

— by **Brian Ruff**

James Bond wasted no time. Three minutes into the movie, and he was already in the company of a beautiful companion. As 007 engaged in suggestive small talk, the mysterious woman rose and walked across the room to the door.

A quick flip of a secret switch, and the Murphy bed sprung shut. Bond found himself trapped between the mattress and the wall, as a gang of masked killers burst into the room, riddling the bed with bullets.

Cut to the street. Whining sirens and flashing lights hailed the arrival of the Hong Kong police, who, after a summary inspection, declared to the delight of his enemies that James Bond was dead.

Of course, James Bond was not dead. He was only playing possum, and was in fact actively engaged in causing mischief.

As defense counsel, we have a *license to kill* flawed claims, and we often exert a great degree of effort to quash cases that fail to conform to statutory guidelines. We are always relieved to receive notice that a case has been dismissed, for whatever reason. Unfortunately, like the martini-swilling British spy, some cases fail to die permanently.

“No, Mr. Bond, I expect you to die.” - Goldfinger

We expect poorly-crafted or mismanaged cases to die. Cases that are not pushed along by plaintiff, or that fail to meet certain statutory requirements will not last long on the docket. With effort and luck, we can sometimes make ill-drafted claims disappear as well.

Unfortunately, not all judgments of dismissal are final, especially judgments without prejudice. “Without prejudice” simply means that

You Only Live Twice: Reinstate, Refile, Request for Trial De Novo

the parties’ ultimate rights have not been adjudicated and there is no bar to further action.

In such cases, plaintiffs have a variety of means at their disposal to raise cases from the dead. The first and most common method of resurrecting a cold case is ORCP 71A. Often referred to as a “Motion to Reinstate,” the rule simply provides for relief from judgment if certain conditions are met. Those conditions are: mistake, inadvertence, surprise, and excusable neglect.

The Oregon Court of Appeals has explained that excusable neglect under Rule 71 does not extend to situations where a case gets dismissed because a party forgot to perform a required act. Walters v. Kmart Corporation. Nor does it apply to the regrettable professional negligence of an attorney. McCarthy v. Oregon Freeze Dry; Montoya v. Housing Authority of Portland.

ORCP 71 also limits the time in which to file a motion for relief from judgment to one year from the date the moving party received notice of the judgment. So, if no action is taken for more than a year to correct an inadvertent dismissal, the case may well and truly be buried.

Absent reinstatement under ORCP 71, you should still *never say never again*. A plaintiff may re-file a dismissed case under certain circumstances depending upon the time of filing and the nature of the dismissal.

When it comes to dismissed cases, we would prefer that plaintiffs *live and let die*. However, in 2003, the Oregon legislature rewrote ORS 12.220 to allow plaintiffs whose cases were involuntarily dismissed to re-file within 180 days from the dismissal. This provision fortunately comes with several qualifications and requirements.

(Continued on next page)

First, the original case must have been filed within the applicable statute of limitations. Second, it must have been involuntarily dismissed without prejudice on any ground not affecting the merits of the action. Third, the defendant must have had actual notice of the filing of the original action, no later than 60 days after the action was filed.

The effective date of the new statute was January 1, 2004, and it applies only to civil actions filed on or after that date. All cases filed before that date are still subject to the old ORS 12.220.

The old statute provides that if the plaintiff's action was dismissed upon trial, the plaintiff may commence a new case on the same cause of action within one year from the dismissal. The key phrase there, however, is "upon trial."

The Oregon Supreme Court has held that the phrase "upon trial" means that the courts have to exercise some judicial function short of adjudication on the merits before dismissing the case. The Oregon Supreme Court has been very clear that dismissal for want of prosecution does not require the court to exercise any judicial function, and, therefore, the "saving statute" does not apply. Fuller v. Safeway Stores; Te-Ta-Ma Truth Foundation v. Vaughan; and Hatley v. Truck Insurance Exchange.

For some plaintiffs, taking a case to trial is like placing a wager at the *Casino Royale*.

Even if a case goes to trial before a jury and the defense wins, it can still be brought back from the great beyond short of filing a formal appeal. ORCP 64 allows for a judgment after a trial to be set aside and a new trial granted; this is usually referred to as a trial de novo.

A request for trial de novo, pursuant to ORCP 64, is only granted in very specific circumstances: irregularity in the proceedings, misconduct of the jury or prevailing party, accident or surprise, newly discovered evidence, insufficiency of the evidence to justify the verdict, and error in law. However, even when these conditions are met, the court will be reluctant to order a new trial.

A party requesting a trial de novo must make the motion within 10 days from the original judgment. In rare circumstances, the court itself may, on its own initiative, order a new trial, but must do so within 30 days of the original judgment.

The common, but fatal flaw of James Bond's foes is always their inclination to underestimate his ability to escape certain death. Therefore, a favorable judgment, like the spy's own demise, should never be taken for granted. Should the plaintiff choose to reinstate, re-file, or request a trial de novo, the case may simply have to *die another day*. ❖

— *While the author of this article is not a secret agent, you may address any questions you have about this area of law to Brian Ruff, brian@lerlaw.com, (503) 768-9600, or visit our website at www.lerlaw.com.*