IN THE SUPREME COURT OF THE STATE OF OREGON

SHRINERS HOSPITALS FOR CHILDREN, a Colorado nonprofit corporation; and OREGON SCOTTISH RITE CLINICS, an Oregon nonprofit corporation,
Plaintiffs-Respondents,
Petitioners on Review,

v.

MACK A. WOODS,
Defendant-Appellant,
Respondent on Review,

and

BENNETT, HARTMAN, MORRIS & KAPLAN, LLP; and TYLER SMITH & ASSOCIATES, P.C.,
Respondents,
Respondents on Review.

Clackamas Co. Circuit Court No. CV07110578

A155952

S064390

MACK WOODS' ANSWERING BRIEF ON THE MERITS

Review of a Decision of the Court of Appeals
In an Appeal from the Judgment of the Circuit Court for Clackamas County;
The Honorable Roderick Boutin, Judge on the Order Denying the Setting Aside;
The Honorable Susie Norby, Judge on the Supplemental Judgments.

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ANSWERING BRIEF ON THE MERITS

(A) Judgments entered without jurisdiction are void

It is well established that a judgment that is entered without personal jurisdiction over the parties is void. *Wiles and Wiles,* 211 Or 163, 168, 315 P3d 131 (1957); *Pennoyer v. Neff,* 95 U.S. 714, 24 L.Ed. 565 (1877). It is equally well established that a "void" judgment has no legal effect; it is as if the judgment has never existed. This Court has stated:

> "it appears to be generally conceded that a void judgment may be disregarded and treated as a nullity," *Trullenger v. Todd,* 5 Or 36, 39 (1873);
>
> "when a void judgment is called to the court's attention, 'it is incumbent upon that tribunal to purge its records of the nullity by canceling the entry,'" *Stretch v. Murphy,* 166 Or 439, 447, 112 P2d 1018 (1941); and
>
> "The validity of a judgment is determined as of the date of its rendition and, if void, it remains so forever. * * *
>
> "* * * A void judgment has been variously and picturesquely described as 'mere waste paper.'" *Wiles, supra,* 211 Or at 169.

(B) Estoppel cannot be used to render a void judgment effective

The court of appeals held:

> "[A] void judgment is one that is 'absolutely null, without legal efficacy * * * and [is] incapable of confirmation, *ratification* or enforcement in any manner or to any degree.' * * * In other words, estoppel cannot lend validity to a judgment that has never existed." *Shriners Hospitals for Children v. Woods,* 280 Or App 127, 134, 380 P3d 999 (2016 (emphasis in original)).

The court's holding is consistent with this Court's prior decisions. Those decisions include:

- *Carey v. Lincoln Loan Co.*, 342 Or 530, 534 n. 2, 157 P3d 775 (2007), a case where the defendant argued that the court of appeals (a court to which it had previously appealed) was not constitutionally established and thus lacked jurisdiction to make a decision in its case. This Court held:

  > "we conclude that ***judicial estoppel does not prevent a party to a case from challenging a court's subject matter jurisdiction,*** even after the party has invoked or consented to the jurisdiction of the court." (Emphasis added).

- *Wink v. Marshall*, 237 Or 589, 591, 392 P2d 768 (1964), a case where the plaintiff sought to sue the defendant's estate, and effected service on a person who was not a legally cognizable estate administrator. This Court held:

  > "The plaintiff contends that the nominal defendant submitted to the jurisdiction of the court and defended the action as an administrator, and, therefore, that he ***ought to be estopped*** to deny that he was an administrator. Because the alleged administrator was never an administrator, * * * [t]he whole proceeding was void from the beginning. * * * Jurisdiction cannot be conferred by the parties by consent, ***nor can the want of jurisdiction be remedied by waiver, or by estoppel***." (Emphasis added).

- *Garner v. Garner,* 182 Or 549, 560, 561,189 P2d 397 (1948), a case where the husband, who had procured a default judgment against his wife, returned to court, seven years later, seeking to undo the alimony award for the reason that the wife had been "at fault" (in 1948, the law did not allow alimony to be paid to a party who was "at fault"). This Court held:

> "It is asserted that a party who procures the entry of a decree * * * ***is estopped to assert*** * * * ***that it is erroneous***. * * * Where, however, the court rendering the decree acted without jurisdiction, or even in excess of its jurisdiction, the decree is void either in whole or in part * * *.
>
> "***[J]urisdiction cannot be conferred by consent, agreement, or other conduct of the parties.***" (Emphasis added).

In each of these cases, there was a judgment that was said to be void, the party who claimed that the judgment was void had acted inconsistently with that claim, and the opposing party asserted that estoppel prevented the claim from being made. In each of these cases, this Court disagreed and held that estoppel was inapplicable.

