IN THE COURT OF APPEALS OF THE
STATE OF OREGON

Clarissa WINN,
Plaintiff-Appellant,
v.
BLAKESLEE VINEYARD ESTATE, INC.
and William Blakeslee,
Defendants-Respondents.

Multnomah County Circuit Court
22CV41323; A183089 (Control), A185125

Judith H. Matarazzo, Judge. (Judgment)

Melvin Oden-Orr, Judge. (Order)

Argued and submitted January 20, 2026.

Richard B. Myers argued the cause for appellant. Also on the briefs were Bennett Hartman, LLP; and Patrick G. Conroy, Randy J. Harvey, and Employment Law Professionals.

Kimberley Hanks McGair argued the cause for respondents. Also on the brief were Kelly R. Tilden and Farleigh Wada Witt.

Tyler Beyerlein and Brincat & New PC; and Nadia H. Dahab and Sugerman Dahab filed the brief *amicus curiae* for Oregon Trial Lawyers Association.

Before Aoyagi, Presiding Judge, Lagesen, Chief Judge, and Kamins, Judge.*

KAMINS, J.

Affirmed.

Lagesen, C. J., dissenting.

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* Lagesen, C. J., *vice* Pagán, J.

KAMINS, J.

Plaintiff appeals a judgment dismissing both her individual and class action wage violation claims. Plaintiff alleged that her former employer, defendant,[1] deducted money from her and her coworkers' paychecks in violation of ORS 652.610(3), which prohibits employers from improperly withholding, deducting, or diverting any portion of an employee's wages. The trial court granted defendant's motion to dismiss the class action claims under ORCP 32 I, a provision of the class action rule that allows a defendant the opportunity to cure the alleged violations and, as a result, have the class action complaint dismissed. As part of that decision, the trial court interpreted the statute to provide a remedy of "actual damages or $200" per category of defendant's statutory violations, rather than per paycheck, as plaintiff had requested. *See* ORS 652.615 (providing for "a private cause of action for a violation of ORS 652.610(3) for actual damages or $200, whichever is greater"). Approximately three months later, the trial court *sua sponte* dismissed plaintiff's individual claims for failure to prosecute after counsel for plaintiff failed to respond to a trial-setting notice. Because the trial court did not err in any respect, we affirm.

According to plaintiff's complaint, she worked as an hourly paid employee at defendant's wine tasting room for about eight months in 2022. After plaintiff resigned in September 2022, she filed a lawsuit on her own behalf and as a class action on behalf of all affected employees of defendant, alleging several different types of wage violations. Plaintiff's allegations can generally be summarized as the improper appropriation of employees' tip money, a failure to compensate employees for the entirety of the hours worked, and the improper deduction of bonuses from employees' paychecks. Defendant responded by moving to dismiss pursuant to ORCP 32 I, arguing that it had cured the alleged violations. In support of that motion, defendant provided evidence that it had notified all affected employees of the alleged violations and its plan to compensate them.

[1] Plaintiff sued both the business that employed her and the president of the business. For ease of reading, in this opinion we refer to both as "employer" or "defendant."

The trial court held a hearing on defendant's motion and determined that the notice that defendant provided was insufficient to meet the requirements of ORCP 32 I. The court abated the case for 60 days to allow defendant to supplement its notice to include additional information about the nature of the lawsuit and available remedy as well as to ensure that it was sent to all affected employees. As to that remedy, the trial court resolved a dispute between the parties over the meaning of the statutory damage provision contained in ORS 652.615 (providing for "a private cause of action for a violation of ORS 652.610(3) for actual damages or $200, whichever is greater"). Plaintiff argued that that provision meant that each employee should be awarded the $200 statutory damage remedy per paycheck containing an unlawful deduction, while defendant argued that it was available per type of statutory violation. The court agreed with defendant and required the notice to alert class members that they would be entitled to actual damages or $200 for each category of violation. Because it determined that defendant complied with ORCP 32 I's notice and cure provisions, the trial court dismissed the class action lawsuit and allowed plaintiff's individual claims to proceed.[2]

