CIRCUIT COURT OF OREGON
FOR LANE COUNTY
LANE COUNTY COURTHOUSE
EUGENE, OREGON 97401

JACK L. MATTISON
JUDGE

687-4257

June 26, 1992

Mr. Henry Kantor
Attorney at Law
900 SW 5th Avenue, Suite 1437
Portland, OR 97204

Re: ORCP 69A

Dear Henry:

The case of Van Dyke v. Varsity Club, Inc., 103 Or App 99 (1990), which interprets ORCP 69A, was brought to my attention this morning during our trial call, and it may be that the Counsel should take a hard look at 69A in light of the holding in that case. I should have been aware of it prior to today, but was not, and I would guess that my ignorance has a lot of company among members of both our bench and bar.

My situation this morning was as follows. A domestic relations case involving a decree modification issue was on today's trial docket. The responding party was pro se, but had made an appearance and had received a written trial notice from our calendar clerk. I was told that he had informed the moving party yesterday that he would not be appearing for trial, but that is not of much legal significance except perhaps as an indication that he had, in fact, received the trial setting notice. When I advised the moving party's attorney I would assign the case out to a judge for a prima facie hearing, he allowed as how he would like to do that, but under the Van Dyke ruling, he believed he had to give the respondent ten days notice of his intent to take a default before he could proceed any further. I then read the opinion, and while 69A has been amended since the case was decided, it is pretty clear that he is right.

As a consequence, although the case was set for trial and proper notice was given to all parties, the only effect the trial date has had was to trigger the mailing of a ten day notice of intent to take a default - to a party who voluntarily chose not to appear for trial. So, the case is now in a state of limbo until the plaintiff's attorney jumps through the ORCP 69 hoops.

EDMONDS, J.

Petitioner moves for reconsideration of our opinion in *Mercer Industries v. Rose*, 100 Or App 252, 785 P2d 385 (1990). We held that the Board erred when it refused to award attorney fees to claimant after claimant actively litigated the issue of responsibility. Petitioner argues that claimant is not entitled to an employer-paid attorney fee, because his right to compensation was never in jeopardy.

Claimant's entitlement to receive compensation was resolved before the hearing when an order of responsibility under *former* ORS 656.307,[1] was issued. ORS 656.386(1) provides, in pertinent part:

> "In all cases involving accidental injuries where a claimant finally prevails in an appeal to the Court of Appeals or petition for review to the Supreme Court from an order or decision *denying the claim for compensation*, the court shall allow a reasonable attorney fee to the claimant's attorney. In such rejected cases where the claimant prevails finally in a hearing before the referee or in a review by the board itself, then the referee or board shall allow a reasonable attorney fee." (Emphasis supplied.)

Because claimant did not seek review from an order denying compensation, he is not entitled to attorney fees under ORS 656.386(1). *Shoulders v. SAIF*, 300 Or 606, 611, 716 P2d 751 (1986). To the extent that *SAIF v. Phipps*, 85 Or App 436, 737 P2d 131 (1987), is inconsistent with this opinion, it is overruled.

Motion for reconsideration allowed; former opinion modified to affirm on cross-petition and adhered to as modified.

[1] ORS 656.307 was amended in 1987, after the hearing in this case, to include a provision for awards of attorney fees in responsibility hearings. *See* ORS 656.307(5).

Argued and submitted May 25, reversed and remanded for further proceedings August 8, reconsideration denied September 26, 1990, petition for review denied October 23, 1990 (310 Or 476)

Lyle H. VAN DYKE,
Myrtle R. Van Dyke, Frederick G. Witham
and Rest-A-Phone Corporation,
Respondents,

v.

VARSITY CLUB, INC.,
Appellant.

(A8606-03623; CA A60891)

796 P2d 382

Action was brought alleging conversion, trespass and interference with business. When defense counsel did not appear on trial date for which notice had been mailed to counsel for both sides, the Circuit Court, Multnomah County, Mercedes Deiz, J., entered judgment for plaintiffs and defendant appealed. The Court of Appeals, De Muniz, J., held that: (1) evidence including presumption of receipt from correctly mailed notice of trial date supported conclusion that defendant received sufficient notice of scheduled trial that defense counsel's failure to appear was not excusable neglect warranting setting aside of judgment, but (2) trial court did not have authority to proceed with trial in absence of defendant that had engaged in extensive motion practice, but rather, should have proceeded under rule governing default that requires ten days' written notice of intent to apply for judgment when party has appeared in action.

