NOTICE
PUBLIC MEETING
COUNCIL ON COURT PROCEDURES
Saturday, April 10, 2004
9:30 a.m.
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

AGENDA

1. Call to order (Ms. Clarke)

2. Approval of 3-13-04 minutes (attached)

3. Reports and recommendations (Ms. Clarke):

3a. ORCP 59 H--Report and recommendation of ORCP 59 H Committee re requirements for preserving error respecting jury instructions (see Attachment A to this agenda) (Justice Durham for the committee).

3b. ORCP 46 A(1)--Judge Velure's proposed amendment (Judge Carp)

3c. ORCP 9 F and 10 D--Effective date of fax service (member of the committee)

3d. ORCP 32--proposed amendments regarding class actions (Mr. Sugerman)

3e. ORCP 44 A--proposed amendments regarding court-ordered physical or mental examinations (see Attachment B to this agenda) (Justice Durham for the committee)

3f. ORCP 44--proposed amendments regarding requests for written reports and existing notations of examinations relating to injuries for which recovery is sought (member of the committee)

4. Old business

5. New business:

5a. ORCP 67--notice to defendant of judgment in excess of amount claimed in original complaint (see Attachment C to this agenda) (Judge Barron)

5b. ORCP 83 A(9) and 83 D--proposed deletion of references to "notice of bulk transfers" (see Attachment D to this agenda) (Prof. Holland)

5c. Proposals by Ms. Kristen David to amend UTCR 5.030 and 5.080 referred to Council by Mr. Bruce C. Miller (see Attachment E to follow) (Prof. Holland)

6. Adjournment (Ms. Clarke)

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COUNCIL ON COURT PROCEDURES

Minutes of Meeting of March 13, 2004
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

Present:	Lisa A. Amato	Daniel L. Harris
	Richard L. Barron	Nicolette D. Johnston
	Benjamin M. Bloom	David Schuman
	Eugene H. Buckle	David F. Sugerman
	Kathryn H. Clarke	John L. Svoboda
	Allan H. Coon	Ronald D. Thom
	Robert D. Durham	

Bruce J. Brothers and Don Corson attended by speaker telephone.

Excused:	Eric J. Bloch	Alexander D. Libmann
	Ted Carp	Connie Elkins McKelvey
	Martin E. Hansen	Shelley D. Russell
	Nely L. Johnson	Russell B. West

Susan Evans Grabe, Public Affairs Director of the Oregon State Bar, was present. Also present were Maury Holland, Executive Director, and Gilma J. Henthorne, Executive Assistant.

(MINUTES COMMENCE ON NEXT PAGE)

Agenda Item 1: Call to order. The Chair, Ms. Clarke, called the meeting to order at 9:35 a.m., and announced that the first order of business would be a discussion with Ms. Susan Grabe, Public Affairs Director of the Oregon State Bar (OSB), regarding the 2005-07 biennium budget process and the possibility of securing refunding of the Council.

Ms. Grabe stated that the OSB would be supportive of refunding of the Council in the 2005 legislature, but that despite recent mildly favorable economic trends in Oregon, refunding was by no means assured and would probably prove to be something of an uphill battle. One reason the effort would be difficult, she added, was that many of the legislators who had been most familiar with the work of the Council and supportive of it would not be members of the 2005-07 Legislative Assembly. Ms. Grabe urged that the word "restore" not be used in connection with refunding, and that references back to former legislators who were Council supporters would best be avoided. She further recommended that each Council member should make contact with his or her legislators, and also that all members be provided with "talking points" about the mission of the Council and its cost-effectiveness. She added that, with more members of the Judiciary Committees being non-lawyers, it would be a serious mistake to assume that they or any other legislators were familiar with the role of the Council, with what preceded it, and with the adverse consequences were it to cease to function. She concluded by stating that, while she and others associated with the OSB would do whatever they could to secure refunding, the principal effort would have to come from Council members themselves, and by stressing the great importance of "educating" as many legislators as possible about what the Council does and why it is important

Mr. Svoboda asked what the response should be to any legislators who might concede that it would be highly valuable for the Council to continue its work, but then point out that it had shown during the current biennium that it could do so without any level of state funding. There was general agreement that this was a matter that should be confronted candidly, and that no impression should be created that unless the Council were refunded, it would or should cease to exist or become a bar committee. Several members commented that, as helpful as refunding would be, the highest priority must be to ensure that, founded or not, the Council does not cease to exist. Prof. Holland was tasked with preparation of "talking points" for reference by all members, both as to the benefits to the state of the Council's continuing to perform its mission and as to why state funding for this purpose, and in what amount, was appropriate.

Ms. Grabe urged that Ms. Clarke and Prof. Holland keep in touch with her and with the Department of Administrative Services to ensure that a bill to authorize funding was prepared by June of 2004.