CLASS ACTION CLAIMS

In plaintiff's first assignment of error, she contends that the trial court erred in granting defendant's motion to dismiss the class action claims pursuant to ORCP 32 I. That rule allows a defendant who offers "the appropriate compensation, correction, or remedy of the alleged wrong" to seek dismissal of a class action claim for damages. On appeal, plaintiff argues that the trial court improperly fashioned its own notice to class members rather than requiring defendant to satisfy its burden under ORCP 32 I. Specifically, the trial court required defendant to communicate additional information to the putative class members regarding defendant's voluntary efforts at providing a remedy. However, plaintiff did not raise any argument as to the court's authority to modify the notice below.[3]

[2] Plaintiff's individual claims will be discussed in more detail below.

[3] In any event, the argument fails on the merits. Nothing in ORCP 32 I would preclude the trial court from ensuring that the notice to class members was accurate and sent to the appropriate recipients. *See* ORCP 32 I; *Stewart v. Albertson's,*

Plaintiff also contends that the trial court erred because her claim sought equitable relief in addition to damages, taking it out of the ambit of ORCP 32 I. *See* ORCP 32 I ("*No action for damages* may be maintained *** upon a showing by a defendant that all of the following [requirements of ORCP 32 I] exist[.]" (Emphasis added.)). The equitable relief plaintiff identifies on appeal is the complaint's assertion that the class is "entitled to a full accounting of the tips and gratuities received and/or paid out by defendants, and to an equitable award of any amounts to which such accounting demonstrates that they are entitled." By its terms, these allegations seek an accounting in service of the claim for damages. Plaintiff does not allege a partnership or other type of relationship that could justify an equitable claim for accounting. *See Carey v. Hays*, 243 Or 73, 79, 409 P2d 899 (1966) (describing partnership accounting). Rather, the type of "accounting" plaintiff requests could be determined through pretrial discovery. In those circumstances, "[t]he fact that the complaint mentions an accounting does not convert the cause into an equity suit." *Lieuallen v. Heidenrich*, 259 Or 333, 335, 485 P2d 1230 (1971); *see also Thompson v. Coughlin*, 329 Or 630, 638, 997 P2d 191 (2000) ("Neither is a complaint's request for equitable relief, ancillary to a purely legal right, sufficient to bring a case within the province of equity.").

As to the damages available for the class claims, plaintiff argues that the trial court erred in concluding that the class members are entitled to statutory damages contained in ORS 652.615 for each *category* of violation of ORS 652.610(3). Rather, plaintiff contends that class members are entitled to statutory damages for each *paycheck* for which the employer made unlawful withholdings because each paycheck containing an unlawful deduction amounted to a statutory violation. *Amicus curiae* Oregon Trial Lawyers Association (OTLA) urges us to go one step further and interpret the statute as providing for a statutory $200 damage for each *discrete instance* that the employer made any unlawful deduction. We review the construction of a statute

Inc., 308 Or App 464, 479-80, 481 P3d 978, *rev den*, 368 Or 138 (2021) (describing trial court's role in determining the appropriate remedy for purposes of ORCP 32 I).

for legal error and the trial court's determination as to what relief is appropriate under the circumstances for an abuse of discretion. *Stewart v. Albertson's, Inc.*, 308 Or App 464, 486, 481 P3d 978, *rev den*, 368 Or 138 (2021).

Plaintiff's argument presents an issue of statutory construction that requires a review of the statute's text, context, and, if helpful, legislative history. *State v. Gaines*, 346 Or 160, 164-65, 206 P3d 1042 (2009). The text of the provision at issue, ORS 652.615, provides:

> "There is hereby created a private cause of action for *a violation* of ORS 652.610 (3) for actual damages or $200, whichever is greater."

(Emphasis added.)

The question we must answer is when "a violation" of ORS 652.610(3), which triggers the statutory damage amount of $200, occurs.