Reversed and remanded.

1. Evidence—Presumptions—Rebuttal of presumptions of fact

Evidence permitted conclusion that civil defendant did not defeat presumption of delivery of notice of trial date which arose from showing that court properly mailed notice to defense counsel at his correct address and notice was not returned undelivered to court, although defense counsel claimed that he never received notice, so failure of defense counsel to appear at scheduled trial would not be considered excusable neglect warranting setting aside of judgment for plaintiffs. ORCP 71B.(1)(a); OEC 311(1)(b, m, p, q).

2. Trial—Course and conduct of trial in general—Presence of parties and counsel—Judgment—By default—Requisites and validity

Trial court did not have authority to proceed with scheduled trial in absence of defendant, where defendant had engaged in extensive motion practice, but failed to appear and defend at trial; rather, court should have proceeded under rule providing for default, which requires giving ten days' written notice of intent to apply for judgment with respect to party who has appeared in action. ORCP 69.

3. Judgment—By default—Requisites and validity

Failure of litigant who has pled to appear and defend at trial is regulated by civil rule providing for default. ORCP 69.

CJS, Evidence § 115.

Appeal from Circuit Court, Multnomah County.

court to conclude that defendant did not defeat the presumption of delivery of the notice. Therefore, the court acted within its discretion in concluding that defendant received sufficient notice. *Pacheco v. Blatchford,* 91 Or App 390, 392, 754 P2d 1219, *rev den* 306 Or 660 (1988).

Defendant next contends that "[t]he March 13 proceeding resulted in a judgment by default" and that the judgment was void, ORCP 71B(1)(d), because "[p]laintiff failed to comply with the notice requirements of ORCP 69 * * *."[2] Despite the fact that defendant mischaracterizes what happened in the trial court, he is correct. Although the word "default" was used several times at the March 13 proceeding, the trial judge clarified the type of judgment that she intended to enter:

> "An order of default may be entered against Varsity Club—well, actually, strike that. *There's no order of default.* They made an appearance. They've appeared, but they haven't appeared before the trial—for the trial itself." (Emphasis supplied.)

2, 3. The trial court did not intend to act under ORCP 69, but, rather, intended to proceed with the trial in the absence of defendant. However, the trial court had no authority to proceed in that manner. This is not the usual ORCP 69 case where a party fails to plead or to appear properly at any stage of the proceeding. Rather, defendant engaged in extensive motion practice but failed to appear and defend at trial. Although the phrase "otherwise defend" in ORCP 69 logically could be read not to include a situation when a litigant fails, after pleading, to appear and defend at trial, *see, e.g., 6 Moore's Federal Practice* 55-13, ¶ 55.03(1) (2d ed 1988) the commentary to the rule indicates that, in Oregon, the failure to appear and defend *is* regulated by ORCP 69.

ORCP 69 was meant to be broader than the statute that it replaced, *former* ORS 18.080, which merely addressed default for failure to answer.[3] The commentary to the proposed rule noted that "[t]his rule would apply to anyone required to file a responsive pleading to a claim and to any person who failed to appear and defend at trial." *Council on Court Procedures, Oregon Rules of Civil Procedure and Amendments, Preliminary Drafts and Final Draft,* Commentary to Draft of Proposed Rules 67-74 at page 40 (October 15, 1979). Moreover, the commentary to the final rule provides, in pertinent part:

> "This rule is a combination of ORS 18.080 and Federal Rule 55. Under section 69A. *all* defaults by a party against whom judgment is sought would be covered by this rule. ORS 18.080 referred only to failure to answer. A failure to file responsive pleading, *or failure to appear and defend at trial,* or an ordered default under Rule 46, *would be regulated by this rule.*" Commentary to Rule 69, reprinted in Merrill, *Oregon Rules of Civil Procedure: 1990 Handbook* 217. (Emphasis supplied.)

Thus, under the circumstances existing here, where the defendant and counsel, without explanation, failed to appear for trial, the court should have proceeded under ORCP 69. Although an order of default could have been entered, ORCP 69B(2) required that plaintiffs give defendant 10 days written notice of the intent to apply for a judgment. That was

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[2] At the time of trial, ORCP 69 provided, in pertinent part:

"A. When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, and these facts are made to appear by affidavit or otherwise, the clerk or court shall order the default of that party.