(C) Even if estoppel *were* generally applicable to parties seeking to establish a judgment's voidness, the present case is not one where it applies

(1) Judicial estoppel

Concerning judicial estoppel, this Court has said:

> "Judicial estoppel is a common law equitable principle that has no single, uniform formulation in the several jurisdictions in which it has
>
> been recognized. * * *. * * * Some courts have stated that judicial estoppel should apply when a litigant 'is playing fast and loose with the courts.' * * *.
>
> "* * * * *.
>
> "* * * That inquiry involves three issues: benefit in the earlier proceeding, different judicial proceedings, and inconsistent positions. * * *." *Hampton Tree Farms, Inc. v. Jewett,* 320 Or 599, 609, 611, 892 P2d 683 (1995).

And the U.S. Supreme Court has stated:

> "'[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.' * * * This rule, known as judicial estoppel, 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.' * * *.
>
> "* * * * *.
>
> "several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be clearly inconsistent with its earlier position. * * *. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position * * *. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.'" *New Hampshire v. Maine,* 532 U.S. 742, 749, 750-51, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001).

The present case is not one where the above formulation applies.

The applicable facts are not simple, they begin in 2002, and they involve three connected legal cases:[1]

(a) The background facts involve defendant's divorce from Woods, and they are well summarized by *Woods v. Hill*, 248 Or App 514, 273 P3d 354 (2012), which is the decision that revived defendant's malpractice claim. A copy of that decision was part of the record before the trial court in the present case. The court of appeals gave this summary:

> "Except as otherwise noted, the facts are not in dispute. Plaintiff's [the defendant in the present case] ex-wife, Woods, petitioned for dissolution of their marriage in 2002. The primary marital asset was the real property on which plaintiff and Woods lived [the Bolland Road property] and on which two houses were located. While plaintiff and Woods were married, they borrowed money from Woods's aunt to finance construction of the second house. Plaintiff alone signed the promissory note. * * *.
>
> "Plaintiff hired [Hill] to represent him in the dissolution. In March 2003, the case was referred to court-annexed arbitration * * *.

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1 Many of the "facts" come from the May 13, 2016 declaration of plaintiffs' attorney, and include the things attached to the declaration. Some of the attachments are duplicated in the supplemental excerpt of record that was filed with the answering brief in the court of appeals. There was no testimony to support the declaration and, because the trial court made its decision without addressing the estoppel defense, defendant was never given an opportunity to give his own version of the facts. Because there was no testimony to support these "facts" and because defendant was never allowed to give his own testimony, defendant does not accept that the facts relevant to plaintiffs' estoppel defense have yet been established.

"* * * * *.

"An arbitration hearing was held later that month. [T]he arbitrator * * * awarded [Woods substantially more than half of the marital assets. One aspect of that award is pertinent to this case: The arbitrator awarded Woods the Bolland Road property but ordered her to pay the remaining debt to her aunt. * * *.

"* * * * *.

"[The trial court] entered a judgment based on the arbitration award.

"Plaintiff * * * appealed, in May 2004. The next month, while that appeal was pending, Woods sold the Bolland property, but she failed to pay the debt to her aunt. Her aunt had since assigned the promissory note that plaintiff had signed, and the assignee's beneficiary [plaintiffs, in the present case] sued plaintiff on the note and obtained judgments for nearly $150,000 plus interest.

"This court ruled on plaintiff's appeal in *Woods and Woods,* 207 Or App 452, 142 P3d 1072 (2006). We * * * reversed and remanded for a trial *de novo* in the dissolution matter. * * *." 248 Or App at 516-19.

(b) In November of 2007, prior to the remand trial in the divorce, plaintiffs (the parties to whom the above referenced note had been assigned), sued defendant on the note and, if defendant's witnesses are to be believed, failed to serve him with a complaint and summons. Defendant did not appear, and a default judgment was entered on January 3, 2008. (Record).

Later in January, defendant learned of the judgment. Defendant was at that time completing his divorce litigation, and plaintiffs agreed to temporarily refrain

from collection efforts. The divorce court was made aware of the judgment, and it ordered that defendant's wife be responsible for half of the judgment. (*See* SER-42 from the answering brief in the court of appeals).

(c) Subsequently, defendant completed his malpractice suit against attorney Hill. The basis of his claim was summarized by the court of appeals in *Woods v. Hill,* 248 Or App 514, 519, 273 P3d 354 (2012):

> "Plaintiff [defendant in the present case] brought this legal-malpractice action against [Hill], alleging that [Hill] had performed negligently in several respects. * * * [P]laintiff claimed he had to incur $20,000 in legal expenses to appeal the judgment, in order to obtain the trial *de novo* to which he was entitled. Second, plaintiff alleged that [Hill] had advised him incorrectly that he had to vacate the Bolland Road property by September 1, 2003, which led plaintiff unnecessarily to expend money on rent * * *. ***Finally, plaintiff alleged that [Hill] negligently failed to file a notice of pendency of action in the dissolution case, which, he contended, would have prevented Woods from selling the Bolland Road property without paying the debt to her aunt.*** (Emphasis added).

