

IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

Katrina OTNES,  
*Plaintiff-Appellant,*

*v.*

PCC STRUCTURALS, INC.,  
an Oregon corporation,  
*Defendant-Respondent.*

Multnomah County Circuit Court  
16CV32466; A167525

John A. Wittmayer, Judge.

On appellant's petition for reconsideration filed August 9, 2018, and respondent's response to appellant's petition for reconsideration filed August 16, 2018.

Quinn E. Kuranz, for petition.

Crystal S. Chase, Karen O'Connor, Melissa Healty, and Stoel Rives LLP, for response.

Before DeVore, Presiding Judge, and Egan, Chief Judge, and James, Judge.

DeVORE, P. J.

Appeal dismissed.

**DeVORE, P. J.**

Plaintiff seeks reconsideration of an order of the Appellate Commissioner dismissing her appeal for lack of jurisdiction. Plaintiff had appealed from a general judgment that dismissed her tort claims after the trial court rejected her motion for new trial and her request for the court to accept that motion as filed on the earlier date on which she had attempted to file the motion without a required filing fee. Defendant moved to dismiss the appeal for lack of jurisdiction, contending that the notice of appeal was untimely because the new trial motion was untimely. The Appellate Commissioner agreed and entered an order dismissing the appeal. In this petition for reconsideration, plaintiff disputes the commissioner's construction of statutes and rules on filing. We allow reconsideration and, for the different reason that plaintiff failed to explain the basis for her request to relate back, conclude that the motion and appeal were not filed within the time necessary to establish appellate jurisdiction. UTCR 21.080(5). Accordingly, this appeal is dismissed.

Appellate jurisdiction turns on events after trial. Plaintiff had brought a number of employment-related claims against defendant. After a jury trial, the court entered a general judgment dismissing plaintiff's claims on January 19, 2018. Plaintiff was given 10 days, or such further time as the court might allow, within which to file a motion for new trial. ORCP 64 F(1). At 11:31 p.m. January 29, plaintiff submitted to the court for electronic filing a motion for new trial without a filing fee.

Two statutes provide that a motion for new trial may be filed upon payment of a filing fee. ORS 21.100; ORS 21.200.<sup>1</sup> The next day, finding no fee with the submission, the clerk rejected the filing and notified plaintiff.

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<sup>1</sup> In material part, ORS 21.100 provides:

"A pleading or other document may be filed by the circuit court only if the filing fee required by law is paid by the person filing the document or a request for a fee waiver or deferral is granted by the court."

Similarly, ORS 21.200 provides, in relevant part:

"(1) In any action or other proceeding subject to a fee under ORS 21.135, 21.145, or 21.160, a \$105 fee must be paid by the party filing one of the following motions and by the party responding to the motion:

On the same day, January 30, 2018, plaintiff electronically resubmitted the new trial motion, this time accompanied by the filing fee. On that day, then eleven days after entry of judgment, plaintiff included a cover letter to the court. In its entirety, it read:

“The original submission date of Plaintiff’s Motion for a New Trial under ORCP 64B and filing date for this filing was January 29, 2018. UTCR 21.080(5)(a)(i).

“The filing was rejected on January 30, 2018.

“The resubmission of this filing is made on January 30, 2018.

“The filing was rejected because of non-payment of the filing fee, which is now included.”

Although the letter cited a provision of Uniform Trial Court Rules concerning resubmission of rejected filings, plaintiff did not offer an explanation for the circumstance, did not provide a reason for the court to treat the motion as if filed on the earlier date on which the motion had been submitted, did not request a hearing on the request to treat the filing and payment as relating back to the day before, and did not ask the trial court to enlarge the 10-day period as permitted by ORCP 64 F.