Judge Harris suggested that the Legislative Advisory Committee of the Council be reactivated, with which there was general agreement. It was agreed that the LAC would consist of Judge Barron, Ms. Clarke, Judge Harris, Ms. Johnston, and Judge Schuman. Ms. Clarke requested that Ms. Henthorne furnish her with a breakdown of all Council expenses incurred to date during the current biennium prior to the April 10 meeting.

Agenda Item 2: Approval of minutes. By motion offered by Justice Durham, duly seconded and unanimously agreed to, the minutes of the 2-14-04 Council meeting were approved as distributed as an attachment to the agenda of the 3-30-04 meeting.

Agenda Item 3: Reports and recommendations (Ms. Clarke):

3a. ORCP 46 A(1)--Judge Velure's proposed amendment. Mr. Corson reported that this committee, consisting of Judge Carp, Judge Harris, and Mr. Hansen, had not yet had an opportunity to meet, but expected to meet prior to the April Council meeting when it might have something to recommend.

3b. ORCP 59--Jury Innovation Committee (Judge Harris). Judge Harris reported that this committee would not have anything to report or recommend until the April or May meeting of the Council.

3c. ORCP 59 H--additional requirements for preservation of error regarding jury instructions (see Attachment A to agenda of this meeting) (Justice Durham). Justice Durham reported that the committee had made substantial progress, that there remained no matters of substantive disagreement among committee members, that it was very close to having a final draft amendment to recommend, and stated that the draft might be finalized during the break. Mr. Corson asked whether the proposed amendment could be understood as relating to anything other than instructions and statements of issues, to which Justice Durham replied that his understanding was that it would not apply to errors apart from those and would not require immediate objection in the hearing of the jury.

Mr. Brothers stated that he was in complete agreement with the fundamental purpose of this amendment as currently drafted, but had some concern that its language might leave the scope of its application unclear. In particular Mr. Brothers asked whether the draft amendment might be contradictory with the final sentence of the present section, especially the term "All adverse ruling, ..." Judge Coon commented that he thought the draft language adequately took care of any possible lack of clarity. Ms. Clarke concluded discussion of this item by stating that an effort would be made to finalize the draft language during the break.

Following the break Justice Durham circulated a slightly revised version of the draft amendment that would divide Section 59 H into two discrete subsections.

3d. ORCP 9 F and 10 D--effective date of fax service. Ms. Clarke stated that this item would be carried over to the April 10 Council meeting.

3e. ORCP 32--proposed amendments regarding class actions (Mr. Sugerman for the committee). Mr. Sugerman reported that this committee had met to discuss possible amendments to Rule 32, and hoped to have one or more specific recommendations to present at the April 10 Council meeting. In particular, he stated, serious consideration was being given to making the present mandatory claim form requirement discretionary with the trial court.

3f. ORCP 44 A--proposed amendments regarding court-ordered physical or mental examinations (see Attachment B to agenda of this meeting) (Justice Durham for the committee). Justice Durham reported that the committee had met in Judge Johnson's chambers and expected to meet again in another week, and that the work was still in an early stage. He also mentioned that Mr. Buckle had contacted the OADC Board with a view of possibly having one or more physicians appear before the Council to discuss the problems doctors would face were this section amended to give examinees the right to have counsel or another representative present during examinations. Judge Coon commented that if an amendment were to provide for recording of examinations, it would be important to ensure that recordings were of good quality.

3g. ORCP 44 C--proposed amendments regarding requests for written reports and existing notations of examinations relating to injuries for which recovery is sought. Mr. Bloom reported that there seemed to be agreement within the committee that this section was in need of clarification, but that agreement had not been reached as to the resulting rule that should be clarified, in particular whether reports or notations by treating physicians who testify as witnesses is or should be discovery by request pursuant to this section. Mr. Svoboda stated that the meaning of Section 44 C was not clear as it stood. Mr. Sugerman said that he agreed there was some ambiguity in the existing section, and that different plaintiffs' lawyers treat it differently, with some providing the reports and notations with the physician's identity redacted.

Judge Coon recalled that the last time the Council had confronted these issues, the process had been a long drawn out one. He therefore suggested that, if anything were to be ready to vote on by the September meeting, the committee would need to make some progress promptly.

Agenda Item 4: Old business. No item of old business was raised.

Agenda Item 5: New business. Mr. Buckle stated that he received an e-mail to the effect that in some counties there was a limitation to reports and notations that can be discovered

pursuant to ORCP 44 C and that such reports must pertain to the same body part for which injury is claimed. Mr. Buckle asked that the 44 C committee consider that issue as well.

Judge Barron referred to a recent opinion of the Court of Appeals, Montoya v. Housing Authority of Portland, __Or App__ (March 10, 2004), concerning default judgments which suggested to him that ORCP 67 C(1) might usefully be amended. He stated that he would try to have something prepared for the Council to consider at its April 10 meeting.