The private right of action—and concomitant damages provision—was first enacted in 1980 and codified as part of ORS 652.610, the same section setting forth the wage violations. Or Laws 1980, ch 1, § 2. Prior to that enactment, the sole mechanism to enforce violations of the wage provisions was through criminal prosecution. ORS 652.990(8) (1979), *amended by* Or Laws 1999, ch 1051, § 215. According to the bill's proposer, the Oregon Legal Services Corporation, however, no criminal action had ever been taken to enforce the statute's provisions. Tape Recording, Senate Committee on Labor, Consumer and Business Affairs, SB 458, Feb 23, 1979, Tape 8, Side A, at 29:35 (statement of Dick Ginsburg). Accordingly, a private right of action was proposed to ensure that the preexisting prohibitions against wage violations contained in ORS 652.610(3) would be enforced. That private right of action is now codified at ORS 610.615.

Looking to the text of that section is not particularly helpful in determining when the legislature intended the statutory damage to be applied. Again, the language of that section provides: "There is hereby created a private cause of action for a violation of ORS 652.610 (3) for actual damages or $200, whichever is greater."

Because the legislature did not define the phrase "a violation," we look to the term's ordinary meaning. *See State v. Hubbell*, 371 Or 340, 349, 537 P3d 503 (2023) (when the legislature has not defined a particular word or phrase, we generally "presume that the legislature intended those terms to be understood in their ordinary sense"). Violation in this context is defined as "an infringement or transgression," as in an infringement of the statutory provisions defining wage violations. *Webster's Third New Int'l Dictionary* 2554 (unabridged ed 1976). Understanding that meaning, however, provides little insight into the question of *when* a violation occurs; that infringement could occur each time an amount is deducted, each paycheck containing such a deduction, or in the aggregate for all improper deductions of the same type.

Perhaps because the definition of "violation" is not helpful, both parties focus their argument on the meaning of the article "a" that modifies "violation." Citing *Merriam-Webster's* online definition of an "indefinite article," plaintiff argues that "a" is "used in English to refer to a person or thing that is not identified or specified." So, according to plaintiff, "a violation," refers to a singular discrete event constituting a violation without identifying which particular violation is specified. According to plaintiff that occurs every time an event that constitutes a violation occurs, namely, when an employer pays wages in a manner that violates ORS 652.610(3). OTLA offers a different analysis: that "a" is a function word before a singular noun followed by a restrictive clause—that is, a penalty connects to each individual act of violation such that each improper deduction is itself an independent violation. Defendant counters that those interpretations improperly replace the word "a" with "each." Defendant's construction echoes the trial court's: that "a violation" refers to the general category of violation contained in ORS 652.610, not each instance of its occurrence (as in, the act of improperly deducting lunch breaks, not each instance of the deduction).

Ultimately, there is little to be gained from parsing the word "a." As the federal district court for the District of Oregon observed when construing the same statutory provision, the use of "a" could reflect a legislative intent to make

the $200 penalty available for "each" improper instance of a violation, but it is "equally plausible that the legislature did not wish to use the plural 'violations' because doing so would wrongly suggest that a cause of action was only available to a plaintiff whose employer violated ORS[ ]652.610(3) multiple times, or at least more than once." *Brinkman v. ABM Onsite Services - West, Inc.*, 383 F Supp 3d 1120, 1124 (D Or 2019).

The statutory context offers several, more helpful, clues as to legislative intent. As noted, the precursor to the private right of action now located in ORS 652.615 was a criminal provision. That statute provided that a "[v]iolation of ORS 652.610 *** is punishable, upon conviction, by a fine of not less than $10 nor more than $100 for *each offense*." ORS 652.990(8) (1979) (emphasis added). When the legislature added a private right of action for the same violation, it did not import the word "each"; rather, it chose to provide damages for "a" violation, suggesting that it did not intend to carry over the statutory framework attaching damages to each occurrence of a violation. *See Belinskey v. Clooten*, 237 Or App 106, 111, 239 P3d 251 (2010), *rev den*, 349 Or 601 (2011) (observing that wording changes are relevant context for purposes of statutory construction and that "new language in a statute ordinarily signals a change in the statute's meaning").

