

FILED: July 27, 2011

IN THE COURT OF APPEALS OF THE STATE OF OREGON

DIANE L. SCOTT,
Plaintiff-Appellant,

v.

JACKSON COUNTY,
Defendant-Respondent.

Jackson County Circuit Court
091455E2

A144157

G. Philip Arnold, Judge.

Argued and submitted on December 02, 2010.

G. Jefferson Campbell, Jr., argued the cause for appellant. With him on the briefs was G. Jefferson Campbell, Jr., P.C.

Michael Jewett argued the cause and filed the brief for respondent.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Rosenblum, Senior Judge.

WOLLHEIM, J.

Reversed and remanded.

1 WOLLHEIM, J.

2 Plaintiff conducted a rabbit breeding operation on property located in
3 Jackson County. In 2001, plaintiff pleaded no contest to animal abuse, and, in
4 conjunction with the criminal proceedings, the county seized her rabbits. The county
5 housed, treated, and fed the rabbits before declaring them abandoned, at which point the
6 county gave them away. In 2003, plaintiff filed an action against the county in federal
7 court, alleging civil rights violations and common-law tort claims. After the Ninth
8 Circuit affirmed summary judgment as to some of plaintiff's claims, she filed a complaint
9 in state court based on the same factual allegations. The trial court granted the county's
10 motion for summary judgment based on issue preclusion, and plaintiff now appeals that
11 judgment. We reverse and remand.

12 This much is undisputed. In May 2001, animal control officers investigated
13 a complaint about the condition of plaintiff's rabbits. The officers discovered and seized
14 four dead rabbits, and plaintiff was charged with animal neglect. In August 2001, county
15 officials executed a search warrant on plaintiff's property and seized approximately 300
16 rabbits; they left some 300 additional rabbits on the property. Plaintiff subsequently
17 pleaded no contest to one count of animal neglect, and she was sentenced to probation.
18 The sentence, however, also prohibited plaintiff from possessing animals and ordered that
19 she forfeit her remaining rabbits.

20 The county seized the remaining rabbits immediately after plaintiff's
21 sentence was pronounced. Two weeks later, the sentencing judge reconsidered the
22 conditions of her order. The judge deleted the forfeiture provision but left in place the

1 condition that plaintiff not possess any animals. Plaintiff thereafter sought the return of
2 the rabbits that were in the county's custody, but the county refused to return them
3 (ostensibly because plaintiff still could not herself *possess* them). Instead, the county
4 cared for and treated the rabbits, declared them abandoned under county law, and gave
5 away those that had survived.

6 On July 22, 2003, plaintiff filed an action in federal court, the specifics of
7 which will be discussed later. In short, plaintiff alleged that the county had unlawfully
8 entered her property, unlawfully seized her rabbits and other property, and had then
9 killed, lost, failed to properly treat and care for, or given away the seized rabbits. Her
10 claims ranged from civil rights violations (taking of property; denial of substantive due
11 process; illegal search and seizure) to state common-law claims of trespass to land,
12 trespass to chattels, and conversion. The district court granted the county's motion for
13 summary judgment on all claims.

14 Plaintiff appealed that judgment. The Ninth Circuit affirmed with respect
15 to plaintiff's federal claims but reversed in part the district court's ruling regarding the
16 state law tort claims. *Scott v. Jackson County*, 297 Fed Appx 623, 2008 WL 4706301
17 (9th Cir 2008). The case was remanded and, on remand, plaintiff moved to dismiss her
18 complaint, asking the court to decline to exercise supplemental jurisdiction over her
19 remaining state law tort claims. The court granted the motion and dismissed those
20 common-law claims without prejudice.

21 Plaintiff then filed this action in Jackson County Circuit Court in April
22 2009. Her complaint, the first 101 paragraphs of which are taken verbatim from her

1 federal complaint, re-alleged her tort claims: trespass to land, trespass to chattels, and
2 conversion. At the same time, plaintiff moved for a change of venue to Klamath County,
3 on the ground that she could not get a fair trial in Jackson County due to the coverage that
4 her case had received in the press.

5 Four days after the complaint and change of venue motion were filed,
6 plaintiff's attorney of record, G. Jefferson Campbell, Jr., began serving a 60-day
7 suspension from the practice of law.¹ During that suspension period, plaintiff filed a
8 reply to the county's response to the motion to change venue. The reply was signed by
9 William S. Dames, as an attorney for G. Jefferson Campbell, Jr., P.C.

10 With the venue motion still pending, the county filed a motion for summary
11 judgment. In that motion, the county argued that all three of plaintiff's claims were
12 barred by issue or claim preclusion, because the same claims and underlying facts had
13 been previously litigated in plaintiff's federal case. In support of the motion, the county,
14 through a declaration from its counsel, offered copies of the district court opinion
15 granting summary judgment and the Ninth Circuit's memorandum disposition. The
16 county's counsel further averred that he had reviewed plaintiff's complaints in both
17 federal and state court and that "[h]er federal complaint contained 105 paragraphs of
18 preliminary factual allegations," all but four of which were included in her state
19 complaint as a "verbatim repetition of the federal allegations."

20 The following day, the trial judge assigned to the case, Judge Arnold,

¹ The suspension was based on Campbell's conduct in a different case. [*In re Campbell*](#), 345 Or 670, 202 P3d 871 (2009).