Defendant objected that plaintiff’s new trial motion was not filed within 10 days and should be rejected. Defendant acknowledged that UTCR 21.080(5)(a)(i) provides that the trial court may permit the filing date of a document to relate back to the date that a filer first attempted to file a document, but noted that UTCR 21.080(6) only permits relation back for rejection due to transmission problems on the part of the court. Defendant argued that, here, plaintiff had “failed to pay the filing fee” and that plaintiff’s “non-payment of the filing fee was an issue entirely within her control and does not justify, explain or excuse her late filing.”

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“(c) A motion for a new trial under ORCP 64.

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“(4) The clerk shall file a motion or response that is subject to a fee under this section only if the fee required by this section is paid when the motion or response is submitted for filing.”

In reply, plaintiff argued that the motion was originally submitted within the proper time frame, that a trial court rule provides for relation back, that the purpose of statutes on fees is just to collect the fee and that the “time of payment is secondary to actual payment.” However, plaintiff neither explained why payment had not been made, nor offered a reason why the court should deem the filing date to relate back to the date of submission.<sup>2</sup>

Based on what was offered, the trial court entered an order denying plaintiff’s motion for new trial, “both because it was untimely under ORCP 64 and UTCR 21.080(6), and on the merits.” Within 30 days of the order, plaintiff filed a notice of appeal. *See* ORS 19.255(2)(a) (permitting a notice of appeal within 30 days of entry of an order under ORCP 64).

Defendant filed a motion to dismiss the appeal. Defendant argued that plaintiff’s motion for new trial was, in fact, filed outside the 10-day period dictated by ORCP 64 F. Defendant contended that the appeal period ran from the judgment, not the subsequent order, and it had not been filed within 30 days of judgment, as required by ORS 19.255(1). The result, defendant concluded, was that this court lacked jurisdiction. Plaintiff argued that the new-trial motion and notice of appeal were both timely. Plaintiff recognized that, although the trial court rules permit an adverse party to object that a filing party had not followed the rules, defendant had “waived” that argument by citing an irrelevant subsection of the rule referring to trouble in transmissions. Plaintiff attached trial court filings but did not include anything showing that she had offered the trial court an explanation for the failure to pay the fee or a reason for the trial court to relate the later filing back to the earlier date.

The Appellate Commissioner considered an additional issue and dismissed the appeal. The commissioner observed that plaintiff ignored ORS 21.100, which mandates payment of a filing fee to file a document. The commissioner continued:

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<sup>2</sup> Beyond these brief arguments, both parties devoted their attention to the merits of the new-trial motion.

“Under that statutory provision, the trial clerk had no authority to accept plaintiff’s motion for new trial for filing \*\*\*. The limitations of the electronic filing system cannot vary legal requirements imposed by the legislature. Here, the legislature, by adopting ORS 21.100, bars the trial court clerk from legally accepting a document for which a filing fee is required by law until the party tendering the document tenders payment of the filing fee. Here, plaintiff did not tender payment of the filing fee required by ORS 21.200(1)(c) until the 11th day after the date of entry of judgment. That was the earliest date that the trial court clerk lawfully could accept the motion for new trial for filing. As such, the motion for new trial was untimely filed.

“Nor did the trial court have authority to grant ‘relation-back’ under UTCR 21.080(5). Whatever authority the trial court may have to grant relief when a trial court clerk rejects a document tendered for filing via the electronic filing system, that authority does not extend to waiving ORS 21.100. ORS 21.100 applies regardless of how a document subject to a filing fee is tendered for filing: in person across the counter, mailed by the U.S. Postal Service, delivered by commercial delivery service, or delivered via the trial court electronic filing system.”

(Footnote omitted.) The commissioner concluded that, because the new trial motion was untimely, the motion did not extend the time in which to have appealed from the judgment. Plaintiff now seeks reconsideration of the commissioner’s order. Plaintiff and defendant make a variety of arguments, largely responding to the commissioner’s analysis.