Additionally, as defendant points out, a similar provision in the same section provides an additional hint as to the legislative intent. ORS 652.100(1) prohibits an employer from requiring an employee to falsify time records, a violation that involves willful conduct. The following subsection provides a remedy for "each" time the employer engages in such wrongful conduct, and specifies that each pay period constitutes a separate violation:

> "(2) In addition to any other remedy provided by law, an employee has a private cause of action for a violation of subsection (1) of this section. The court may award actual damages or $1,000 for *each violation*, whichever is greater, injunctive relief, attorney fees and costs. The court *shall count each pay period in which a violation occurs or continues as a separate violation*."

ORS 652.100(2) (emphases added).

That the legislature provided specific instructions as to when each pay period amounts to a separate wage violation in certain contexts suggests that that is the language it would use to signify that each pay period is a separate wage violation in other contexts. Typically, the legislature's use of different words in similar circumstances—within the same statutory chapter—suggests it intended to mean something different. *See State v. Gardner-Rolph*, 345 Or App 681, 690, 584 P3d 270 (2025), *rev den*, 375 Or 261 (2026) ("If the legislature uses different terms in statutes, we generally will assume that the legislature intends different meanings for those terms."); Jack L. Landau, *Oregon Statutory Construction*, 97 Or L Rev 583, 669-70 (2019). The absence of such an instruction in a different section of the same chapter reflects an intent not to count each "pay period" as a separate violation for purpose of ORS 652.615.

The legislative history lends further support to the conclusion that the legislature did not intend the statutory damage to stack by pay period. As noted, the reason that the legislature added the private right of action was to ensure that the preexisting statutory violations would be enforced, and, as explained by a director of the Legal Services Corporation, the bill is "very much a victims' compensation bill where the wrongdoer, the employer, would be compensating the victim." Tape Recording, Senate Committee on Labor, Consumer and Business Affairs, SB 458, Feb 23, 1979, Tape 8, Side A, at 29:35, 32:06 (statement of Dick Ginsburg).

But the bill faced substantial opposition in committee, driven by a concern over spiraling costs for employers. In both the Senate and House committees, lawmakers demanded that the Legal Services Corporation provide evidence of documented cases to demonstrate that enforcing wage violations was really a problem. *Id.* at 41:50 (statement of Sen George Wingard). And in the House Labor Committee, one legislator brought up a recent newspaper article and read a portion into the record: "Legal costs are high because of the adversarial roles we have in the system right now ***. We need a system that will minimize litigation." Tape Recording, House Labor Committee SB 458,

Tape 37, Side A, at 1:35:36 (June 20, 1979) (statement of Rep Joe Rogers).

In committee, the bill was modified in several ways to address the concerns that employers could be harmed by the new private right of action. First, the initial bill required courts to award attorney fees only to successful *employees*. SB 458, § 2 (1979). At the bill's work session in the House Labor Committee, a legislator pushed back: "There is the expense of attorney fees. The assumption I guess is always made that every firm is a Weyerhaeuser Georgia-Pacific. What's $200 or $2,000 in legal fees? *** There are many small employers, small persons, small corporations, partnerships that can get zinged by this." Recording, House Committee on Labor, Consumer and Business Affairs, SB 458, June 22, 1979, Tape 38, Side A, at 28:13 (statement of Rep Joe Rogers). Addressing that concern, the final bill allowed (rather than required) the court to award costs and fees to the prevailing party (not just the employee). Or Laws 1980, ch 1, §§ 1, 2.

Specific to the statutory damage provided in the bill for a violation of ORS 652.610(3), the initial draft authorized up to $500. At a work session in the Senate committee, the bill's sponsor, Senator Kulongoski, proposed an amendment that that amount be reduced. Tape Recording, Senate Committee on Labor, Consumer and Business Affairs, SB 458, May 31, 1979, Tape 29, Side B, at 3:25:20 (statement of Sen Theodore Kulongoski). Later in that work session, Kulongoski stated that the Bureau of Labor has a backlog, and "with the $200" statutory damage, the amount was low enough that an issue "would probably" be litigated in district court,[4] where it could be resolved "very quickly." *Id.* at 3:26:45. A representative of the Legal Services Corporation observed that, "in addition to that, with the $200, someone could even go to small claims court." *Id.* at 3:27:04 (statement of Anita Paulsen).