Ms. Clarke stated that the OSB Practice & Procedure Committee had some issue concerning ORCP 54 E which it wanted the Council to consider and would probably appear on the agenda of the April 10 meeting.

Agenda Item 6: Adjournment. Without objection Ms. Clarke adjourned the meeting at 11:26 a.m.

Respectfully submitted,

Maury Holland
Executive Director

PROPOSED REVISION OF ORCP 59 H

NECESSITY OF NOTING EXCEPTION ON ERROR IN STATEMENT OF ISSUES OR INSTRUCTIONS GIVEN OR REFUSED

H(1) Statement of issues or instructions given or refused. A party may not obtain review on appeal of an asserted error by a trial court in submitting or refusing to submit a statement of issues to a jury pursuant to subsection C(2) of this rule or in giving or refusing to give an instruction to a jury unless the party who seeks to appeal identified the asserted error to the trial court and made a notation of exception immediately after the court instructed the jury.

H(2) Exceptions must be specific and on the record. A party shall state with particularity any point of exception to the trial judge. A party shall make a notation of exception either orally on the record or in a writing filed with the court.

FINAL AMENDMENTS AS OF SEPTEMBER 8, 2000

Compelled Medical Examinations

(ORCP 44 A)

Add highlighted material to existing text of ORCP 44A:

A. Order for Examination. When the mental or physical condition or the blood relationship of a party, or of an agent, employee, or person in the custody or under the legal control of a party (including the spouse of a party in an action to recover for injury to the spouse), is in controversy, the court may order the party to submit to a physical or mental examination by a physician or a mental examination by a psychologist or to produce for examination the person in such party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it

is to be made. Unless the trial court requires other or different conditions for good cause supported by the record, the following conditions shall apply to a compelled medical examination under this rule:

A(1) *Compliance With Agreed Conditions.* The parties, the examinee, and their representatives shall comply with any conditions for the examination to which they agree in writing.

A(2) *Representation; Reservation of Objections; Assertion of Privileges.* The examinee may have counsel or another representative present during the examination. All objections to questions asked and the procedures followed during the examination are reserved for trial or other disposition by the court. The examinee may assert, either personally or through counsel, a right protected by the law of privileges.

A(3) *Obstruction.* No person may obstruct the examination.

If the examinee, counsel, or the examining physician or psychologist suspends the examination based on a good faith claim that a person has obstructed the examination, the court may order a resumption of the examination under any conditions that the court deems necessary to prevent obstruction. The parties may agree to resume an incomplete examination without an order by the court.

A(4) *Record of Examination.* Any party, the examinee, or the examining physician or psychologist may record the examination stenographically or by audiotape in an unobtrusive manner. A person who records an examination by audiotape shall retain the original recording without alteration until final disposition of the action unless the court orders otherwise.

A(5) *Transcription of Record.* Upon request, and upon payment of the reasonable charges for transcription and copying,

the stenographic reporter shall make a transcription of the examination and furnish a copy of the transcript, or in the case of an audiotape record, the person who records the examination shall make and furnish a copy of the original recording, to any party and the examinee.

Add highlighted material to ORCP 46B(2)(e):

B(2)(e) Such orders as are listed in paragraphs (a), (b), and (c) of this subsection, where a party has failed to comply with an order under Rule 44 A requiring the party to produce another for examination, unless the party failing to comply shows inability to produce such person for examination, **or where a party, the examinee, or a representative has violated an agreed condition or has obstructed an examination under Rule 44 A.**

Montoya v. Housing Authority of Portland, __Or App__ (March 10, 2004)

Before EDMONDS, Presiding Judge, and DEITS, Chief Judge, and WOLLHEIM, Judge.

EDMONDS, P.J.

Defendant Quantum Residential, Inc. (Quantum) appeals from the trial court's denial of its motion to set aside a default judgment entered against it. ORCP 71 B(1). Quantum first asserts that the judgment is void for lack of jurisdiction because the judgment's face amount exceeds the amount pleaded, contrary to ORCP 67 C(1). Alternatively, Quantum asserts that the trial court erred in determining that it had not established that its failure to defend was the product of "excusable neglect" pursuant to ORCP 71 B(1)(a). We agree with Quantum's first argument and hold that the judgment is void to the extent that its amount exceeds the amount sought in plaintiff's complaint. Otherwise, we agree with the trial court's ruling.

On July 28, 2000, plaintiff filed an action for personal injuries against Quantum and the Housing Authority of Portland (HAP), alleging injuries as a result of a fall by plaintiff on premises owned by HAP and managed by Quantum. Plaintiff alleged, among other things, a failure to maintain, inspect, and repair the premises. The original complaint alleged: "[P]laintiff prays for judgment against defendants and each of them jointly and severally, in the sum of $40,000.00 in non-economic damages, to be proven more accurately at trial, with economic damages for $25,800.00, and for her costs, disbursements and attorney fees incurred herein." Plaintiff filed an amended complaint on August 30, 2000, containing similar language:

"Plaintiff suffered non-economic damages for $40,000.00.