"* * * * *

"B.(2) In all other cases, the party seeking a judgment by default shall apply to the court therefor, but no judgment by default shall be entered against a minor or an incapacitated person unless they have a general guardian or they are represented in the action by another representative as provided in Rule 27. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing, or make an order of reference, or order that issues be tried by a jury, as it deems necessary and proper. The court may determine the truth of any matter upon affidavits. In the event that it is necessary to receive evidence prior to entering judgment, and if the party against whom judgment by default is sought has appeared in the action, the party against whom judgment is sought shall be served with written notice of the application for judgment at least 10 [illegible]ss shortened by the court, prior to the hearing on such application."

[3] *Former* ORS 18.080(1) provided, in relevant part:

"Judgment may be had upon failure to answer, as prescribed in this section. When it appears that the defendant * * * has been duly served with the summons, and has failed to file an answer with the clerk of the court within the time specified in the summons, or such further time as may have been granted by the court or judge thereof, the plaintiff shall be entitled to have judgment against [illegible]ch defendant * * *."

Dennis J. Hubel

Admitted in Oregon and Washington

Karnopp, Petersen
Noteboom, Hubel
Hansen & Arnett
ATTORNEYS AT LAW

Riverpointe One
1201 N.W. Wall Street, Suite 300
Bend, Oregon 97701-1936
(503) 382-3011

Lyman C. Johnson
(1929-1986)

FAX (503) 388-5410

October 16, 1992

VIA FACSIMILE AND REGULAR MAIL

Mr. Maury Holland
Executive Director, Council on Court Procedures
U of Oregon, Room 275A
School of Law

[redacted]

Thank you for providing me with a copy of the Agenda for the Council on Court Procedures meeting for Saturday, October 17, 1992, together with your October 5th memorandum regarding the ORCP 69 problems discussed at the September 26th meeting of the Council. As I agreed to do at that Council meeting, I have given some thought to and, by this letter, I am giving you my suggestions regarding a practical solution to the problem of a party failing to appear either in person or through counsel at the appointed hour for a trial. This assumes that the party has been given proper notice of the trial pursuant to whatever rules apply in the particular court.

First, I think it would be helpful if we removed this hypothetical situation from Rule 69 altogether. I believe that most trial attorneys [certainly all of those to whom I spoken about this since the September meeting] believe that the term default should be restricted to those situations where a party has failed to plead or appear by way of motion in response to the Complaint. Obviously, it does have some application to those situations where a party's pleadings have been stricken for whatever reason by order of the court and they are, therefore, no longer deemed to have entered an appearance. The confusion in this area, [see Judge Diez' comments in Van Dyke v. Varsity Club, Inc., 103 Or App 99 (1990) and Judge Mattison's letter] seems to stem from use of the term "default" in the situation where a party has not appeared for

the appointed trial date. Therefore, I suggest that the clause "or further defend" be either removed from ORCP 69 or be qualified to exclude appearance and defense at trial. It would be helpful to make a clear line of demarcation such that Rule 69 applies to defaults or failure to defend as required by the rules when it occurs prior to the day for trial. If it occurs on the day for trial, this should be handled by an amendment to ORCP 58 TRIAL PROCEDURE. I would suggest the addition of a paragraph E to ORCP 58 that reads as indicated on the enclosure to this letter. The purpose of this addition would be to clearly define and indicate that the trial court has the power and discretion to proceed with trial on the appointed date when the court record reflects that trial notices were mailed to the party or counsel for the party and that that party has failed to appear at trial.

It is neither practicable nor economical for the court or the parties to use the ten-day notice provision for defaults under ORCP 69 to handle the problem of the non-appearing party at trial. In any case, the party who is at trial will have incurred substantial attorney's fees, costs and potentially expert witness fees in preparation for the trial. If that party is forced, with the non-appearance of the defendant, to then give ten-days written notice of the prima facie hearing, the plaintiff will have incurred the expenses and, most likely, will incur additional charges for the delayed prima facie hearing. As an aside, how many busy trial judges will find a 1 - 3 hour block of time for the prima facie hearing within ten days in their schedule? It's hard to imagine a rational due process argument against allowing the appearing party to proceed to trial, put on their evidence in an abbreviated format (absent cross-examination from the non-appearing party) and obtain his or her judgment.