1 denied plaintiff's venue motion. In his order, Judge Arnold stated that "[n]one of
2 [plaintiff's] reasons constitutes justification for granting the motion." He then went on to
3 explain that he had not considered plaintiff's reply brief on the motion because he
4 believed that, notwithstanding Dames's signature on the brief, Campbell had actually
5 written it during his suspension and was thereby engaged in the unauthorized practice of
6 law. Judge Arnold simultaneously sent a letter to the Oregon State Bar detailing his
7 suspicion that Campbell was engaged in the unauthorized practice of law. (The Bar later
8 investigated the accusation and found insufficient evidence that Campbell--as opposed to
9 his paralegal--had drafted the brief for Dames's review.)

10 Two months after the venue motion was denied, on the morning of July 13,
11 2009--the day scheduled for a hearing before Judge Arnold on the county's summary
12 judgment motion--plaintiff filed a motion to disqualify the judge and to have the case
13 reassigned to another judge.² Later that day, Judge Arnold commenced the summary
14 judgment hearing by stating, "A motion was filed today to disqualify me. That motion is
15 denied." The parties then argued their respective positions on summary judgment;
16 nothing more was said of the motion to disqualify. The court ultimately granted
17 defendant's motion for summary judgment, explaining:

18 "It is for this Court to determine whether or not issues remain in this
19 case to be decided after the 9th Circuit's order.

² Plaintiff further requested that the action not be assigned to one of three other Jackson County judges, each of whom had previously been involved in criminal or civil forfeiture proceedings involving plaintiff.

1 "Defendant's motion for summary judgment analyzes on a claim by
2 claim basis how the opinion of the 9th Circuit, in affirming parts of the
3 District Court's opinion has decided the issues presented in plaintiff's 56
4 page, 120 paragraph complaint.

5 "In attempting to argue against the motion for summary judgment,
6 plaintiff does not point to any of her 120 paragraphs of allegations which
7 have not been decided. Rather, she paints with a broad brush that
8 something remains. This Court has reviewed the entire complaint for
9 undecided issues and has found none.

10 "The Court finds that the motion for summary judgment is well
11 taken, that all of the issues raised in plaintiff's complaint have been decided
12 adversely to plaintiff and grants the motion. * * *"

13 The court entered judgment accordingly, and plaintiff now appeals.

14 Plaintiff advances two assignments of error. In her first assignment, she
15 contends that her state common-law claims survived the federal court action and that the
16 court therefore erred in granting summary judgment. In her second assignment, she
17 contends that Judge Arnold erred in ruling on a motion to disqualify when he was the
18 very subject of the motion. We address her assignments in that order.

19 As previously set out, the trial court granted the county's motion for
20 summary judgment on the ground that "all of the issues raised in plaintiff's complaint
21 have been decided adversely to plaintiff" in an earlier federal action. It is therefore
22 necessary to discuss the pleadings and procedural history of that earlier action in some
23 detail. Plaintiff's federal complaint alleged five separate claims for relief against the
24 county and its actors, four of which are relevant here.³ Her first claim was brought under

³ Plaintiff also alleged claims against a private veterinarian and a claim for "treble damages for violation of Oregon Property Protection Act of 2000, Article XV, Sec. 10, Constitution of the State of Oregon." Those aspects of the federal complaint are not

1 42 USC section 1983 for "money damages to redress the deprivation by the Defendants
2 of the civil rights secured to the Plaintiff." Among those alleged civil rights violations
3 were deprivations of her rights to due process, to be free of unreasonable searches and
4 seizures, and to not have her property taken without just compensation.

5 Plaintiff's second claim for relief was for "trespass to real property" and
6 was based on the theory that, "[b]etween May 8, 2001 and August 1, 2001, the
7 Defendants, as alleged, made continual and repeated entries onto Plaintiff's property
8 without the Plaintiff's consent or knowledge, and without any search warrant or other
9 legal justification or excuse." Her third claim was for trespass to chattels. She alleged
10 that she was the owner of rabbits, other animals, and various other items of personal
11 property that were seized or harmed by the county. She further alleged that

12 "[d]efendants, by and through the acts alleged, intentionally
13 interfered with the Plaintiff's right to possession of her personal property
14 and chattel by entering onto the Plaintiff's property and seizing the same, as
15 alleged, all without Plaintiff's consent and without any lawful authority and
16 excuse, and thereby committed a trespass as to such items of personal
17 property and chattel."

18 Plaintiff's fourth claim was for conversion of plaintiff's "rabbits and
19 personal property." She alleged that the county and its agents had "intentionally
20 converted the Plaintiff's rabbits and personal property to their own use, or the use of
21 others, and deprived the Plaintiff of her right to ownership and possession thereof," and
22 that she "did not consent to the conversion of her personal property and the acts and
23 conduct of the Defendants, as alleged, were without legal justification and excuse."

germane to this appeal.