In response to that comment, Senator George Wingard suggested that the legislature "fix" it so that

[4] District courts in Oregon previously had exclusive jurisdiction of claims for money or damages not exceeding $3,000. *Former* ORS 46.060 (1979), *repealed by* Or Laws 1995, ch 656, § 127.

employees would be *required* to pursue their remedy in small claims court. *Id.* at 3:27:20 (statement of Sen George Wingard). Senator Kulongoski rejected that suggestion because there may be "some times" when the claim for actual damages exceeds the statutory damage amount, taking it out of small claims court jurisdiction. *Id.* at 3:27:40 (statement of Sen Theodore Kulongsoki). In response, Senator Wingard observed that there was a bill pending that would increase small claims jurisdiction to $1,000, which should address that concern. *Id.* at 3:29:20 (observing that "we don't want to turn this into a plaintiff's attorney bill, we can take care of the people"). In support of limiting the jurisdiction to small claims court, Senator Wingard observed that he wanted to help employees, but was worried that the bill could lead to *employers* being the ones that need help "when you allow it to be profitable for someone to get into that process. That's what our courts are full of now." *Id.* at 3:32:05.

It would be incongruent with the legislature's concern over minimizing the cost for employers to construe the $200 statutory damage—a much larger value in 1979 than today—as one that stacks each time the same violation occurs. Specifically, the discussion that the statutory damage amount was low enough to allow the claim to proceed in district or small claims court reveals that no legislator thought that the $200 itself would stack because that would quickly remove the case from courts of limited lower value jurisdiction. And the reason that the statute was not limited to small claims court, according to the bill's sponsor, was that, while the statutory damage amount would allow for such jurisdiction, the *actual damages* might be too high.

Finally, according to the Legal Services Corporation, the provision at issue was modelled on ORS 652.150,[5] which provides for statutory damages for failure to pay wages on termination of employment. Tape Recording, Senate Committee on Labor, Consumer and Business Affairs, SB 458, Feb 23, 1979, Tape 8, Side A, at 30:04 (statement of Dick Ginsburg). That statute clearly limits the extent of statutory damages an employer can be subject to, capping the amount

[5] The statute has been subsequently amended; for ease of reading, we cite to the version of the statute at the time of the legislative discussion of SB 458.

of damages at 30 days of wages. ORS 652.150 (1979), *amended by* Or Laws 1991, ch 966, § 2; Or Laws 1995, ch 501, § 1; Or Laws 2001, ch 690, § 1; Or Laws 2003, ch 779, § 1; Or Laws 2005, ch 664, § 2; Or Laws 2011, ch 348, § 2.[6] To the extent that that damages cap can provide guidance as to whether "a violation," as provided in ORS 652.615, occurs each time a deduction or paycheck is issued or as an aggregate of the commission of a type of violation, it does not support a reading that each violation triggers an additional penalty.[7]

Faced with the clarity of that legislative history, plaintiff argues that the structure of the "original session law" supports the argument that the legislature intended the $200 damage to apply per paycheck. Plaintiff points out that the first section of the original session law required an employer to provide an employee with an itemized statement on each regular payday, and the second section required that statement be provided whenever an employee gets paid, both of which correlate to current ORS 652.610(1) and (2). Or Laws 1980, ch 1, §§ 1, 2. The third section of the original session law correlates to ORS 652.610(3) and sets forth the statutory violations at issue in this case—improper withholdings or deductions from an employee's pay. *Id.* at § 3. The fifth section of the session law, now codified at ORS 652.615, provides for the private right of action. *Id.* at § 5. Plaintiff argues that that organizational structure, with the private action following the requirement of an itemized statement per paycheck and a list of prohibitions, indicates that those prohibitions and correlated damages also apply per pay period.

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[6] ORS 652.150 (1979) provided:

> "If an employer wilfully fails to pay any wages or compensation of any employe who is discharged or who quits his employment, as provided in ORS 652.140, then, as a penalty for such nonpayment, the wages or compensation of such employe shall continue from the due date thereof at the same rate until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days; and provided further, the employer may avoid liability for the penalty by showing his financial inability to pay the wages or compensation at the time they accrued."