"As a further result of defendants' negligence, plaintiff incurred approximately $9,000.00 in health care and medical expenses and approximately $16,800.00 in lost wages and benefits, said wage loss continuing and to be proven more accurately at trial."

Both defendants were served with civil process. On October 5, 2000, an order of default was entered against Quantum. On October 19, 2000, pursuant to plaintiff's request, the court dismissed the claims against HAP with prejudice. On December 7, 2000, the trial court awarded a default judgment against Quantum in the amount of $79,766, which included $40,000 in noneconomic damages and $39,766 in economic damages. The award exceeded the specific amount prayed for in the original and amended complaints by $13,966. The record includes a copy of the notice of entry of judgment in the trial court file that lists Quantum's name but not its address. Quantum asserts that it did not receive notice that a judgment had been entered against it until plaintiff made a post-judgment demand for payment on February 9, 2002. On March 8, 2002, Quantum filed a motion to set aside the default judgment on the basis of excusable neglect pursuant to ORCP 71 B(1)(a).

In support of its motion to set aside the default judgment, Quantum submitted an affidavit

from its president, Gary O'Connell. O'Connell averred that he learned of the lawsuit in August 2000 but that, based on HAP's previous practices and based on a conversation with HAP's Director of Asset Management, John Meyer, he believed that HAP's insurer, Housing Authority Risk Retention Pool (HARRP), would undertake the defense of Quantum. O'Connell asserted: "When an action is filed against a HAP building and the property manager, occasionally the property manager will defend the case. However, most often HAP--as owner of the building--will take on the defense of the case through HARRP."

O'Connell also said in his affidavit that, at the time of the filing of the lawsuit, Meyer had "informed [him] that HAP would take over defense of this case." Meyer, on the other hand, testified that he did not recall whether O'Connell asked him if HAP or HARRP would defend Quantum. He did, however, note that, although it was not his understanding that HAP or HARRP "would necessarily represent [Quantum]," it was his understanding "that HAR[R]P and [HAP's] counsel should have been working with the property--with Quantum's counsel to coordinate a defense on" the claim. (Emphasis added.) Meyer noted that his usual practice is to "make sure the property manager would forward [information regarding a lawsuit] on to HAR[R]P," or that the asset manager working for him would coordinate that.

Additionally, portions of a "Property Management Services Agreement" between HAP and Quantum were submitted to the court by the parties with regard to Quantum's motion to set aside the default judgment. The agreement contains two relevant indemnification provisions on which the parties relied below in support of their respective excusable neglect arguments. Article 5(A)(1) of the agreement states: "Indemnification for Third Party Injuries to Person and Property: Irrespective of whether [Quantum] is negligent [Quantum] shall indemnify, defend and save [HAP] harmless from any and all claims, or liability relating to the management of the premises. This obligation shall include all costs and expenses (including, but not limited to, fines, penalties and reasonable attorney fees), for injuries or damages to persons, including any employee of [HAP], or property of others. This obligation does not extend to claims arising against [HAP] which solely allege wrongdoing by [HAP], its officers or employees. [Quantum's] obligation to indemnify [HAP] shall not exceed five million ($5,000,000) for any single claim or in the aggregate for each year during which this Agreement is in effect. This limitation shall not apply to claims based upon allegations of the sole wrongdoing of [Quantum]."[1]

Article 5(A)(2), of the agreement provides: "Indemnification for Violation of Law: [HAP] shall indemnify, defend and save [Quantum] from any and all claims, or liabilities, as well as all costs and expenses thereof (including, but not limited to, fines, penalties and reasonable attorney's fees) involving alleged or actual violation by [HAP] of a criminal statute, rule or regulation pertaining to the premises, property, the management or operation of the Property, except to the extent that such a claim, proceeding or liability resulted from the intentional wrongdoing of [Quantum] or the failure of [Quantum] to notify [HAP] of the issue after having gained actual knowledge thereof."

The agreement further states that, "except in any claim which is clearly against only [HAP], [Quantum] shall be responsible for conducting the joint defense and protecting the common interest."

The trial court denied Quantum's motion, ruling that it failed to establish sufficiently that

[1]The agreement refers to Owner (HAP) and Agent (Quantum).

it was entitled to relief based on its claim of excusable neglect. The trial court specifically referred to the provision of the agreement that required Quantum to conduct a joint defense and to protect the common interest of HAP and itself. The trial court also said that it "was not persuaded that Quantum [had] shown that the HAP agreed to defend Quantum" and that "Quantum and Gary O'Connell did not have reason to believe that the HAP was going to defend Quantum in this lawsuit."