In the trial memorandum that defendant filed in the malpractice case, defendant stated:

> "The marital home was * * * sold before the divorce appeal was final. The Plaintiff's [defendant in the present case] prior spouse retained all of the sale proceeds and the promissory note was never paid. The note was then assigned to the Shriners [plaintiffs in the present case]. Following non-payment of the note the Shriners filed suit against the Plaintiff, resulting in a substantial judgment against him. Plaintiff was left unable to satisfy this loan, or the subsequent judgment, because his spouse retained all proceeds from the sale. As a result of [Hill's] negligence in failing to file a notice of lis pendens, despite the

> Plaintiff's repeated requests, Plaintiff sustained damages exceeding $350,000 from the loss of sales proceeds, which precluded his ability to satisfy the promissory note." (SER-34-35).

According to plaintiffs, these facts – particularly the statement from the trial memorandum – demonstrate the taking of an inconsistent position so as to create a judicial estoppel.

Plaintiffs' argument is without merit; there was no inconsistency. In the malpractice suit, defendant claimed:

- Hill had harmed him by failing to file a notice of lis pendens
- That failure allowed his former wife to sell the principal asset of the marriage (Bolland Road) and keep the proceeds to herself
- Without the proceeds from the house sale, defendant was unable to pay off the money due on the promissory note and unable to satisfy the plaintiffs' judgment.

In the present case, defendant claimed:

- He was never served with the plaintiffs' complaint
- He had witnesses who would so testify
- Were the trial court to find those witnesses credible, and the process server not credible, then it would need to declare the plaintiffs' judgment void.

In other words, the focus of the malpractice claim was not the plaintiffs' judgment

– defendant never suggested that Hill's malpractice had effected the judgment – but that Hill's omission had allowed defendant's spouse to sell their home and thus prevented defendant from paying off the debt created by the promissory note. Although the trial memorandum mentioned, *in passing,* that there was a judgment for the debt, the real problem was not the judgment, but the debt itself (a debt that would exist whether or not plaintiffs had sued, whether or not the service was valid, and whether or not plaintiffs' judgment was valid). Further, there was (and even now still is) a judgment for that debt, and there is nothing inconsistent or dishonest about simultaneously acknowledging the existence of the judgment (it is a matter of record) and moving to set it aside (a motion that may or may not ever be granted).

This is not the stuff of judicial estoppel. Defendant has not taken inconsistent positions, he has not played "fast and loose" with the courts, and he has not acted disingenuously. To the contrary, were this Court to side with plaintiffs, it would be *plaintiffs* who conceivably would be playing "fast and loose": parties who may have no valid claim to their judgment (it is a default judgment, and the merits have never been litigated), and who may have caused, negligently or intentionally, the filing of a false affidavit of service, will be allowed to collect $137,000 (plus interest and attorney fees) without serving the defendant and proving their entitlement to the money.

Therefore, even if the doctrine of judicial estoppel could be used to prevent a party from seeking to have a void judgment so declared, this Court should nevertheless rule in defendant's favor. The facts of the present case do not support the doctrine's application.

(2) Equitable estoppel

Plaintiff correctly details the elements of equitable estoppel: (a) a false representation; (b) made with knowledge of the facts; (c) to a person who is ignorant of the truth; (d) made with the intention that the party rely on the representation; and (e) reliance on the representation. But the present case does not have those elements.

(a) There was no false representation. Plaintiffs had a judgment against defendant, and until and unless that judgment was set aside, the courts were prepared to allow a seizure of defendant's assets and to force him to submit to a debtor's exam and interrogatories. That collection efforts were initiated, and that defendant responded to interrogatories without mentioning a plan to *attempt* to challenge the judgment, does not create a false representation.

(b) The record does not demonstrate that, at the time defendant made his representations, he knew that the judgment was void. Indeed, he may have believed that service was not required because, through other means, he had

learned of the suit.[2] No doubt, defendant at *some point* became aware of the importance that the law gives to service (otherwise he would not have filed his motion to set aside), but whether he reached that point shortly after the default judgment was entered or some years later (and after the malpractice suit was completed) is not known.

(c) The record does not establish that plaintiffs were ignorant of the truth. It was *plaintiffs'* process server who claimed to have effected service and, if indeed service never occurred (a matter still be be decided on remand), it was *plaintiffs'* process server who either lied about service or was mistaken as to whom he served. In any case, it was a matter that *plaintiffs* controlled, and it cannot be assumed, under the present record, that plaintiffs did not know that the judgment was void.

