FILED: September 1, 2010

IN THE COURT OF APPEALS OF THE STATE OF OREGON

ROBYN M. BELINSKEY,

Plaintiff-Appellant,

v.

JULIA R. CLOOTEN,

Defendant-Respondent.

Multnomah County Circuit Court
080507057
A140228

James G. Driscoll, Judge pro tempore.

Argued and submitted on December 08, 2009.

Willard E. Merkel argued the cause for appellant. With him on the briefs was Merkel & Associates.

Wendy M. Margolis argued the cause for respondent. With her on the brief were Julie A. Smith and Cosgrave Vergeer Kester LLP.

Before Landau, Presiding Judge, and Schuman, Judge, and Sercombe, Judge.

SCHUMAN, J.

Affirmed.

SCHUMAN, J.

This case requires us to construe ORS 12.220, commonly referred to as a "saving statute," which provides that, if an action is first filed within the statute of limitations and then "involuntarily dismissed without prejudice on any ground not adjudicating the merits of the action," a new action may be filed within 180 days "after the judgment dismissing the original action is entered in the register of the court," notwithstanding that the statute of limitations has run during the interim.[(1)] Here, the trial court dismissed plaintiff's personal injury action as a sanction because plaintiff failed to attend an appointment with an independent medical examiner. The dismissal was involuntary, without prejudice, and it did not address the merits of the personal injury claim. That dismissal was "entered in the register" of the circuit court. Plaintiff appealed. We affirmed, *Belinskey v. Clooten*, 214 Or App 172, 164 P3d 1163 (2007), and the Supreme Court denied review, 344 Or 194 (2008). The Supreme Court then sent the appellate judgment back to the trial court, where it was also "entered in the register" pursuant to ORS 19.450(3). Within 180 days after the *appellate* judgment from the Supreme Court was "entered in the register" of the circuit court, but long

after 180 days had elapsed since the original *trial court* judgment of dismissal had been entered in the circuit court register, plaintiff refiled her claim. By that time, of course, the statute of limitations had run, and defendant moved for summary judgment on that ground. The trial court granted defendant's motion, rejecting plaintiff's argument that, because she refiled within 180 days of the entry of the *appellate* judgment, her action was "saved" by ORS 12.220. This appeal ensued. The question presented is what "the judgment dismissing the original action" means in ORS 12.220(2). Defendant contends that, as the trial court ruled, the term refers to the first judgment--the trial court's original judgment dismissing the action before appeal. Plaintiff contends that the term also includes the judgment entered in the trial court register after the appellate mandate issues. We agree with defendant and therefore affirm.

We acknowledge that plaintiff's arguments have considerable force. Focusing first on the text and context of ORS 12.220, she notes that an appellate judgment, like a trial court judgment, is entered in the trial court register as a "judgment," not an "appellate judgment." ORS 19.450(3). She also points out that "dismiss" commonly means "to put (a legal action or a party) out of judicial consideration **:** refuse to hear or hear further in court." *Webster's Third New Int'l Dictionary* 652 (unabridged ed 2002). Thus, she concludes, an action is not "dismissed" until it has run its course; when a party files an appeal, the appellate court acquires jurisdiction, ORS 19.270(1), the trial court loses jurisdiction for most purposes, ORS 19.270(6), and the case is not "put out of judicial consideration" until the appellate judgment issues and is entered in the trial court register as a dismissal. Further, a "judgment" is the "concluding decision of a court on one or more requests for relief in one or more actions, as reflected in a judgment document." ORS 18.005 (9). Because a trial court judgment of dismissal does not "conclude" an action that is appealed, the judgment referred to in ORS 12.220 must include the final judgment in such a case.

Turning to the legislative history, plaintiff cites the oral and written testimony presented to the Senate Judiciary Committee on behalf of the Oregon Law Commission "Saving Statute" Work Group, which drafted the statute. Minutes, Senate Committee on the Judiciary, HB 2284, Tapes 126A & 127A (Public Hearing, May 12, 2003); Exhibit D (Oregon Law Commission Saving Statute Work Group Report); Exhibit E (Written testimony of Prof Maury Holland). That testimony, she argues, demonstrates that one of the purposes underlying the statute was to avoid deciding cases on procedural grounds instead of the merits.

In the final analysis, however, plaintiff's arguments are not well taken. The statute provides that a plaintiff may refile an action when it is "involuntarily dismissed without prejudice." That language logically refers to a proceeding at the trial court level. Trial court judges "dismiss without prejudice" and, although appellate courts on rare occasions "dismiss" an appeal, ORS 19.410, they more typically "affirm, reverse or modify" trial court decisions, ORS 19.420(1). Additionally, the term "dismiss" as a legal term of art means "[t]o send (something) away; specif., to terminate (an action or claim) without further hearing, esp. *before the trial* of the issues involved." *Black's Law Dictionary* 502 (8th ed 2004) (emphasis added). Again, because a dismissal usually occurs "before the trial," not after a trial and appeal, ORS 12.220 likely refers exclusively to the trial court's pretrial judgment of dismissal.

That likelihood is bolstered by consideration of the 2003 statute's context, which includes wording changes between that version and its predecessor. *See Krieger v. Just*, 319 Or 328, 336, 876 P2d 754 (1994) (wording changes are a part of the context of the present version of