ‘just’ to do so. Prejudice to the party seeking discovery is one reason why dismissal may be ‘just,’ but that circumstance also can occur without specifically identified prejudice to that party. Accordingly, we hold that, under ORCP 46 B(2)(c), a finding of prejudice to the party seeking discovery is not required.” *Pamplin*, 319 Or at 435-36, quoting and relying on *National Hockey League v. Metro. Hockey Club, Inc.*, 427 US 639, 96 S Ct 2778, 49 L Ed2d 747 (1976).

There is no support in the case law for plaintiff’s proposal that a trial court is required to make a finding of prejudice to the opposing party or to the operation of the legal system. *See Bock*, 202 Or at 615-16 (in motion for dismissal for want of prosecution, defendant was not required to show that it had suffered prejudice). As discussed in the following section, the case law holds that the sanction of dismissal is appropriate only there is willfulness, bad faith, or other fault of like magnitude by the disobedient party and only when it is just in view of the facts on which the trial court based its decision and in view of the other sanctions that are available. Within those parameters, the trial court needs to have flexibility and discretion.

Pamplin, 319 Or at 436.

- e. **Plaintiff failed to preserve his position that the trial court failed to explain why a lesser sanction is not warranted.**

On appeal, plaintiff assigned as error the trial court's order in granting defendants' motions to dismiss. App Br 8. Plaintiff argued, for the first time, that the trial court failed to explain the analytical process by which it concluded that dismissal is just in view of the other available sanctions and that lesser sanctions are not appropriate. App Br 13. Accordingly, plaintiff failed to preserve his position. ORAP 5.45(1); *Peeples*, 345 Or at 222-23.

- f. **The trial court did explain its analytical process as to why a lesser sanction is not warranted.**

Plaintiff proposes as a rule of law that dismissal pursuant to ORCP 54 B(1) requires a finding of why any less onerous sanction would not be just or would be inadequate. Petitioner's Brief, p. 27. Defendants agree.

In *Pamplin*, the court held that the trial court must explain why the sanction of dismissal is "just" in view of the facts on which the trial court based its decision and in view of the other sanctions that are available. 319 Or at 437. *See also Johnson*, 159 Or App at 173 (follows *Pamplin*).

If the court determines to consider plaintiff's contention that the court

failed to explain the analytical process by which it concluded that dismissal is just in view of the other available sanctions and that lesser sanctions are not appropriate, the court did explain its analytical process. *See* the trial court's order on defendants' motions to dismiss, ER 34; the transcript of the trial court's ruling on plaintiff's motion to set aside the dismissal, which is summarized at pages 9-11, *supra*; and the trial court's order on plaintiff's motion to set aside, ER 37.

If the court determines that the trial court did not adequately explain why less onerous sanctions would not be just under the circumstances, the court should remand for reconsideration. *Johnson*, 159 Or App at 173.

g. Plaintiff failed to preserve an objection to paragraph 4 of the order of dismissal.

In its ruling from the bench on July 24, 2014, the court explained why it was denying plaintiff's objection to the order of dismissal. The court held, *inter alia* that there was a knowing violation of the court's order; and that the motion to dismiss had merit.

Plaintiff complains because the order of dismissal includes a paragraph that recites that discovery was complete on October 8, 2013, that plaintiff was required to file a motion for leave to file a third amended complaint within ten days after completion of discovery, and that in willful violation of the court's order, plaintiff

delayed filing his motion until March, 2014, five months after it was due.

Petitioner's Brief, pages 31-32, referring to Order at ER 34-36, paragraph 4.

Plaintiff filed an objection to the proposed order of dismissal which contended that plaintiff had not received a copy of the motion to dismiss and had not received notice of the hearing from the trial court. Plaintiff's objection did not include an objection to paragraph 4. of the order. ER 27-29. Accordingly, plaintiff failed to preserve that objection. ORAP 5.45(1); *Peeples*, 345 Or at 222-23.

h. Plaintiff failed to preserve his position that the trial court erred in denying plaintiff's motion to set aside the dismissal.

Plaintiff assigned the trial court's order denying plaintiff's motion to set aside the dismissal as error. App Br 13. Plaintiff's assignment of error did not comply with the requirements of ORAP 5.45(5) that an assignment of error identify the applicable standard or standards of review. *See*:

“[T]his provision of the appellate rules is not a mere technicality or formality. This requirement serves the purpose of causing the parties to frame their arguments appropriately to the types of rulings being challenged. It also helps to identify any differences that the parties may have regarding the proper scope of review, thereby allowing the court to explore the issue further at oral argument.” *State v. Schwartz*, 173 Or App 301, 305 n 2, 21 P3d 1128 (2001).

The petition for review does not claim that trial court erred in denying plaintiff's motion to set aside the dismissal in his brief on the merits. Because the

question was not properly before the Court of Appeals, and because the petition for review does not claim that the trial court erred in this respect, the question is not before this court. ORAP 9.20(2).

i. Plaintiff failed to demonstrate excusable neglect.

If the court determines to consider the contention made in plaintiff's brief in the Court of Appeals that the trial court erred in denying plaintiff's motion to set aside the order of dismissal, plaintiff failed to demonstrate excusable neglect.