1 The county and its agents moved for summary judgment on all claims in
2 the federal complaint, arguing, among other contentions, that the county's agents had
3 qualified immunity and that plaintiff had failed to give proper notice of her state law
4 claims as required by the Oregon Tort Claims Act (OTCA). The district court began its
5 analysis by addressing the section 1983 claim. The court explained that it would take a
6 two-step approach to the question whether the individual county defendants had qualified
7 immunity: First, "the court must determine whether defendants violated plaintiff's
8 constitutional rights"; second, assuming that there was a violation, "the court proceeds to
9 determine whether that right was 'clearly established' such that 'it would be clear to a
10 reasonable officer that his conduct was unlawful in the situation he confronted.'" *Scott v.*
11 *Jackson County*, 403 F Supp 2d 999, 1005 (D Or 2005) (quoting *Saucier v. Katz*, 533 US
12 194, 201-02, 121 S Ct 2151, 150 L Ed 2d 272 (2001)). The court then applied that two-
13 step approach to the alleged constitutional violations underlying the section 1983 claim
14 and, as to each allegation, concluded either that no violation occurred or that, even if it
15 did, the county agents reasonably believed that their actions were lawful.

16 With respect to the common-law claims for trespass to land, trespass to
17 chattels, and conversion, the district court agreed with the county's contention that
18 plaintiff failed to give the requisite tort claim notice under Oregon law. The court
19 explained that, under the OTCA, in order to bring an action against a public body or its
20 agents, the plaintiff must give notice to the public body within 180 days of the alleged
21 injury or loss. *See* ORS 30.275(1), (2)(b); ORS 30.275(3)(a), (b) (notice may be "formal"
22 or "actual"). The only notice--a "cryptic" reference by plaintiff's attorney, during a

1 criminal proceeding, to a claim against the county--was, in the district court's view,
2 insufficient as a matter of law. Thus, the court granted defendant's motion for summary
3 judgment as to each of the state tort claims.

4 Plaintiff appealed the district court's grant of summary judgment. The
5 Ninth Circuit, in an unpublished memorandum opinion, affirmed the judgment in some
6 respects but reversed in others. *Scott*, 297 Fed Appx 623. Initially, the Ninth Circuit held
7 that the district court "erred in wholly ignoring" plaintiff's complaint as evidence at the
8 summary judgment stage; "[a] verified complaint may be treated as an affidavit to the
9 extent that the complaint is based on personal knowledge and sets forth facts admissible
10 in evidence and to which the affiant is competent to testify." *Id.* at 624 (internal
11 quotation marks omitted).

12 The Ninth Circuit then turned to plaintiff's section 1983 claim, and her
13 contention that, "between May 8, 2001, and August 1, 2001, the County engaged in
14 several warrantless searches and seizures of her property in violation of the Fourth
15 Amendment." *Id.* at 625. The court held that, contrary to the district court's approach,
16 there was no need to reach the merits of plaintiff's contentions. The "statute of
17 limitations for § 1983 actions," it explained, "'must be borrowed from state law.'" *Id.*
18 (quoting *Plumeau v. Sch. Dist. #40 County of Yamhill*, 130 F3d 432, 438 (9th Cir 1997)).
19 "Here, the applicable period is two years. [ORS] 12.110(1);^[4] *see also Plumeau*, 130 F3d

⁴ ORS 12.110(1) provides:

"An action for assault, battery, false imprisonment, or for any injury to the person or rights of another, not arising on contract, and not especially

1 at 438." 297 Fed Appx at 625. The Ninth Circuit then concluded, without extended
2 discussion, that plaintiff's complaint "was filed on July 22, 2003. Any constitutional
3 claims arising prior to July 22, 2001, are time barred." *Id.* In a footnote, the court dealt
4 with a later, warrantless entry:

5 "The record indicates that [an animal control officer] entered
6 [plaintiff's] property on July 23, 2001, without a warrant. The conditions of
7 [plaintiff's] release following arraignment on May 18, 2001, required that
8 she cooperate with Animal Control officers. [The officer's] entry was
9 permissible under such requirement."

10 *Id.* at 625 n 4.

11 The Ninth Circuit next considered plaintiff's allegations that the county and
12 its agents had violated section 1983 in their execution of a search warrant on August 1,
13 2001, and by seizing her rabbits on November 1, 2001, based on the forfeiture provision
14 in the first criminal judgment. The court rejected both arguments. As to the execution of
15 the search warrant, the court explained:

16 "When considering '[w]hether a search exceeds the scope of a search
17 warrant,' we must engage in 'an objective assessment of the circumstances
18 surrounding the issuance of the warrant, the contents of the search warrant,
19 and the circumstances of the search.'" *Unites States v. Hitchcock*, 286 F3d
20 1064, 1071 (9th Cir), *amended by* 298 F3d 1021 (9th Cir 2002). Here, we
21 agree with the district court that the officers properly interpreted the
22 language of the warrant. *See Scott*, 403 F Supp 2d at 1008. Absent a
23 violation of a 'clearly established [constitutional] standard[],' we need not

enumerated in this chapter, shall be commenced within two years;
provided, that in an action at law based upon fraud or deceit, the limitation
shall be deemed to commence only from the discovery of the fraud or
deceit."

1 discuss qualified immunity. *Saucier v. Katz*, 533 US 194, 208, 121 S Ct
2 2151, 150 L Ed 2d 272 (2001)."