We turn to Quantum's first assignment of error. Quantum asserts: "Quantum did not argue below that the trial court lacked jurisdiction; that the default judgment is void; or that the default judgment should be set aside under ORCP 71 B(1)(d). However, '[a] void judgment is subject to collateral attack at any time.' * * * Also, a question concerning the trial court's jurisdiction is not waivable. Finally, as explained infra, this court can and should treat the trial court's denial of the motion to set aside that judgment as plain error. ORAP 5.45(4)(b). For any of these reasons, this otherwise unpreserved error is reviewable." (Citations omitted.)

In light of the above arguments, we determine first whether the trial court had jurisdiction to enter a default judgment for approximately $14,000 more than requested by plaintiff's pleading. First, there is no indication in the record that the trial court lacked personal jurisdiction over the parties at the commencement of the action. Rather, the record reflects that Quantum was properly served at the outset of the lawsuit. Second, under the Oregon Constitution, trial courts "have subject matter jurisdiction over all actions unless a statute or rule of law divests them of jurisdiction." Greeninger v. Cromwell, 127 Or.App. 435, 438, 873 P.2d 377 (1994) (citation omitted). "The fact that a court acts in violation of a statute does not mean that the resulting judgment is void." Geranghadr v. Entagh, 189 Or.App. 567, 572, 77 P.3d 323 (2003) (citation omitted).

Quantum, however, relies on our opinion in Cooley v. Fredinburg, 144 Or.App. 410, 927 P.2d 124 (1996), modified on other grounds, 146 Or.App. 436, 934 P.2d 505 (1997), to support its assertion that the lack of notice and opportunity to be heard underlying the award in the default judgment renders it void. In that case, we said: "The fact that a court has initial jurisdiction over the parties and the subject matter does not authorize it to act without appropriate notice to the parties. If the proposed order would grant relief different from that contemplated by the original proceeding and would affect a party's personal rights, due process requires that there be reasonable notice and an opportunity to be heard. Scarth v. Scarth, 211 Or. 121, 126, 315 P.2d 141 (1957). If the notice of the proposed relief is so defective or lacking that it does not satisfy the requirements of due process, the court is deprived of jurisdiction to enter an order arising out of such a defective proceeding. Hood River County v. Dabney, 246 Or. 14, 21, 423 P.2d 954 (1967). Such an order, entered without jurisdiction, must be considered a nullity. State ex rel. v. Hall, 153 Or. 127, 129, 55 P.2d 1102 (1936)." Cooley, 144 Or.App. at 418, 927 P.2d 124 (footnote omitted).

Thus, in Cooley, we held that a default judgment entered in violation of ORCP 67 C was

void ab initio because it deprived the defaulted party of due process of law.[2] Plaintiff counters that the facts in this case are different from the facts in Cooley. According to plaintiff, "there is no variance between judgment and pleading so extreme as to raise the due process concerns expressed in Cooley [.]" He adds: "While it may have violated ORCP 67C for the trial court to enter a default judgment for the amounts it did, and while that error might have justified the trial court in vacating the default judgment insofar as it exceeded the amounts specified in the complaint, the inconsistency did not divest the trial court of power to enter a judgment, or make the judgment it did enter a nullity."

This case is like Cooley in one major respect. At the time that the proceeding was pending and the default judgment was entered, the trial court had continuing jurisdiction over the parties and the subject matter. However, in Cooley the issue was whether the trial court could grant relief beyond what the complaint requested when it ordered a party personally to deliver the surplus proceeds from a foreclosure sale without giving that party notice and an opportunity to appear and be heard. We reasoned that, if notice is defective by reason of its failure to satisfy the requirements of due process, then a trial court lacks jurisdiction to enter a particular order, even though it may have continuing personal and subject matter jurisdiction over the parties. Cooley, 144 Or.App. at 418, 927 P.2d 124. Our holding in Cooley is an example of where the trial court, although it had continuing jurisdiction, lacked the additional jurisdiction to order a party personally to perform an act without giving that party notice and an opportunity to be heard. Thus, "the question is not strictly one of jurisdiction, but merely the adequacy of notice to warrant the court in exercising the jurisdiction which it has." Scarth, 211 Or. at 127, 315 P.2d 141.

In Frederick v. Douglas Co. et al., 176 Or. 54, 63-64, 155 P.2d 925 (1945), the court explained the difference between procedural statutes that are directory in nature and procedural statutes that are jurisdictional in nature: "In reaching a conclusion as to what statutory provisions are jurisdictional, a distinction may be made between procedures which are required both by statute and also by the due process clause of the constitution on the one hand, and procedures required by statute alone, over and beyond anything rendered necessary by the constitution, on the other. Those requirements of statute which are essential to due process are, of course, jurisdictional, and we think that statutory requirements over and beyond the bare necessities of due process may also be jurisdictional, but only if it is the legislative intent to make them so." (Citation omitted.)