(d) Even assuming that defendant indeed made a false representation (by way of his implied acceptance of the judgment as valid), there is no evidence that defendant intended plaintiffs to change their position in reliance on the representation. This is not a case of a seller falsely telling a buyer that the thing being sold has characteristics that it lacks so that the buyer will be induced to

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2 This belief would have been incorrect. *Jordan v. Wiser,* 302 Or 50, 59-60, 726 P2d 365 (1986), tells us that there is no jurisdiction unless the plaintiff has complied with ORCP 7D(1), and this is so even if the defendant, though happenstance, receives actual notice of the lawsuit.

complete a sale he would not otherwise have completed. It is a case of a judgment debtor failing to tell the judgment debtor that its judgment may be void. Plaintiffs argue that the misrepresentation caused them to agree to delay enforcement of the judgment. But had they known the truth – that their judgment was void – they would have done what is entirely inequitable and accelerated their collection efforts so that they could collect on a void judgment prior to it being set aside. This is not the result that "equitable" estoppel is supposed to achieve.

(e) Nor does the record show that plaintiffs relied on the supposed misrepresentation. What they relied on was the fact of defendant's malpractice suit and the possibility that they might get their money by garnishing the PLF (a relatively simple and risk free process) instead of trying to collect it from a debtor without substantial funds. Their decision to delay their collection efforts was based on practicality; it had nothing to do with a false representation emanating from defendant.

In sum: even if equitable estoppel could be used to prevent the setting aside of a void judgment, the elements of equitable estoppel have not been proven. Nor is there proof that, between the parties, it is somehow equitable to allow plaintiffs to keep their judgment while denying defendant the opportunity to set it aside. After all, we do not know whether, on the merits, plaintiffs are

entitled to their judgment. And procedurally, we do not know how it is that a possibly false affidavit of service got filed with the court.

(D) Timing of defendant's motion

As a last argument, plaintiffs claim that defendant waived his right to seek to have the judgment declared void because he filed his motion to set aside some five years after entry of the judgment. Again, their argument lacks merit.

The one Oregon case that plaintiffs cite – *Protective Wear Distributing Co., Inc. v. Banks,* 80 Or App 101, 720 P2d 1320 (1986) – does not support them: *Banks* held only that a defendant's general appearance (an appearance at which the defendant did not attack jurisdiction) waived the defendant's right to subsequently attack personal jurisdiction because the appearance itself gave the court jurisdiction. Of more relevance are this Court's prior decisions, including: *Garner v. Garner, supra,* where the husband returned to court *seven years* after entry of judgment and was allowed to attack it on jurisdictional grounds; and *Damskov v. Meyers,* 197 Or 520, 254 P2d 227 (1953), a case where an adoptee was allowed to attack, on jurisdictional grounds, an adoption decree entered some *twenty years* earlier (and this was so case even though the adoptee had reached adulthood about ten years before moving to set aside the decree) because it could not be established that service had been made on both of the adoptee's original parents.

The *Garner* and *Meyers* decisions make sense. Because lack of jurisdiction renders a judgment void, a court that sets aside a void judgment is doing nothing more than formally declaring a thing that is already in existence. There can be no time limit on the obtaining of the declaration. A void judgment remains void whether it is so declared soon after its entry, many years after its entry, or never at all.

(E) Conclusion

If plaintiffs obtained their judgment without service on defendant, the judgment is void. If void, it is a nullity, and it must be set aside. Judicial estoppel, equitable estoppel, or the passage of time cannot impact a void judgment. The "judgment" is a thing that has never existed.

Were this court to disagree and rule that a party may, by his actions or delay, be prevented from filing a motion to set aside a void judgment, then defendant believes that, on the record now before the Court, the facts do not demonstrate that defendant did anything that should prevent him from having his motion considered. There is no evidence that defendant acted inconsistently, or knowingly made misrepresentations designed to mislead plaintiffs, or unreasonably delayed the filing of his motion.

If this Court disagrees as to the state of the record then, rather than affirming the trial court, it should set out the applicable law (law not previously

established and about which the parties cannot have been aware) and remand so that the factual record may be fully developed. As things presently stand, the only facts relevant to estoppel or waiver are the "facts" submitted by way of declarations and court records filed by plaintiffs. Defendant must be given an opportunity to put on evidence to counter and supplement those facts. He must be allowed to present argument as to why it is inequitable to estop him and why his filing was reasonably timely.

s/George W. Kelly
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CERTIFICATE OF COMPLIANCE
WITH ORAP 5.05(2)(D)

I certify that this brief complies with the word-count limitation in ORAP 5.05(2)(b) and the word-count on this brief (as described in ORAP 5.05(2)(b) is 3,685 words.

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)(f).

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SERVICE AND FILING

I certify that the I filed this brief on January 3, 2017; that same date I sent a copy to attorneys Hartman, Morris, Grant and Smith by way of the court's efile system.

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