3 297 Fed Appx at 625 (alterations in original). The Ninth Circuit's treatment of the
4 forfeiture provision, based on qualified immunity, was equally brief:

5 "[Plaintiff] also challenges the November 1, 2001, seizure of her
6 rabbits under the forfeiture provision of the initial state trial court judgment.
7 We agree with the district court that the County officials are entitled to
8 qualified immunity *because they reasonably believed the seizure was*
9 *lawful.*"

10 *Id.* (emphasis added).

11 Having affirmed the district court's judgment as to plaintiff's section 1983
12 claim,⁵ the Ninth Circuit turned to her state law claims, which the district court had
13 dismissed for inadequate notice under the OTCA. The court disagreed with the district
14 court's ruling, concluding that the oral notice by plaintiff's counsel at a criminal hearing
15 on August 28, 2001, was sufficient "to put Jackson County on actual notice as to the
16 circumstances upon which [plaintiff] intended to bring her lawsuit." 297 Fed Appx at
17 629. Moreover, there was evidence that plaintiff had given "'formal' notice of state tort
18 actions on April 18, 2002, in a letter she personally delivered to Jackson County Animal
19 Control's office. Such a letter would be effective for any torts that accrued on or after
20 October 22, 2001." *Id.* Thus, the court held:

⁵ The Ninth Circuit also rejected plaintiff's contentions that her rights under the Takings Clause had been violated, a matter discussed later in this opinion. The court likewise affirmed the dismissal of plaintiff's claims based on the Oregon Property Protection Act, but its discussion and disposition of that claim does not bear on our analysis here.

1 "It follows that the only claims for which the County did not receive
2 notice were those claims which accrued between August 28, 2001, and
3 October 22, 2001. *Therefore, the district court's decision to dismiss*
4 *[plaintiff's] state law tort claims on summary judgment must be reversed,*
5 *except for those claims which accrued between August 28, 2001, and*
6 *October 22, 2001."*

7 297 Fed Appx at 626 (emphasis added). Accordingly, the case was remanded to the
8 district court for further proceedings on the state law tort claims that accrued outside that
9 window.

10 Once the case was remanded, with the federal claims no longer in the
11 action, plaintiff filed a motion requesting that the district court decline to exercise its
12 supplemental jurisdiction over what was left of her state tort claims. Jackson County did
13 not oppose that motion, and the district court granted it, dismissing the tort claims
14 without prejudice. Plaintiff then filed the identical common-law claims in state court.

15 The dispute on appeal is whether plaintiff's refiled tort claims are precluded
16 by the federal action--that is, whether, in light of the issues that were litigated and
17 decided in that earlier action, there is anything left of her tort claims. "Issue preclusion
18 arises in a subsequent proceeding when an issue of ultimate fact has been determined by
19 a valid and final determination in a prior proceeding." *Nelson v. Emerald People's Utility*
20 *Dist.*, 318 Or 99, 103, 862 P2d 1293 (1993). Five requirements are essential to the
21 application of issue preclusion: (1) "[t]he issue in the two proceedings is identical"; (2)
22 the issue actually was "litigated and was essential to a final decision on the merits in the
23 prior proceeding"; (3) "[t]he party sought to be precluded has had a full and fair
24 opportunity to be heard on that issue"; (4) "[t]he party sought to be precluded was a party

1 or was in privity with a party to the prior proceeding"; and (5) "[t]he prior proceeding
2 was the type of proceeding to which this court will give preclusive effect." *Id.* at 104. At
3 the summary judgment stage, issue preclusion applies as a matter of law only if it can be
4 conclusively determined from the record that "all the *Nelson* requirements [are]
5 satisfied." *Barackman v. Anderson*, 338 Or 365, 372, 109 P3d 370 (2005).⁶

6 Our first task, then, is to sort through the potentially overlapping issues
7 with regard to the federal action and each of plaintiff's tort claims. We begin with the
8 claim for trespass to land, in which plaintiff alleges unlawful entries onto her property
9 that occurred "[b]etween May 8, 2001 and July 23, 2001"--a window for which the Ninth
10 Circuit determined that her notice under the OTCA was sufficient. The county argues
11 that, despite the Ninth Circuit's reversal of summary judgment on notice grounds, a
12 separate issue was decided in the memorandum opinion--albeit in the context of her
13 section 1983 claim--that ultimately bars her trespass claim: specifically, that her trespass
14 claim accrued more than two years before she filed her complaint. *See* ORS 30.275(9)
15 (action arising from act or omission of a public body or its agents "shall be commenced
16 within two years after the alleged loss or injury").

17 Plaintiff's section 1983 claim, like her present trespass claim, was based on
18 the county's "warrantless entries onto her property from May through July of 2001." 403
19 F Supp 2d at 1006. The Ninth Circuit held, as set out above, that plaintiff's section 1983

⁶ *Cf. Barackman*, 338 Or at 372 ("[A]s previously noted, not all of the *Nelson* requirements can be determined on the record before us. It follows that the Court of Appeals had no legal basis for ruling as a matter of law that issue preclusion *did* apply in this case." (Emphasis in original.)).