Here, the first sentence in ORCP 67 C(1) is arguably essential to due process. A party may be content to permit the relief sought in the complaint served on the party to be granted without contest, but if different relief from that requested in the complaint is sought, then the

[2]ORCP 67 C provides: "Every judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if such relief has not been demanded in the pleadings, except: (1) A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. However, a default judgment granting equitable remedies may differ in kind from or exceed in amount that prayed for in the demand for judgment, provided that reasonable notice and opportunity to be heard are given to any party against whom the judgment is to be entered. (2) Where a demand for judgment is for a stated amount of money as damages, any judgment for money damages shall not exceed that amount."

party is entitled to notice and an opportunity to be heard. But even if an increase in economic damages awarded in a judgment from the amount sought in the complaint does not clearly implicate due process, the remainder of the language in ORCP 67 C(1) makes it apparent that the legislature intended the rule to be jurisdictional in nature. The second sentence of ORCP 67 C(1) provides for an exception to the limitation on the court's authority to grant relief different in kind or in amount from that prayed for in the demand for judgment. However, even the exception expressly requires "that reasonable notice and opportunity to be heard are given to any party against whom the judgment is to be entered." In our view, that language when read with the first sentence of ORCP 67 C(1) makes clear that the legislature intended that notice and the opportunity to be heard are jurisdictional essentials before a party can obtain a judgment greater in amount than that sought in the complaint; that is, the court acquires personal jurisdiction over a nonappearing party only to the extent of the relief requested in the complaint served on the party. We conclude therefore that the trial court was without jurisdiction to enter the default judgment to the extent that the amount of the judgment exceeds the amount prayed for and, to that extent, the judgment is void ab initio.[3]

Having ruled that the judgment is void to the extent it exceeded the amount prayed for, we turn to Quantum's second and third assignments of error with regard to the remaining portion of the judgment. In its second and third assignments of error, Quantum challenges the trial court's ruling that it did not demonstrate excusable neglect regarding its default. If Quantum is correct, then it is entitled to have the default judgment set aside in its entirety. If its argument is not correct, then the trial court on remand should enter an amended judgment reflecting the amount prayed for in the complaint.

[3]We note that the rule that we interpret here, ORCP 67, was derived from the Federal Rules of Civil Procedure. See State ex rel Zidell v. Jones, 301 Or. 79, 88-89, 720 P.2d 350 (1986) (noting that legislative history indicates that ORCP 67 was derived from the Federal Rules of Civil Procedure); see also FRCP 54(c) (providing similar language to ORCP 67 C in that "[a] judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment"). The Ninth Circuit has held that a default judgment is void to the extent that it goes beyond the scope of the complaint. Pueblo Trading Co. v. El Camino Irr. Dist., 169 F.2d 312 (9th Cir.1948), cert. den., 335 U.S. 911, 69 S.Ct. 482, 93 L.Ed. 444 (1949); see also Cooper v. Cooper, 275 Or. 627, 552 P.2d 536 (1976). In its analysis of whether the trial court's error was jurisdictional, the Supreme Court indicated the following: "'Clearly, a judgment given by a court that has obtained jurisdiction can be considered a nullity only when that jurisdiction has been lost or exceeded. If the court in rendering the judgment stays within the powers conferred upon it by law and does not transcend the jurisdiction it has acquired in the particular case, its decision, however erroneous, is at most voidable and not for that reason subject to a challenge in an independent proceeding.' " Cooper, 275 Or. at 630, 552 P.2d 536 (quoting A.C. Freeman, 1 Freeman on Judgments § 357, 743-44 (5th ed. 1925)) (emphasis added). In the present case, the trial court exceeded its jurisdiction when it awarded damages in excess of the amount prayed for in violation of ORCP 67 C.

First, Quantum assigns as error the trial court's denial of its motion to set aside the default judgment on the ground that Quantum established excusable neglect. ORCP 71 B(1)(a). Next, Quantum assigns as error the trial court's finding that "Quantum and Gary O'Connell did not have reason to believe that the HAP was going to defend Quantum in this lawsuit" and asserts that that finding is not supported by the evidence. Because we understand Quantum's second and third assignments of error to raise essentially the same issue, we discuss them together. We review the denial of a motion to set aside a judgment on the basis of ORCP 71 B(1) for abuse of discretion, accepting the trial court's factual findings if they are supported by the evidence. Wood v. James W. Fowler Co., 168 Or.App. 308, 311-12, 7 P.3d 577 (2000); Adams and Adams, 149 Or.App. 342, 346-48, 942 P.2d 874 (1997).