Plaintiff's motion to set aside the dismissal is governed by ORCP 71 B(1)(a) (relief from judgment for mistake, inadvertence, surprise or excusable neglect). *Longyear, Admx. v. Edwards*, 217 Or 314, 319, 342 P2d 762 (1959), construing and applying the predecessor of ORCP 71 B(1)(a), *former* ORS 18.160, to order of dismissal for want of prosecution.

Where, as here, the party whose case has been dismissed was represented by an attorney, the excusable neglect analysis examines the act or omission of the attorney to determine whether the conduct of the attorney was the kind of mistake, negligence, or inadvertence that would require vacation of the order. *McCarthy v. Oregon Freeze Dry, Inc.*, 334 Or 77, 90, 46 P3d 721 (2002).

The applicable rule is that:

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“Ordinarily a party will not be relieved from a judgment or decree taken against him through the mistake, negligence or inadvertence of his attorney, unless the act or omission of the attorney was such, that had it been committed or omitted by the party himself, he would be entitled to a vacation of the judgment or decree.” *Id.*

In *Longyear* the court held that plaintiff and her attorneys were charged with knowledge that inaction for one year could result in dismissal of her case under *former* ORS 18.260, and that the negligence of plaintiff’s attorney in failing to investigate the record to see what had transpired was attributable to the plaintiff. *Longyear*, 217 Or at 320. In *Ebel v. Boly*, 258 Or 308, 313, 481 P2d 620 (1971), the court held that plaintiffs were charged with notice of *former* Multnomah County Court Rule 4.00 which provided for dismissal of a case for want of prosecution, and that the negligence of plaintiffs’ attorney was plaintiffs’ negligence.

Similarly, in this case plaintiff and his former attorneys were charged with knowledge of the trial court’s ruling on April 14, 2014, the defendants’ motions to dismiss, the date scheduled for oral argument, and the rules on preservation.

If Mr. Dimitre failed to protect plaintiff’s position with respect to the trial court’s ruling on April 14, 2014, Mr. Dimitre’s negligence is plaintiff’s negligence, and plaintiff has failed to demonstrate excusable neglect.

The same result is reached by applying the rule that ineffectiveness of legal

counsel in avoiding a judgment is not excusable neglect sufficient to require relief under ORCP 71 B(1). *Blue Horse v. Sisters of Providence*, 113 Or App 82, 86, 830 P2d 611 (1992) (if plaintiff's otherwise unexplained failure to appear at hearing was the result of a misunderstanding or miscommunication with her attorney, trial court did not abuse its discretion in denying plaintiff's motion to set aside under ORCP 71 B(1)); *Stull v. Ash Creek Estates, LLC*, 187 Or App 63, 68, 66 P3d 515 (2003) (it is not excusable neglect if the responsible attorney is unable to explain why he failed to respond to a motion or appear at a hearing).

j. Plaintiff's motion to set aside was not accompanied by a response to the motion to dismiss as required by ORCP 71 B(1).

ORCP 71 B(1) requires that a motion to set aside a judgment for excusable neglect be accompanied by a pleading or motion under Rule 21 A that "contains an assertion of a claim or defense." A court "abuses its discretion by considering an ORCP 71 B(1) motion that is not 'complete,' that is, that does not contain a responsive pleading[.]" *Dickey v. Rehder*, 239 Or App 253, 259, 244 P3d 819 (2010), *rev den* 349 Or 664 (2011); *Duvall v. McLeod*, 331 Or 675, 680, 21 P3d 88 (2011). The purpose of the rule, in the context of this case, is to require the plaintiff to demonstrate that he has a colorable response to the motion to dismiss

and that vacation of the order of dismissal would not be a waste of time. *Ballinger v. Nooth*, 254 Or App 402, 407, 295 P23d 115 (2012), *rev den* 353 Or 747 (2013).

Plaintiff's motion to set aside was not accompanied by a response to the motion to dismiss. It would have been an abuse of discretion for the trial court to grant the motion to set aside the order of dismissal and grant plaintiff additional time to file a response to the motion to dismiss.

7. Conclusion

The trial court found that plaintiff's conduct was willful and adequately explained the process by which it concluded that the dismissal was just. The court was not required to make a finding of prejudice to the defendants or to the operation of the legal system. On plaintiff's motion to set aside the order of dismissal, the court held that plaintiff failed to demonstrate excusable neglect or inadvertence.

For all of the foregoing reasons, the court should affirm the holding of the trial court.

DATED this 12 day of October, 2016

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PROOF OF SERVICE

I certify that on October 12, 2016, Joint Respondents served a true copy of RESPONDENTS' JOINT BRIEF ON THE MERITS ON REVIEW.

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by the Court's electronic filing system; and by regular U.S. Mail, contained in a sealed, postage-paid envelope, addressed to counsel of record as shown above, and deposited with the Post Office at Portland, Oregon on said date.

I further certify that on October 12, 2016, using the court's electronic filing system, I filed the original RESPONDENTS' JOINT BRIEF ON THE MERITS with the State Court Administrator.

s/ David C. Landis
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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

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 is 6,517.

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(4)(g).

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