1 claim was untimely under a "borrowed" two-year statute of limitations, ORS 12.110(1).⁷
2 According to the county, the OTCA, which applies to plaintiff's trespass claim, likewise
3 has a two-year statute of limitations that is equivalent to ORS 12.110(1), and the Ninth
4 Circuit's holding should therefore preclude plaintiff from arguing that her trespass claim
5 is now timely. Plaintiff, meanwhile, argues that she *discovered* her claims within two
6 years of filing them, that the Ninth Circuit made no mention of any discovery rule, and
7 that "[t]he nature of the interests harmed for a civil rights violation under 42 USC section
8 1983 versus that for trespass entries on real property are entirely different * * * which
9 gives rise to entirely different statute[s] of limitations for each type of claim and injury."

10 The parties' arguments pertain to the first three *Nelson* factors: the identity
11 of the issue in the state and federal actions, whether the issue was actually litigated and
12 essential to a final decision, and whether plaintiff had a sufficient opportunity to litigate it
13 in federal court.⁸ We conclude that, regardless of whether the first two factors are met on
14 this summary judgment record, the third is not.

15 The two-year statute of limitations that applies to plaintiff's trespass claim

⁷ Under Oregon law, actions for trespass to land are governed by a six-year statute of limitations under ORS 12.080(3). However, because section 1983 actions are for injuries to the person, federal law borrows the two-year statute of limitations in ORS 12.110(1). *Plumeau*, 130 F3d at 438 ("We have held that § 1983 claims are to be characterized as personal injury actions for statute of limitations purposes. *Davis v. Harvey*, 789 F2d 1332, 1333 (9th Cir 1986). Oregon's general tort statute provides a 2-year statute of limitations. [ORS] 12.110(1).").

⁸ Plaintiff does not dispute--nor could she--that she was a party in the federal action or that the federal action "was the type of proceeding to which this court will give preclusive effect."

1 may well operate the same way as the two-year statute of limitations for her section 1983
2 claims. *Compare Adams v. Oregon State Police*, 289 Or 233, 239, 611 P2d 1153 (1980)
3 (two-year statute of limitations period under OTCA "does not commence to run until
4 plaintiff has a reasonable opportunity to discover his injury and the identity of the party
5 responsible for that injury"), with *Johnson v. California*, 207 F3d 650, 653 (9th Cir 2000)
6 ("Under federal law, a claim accrues when the plaintiff knows, or should know, of the
7 injury which is the basis of the cause of action."). In fact, in the context of a section 1983
8 action, the Oregon Supreme Court has simply applied Oregon's "discovery rule" of
9 accrual and observed that "Oregon law mirrors the generally applicable common-law
10 discovery rule." [*T. R. v. Boy Scouts of America*](#), 344 Or 282, 291, 181 P3d 758, *cert den*,
11 ___ US ___, 129 S Ct 146 (2008) ("As we have noted, the accrual rule that applies to
12 determine when plaintiff's section 1983 claim accrued is a 'discovery' accrual rule.").

13 Assuming that to be the case, however, the evidence in the record does not
14 demonstrate that plaintiff had an adequate opportunity to litigate any discovery issues
15 with respect to the statute of limitations for her section 1983 claim. The summary
16 judgment record in this action contains the district court opinion and the Ninth Circuit
17 opinion; it does not include the county's motion for summary judgment in the federal
18 action. And, from the text of those two opinions, there is no indication that the county
19 actually raised the statute of limitations issue in its motion for summary judgment on the
20 section 1983 claim. The district court opinion does not make any mention of a statute of
21 limitations argument by the county, nor does the Ninth Circuit's opinion indicate that the
22 county moved for summary judgment on that ground. Rather, the Ninth Circuit's opinion

1 appears to address the statute of limitations question *sua sponte*, as an alternative basis to
2 affirm the district court. In fact, the Ninth Circuit follows up its statute of limitations
3 analysis with this citation: "*See Vernon v. City of L.A.*, 27 F3d 1385, 1391 (9th Cir 1994)
4 ('[We] may affirm on any ground supported by the record.')." *Scott*, 297 Fed Appx at
5 625.

6 In sum, the record before us does not demonstrate that plaintiff had an
7 adequate opportunity in federal court to litigate the timing of her discovery of the
8 county's alleged trespass. The trial court therefore erred in granting the county's motion
9 for summary judgment as to the claim for trespass to land.

10 Plaintiff's remaining claims are for trespass to chattels and conversion.
11 Those claims arise out of the county's seizures of her property on August 1, 2001, and
12 November 1, 2001, and the county's subsequent disposition of her property--claims for
13 which the Ninth Circuit determined that plaintiff's tort claim notice was adequate. To
14 briefly recap, county agents executed a search warrant and seized plaintiff's rabbits in
15 August 2001. Plaintiff pleaded no contest to animal neglect and was sentenced on
16 October 31, 2001. The sentence originally ordered the forfeiture of plaintiff's rabbits and,
17 on November 1, the county seized plaintiff's remaining rabbits and other property. On
18 plaintiff's motion, however, the judge reconsidered the forfeiture provision and, on
19 November 20, 2001, issued an amended judgment that no longer included a forfeiture
20 provision.⁹

⁹ In the meantime, plaintiff had likewise asked this court to stay that provision of the original judgment; we granted the stay on November 30, 2001.

1 According to the county, the Ninth Circuit and federal district court
2 conclusively resolved two issues--that the seizures were "lawful" and that plaintiff
3 "abandoned" her property--that preclude both tort claims. We conclude that neither
4 "issue" is preclusive of her claims nor supports the trial court's grant of summary
5 judgment against those claims.