Before addressing the merits of Quantum's arguments, we first discuss plaintiff's assertion that, because there is no transcript of oral proceedings, the record is inadequate for review with regard to Quantum's second and third assignments of error. We conclude that the assignments are reviewable in light of the record designated by Quantum on appeal. Quantum asserts that all the evidence was presented to the trial court in the form of documents, affidavits, and excerpts of depositions and that that evidence is present in the record before us. Plaintiff argues that "statements of counsel" are necessarily evidentiary in nature, that they are not in the record, and that therefore the record is incomplete without them. However, in State v. Ordonez-Villanueva, 138 Or.App. 236, 244, 908 P.2d 333 (1995), rev. den., 322 Or. 644, 912 P.2d 375 (1996), we held that "a unilateral assertion of counsel is not evidence, because it is not a medium through which a party can present proof of a fact." (Footnote omitted.) That principle applies here. Based on our understanding that no evidence was taken at the hearing on the motion to set aside the default judgment, we conclude that the record before us is adequate for review.

Under ORCP 71 B(1), a default judgment may be set aside if it was the result of "excusable neglect." The motion must be made "within a reasonable time," and "not more than one year after receipt of notice by the moving party of the judgment." Id. (emphasis added). The motion must also be accompanied by a pleading or motion under ORCP 21 A that contains an assertion of a claim or defense. Because we agree with the trial court that Quantum has not demonstrated "excusable neglect," we do not discuss plaintiff's other arguments.

The parties dispute whether HAP indicated to Quantum that it would take over the defense on Quantum's behalf. The trial court resolved that factual dispute against Quantum. We are bound by that finding if there is evidence to support it. Adams, 149 Or.App. at 346-48, 942 P.2d 874. The trial court based its ruling, in part, on the indemnification clause that required Quantum to "defend and save [HAP] harmless from any and all claims, or liability relating to the management of the premises" and on Meyer's testimony that he anticipated at most a "coordinated" defense between HAP and Quantum. The trial court therefore necessarily rejected O'Connell's testimony that HAP said that it would take over its defense of the case. Consequently, there is evidence to support the trial court's findings. In light of its findings, the trial court drew the correct legal conclusion that Quantum did not demonstrate excusable neglect. In other words, Quantum was responsible for its own defense unless it demonstrated an agreement for HAP to take over the defense, an agreement that it failed to prove. Thus, the trial court did not abuse its discretion in denying Quantum's motion to set aside the default judgment.

Order denying motion to set aside judgment reversed; remanded with instructions to enter amended judgment in amount of the prayer of plaintiff's complaint.

DEITS, C.J., concurring. I agree with the majority's disposition of this case and with most of its analysis. The trial court exceeded the extent of its personal jurisdiction over defendant when it entered a default judgment that exceeded the amount of relief sought in the last pleading with which defendant was served. See ORCP 9 A ("No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in [ORCP] 7."). I write separately because I do not agree with the majority's reading of ORCP 67 C. Because, in my view, the result does not depend upon the application of the majority's construction of ORCP 67 C, however, I concur.

The majority concludes that, under ORCP 67 C, notice and an opportunity to be heard are "jurisdictional essentials" that must exist before a party can obtain a default judgment in excess of the amount sought in the complaint. --- Or.App. at ----, --- P.3d at ---- (slip op at 8). I agree with the majority insofar as it concludes that a trial court exceeds its jurisdiction when it enters a default judgment that exceeds in amount the prayer for relief in the operative pleading. I also agree that it is likely that the legislature intended ORCP 67 C(1) to embody jurisdictional requirements imposed by due process principles. I disagree only with how the majority construes ORCP 67 C(1) to reach that result.

According to the majority, we can tell that the legislature intended ORCP 67 C(1) to comport with due process by looking at the second sentence of that subsection, which requires " 'that reasonable notice and opportunity to be heard are given to any party against whom the judgment is to be entered.' " --- Or.App. at ----, --- P.3d at ---- (quoting ORCP 67 C(1)) (slip op at 8). That clause, however, appears in a sentence that governs only those default judgments granting equitable remedies and, accordingly, does not directly apply in this case.

ORCP 67 C provides, in relevant part: "Every judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if such relief has not been demanded in the pleadings, except: C(1) A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. However, a default judgment granting equitable remedies may differ in kind from or exceed in amount that prayed for in the demand for judgment, provided that reasonable notice and opportunity to be heard are given to any party against whom the judgment is to be entered."

The first sentence of ORCP 67 C(1) states that default judgments shall not be different in kind or exceed in amount what was prayed for. The second sentence is an exception: a default judgment granting equitable remedies may be different in kind or exceed in amount what was prayed for if proper notice and an opportunity to be heard are given. The majority reasons that the legislature intended notice and opportunity to be heard to be required whenever a judgment is to exceed the amount prayed for. --- Or.App. at ----, --- P.3d at ---- (slip op at 8). It seems much more likely that the legislature intended that requirement to apply only to cases involving equitable relief; otherwise it would not have phrased ORCP 67 C(1) as a general rule followed by an exception, but rather would have said that any default judgment can differ in kind or exceed in amount what was sought if proper notice and an opportunity to be heard are given.