We do not reach the sundry questions posed by the parties or the commissioner, because plaintiff’s request to relate back failed for another reason. We conclude that, even assuming, without deciding, that UTCR 21.080(5) could permit relation back notwithstanding the filing fee requirement under ORS 21.100, the trial court cannot be found to have erred in denying plaintiff’s request to treat the effective filing date as the date of the earlier submission, given plaintiff’s failure to have complied with the rule by providing the court a reason to grant retroactive filing.

For perspective, we begin with statutory authority for trial court rules in general and the rules on electronic filing in particular. To facilitate electronic filing, the Chief Justice is authorized to promulgate uniform rules. ORS 1.002(2)(d)(B). The authorizing statute, ORS 1.002(4), also provides:

“Rules adopted by the Chief Justice under subsection (2) of this section must be consistent with the laws governing courts and court procedures, but any person who serves, delivers, receives, files, enters or retains an electronic document, or an electronic image of a paper document in lieu of the original paper copy, in the manner provided by a rule of the Chief Justice under subsection (2) of this section shall be considered to have complied with any rule or law governing service, delivery, reception, filing, entry or retention of a paper document.”

The legislature enacted ORS 1.002(4) to broaden the Chief Justice’s authority to adopt trial court rules that facilitate electronic filing notwithstanding any lingering language involving paper filing. Or Laws 2007, ch 129, § 1; Audio Recording, Floor Statement, HB 2357, Feb 26, 2007, at 49:00 (comments of Rep Wayne Krieger), <https://olis.leg.state.or.us> (accessed Jan 14, 2019); Testimony, Senate Judiciary Committee, HB 2357, Mar 7, 2007 (statement of Mark Comstock, Chair of the OSB E-Filing Task Force).

The trial court rules address a problem that is unique to electronic filing. Electronic filing requires the filer to enter some data that a court clerk might otherwise enter for a document filed in paper form. With a filer’s entry of that added data comes the risk that the filer may make clerical mistakes, entering erroneous data that unwittingly prevents filing. For example, an electronic filer might enter the wrong case type, the wrong filing code, the wrong court location, or the wrong responsible party. The filer might submit the document with pages upside-down or sideways, as a PDF document that has text that is not searchable, or with other technical errors. Such clerical mistakes are among reasons for the court to reject electronic filings. *See Oregon Judicial Department, Policy and Standards for Acceptance of Electronic Filings in the Oregon Circuit Courts*, 4-8 (May 22, 2015).

To address the problem of filing flaws, UTCR 21.080(5) provides that, if the court rejects a document submitted electronically for filing, then the court will send an email to the filer explaining the cause for rejection. To allow the electronic filer a chance to correct clerical errors, the subsection further provides:

“(a) A filer who resubmits a document within 3 days of the date of rejection under this section may *request*, as part of the resubmission, that the date of filing of the resubmitted document relate back to the date of submission of the original document to meet filing requirements.”

(Emphasis added.) The rule states that the filer must include a cover letter that sets out the reason that would justify relation back to the original submission. *Id.* In material part, UTCR 21.080(5)(a) specifies:

“A filer who resubmits a document under this subsection must include:

“(i) A cover letter that sets out the date of the original submission and the date of rejection *and that explains the reason for requesting that the date of filing relate back to the original submission* \* \* \*.”

(Emphasis added.) Presumably, a filer could report the nature of the circumstance that frustrated filing. For example, she might say that she had inadvertently entered the wrong court location. The filer might explain why the attempted filing date matters in relation to events in the case, explain how rights of the parties are affected or not, and explain why the filing failure is excusable or relief is justified.

The rule also provides that a responding party may object to the request. UTCR 21.080(5)(b). Given the two provisions allowing a filer to request relation back and an opponent to object to that request, UTCR 21.080(5) necessarily gives the trial court discretion to allow or disallow relation back to cure a failed filing. Relation back is not a matter of right simply because a document is resubmitted, this time properly. Rather, the rule gives the trial court discretion to consider the nature of the reason for rejection, the reasonableness of an excuse offered, and the type of document

to be filed. The court has discretion to grant or deny the request, because the reasons for rejection may vary from the trivial to unfixable. Those reasons range from unwitting clerical errors to inexcusable violations of a statute or rule. *See, e.g.*, UTCR 21.070(3) (some documents must be filed conventionally).