[7] The dissent posits an alternate construction based on the clarity of the statutory text and without reference to the legislative history. 352 Or App at 819-21 (Lagesen, C. J., dissenting). However, plaintiff, *amicus*, and the dissent all posit different interpretations of that text, suggesting that it is not a model of clarity.

The problem with plaintiff's argument is that those statutory subsections (the first, second, and third section of the session law) were preexisting, and the private right of action was simply tacked on to the end of the statute. Indeed, in the very next legislative session, the legislature relocated the private right of action into its own provision. The explanation from the proposer of that edit was simply that the private right of action had previously "sort of wound up in the wrong place." Tape Recording, Senate Committee on Labor, Consumer and Business Affairs, SB 458, June 9, 1981, Tape 113, Side A, at 28:17 (statement of Wage & Hour Commission representative Paul Tiffany). Given that the private right of action was simply added to the end of the statute, we cannot glean the same meaning as plaintiff from the existence of the preexisting provisions of that statute.

Our interpretation that the damages were intended not to apply per deduction or pay period, but rather by type of violation is consistent with the Oregon Supreme Court's reading of other statutes with similar damage provisions. In *Shepard Investment Group LLC v. Ormandy*, the Oregon Supreme Court considered a similar issue in the Oregon Residential Landlord and Tenant Act (ORLTA). 371 Or 285, 533 P3d 774 (2023). A provision of the ORLTA, ORS 90.315(4)(f), provides that a tenant may recover damages for a landlord's failure to disclose certain costs: "[I]f a landlord fails to comply [with certain statutory provisions] the tenant may recover from the landlord an amount equal to one month's periodic rent or twice the amount wrongfully charged to the tenant, whichever is greater." The question before the court was whether that language meant that a tenant could recover the statutory damage of a month's rent each time that a landlord "fails to comply." 371 Or at 294. The court observed that the language "fails to comply" could refer to either a discrete or ongoing violation. *Id.* Similarly, the language the "amount wrongfully charged" could also be an aggregate term encompassing both discrete and ongoing violations. *Id.* at 295. The fact that both terms could reference the aggregate amount evinced a legislative intent to compensate the tenant for aggregate harm. *Id.* Moreover, nothing in the legislative history suggested "a legislative intent to impose a particularly punitive penalty." *Id.* at 297.

Rather, the legislative history indicated a preference that the statutory damage amount of a month's rent represent the "upper ceiling of potential penalties." *Id.* Reading that penalty to stack would require the court to insert the word "each," contrary to the mandate that reviewing court not insert into a statute language that had been omitted. *Id.* at 295 (citing ORS 174.010).

Similarly, here, the statutory language—"a violation"—like "fails to comply" could refer to an aggregate or discrete violation. And "actual damages"—like "amount wrongfully charged"—could be an aggregate term encompassing both discrete and ongoing violations. And, as discussed above, the legislative history does not reflect an intent to impose a particularly punitive penalty—rather, it reflects an intent to compensate employees while keeping costs manageable for employers. In sum, the text, context, and legislative history evince an intent to impose a $200 statutory damage for each type of statutory violation in the aggregate, not each discrete time the violation occurred.

INDIVIDUAL CLAIMS

In plaintiff's second and third assignments of error, she challenges the dismissal of her individual claims for want of prosecution. An understanding of her argument requires a brief summary of the procedural history below. After the class claims were dismissed, and while the parties were litigating attorney fees on those issues, the trial court sent plaintiff notice as to her individual claim. On August 2, 2023, the trial court notified plaintiff:

> "The stipulated order setting trial date must be submitted to the court 35 days from the date the order was sent to the parties by the court. A 30-day notice pending dismissal will be sent to the parties if this order is not submitted to the court within 35 days."

Plaintiff took no action related to that notice. On September 15, the court issued a "notice of intent to dismiss" stating: "The court will dismiss this case in 30 days if you do not take further action." Plaintiff once again took no action in response to that notice. On November 21, the court entered a general judgment of dismissal. Plaintiff

later moved to set aside the judgment pursuant to ORCP 71, but the trial court denied that motion.

