

**FILED: April 16, 2014**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

JINNY SOHN,  
Plaintiff-Appellant,

v.

LAM THANH THUY THI,  
Defendant-Respondent.

Multnomah County Circuit Court  
110303767

A151043

O. Meredith Wilson, Jr., Judge pro tempore.

Submitted on January 02, 2014.

Willard E. Merkel filed the brief for appellant.

No appearance for respondent.

Before Ortega, Presiding Judge, and Duncan, Judge, and DeVore, Judge.

DEVORE, J.

Reversed and remanded.

1                   DEVORE, J.

2                   Faced with a contest between defendant's motion for summary judgment,  
3 seeking dismissal with prejudice, and plaintiff's notice of voluntary dismissal without  
4 prejudice, the trial court entered an order that purported to grant both. The court  
5 followed with a judgment that dismissed plaintiff's case with prejudice. Plaintiff appeals  
6 and assigns error to the court's dismissal with prejudice.<sup>1</sup> We reverse and remand.

7                   Although the procedural course of this case is not simple, the procedural  
8 facts are not disputed, and the resolution is not complicated. Plaintiff had filed an earlier  
9 action for personal injury arising from a chemical hair treatment at a beauty salon. The  
10 prior action named as defendant another person, Cua Nguyen, who had appeared as the  
11 salon's owner in the records of the Oregon Corporation Division. The prior action was  
12 dismissed. This action was filed alleging the same injury but alleging instead that  
13 defendant Lam operated the salon and was negligent in applying the hair treatment.  
14 Plaintiff took a default against defendant. Disputing service of summons, defendant  
15 prompted the court to set aside the default order and judgment. Defendant continued to  
16 dispute service of summons when she filed a motion for summary judgment and added  
17 that she had not been served within the two-year period prescribed by ORS 12.110(1).  
18 Defendant sought dismissal with prejudice.

19                   A week before the hearing on the motion for summary judgment and about

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<sup>1</sup> A similar issue is presented in another case decided this date, *Ramirez v. Northwest Renal Clinic*, \_\_\_ Or App \_\_\_, \_\_\_ P3d \_\_\_ (Apr 16, 2014).

1 three weeks before trial, plaintiff filed a notice of voluntary dismissal pursuant to ORCP  
2 54 A(1). At the hearing on defendant's motion, plaintiff argued, in effect, that her notice  
3 of dismissal upstaged consideration of summary judgment. She said that her notice "ends  
4 the matter" and that there was not "anything to hear today." Plaintiff explained that she  
5 intended to refile the action under the "savings statute," ORS 12.220. Defendant rejoined  
6 that, notwithstanding the part of ORCP 54 A allowing dismissal without prejudice,  
7 another part of the rule provides that the court may dismiss with prejudice if the claim has  
8 been previously filed. The trial court agreed that defendant was entitled to dismissal with  
9 prejudice. Treating plaintiff's notice of dismissal as a request, the court entered an order  
10 granting defendant's motion and "granting" plaintiff's notice. The court's judgment  
11 dismissed the case with prejudice.

12 On appeal, plaintiff contends that the trial court erred in construing ORCP  
13 54 A(1). In relevant part, ORCP 54 A(1) provides:

14 "[A] plaintiff may dismiss an action in its entirety or as to one or more  
15 defendants without order of court: (a) by filing a notice of dismissal with  
16 the court and serving such notice on all other parties not in default not less  
17 than five days prior to the day of trial if no counterclaim has been  
18 pleaded[.] Unless otherwise stated in the notice of dismissal or stipulation,  
19 the dismissal is without prejudice, except that a notice of dismissal operates  
20 as an adjudication upon the merits when filed by a plaintiff who has once  
21 dismissed in any court of the United States or of any state an action against  
22 the same parties on or including the same claim unless the court directs that  
23 the dismissal shall be without prejudice. Upon notice of dismissal or  
24 stipulation under this subsection, a party shall submit a form of judgment  
25 and the court shall enter a judgment of dismissal."

26 We read this rule of civil procedure as we would read a statute. *State v. Arnold*, 320 Or  
27 111, 119, 879 P2d 1272 (1994); *Guerin v. Beamer*, 163 Or App 172, 174, 986 P2d 1241

1 (1999). Its plain text provides that, when a defendant has pleaded no counterclaim and  
2 trial is five days or more away, a plaintiff may file a notice that serves to dismiss  
3 plaintiff's action. The term "notice" does not denote a request or a motion. Rather, notice  
4 of dismissal precipitates a judgment of dismissal, and ordinarily that "dismissal is without  
5 prejudice" to refiling the action. When considering the rule, this court has observed, "The  
6 legislative history of ORCP 54 A(1) reflects a considered policy choice to permit a  
7 plaintiff to dismiss his or her action even though the defendant's summary judgment  
8 motion is pending." *Guerin*, 163 Or App at 177 (footnote omitted); *see also Palmquist v.*  
9 *FLIR Systems, Inc.*, 189 Or App 552, 558, 77 P3d 637 (2003), *rev den*, 336 Or 376 (2004)  
10 (notice of dismissal avoiding summary judgment); *Maxwell v. Stebbins*, 180 Or App 48,  
11 53, 42 P3d 336 (2002) (allowing dismissal under ORCP 54 A(1) despite pending motions  
12 under ORCP 14 and ORCP 21).

13           The exception within ORCP 54 A(1) provides that, unless the court directs  
14 otherwise, dismissal is to be with prejudice if the plaintiff has once dismissed an action  
15 "against the *same parties on or including the same claim.*" (Emphasis added.) In order  
16 for the exception to apply, the court must find two circumstances to be true: (1) This  
17 action and a prior action must involve the same defendant; and (2) the past and present  
18 actions must be "on or including" the same claim. It is not enough to conclude that this  
19 claim for personal injury involved the same allegations of fault and personal injury. The  
20 defendant in the prior case and present case must also be the same. The prior action was  
21 not against current defendant Lam. Because the present case is not "against the same

1 parties," this was not an occasion in which the trial court had the discretion to consider  
2 whether dismissal would be with or without prejudice. Absent a counterclaim and with  
3 five days or more remaining before trial, plaintiff was entitled to dismissal without  
4 prejudice. The trial court erred in granting defendant's motion for summary judgment  
5 and dismissing with prejudice.

6                   Reversed and remanded.