In this case, plaintiff first attempted to file her new trial motion in the waning hour of the last day of the 10-day period permitted by ORCP 64. The submission failed to achieve filing on January 29. The next day, when plaintiff did file and pay, she did both electronically—demonstrating that she had the wherewithal to do both. She did not, however, explain that she had made an error in coding or format.<sup>3</sup> Plaintiff did not suggest that she had tried to pay at the time of filing.<sup>4</sup> She did not explain why relation back was critical or warranted. Instead, plaintiff simply said that she had paid the fee. With only that showing, plaintiff seemed to expect relation back as an entitlement due to payment. Defendant objected, pointing to the failure to pay a fee when required, and arguing that plaintiff’s “non-payment of the filing fee was an issue entirely within her control and *does not justify, explain or excuse her late filing.*” (Emphasis added.)

Under UTCR 21.080(5), no evidentiary hearing is expressly or necessarily contemplated. As noted, plaintiff made no request under UTCR 5.050(1) for an oral argument on her request for filing with relation back to the earlier date. In that posture, the trial court could proceed to rule on the record before it. That is the record we consider.

We readily agree with plaintiff that the court’s order citing UTCR 21.080(6) on transmission failures, if it was intended as more than an analogy to a filer’s own fault, would have been inapt. However, we agree with defendant that plaintiff had provided the trial court with no basis

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<sup>3</sup> The record does not reflect whether plaintiff wrongly identified the specific nature of the motion, some which require fees while others do not, or whether she simply did not know that the statutes required a fee for a new-trial motion.

<sup>4</sup> This is not a case in which, for instance, the party electronically filing a motion for new trial attempts to pay the filing fee at the same time and, for some technical reasons, the trial court is unable to process the proffered payment.



upon which to excuse plaintiff's failure to pay the fee or to justify the court's exercise of discretion to order relation back. The trial court was well aware of the 10-day period in which plaintiff must have filed a motion for new trial under ORCP 64 F(1). The court could have considered an enlargement of that time, but plaintiff did not ask.<sup>5</sup> Given defendant's objection, the court could well conclude, as defendant argued, that plaintiff had offered nothing with which to "justify, explain, or excuse her late filing." On this record, we find no basis on which to conclude that the trial court abused its discretion in rejecting plaintiff's request, treating the new trial motion as filed on January 30, 2018, a day late.

Finally, because plaintiff's motion was late, it did not extend the time within which to have filed a notice of appeal after judgment. *See Schmidling v. Dove*, 65 Or App 1, 7, 670 P2d 166 (1983) (assuming the subject motion was a motion for new trial, it was untimely and so did not extend the time in which to appeal); *State ex rel State Farm Mutual Auto. Ins. Co. v. Olsen*, 285 Or 179, 181, 590 P2d 231 (1979), *rev'd on other grounds*, *Assoc. Unit Owners of Timbercrest Condo. v. Warren*, 352 Or 583, 288 P3d 958 (2012) (trial court exceeded its authority in entertaining a motion to set aside a judgment made more than 10 days after the judgment had been filed). As a consequence, plaintiff's appeal was untimely, and this court lacks jurisdiction to entertain the appeal.

Appeal dismissed.

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<sup>5</sup> Nothing in this opinion limits the authority of the trial court to exercise its discretion to disregard defects in pleadings or filings not affecting a substantial right as permitted by ORCP 12 B, enlarge the time within which to file a pleading or motion as permitted by ORCP 15D, or permit a motion for new trial within such further time as the court may allow as permitted by ORCP 64 F.