Likewise, a non-appearing plaintiff should not be allowed to complain about the court dismissing the plaintiff's case for failure to produce any evidence. Certainly, the defendant who is prepared for trial and incurred the expenses necessary to do so, should not be deprived of his or her opportunity to obtain a dismissal with prejudice of the plaintiff's claim at that time. If there is some reasonable explanation for the non-appearance of a defendant or a plaintiff, certainly the service of the judgment upon the non-appearing party or their counsel will trigger their use of the procedures already existing to remedy the result. See ORCP 64B(1) and C, ORCP 71.

Since the September meeting, I have re-read the Court of Appeals decision in Van Dyke v. Varsity Club, Inc., 103 Or App 99 (1990). I have been puzzled continuously by the statement of the court that -

> "The trial court did not intend to act under ORCP 69, but, rather, intended with trial in the absence of defendant. However, the trial court had no authority to proceed in that manner."

Van Dyke, 103 Or App at 102.

I reviewed the Oregon Rules of Civil Procedure looking for something to suggest the trial court had no such authority. Unless ORCP 69 in its current form prohibits this procedure, I find nothing. It seems to be a strained interpretation of ORCP 69 to suggest it prohibits a trial judge from proceeding. On the other hand, ORCP 52A states,

> "When a cause is set and called for trial, it **shall** be tried or dismissed unless good cause is shown for a postponement. At its discretion, the court may grant a postponement, with or without terms, including requiring the party securing the postponement to pay expenses incurred by an opposing party."

It strikes me that ORCP 52A is authority and, in fact, is mandatory in its command to the trial court to try the case when called for trial without consideration of whether a party appears or not. The staff comment for the Council on Section 52A, when it was adopted, indicates that the language of 52A is new. Apparently, in 1980, a modification to the second sentence of 52A was made according to the 1980 staff comment. The last clause of that sentence was apparently suggested by the case of Spalding v. McCaige, 47 Or App 129 (1980). I am enclosing a copy of the relevant portions of that opinion. Apparently, according to the Spalding opinion, prior to the enactment of ORCP 52A, when a party failed to appear at trial, the Court of Appeals felt that the trial judge was left with two choices: (1) To default the non-appearing party; or, (2) To postpone the trial. Spalding, 47 Or App at 137. It is not clear that any court has dealt with the significance of the first sentence of ORCP 52A mandating that the court case shall be tried or dismissed once it is set and called for trial. Certainly, the Spalding case did not resolve this as it acknowledged that ORCP 52A was enacted after the trial of that case.

I am concerned about your suggestion that the second full sentence of ORCP 69A be removed. This sentence requires ten-days written notice of a party's intent to seek "an order of default" if the party against whom the default is sought (1) has filed an appearance; or, (2) has provided written notice of intent to file an appearance. In practice, defaults are becoming more difficult to set aside. When this provision was added, we had certainty in

state court practice for the first time. The court didn't have to speculate about the parties' agreements regarding an extension any more. A defendant knew precisely how to automatically trigger a requirement for ten-days written notice of default. A plaintiff knew precisely how to automatically trigger an absolute deadline for the defendant to do something. This system has worked well. It should not be eliminated.

I indicated when I appeared at the Council's meeting in September that I appeared as the liaison representative of the Oregon State Bar Procedure & Practice Committee. Our Committee has not had a meeting since your September meeting and, therefore, these comments in this letter should not be construed as the position of the Procedure & Practice Committee. Rather, they are merely my thoughts and suggestions which I will review with the Procedure & Practice Committee at our next regularly scheduled meeting on October 24, 1992.

Thank you for your consideration.

