

# OREGON CASE UPDATE

## Putting that Final Nail in the Coffin: When will Duplicative Litigation be Barred?

**From the desk of Joshua P. Hayward: When a plaintiff's original action is dismissed without prejudice, will issue preclusion bar plaintiff's second action including the same allegations? Read on to see how the Oregon Court of Appeals recently answered this question.**

**Claims Pointer: The Oregon Court of Appeals held that the defendant failed to establish that the first negligence action, which was dismissed without prejudice, resulted in a final decision on the merits. Therefore, because a final decision was not rendered, plaintiff could bring a second matter with the same allegations. To avoid subsequent litigation, it is important to obtain a dismissal with prejudice or an adjudication via summary judgment.**

Hancock v. Pioneer Asphalt, Inc., 276 Or App 875 (March 9, 2016).

Richard Hancock ("Hancock") initially filed a timely action alleging he was injured while driving over an unmarked speed bump on a private road owned by Threemile Canyon Farms (Threemile). He alleged that his injury was caused by the negligence of Threemile as well as by the negligence of the company or companies that constructed the speed bump. He identified these potential defendants as John Does 2 and 3. Hancock sent a copy of his complaint to Pioneer Asphalt, Inc. ("Pioneer") and other construction companies known to do business in the county. He also provided a cover letter with the complaint advising the companies that they might be the potential defendant identified as "John Doe."

More than two years after his injury, Hancock learned through discovery that Pioneer was likely involved in constructing the speed bump and he amended his complaint to name Pioneer. Pioneer moved to dismiss arguing that, as to Pioneer, the case was not commenced within the time limited by statute. Hancock argued that the letter along with the copy of the complaint sent to Pioneer within the two year limitation period provided Pioneer notice that it was the proper defendant and, therefore, that the filing date of the amended complaint should relate back to the original complaint's filing date. Pioneer provided a declaration stating that

when they received the original documents, the company searched its records and was unable to determine whether it was the construction company described in the complaint.

The trial court dismissed Hancock's claims against Pioneer without prejudice. The order of dismissal was contained in a "Supplemental Judgment Regarding Costs & Disbursements and Money Award." The award specified that Pioneer was dismissed from the amended complaint without prejudice.

Within 180 days of the supplemental judgment's entry, Hancock filed another action against Pioneer containing the same allegations. Pioneer again responded that the claim was filed after the time allowed by the statute of limitations and sought summary judgment. Pioneer also contended that Hancock's relationship argument was barred by issue preclusion as Hancock had previously litigated the matter and lost. The trial court agreed with Pioneer and granted its motion for summary judgment.

The Oregon Court of Appeals reversed the ruling of the trial court, concluding that Pioneer failed to establish that the first action, which was dismissed without prejudice, resulted in a final decision to which issue preclusion would apply. Oregon recognizes "issue preclusion," when an issue of ultimate fact has been determined by a valid and final determination in a prior proceeding. According to the Court

case in point...

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of Appeals, the Supreme Court in Oregon identified five requirements essential to the application of issue preclusion: (1) the issue in the two proceedings must be identical; (2) the issue must have been actually litigated and essential to a final decision on the merits in the prior proceeding; (3) the party against whom issue preclusion is asserted had a full and fair opportunity to be heard on that issue; (4) the party against whom issue preclusion is asserted must have been a party or in privity with a party in the prior proceeding; and (5) the prior proceeding is the type to which the court will give preclusive effect.

In reviewing the factors, the court found that Pioneer did not establish the second factor—that the relation-back issue was actually litigated and essential to a final decision on the merits. In determining that Pioneer failed to establish that the issue was actually litigated and finally determined in the prior proceeding, the court ruled that a judgment dismissing a case without prejudice adjudicated nothing and, thus, is not a basis for issue preclusion. In this case, the court did not enter a dismissal with prejudice, a partial summary judgment on the disputed issue, or any other ruling that would allow Pioneer to argue that the relation-back issue was finally determined on its merits.

Thus, the Court of Appeals reversed the trial court's ruling based on issue preclusion and remanded the case back to the trial court.

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