In plaintiff's second assignment of error, she challenges the initial entry of the judgment, and in her third assignment of error, she asserts that the trial court abused its discretion in denying her ORCP 71 motion to set that judgment aside. As to plaintiff's second assignment, she did not preserve a challenge to the initial entry of judgment. The first time she raised a concern with the judgment was through the filing of an ORCP 71 motion to set aside the judgment. Indeed, her brief on appeal identifies that motion as where she preserved the arguments presented in support of her second assignment of error. Accordingly, we review the trial court's denial of plaintiff's ORCP 71 motion as asserted in plaintiff's third assignment of error.

Plaintiff argues that the entry of judgment amounts to a "clerical mistake" under ORCP 71 A or, in the alternative, that relief from judgment was warranted due to "mistake, inadvertence, surprise, or excusable neglect" under ORCP 71 B(1)(a). We defer to the trial court's factual findings and review the court's ultimate decision under ORCP 71 A and B for abuse of discretion. *Hill v. Hill*, 323 Or App 458, 463, 523 P3d 163 (2022). We review whether plaintiff has established a cognizable basis for relief under ORCP 71 B for errors of law. *Union Lumber Co. v. Miller*, 360 Or 767, 778, 388 P3d 327 (2017).

In support of the contention that the judgment was a clerical error under ORCP 71 A, plaintiff contends that the rules relied on in the judgment of dismissal do not support dismissing the case. However, for purposes of ORCP 71 A, a clerical mistake cannot be "an error that involves the exercise of legal reasoning; rather, it is the kind of mistake in a judgment that causes the judgment, through oversight or omission, not to reflect what occurred in the proceeding that led to the judgment." *Fitzgerald v. Rogue Agrisource LLC*, 333 Or App 555, 562, 554 P3d 838 (2024) (internal quotation marks omitted). Plaintiff's argument—that the rules cited in the judgment do not legally support the issuance of a judgment—relies on legal reasoning and analysis and therefore does not constitute a "clerical mistake" for purposes of

ORCP 71 A. *See Yarbrough v. Viewcrest Investments, LLC*, 299 Or App 143, 158, 449 P3d 902 (2019), *rev den*, 366 Or 135 (2020) ("clerical mistake" is "a type of mistake or omission mechanical in nature which is apparent on the record and which does not involve a legal decision or judgment by an attorney").

In support of the contention that the judgment should be set aside due to excusable neglect under ORCP 71 B, plaintiff argues that her lead counsel suffered a concussion and contracted COVID-19 "in the same timeframe" as the notice of dismissal for lack of prosecution and none of plaintiff's other attorneys received that notice. She further argues that she was actively litigating the class claims and therefore the case was being actively prosecuted.

To be entitled to relief from the trial court's judgment of dismissal on the ground of excusable neglect, plaintiff "was required to demonstrate that [s]he had a reasonable excuse for failing—on account of neglect—to appear or otherwise defend [her] interests." *Reeves v. Plett*, 284 Or App 852, 854-55, 395 P3d 977 (2017) (internal quotation marks omitted). Whether a party has demonstrated a reasonable excuse sufficient to justify setting aside a judgment requires an assessment of the totality of the circumstances that led to the entry of the judgment sought to be set aside. *Id*. at 855. The focus of the inquiry is whether the totality of the circumstances reflects that the party seeking relief from judgment has "taken reasonable steps to protect its interests." *Id*.

Assuming that plaintiff preserved her arguments relating to excusable neglect, the trial court did not err in determining that plaintiff failed to meet her burden. Here, the initial trial setting notice requiring a response issued on August 2, 2023. The subsequent dismissal notice issued September 15 and gave plaintiff 30 days to respond and avoid dismissal. Dismissal did not issue until November 21. According to the exhibits submitted below, plaintiff's counsel suffered a concussion on Augst 12 and was back to work a week before the September dismissal notice had issued and over a month before the expiration of the 30-day period provided for plaintiff to respond. Judgment did not enter for

another 60 days. Counsel (who worked at a law firm with multiple attorneys) was only absent for 10 days during the nearly 90-day time frame between the issuance of a dismissal notice and the judgment. Given those facts, the trial court did not err in concluding that plaintiff did not demonstrate excusable neglect.