6 The county initially contends that plaintiff's claims are barred because the
7 Ninth Circuit determined that the county's employees acted "lawfully" in effecting the
8 seizures. With respect to the November 1 seizure, the county contends that "[t]he Ninth
9 Circuit focused more narrowly on qualified immunity, while [the district court] ruled
10 more broadly that no civil rights violation occurred, but both courts said the same thing:
11 *seizure of the rabbits on November 1 was lawful.*"

12 That, in our view, is not an accurate statement of the "issue" that was
13 finally adjudicated by the Ninth Circuit. The Ninth Circuit concluded that, as to the
14 "November 1, 2001, seizure of her rabbits under the forfeiture provision of the initial
15 state trial court judgment," the district court had correctly ruled that "the County officials
16 are entitled to qualified immunity because they *reasonably believed* the seizure was
17 lawful." 297 Fed Appx at 625.

18 At the time of the Ninth Circuit's decision, questions of qualified immunity
19 were decided under the rubric of *Saucier*, which called for a sequential inquiry:

20 "A court required to rule upon the qualified immunity issue must
21 consider, then, this threshold question: Taken in the light most favorable to
22 the party asserting the injury, do the facts alleged show the officer's conduct
23 violated a constitutional right? This must be the initial inquiry. * * *

1 "If no constitutional right would have been violated were the
2 allegations established, there is no necessity for further inquiries concerning
3 qualified immunity. On the other hand, if a violation could be made out on
4 a favorable view of the parties' submissions, the next, sequential step is to
5 ask whether the right was clearly established."

6 533 US at 201.¹⁰ At that second stage, "[t]he relevant, dispositive inquiry in determining
7 whether a right is clearly established is whether it would be clear to a reasonable officer
8 that his conduct was unlawful in the situation he confronted." *Id.* at 202.

9 In this case, the district court ruled, "[G]iven that plaintiff did not object to
10 the forfeiture provision, defendants are entitled to qualified immunity, because they
11 reasonably believed their actions on November 1, 2001 were lawful under the judgment
12 of conviction." That is, the court ruled that, *even if* the seizure violated plaintiff's rights,
13 it would not have been "clear to a reasonable officer that his conduct was unlawful in the
14 situation he confronted." *Saucier*, 533 US at 202. That is the ground on which the Ninth
15 Circuit affirmed the dismissal of plaintiff's section 1983 claim. *Scott*, 297 Fed Appx at
16 625. In other words, the Ninth Circuit did not decide whether the November 1 seizure
17 was lawful; it decided only that the officers *reasonably believed* that to be the case.¹¹

18 An actor's "reasonable belief" that conduct is lawful, although relevant to

¹⁰ Subsequently, the United States Supreme Court revisited "the *Saucier* two-step protocol" and, "[o]n reconsidering the procedure required in *Saucier* [concluded] that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory." *Pearson v. Callahan*, 555 US 223, 235-36, 129 S Ct 808, 172 L Ed 2d 565 (2009).

¹¹ The district court did state that the "seizure was lawful," 403 F Supp 2d 1008, but the Ninth Circuit did not affirm on that basis, instead referring to what the officers "reasonably believed." 297 Fed Appx at 625. *See* ___ Or App at ___ (slip op at 22-23) (explaining that Ninth Circuit decision is relevant judgment for issue preclusion).

1 tort claims for conversion and trespass to chattels, is not itself dispositive. Oregon has
2 adopted the definition of "conversion" set forth in *Restatement (Second) of Torts* § 222A
3 (1965). *Mustola v. Toddy*, 253 Or 658, 664, 456 P2d 1004 (1969). That definition
4 provides:

5 "(1) Conversion is an intentional exercise of dominion or control
6 over a chattel which so seriously interferes with the right of another to
7 control it that the actor may justly be required to pay the other the full value
8 of the chattel.

9 "(2) In determining the seriousness of the interference and the justice
10 of requiring the actor to pay the full value, the following factors are
11 important:

12 "(a) the extent and duration of the actor's exercise of dominion or
13 control;

14 "(b) the actor's intent to assert a right in fact inconsistent with the
15 other's right of control;

16 "(c) *the actor's good faith*;

17 "(d) the extent and duration of the resulting interference with the
18 other's right of control;

19 "(e) the harm done to the chattel;

20 "(f) the inconvenience and expense caused to the other."

21 *Restatement (Second) of Torts* § 222A (1965) (emphasis added). The elements of a claim
22 for trespass to chattels are, for relevant purposes, the same; the only arguable differences
23 are the extent of the interference and remedy. *See Mustola* 253 at 664 n 4 ("There is a
24 strong argument for abolishing the distinction between conversion and other types of
25 interference, such as trespass."); *Morrow v. First Interstate Bank*, 118 Or App 164, 168,
26 847 P2d 411, *rev dismissed*, 317 Or 580 (1993) (trespass to chattels has been described as

1 the "little brother of conversion").