In my view, the legislature clearly indicated in ORCP 67 C(1) that, consistently with due process, a judgment granting only legal relief may not exceed the amount sought in the prayer.

Consequently, I agree with the majority that the trial court lacked jurisdiction to enter the default judgment to the extent that it exceeded the amount sought in plaintiff's amended complaint. I do not agree that, under the plain language of ORCP 67 C(1), a default judgment granting only legal relief may exceed the amount sought if proper notice and an opportunity to be heard are given. However, that is not a question we need to decide in this case.

For the reasons stated above, I concur.

From: Heyndericks David W <David.W.Heyndericks@state.or.us>
Date: Mon Nov 3, 2003 3:22:42 PM US/Pacific
To: Maurice Holland <maury579@mac.com>
Subject: ORCP 83

Maury, ORCP 83A (9) and ORCP 83 D talk about notices of bulk transfers. We repealed the bulk transfer laws in 1991 (c. 83, OL 1991). As far as I know, there are no other laws requiring "notice of bulk transfers). Would the council consider amending this rule to get rid of ORCP 83A (9) and ORCP 83 D?

Thanks.

Replied 11-7-03 - refer to CBCP.

Attachment D to 4-10-04
Agenda

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October 13, 2003

UTCR Reporter
Office of the State Court Administrator
1163 State Street
Salem, OR 97301-2563

Re: Suggestions for 2004 UTCR changes.

To Whom It May Concern:

My practice involves medical and legal malpractice defense in complex cases. Given the nature of the complaints we receive, motion practice and discovery tools are extremely important as are the controlling ORCP and UTCR authority. Unfortunately, the rules are often ambiguous and unclear on their intent. As the committee discussed this last spring there are real and apparent differences between the UTCRs and the ORCPs. The following are issues which I have noted for the last six months which are problematic in reality and could be made more practical for daily usage.

UTCR Chapter 2: Standards for Pleadings and Documents.

I believe we need one uniform certificate of service. A rule is needed to set forth with particularity the requirements of what constitutes mailing. Service of Orders, Motions and other documents are raised in dozens of the rules. The problem is that every person does it differently. Is it enough to "place the pleading in a sealed envelope with postage prepaid" and place in a dead mailbox or is there a requirement to certify that the item was "mailed (i.e. postmarked) that day." What about offices which can postmark that day but the letter does not go to the postal service until a day or two later? There are many different types of mailing practices and it becomes problematic with ORCP 9 and 10 and UTCR 5.030 and 5.100. When seven day and three day deadlines are at issue, the method of mailing becomes important. Especially in light of the "service by mail is complete upon mailing" (ORCP 9). So again - what is the proper uniform way to mail an item?

In addition, a uniform certificate of service would also eliminate the confusion over a once recognized need for a true copy stamp. The top of many certificates of service identify that the item being served is a true copy thereof. This language would satisfy the requirement that an exact copy be served on all parties as established in ORCP 9.

UTCR 5.030 and ORCP 10 C: Time for Response.

While many of the courts, such as Clackamas County, specifically reenforce UTCR 5.030 by stating on the Notice of Hearing "any response not received within 14 days will not be considered," it is contrary to the language of ORCP 10C. ORCP 10C allows for an additional 3 days to be added to any prescribed time to act when service has been by mail. Therefore, in cross-referencing UTCR 5.030 for consistency a simple third section could affirm this requirement and clarify that 3 additional days are allowed when service was by mail. Another option could be to change the language of 5.030 (1) & (2) to state "not later than 14 days from the date of service of the motion, unless service was by mail, and then 3 additional days shall be added."

Again, in reality these issues do come up and the Courts are faced with these decisions as to whether to consider late (by 3 days) filings.

UTCR 5.080 and ORCP 68: Statement of Attorney Fees or Affidavit of Attorney Fees.

Each time I face an award of attorney fees, the requirements of this rule are re-argued. While UTCR 5.080 and ORCP 68 require the filing of a "statement for attorney fees" there is the question as to whether an additional affidavit is required to evidence the "reasonableness" and "factors" checked on the UTCR form. It has been my position that both the Statement (while notarized and in form similar to an affidavit) and a Supplemental Affidavit need to be filed. Unfortunately ORCP 68 is silent on whether a separate affidavit is required and UTCR 5.080/ UTCR form simply states "as explained more fully in Exhibit(s) ____ attached."

I believe the clarification of this problem is to add either to the ORCP or the UTCR rule language that requires an Affidavit supporting the "reasonableness of the fees" and the "factors" checked.

While some attorneys may feel that these are unnecessary change, it is the parties and the judges in highly complex cases where strict adherence can be crucial who are faced with these ambiguities. Slight changes in the UTCRs can benefit all attorneys and would lessen the need for judicial interpretation.

I thank you for your consideration of these issues. If you have any questions, please feel free to give me a call.

Very truly yours,

Kristen S. David

Attachment E-2 to 4-10-04
Agenda