IN THE COURT OF APPEALS OF THE
STATE OF OREGON

Alex TRAIL
and Connie Trail,
Plaintiffs-Respondents,
v.
Azonia HANEY,
Defendant,
and
Brent WEBSTER,
Defendant-Appellant.
Azonia HANEY
and Brent Webster,
Third Party Plaintiffs,
v.
Alexander TRAIL,
Connie Trail, and
Trails Sons & Granddaughters, et al.,
Third Party Defendants.
Clackamas County Circuit Court
CV15040205; A162851

Paul E. Winters, Judge pro tempore.

Submitted April 7, 2017.

Brent Evan Webster filed the brief *pro se*.

James P. Losk and Maylie & Grayson LLP filed the brief for respondents.

Before Ortega, Presiding Judge, and Egan, Judge, and Lagesen, Judge.

LAGESEN, J.

Appeal dismissed.

LAGESEN, J.

Defendant appeals a purported limited judgment awarding $2,000 in sanctions under ORCP 17 to plaintiffs, and an order granting plaintiffs' motion to strike defendant's fourth amended answer, contending that each is erroneous for a variety of reasons. In response, plaintiffs argue that neither document is appealable and that the appeal should be dismissed for that reason. Plaintiffs also request that we award them "delay damages" under ORS 19.445,[1] contending that defendant lacked "probable cause" for taking the appeal, as well as attorney fees and costs. For the reasons that follow, we dismiss this appeal but deny plaintiffs' request for delay damages under ORS 19.445.

We start with the purported limited judgment awarding ORCP 17 sanctions against defendant. That document, which was prepared by plaintiffs' counsel, is titled "Limited Judgment and Money Award." It therefore is not surprising that defendant understood it to be a limited judgment and appealed from it. Had he not done so, and it turned out to be a valid limited judgment, then he would have lost his ability to challenge it. However, notwithstanding its title, the document is not a valid limited judgment.

ORS 18.005(13) defines what qualifies as a "limited judgment":

"Limited judgment" means:

"(a) A judgment entered under ORCP 67 B or 67 G;

"(b) A judgment entered before the conclusion of an action in a circuit court for the partition of real property, defining the rights of the parties to the action and directing sale or partition;

"(c) An interlocutory judgment foreclosing an interest in real property; and

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[1] ORS 19.445 provides:

"Whenever a judgment is affirmed on appeal, and it is for recovery of money, or personal property or the value thereof, the judgment shall be given for 10 percent of the amount thereof, for damages for the delay, unless it appears evident to the appellate court that there was probable cause for taking the appeal."

> "(d) A judgment rendered before entry of a general judgment in an action that disposes of at least one but fewer than all requests for relief in the action and that is rendered pursuant to a legal authority that specifically authorizes that disposition by limited judgment."

The purported limited judgment in this case falls within none of those categories.

Working through the ORS 18.005(13) categories in reverse, it is not a limited judgment under ORS 18.005(13)(d) because, even if an order granting a motion for ORCP 17 sanctions could be construed as disposing of a "request for relief" in the action, there is no source of legal authority that authorizes a court to award ORCP 17 sanctions by limited judgment. The document is not a limited judgment under ORS 18.005(13)(b) or (c) because it does not resolve the sort of real property disputes identified in those provisions.

That leaves ORS 18.005(13)(a). The document is not a judgment under ORCP 67 G because it is not a "portion of any claim that exceeds a counterclaim." ORCP 67 G. And, under *Baugh v. Bryant Limited Partnerships*, 98 Or App 419, 779 P2d 1071 (1989), it is not a judgment under ORCP 67 B. There, we considered whether a purported ORCP 67 B judgment awarding sanctions pursuant to a party's motion for sanctions under ORCP 46 D was a valid judgment under ORCP 67 B. *Id.* at 422-24. We concluded that it was not. We explained:

> "[F]or ORCP 67 B to apply, the court must have determined a 'claim.' We hold that a motion for sanctions under ORCP 46 D does not constitute a claim within the meaning of ORCP 67; therefore, a purported judgment for sanctions under ORCP 46 D standing by itself cannot be final and appealable."

Id. at 423.

Although our decision in *Baugh* addressed a purported ORCP 67 B judgment awarding sanctions under ORCP 46 D, it did not turn on the particular characteristics of an award of sanctions under ORCP 46 D. For that reason, our analysis in that case applies with equal force to this one. Under that analysis, a trial court's purported

limited judgment awarding sanctions does not resolve a "claim" within the meaning of ORCP 67 and, as such, is not a valid ORCP 67 B judgment. Thus, the purported limited judgment in this case is not appealable.[2]

The trial court's order striking the fourth amended answer likewise is not appealable. Under ORS 19.205(2), an interlocutory order of the trial court is not appealable unless it "affects a substantial right" and "effectively determines the action so as to prevent a judgment in the action." Here, regardless of whether the order striking the fourth amended answer affected a substantial right, it has not effectively determined the action below. As a result, ORS 19.205 does not allow an independent appeal of the order. We therefore must dismiss this appeal because defendant has not appealed anything that is appealable.

All that remains is plaintiffs' request for damages for delay under ORS 19.445, attorney fees, and costs. As noted, ORS 19.445 provides:

> "Whenever a judgment is affirmed on appeal, and it is for recovery of money, or personal property or the value thereof, the judgment shall be given for 10 percent of the amount thereof, for damages for the delay, unless it appears evident to the appellate court that there was probable cause for taking the appeal."

As is evident from its plain terms, the statute does not apply under the circumstances of this case. It only authorizes an award of damages for delay in cases in which "a judgment is affirmed on appeal." Here, we are dismissing the appeal, not affirming a judgment. Accordingly, we must deny plaintiffs' request.

As to costs, because plaintiffs' erroneous designation of the order awarding sanctions as a "limited judgment" may have contributed to defendant appealing prematurely, we think it is appropriate that the parties bear their own costs on appeal.

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[2] This does not mean that defendant is left without an opportunity to challenge the award of sanctions. It means that defendant must wait until the trial court has entered a judgment that satisfies the requirements of ORS 18.005.

As to attorney fees,[3] we deny plaintiffs' request for the same reason. Although plaintiffs' request for fees—made in their brief rather than in a petition under ORAP 13.10—is premature and we ordinarily would deny it for that reason, *see Quesnoy v. Dept. of Rev.*, 286 Or App 359, 375, 400 P3d 960 (2017), under these circumstances, we deny the request now to spare the parties the additional expense of fruitless attorney fee litigation.

Appeal dismissed.

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[3] Plaintiffs have not identified a source of law entitling them to fees. We understand plaintiffs to be seeking fees as a discretionary sanction against defendant.