

unless the party failing to act has applied for a protective order as provided by Rule 36 C.

BACKGROUND NOTE

For failure to furnish expert report when requested, see Rule 36 B.(4). For failure of person taking deposition or witness to appear at deposition, see 39 H. For failure to furnish medical reports when requested, see Rule 44 D. For failure to provide access to hospital records, see Rule 44 E.

ORS sections superseded: 41.617, 61.626(5), (6) and (7), 41.631(3), 45.190.

COMMENT

This rule is based upon Federal Rule 37 and incorporates most sanctions for failure to engage in discovery into one rule. The existing sanction provisions in Oregon are scattered through ORS Chapters 41 and 45 as part of the ORS sections relating to specific discovery devices and do not provide a clear procedure to be followed when a party or witness fails to comply with discovery requirements. The federal language was modified slightly to fit existing ORS sections and these rules. In subsection A.(2) a reference to failure to respond to a request for insurance policy under Oregon Rule 36 was included. In subsection A.(4) the court "may" award expenses, and in subsection B.(2) the court "shall" award expenses which conforms to ORS 41.617(2), 41.631, 41.626(5) and 41.617(4). Failure to advise a party seeking discovery under Rule 36 B. of the existence of a coverage question was added to section 46 D.

RULE 47 (RESERVED) — Add summary debts

RULE 48 (RESERVED)

RULE 49 (RESERVED)

RULE 50

JURY TRIAL OF RIGHT

The right of trial by jury as declared by the Oregon Constitution or as given by a statute shall be preserved to the parties inviolate.

BACKGROUND NOTE

ORS sections superseded: 17.033.

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Rule 47 - Reserved

Rule 48 - Reserved

Rule 49. Reserved.

Rule 50

Jury trial of Right

Background note

ORs sections superceded.

17.033

COMMENT:

The elimination of procedural distinctions between actions at law and suits in equity cannot effect the consitutional right to jury trial.

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RULE 47

SUMMARY JUDGMENT

A. For claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move, with or without supporting affidavits, for a summary judgment in <sup>that party's</sup> favor upon all or any part thereof.

B. For defending party. A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move, with or without supporting affidavits, for a summary judgment in <sup>that party's</sup> favor as to all or any part thereof.

C. Motion and proceedings thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

D. Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories or further affidavits. When a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of ~~his~~ THAT PARTY'S pleading, but his response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue as to any material fact for trial. If ~~he~~ the adverse party does not so respond, summary judgment, if appropriate, shall be entered against ~~him~~ SUCH PARTY.

E. When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that ~~he~~ SUCH PARTY cannot, for reasons stated, present by affidavit facts essential to justify ~~his~~ the opposition, ~~the~~ OF THAT PARTY the court may refuse the application for judgment, or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had, or may make such other order as is just.

F. Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused ~~him~~ the other party to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.

G. Multiple parties or claims; final judgment. In any action involving multiple parties or multiple claims, a summary judgment which is not entered in compliance with ORS 18.125 shall not constitute a final judgment.

COMMENT

This is ORS 18.105 without change.

RULE 48 (RESERVED)

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