In addition to pointing to that sequence of events, plaintiff argues that a judgment for want of prosecution of her individual case never should have been entered because she was actively litigating the issue of attorney fees relating to the dismissal of the class action suit. That plaintiff was litigating an attorney fee issue in the class action does not demonstrate excusable neglect in repeatedly failing to respond to a trial setting notice in her individual case.

In sum, the trial court did not err in dismissing either the class or individual claims and correctly concluded that the statutory $200 damage provided for in ORS 610.615 is allocated per type or category of statutory violation rather than per pay period.

Affirmed.

LAGESEN, C. J., dissenting.

The majority opinion holds that ORS 652.615 authorizes the imposition of "a $200 statutory damage for each type of statutory violation [of ORS 652.610(3)] in the aggregate, not each discrete time the violation occurred." 352 Or App at 816. Based on that construction of the statute, the majority opinion upholds the dismissal of the class claims under the theory that payment of the minimum statutory damages "for each category of violation" adequately cured defendant's alleged repeated violations of ORS 652.610(3) for purposes of ORCP 32 I. *See id.* at 14-16. Because the majority opinion's reading is at odds with the plain text of ORS 652.615—which authorizes the award of specified damages for singular violations of ORS 652.610(3)—I respectfully dissent.

ORS 652.615, by its terms, provides a cause of action for the greater of actual damages or $200 for "a violation of ORS 652.610(3)." The use of the word "a" indicates that the

legislature intended to authorize actual damages or $200 for each single violation of ORS 652.610(3). Regardless of the various meanings of the indefinite article "a," the word refers to a single thing, in this instance, a single violation. *See State v. B. Y.*, 371 Or 364, 375, 537 P3d 517 (2023) (notwithstanding the existence of two plausible interpretations of the indefinite article "an," when "used with the singular noun 'act,'" both interpretations indicate that the indefinite article "refers to a single thing—here, a single act"). Thus, when ORS 652.615 is given its most natural reading, an employee has a cause of action for the greater of actual damages or $200 for any single violation of ORS 652.610(3). Contrary to the trial court's conclusion, had the legislature intended damages to be based on categories of violations, rather than single violations, it would have drafted the statute in those terms. It did not.

The remaining question is what constitutes "a violation of ORS 652.610(3)." ORS 652.615. Answering that question requires an examination of the terms of ORS 652.610(3) itself. It prohibits "withhold[ing], deduct[ing], or divert[ing] any portion of an employee's wages" unless the withholding, deduction, or diversion complies with ORS 652.610(3)(a) to (f). An employer thus violates ORS 652.610(3) when the employer withholds, deducts, or diverts any portion of an employee's wages in a manner that does not comport with the statutory requirements. Because any prohibited withholding, deducting, or diversion of "any portion of an employee's wages" necessarily occurs at the time that the employer pays the employee's wages, *see generally* ORS 652.610(1) (providing for regular pay periods), I would conclude that "a violation of ORS 652.610(3)" occurs—and a cause of action under ORS 652.615 accrues—each time an employer issues a paycheck from which "any portion" of the employee's wages has been withheld, deducted, or diverted in a manner that does not comply with ORS 652.610(3)(a) to (f). Under that construction of ORS 652.610(3) and ORS 652.615, an employee is entitled to recover the greater of actual damages or $200 for each paycheck from which the employer has unlawfully withheld "any portion" of the employee's wages.

Because the trial court's dismissal of the class claims rested on a different and, in my view, incorrect

interpretation of ORS 652.615, I would reverse the dismissal of the class claims and remand for further proceedings. As for the dismissal of plaintiff's individual claims for want of prosecution, I agree with the majority opinion's analysis of the second and third assignments of error. Nevertheless, given my conclusion that the trial court erred in dismissing the class claims, I would vacate and remand the dismissal of the individual claims for the purpose of permitting the trial court to assess in the first instance how the justifiable dismissal of the individual claims relates to the need for further proceedings on the putative class claims.