2 The list of factors in the *Restatement* for determining "whether a conversion
3 occurs is nonexclusive * * * and *no one factor is considered dispositive.*" [Becker v.](#)
4 [Pacific Forest Industries, Inc.](#), 229 Or App 112, 116, 211 P3d 284 (2009). The latter is
5 true of "good faith" as well. See [In re Martin](#), 328 Or 177, 184-85, 970 P2d 638 (1998)
6 ("An actor commits conversion if the actor mistakenly believes that he or she is acting
7 legally with respect to the other person's property, *Hemstreet v. Spears*, 282 Or 439, 579
8 P2d 229 (1978)."). Thus, a prior determination that the county's officers acted with a
9 "reasonable belief" in the lawfulness of their actions is not, by itself, automatically
10 preclusive of a conversion or trespass to chattels claim.¹²

11 The county's arguments that plaintiff's claims are precluded by a prior
12 determination of "abandonment" likewise fails. In both of her complaints--federal and
13 state--plaintiff alleged that, at various points after the August and November seizures, the
14 county had unlawfully destroyed or given away the rabbits that were in its custody and
15 had lost other property. In her federal complaint, she relied on those allegations as the
16 basis for a section 1983 claim based on a deprivation of her rights under the Takings

¹² We limit our discussion to the question whether the federal action decided facts pertaining to the elements of the torts themselves; the county does not raise, and we do not address, the applicability of any potential defenses, including immunity under the OTCA. Cf. *Dickens v. DeBolt*, 288 Or 3, 14-15, 602 P2d 246 (1979) (discussing OTCA immunity in context of state police officer who seized and then ate sturgeon that he believed to have been caught illegally; if the officer "ate most of the sturgeon and at that time was not acting within the course and scope of his employment, as the jury was entitled to find from the evidence of this case, he would then be subject to punitive damages on the same basis as any other person who commits an act of conversion") (emphasis omitted).

1 Clause of the Fifth Amendment. The district court, in granting summary judgment on the
2 section 1983 claim, specifically addressed the allegations concerning the euthanasia and
3 adoption of various rabbits:

4 "Next, plaintiff alleges that the euthanasia and adoption of her
5 rabbits in November 2001 constitutes an unlawful taking of her property
6 without just compensation. However, the rabbits were placed or destroyed
7 at that time as condition of forfeiture in a criminal judgment. *See*
8 *Eversleigh v. United States*, 24 Cl Ct 357, 359 (Cl Ct 1991) (invalid
9 forfeiture cannot be the foundation for a Fifth Amendment taking claim).
10 Further, although Animal Control officers adopted out or euthanized some
11 rabbits between November 1 and November 17, an amended judgment
12 deleting the forfeiture provision was not issued until November 20, 2001.
13 Plaintiff presents no evidence that Animal Control disposed of any rabbits
14 after it obtained notice of the amended judgment or temporary stay of the
15 forfeiture provision issued by the Oregon Court of Appeals.

16 *"Further, I do not find that the subsequent adoption and/or*
17 *euthanasia of the rabbits in June 2002 constitutes a 'taking.'* *After plaintiff's*
18 *criminal judgment was amended to delete the forfeiture provisions, plaintiff*
19 *failed to take action to provide another caretaker or alternative*
20 *arrangements for the rabbits, either by selling or giving the rabbits away.*
21 *Notably, plaintiff did not appeal the probation condition that she not*
22 *possess any animals. Therefore, the County could not lawfully return the*
23 *rabbits to plaintiff. After six months in limbo, Animal Control invoked*
24 *Jackson County Code § 612.07(g) and deemed the animals abandoned.*

25 "Section 612.07(g) provides:

26 "Any failure or refusal to pay fees, penalties, or costs
27 as provided for in this Chapter after 10 days from the date
28 notice is posted at the Animal Shelter, is deemed
29 abandonment of the impounded animal and the Animal
30 Shelter shall retain the right to dispose of the animal as
31 considered by the Director to be in the best interest of Jackson
32 County.'

33 "* * * * *

34 "It is true that the adoption of rabbits in June 2002 arguably violated
35 the stay of the forfeiture provision issued by the Oregon Court of Appeals

1 on November 30, 2001, because it was intended to prevent the placement or
2 destruction of the rabbits pursuant to the forfeiture provision. However, the
3 forfeiture provision had long been deleted and it is arguable that the stay
4 was moot. *Furthermore, the rabbits were not offered for adoption under*
5 *the authority of the forfeiture provision; rather, Animal Control relied on §*
6 *612.07(g) of the Jackson County Code."*

7 403 F Supp 2d at 1009 (emphasis added).

8 The Ninth Circuit affirmed the district court's grant of summary judgment,
9 but on different grounds. It explained that "[t]he district court properly stated that claims
10 of improper criminal forfeiture cannot be considered under the Fifth Amendment" and
11 that "[t]he Takings Clause is implicated only when the taking in question is for a public
12 use. Here, [plaintiff] never alleged that her property was taken or retained for any reason
13 other than for law enforcement purposes." 297 Fed Appx at 625-26.

14 In its motion for summary judgment in state court, the county argued that
15 plaintiff's conversion claim, to the extent that it was based on the county's disposition of
16 the rabbits, was precluded by the *district court's* ruling.¹³ The county explained that the
17 district court "expressly found that disposition of the rabbits was done lawfully under a
18 County code provision governing abandoned animals. *The Ninth Circuit affirmed on*
19 *other grounds. * * ** For the same reason there was no 'taking' there necessarily was no
20 'conversion' here." (Emphasis added.)