Very truly yours,

DENNIS JAMES HUBEL

DJH:sb

cc: Henry Kantor, Esq.\via fax
Stephen C. Thompson, Esq.\via fax

Enclosures

Dennis J. Hubel

Admitted in Oregon
and Washington

Karnopp, Petersen
Noteboom, Hubel
Hansen & Arnett
ATTORNEYS AT LAW

Riverpointe One
1201 N.W. Wall Street, Suite 300
Bend, Oregon 97701-1936
(503) 382-3011

Lyman C. Johnson
(1929-1986)

FAX (503) 388-5410

November 11, 1992

VIA FACSIMILE AND REGULAR MAIL

Mr. Maury Holland
Executive Director, Council on Court Procedures
University School of Law
Room 275A
1101 Kincaid Street
Eugene OR 97403-3720

The Honorable Winfrid Liepe
District Court Judge
Lane County Courthouse
125 E 8th Avenue
Eugene OR 97401-2926

The Honorable William Campbell Snouffer
Circuit Court Judge
Multnomah County Courthouse
1021 S W 4th Avenue
Portland OR 97204

Re: Rule 69 and Van Dike v Varsity Club, 103 Or App 99, Review Denied 310 Or 476 (1990)

Dear Subcommittee Members:

Thank you for copies of your correspondence regarding the suggested changes to ORCP 69 following the Council's meeting in October, 1992. At the Procedure & Practice Committee's October meeting, the rule and Judge Snouffer's suggested changes were discussed. Since our meeting was October 24, 1992, we did not have the benefit of Judge Liepe's proposal at the time of our meeting.

The Procedure & Practice Committee was in general agreement with Judge Snouffer that a simple solution accomplished by a brief

modification of ORCP 69 was probably the best approach. However, there were at least two concerns the Committee had with Judge Snouffer's proposal which bear discussion.

First, the suggested changes refer only to the entry of an order of default and make no reference to proceeding on the day of trial to the imposition of a judgment based upon the default. [Judge Liepe's proposal addresses this issue]. As noted, in earlier discussions, the party who has prepared for trial and showed up that day, with witnesses, ought to be entitled to proceed to judgment.

The second concern was that the judgment by default which is entered as a result of the non-appearance of a party ought to be served on the party who failed to appear at trial, but who had previously filed an appearance in the case. If, for example, there were some basis for appeal of the judgment or some basis for ORCP 71 relief from judgment, these could not be obtained if there was no service of the judgment on the non-appearing party so as to alert them to the entry of the judgment and the time periods within which to either appeal or make application for relief from the judgment.

The committee has suggested a modification to Judge Snouffer's new paragraph A(2) to read as follows:

> "A.(2). When a party who has filed an appearance fails to appear at trial, an order of default and judgment by default shall be entered, regardless of the time limits imposed by subsection (1) of this rule and a copy of the judgment shall be served by the prevailing party upon the party who fails to appear for trial. A judgment by default shall not be entered until the court file contains a return of service showing service of the form of judgment upon the party who failed to appear for trial."

Since our meeting to discuss this proposal, I received Judge Liepe's October 28, 1992, letter and proposal. I agree with his suggestion to change the mandatory language to permissive language with respect to the entry of the default and the judgment by default. His paragraph A(3) meets our committee's concern that not only an order of default is available on the day of trial when a party fails to appear, but also a judgment by default is equally available. However, the actual document recording the judgment will typically be prepared later by the prevailing party and submitted to the court for filing as discussed above. Judge Liepe's proposal can be similarly modified as outlined above to provide for service of the form of judgment on the party who fails

to appear at trial, we assume the court will mail notice of entry of the judgment as they currently do in all cases to ensue notice of the entry of judgment triggering the time for appeal or Rule 71 relief is received by the non-appearing party.

Judge Liepe expresses concern regarding a requirement in liquidated damages cases such as an action on a promissory note for requiring testimony or affidavit to support the allegations of the complaint in the situation where a party fails to appear at trial. I think his concern can be alleviated by allowing the default judgment by either method contemplated by ORCP 69B(1) or B(2). In any event, the issue we are trying to address is the expedient entry of that judgment when a party fails to appear at trial and rather than sending the litigant down to the clerk who, no doubt will have no time on their calendar for receipt of any evidence to support the judgment at that date, it will probably be more expedient to simply have the evidence presented to the judge at the time of trial.

As my schedule stands now, I will probably not be able to appear at the November 14, 1992, meeting of the Council in Portland. However, another member of the Procedure & Practice Committee, Doug Wilkinson, will be attending in my place and be prepared to discuss this proposal with the Council.

Thank you for including me in this discussion.

Very truly yours,

DENNIS JAMES HUBEL

DJH:sb

cc: Henry Kantor
The Honorable Elizabeth Welch
The Honorable Jack Mattison