21 On appeal, the county continues to assert that the conversion claim is

¹³ Incidentally, plaintiff's claims also allege conversion and trespass to personal property other than the destroyed or adopted rabbits; the district court's takings determination does not address that other personal property, which allegedly included equipment and supplies that were seized. The county does not address plaintiff's allegations regarding that additional property.

1 precluded because the district court "expressly found that the County had disposed of the
2 rabbits lawfully under a County code provision." The problem with that argument,
3 however, is that issue preclusion applies only to issues that were "essential to a final
4 decision on the merits in the prior proceeding." *Nelson*, 318 Or at 104. The county
5 concedes that the Ninth Circuit did not reach the district court's determination regarding
6 the code provision, instead affirming on alternative grounds--namely, that the Takings
7 Clause simply was not implicated by claims of improper criminal forfeiture. The county
8 does not explain how, in that posture, the district court's determination was nevertheless
9 "essential" to the final judgment dismissing plaintiff's section 1983 claim. Indeed,
10 Oregon law is to the contrary. In *State v. Stanford*, 111 Or App 509, 513, 828 P2d 459
11 (1992), we held that the defendant was not precluded from relitigating issues that had
12 been raised below in an earlier case but were not addressed in the previous appeal:

13 "In our previous decision in this case, we expressly declined to consider the
14 issue of whether defendant had violated the law, because it was
15 unnecessary to do so to affirm the trial court. The issue was neither
16 determined nor essential to the previous judgment. *When an appellate*
17 *court refuses to consider an issue and affirms a judgment on a different*
18 *ground, a party is not prevented from relitigating that issue. See*
19 *Restatement (Second) Judgments § 27, comment o at 263 (1982).*"¹⁴

¹⁴ The comment to section 27 of *Restatement (Second) of Judgments* provides, in part:

"If the judgment of the court of first instance was based on a determination of two issues, either of which standing independently would be sufficient to support the result, and the appellate court upholds * * * one of these determinations as sufficient and refuses to consider whether or not the other is sufficient and accordingly affirms the judgment, the judgment is conclusive as to the first determination."

1 (Emphasis added.)

2 Thus, even assuming that the district court's ruling regarding the disposition
3 of the rabbits somehow decided an issue that overlaps with the conversion claim, the
4 county still has not demonstrated that the ruling was "essential" to the Ninth Circuit's
5 decision--the final judgment here. For that reason, and the others stated above, we
6 reverse the trial court's grant of summary judgment on plaintiff's claims for trespass to
7 chattels and conversion.¹⁵

8 We turn, then, to plaintiff's second assignment of error, in which she
9 contends that Judge Arnold, the judge who ruled on the summary judgment motion,
10 "erred by considering, ruling upon, and denying" plaintiff's motion to disqualify him.
11 Plaintiff contends that, once Judge Arnold reported to the bar his belief that plaintiff's
12 counsel was ghostwriting briefs during a suspension from the practice of law, the judge
13 was required to recuse himself from the action because his accusations created the
14 appearance of bias. The county, in response, argues that the motion was untimely, that it
15 was too broad (in that it sought recusal of too many judges), and that plaintiff either
16 invited Judge Arnold to rule on the motion himself or failed to preserve the alleged error
17 in that regard.

18 Three critical aspects of the ruling on the motion to disqualify are murky on

¹⁵ As to the August seizure, the Ninth Circuit concluded that the "officers properly interpreted the language of the warrant." 297 Fed Appx at 625. Even if plaintiff can no longer assert that the August seizure was unlawful, her trespass to chattels claims are not limited to that seizure and, for the reasons previously discussed, survive summary judgment.

1 the record before us: (1) the basis for the trial court's denial of the motion--timeliness or
2 merits or some combination; (2) whether plaintiff preserved the claim of error on appeal,
3 specifically as to Judge Arnold deciding the motion himself; and (3) what, if anything,
4 plaintiff would gain from our consideration of this assignment of error at this juncture.
5 On the last point, the case will be remanded, at which time Judge Arnold may or may not
6 be the assigned trial court judge. If Judge Arnold is assigned, plaintiff will have an
7 opportunity to renew her motion to disqualify at that time, and the motion will be
8 considered under the circumstances then existing--possibly by a different judge.¹⁶
9 Accordingly, we decline to address the trial court's ruling on the motion to disqualify,
10 which presents an issue that may or may not arise on remand and that has not, to this
11 point, demonstrably prejudiced plaintiff.¹⁷
12 Reversed and remanded.

¹⁶ In fact, plaintiff's perceptions of Judge Arnold's impartiality--or appearance of impartiality--might have changed in the year plus since the initial motion to disqualify; the county notes, for instance, that plaintiff was successful before Judge Arnold on subsequent attorney fee issues.

¹⁷ Plaintiff does not argue that Judge Arnold was or is actually biased toward her or that plaintiff was somehow prejudiced as to any other rulings in the case. Her arguments regarding the grant of summary judgment, which involved pure questions of law, make no mention of bias; nor does she contend that the ruling on the motion for change of venue (which is not at issue on appeal) was somehow tainted.