

RULE 21

DEFENSES AND OBJECTIONS; HOW PRESENTED; BY
PLEADING OR MOTION; MOTION FOR JUDGMENT ON THE
PLEADINGS

Sections A. through F. unchanged.

G. Waiver or preservation of certain defenses.

G.(1) A defense of lack of jurisdiction over the person, [that a plaintiff has not legal capacity to sue,] that there is another action pending between the same parties for the same cause, insufficiency of summons or process, or insufficiency of service of summons or process, [or that the party asserting the claim is not the real party in interest,] is waived under either of the following circumstances: (a) if the defense is omitted from a motion in the circumstances described in section F. of this rule, or (b) if [it] the defense is neither made by motion under this rule nor included in a responsive pleading. [or an amendment thereof permitted by Rule 23 A. to be made as a matter of course; provided, however,] The defenses [denominated (2) and (5) of section A. of this rule] referred to in this subsection shall not be raised by amendment.

G.(2) A defense that a plaintiff has not the legal capacity to sue, that the party asserting the claim is not the real party in interest, or that the action has not been commenced within the time limited by statute, is waived if it is neither made by motion under this rule nor included in a responsive pleading or an amendment

thereof. Leave of court to amend a pleading to assert the defenses referred to in this subsection shall only be granted upon a showing by the party seeking to amend that such party did not know and reasonably could not have known of the existence of the defense or that other circumstances make denial of leave to amend unjust.

G. [(2)] (3) A defense of failure to state ultimate facts constituting a claim, [a defense that the action has not been commenced within the time limited by statute,] a defense of failure to join a party indispensable under Rule 29, and an objection of failure to state a legal defense to a claim or insufficiency of new matter in a reply to avoid a defense, may be made in any pleading permitted or ordered under Rule 13 B. or by motion for judgment on the pleadings, or at the trial on the merits. The objection or defense, if made at trial, shall be disposed of as provided in Rule 23 B. in light of any evidence that may have been received.

G. [(3)] (4) If it appears by motion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court shall dismiss the action.

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G.(2) A defense that a plaintiff has not the legal capacity to sue, that the party asserting the claim is not the real party in interest, or that the action has not been commenced within the time limited by statute, is waived [if it appears on the face] of an opponent's pleading and (a) is omitted from a motion in the circumstances described in section F. of this rule, or (b) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment

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REPORT OF OREGON STATE BAR COMMITTEE
ON PROCEDURE AND PRACTICE
ON PROPOSED OREGON RULES OF CIVIL PROCEDURE

The Committee on Procedure and Practice has reviewed the proposed Oregon Rules of Civil Procedure dated December 2, 1978, as promulgated by the Council on Court Procedures. Five subcommittees of the Committee on Procedure and Practice studied the proposed rules and reported to the Committee as a whole, which makes the following recommendations.

Jurisdiction and Process

Rule 7, Summons, should be expanded to incorporate by appropriate language the substance of ORS 15.190 which provides for service upon the Department of Motor Vehicles. ORS 15.190 provides a clearly defined standard of due diligence for substituted service upon non-resident motorists and resident motorists who depart from or cannot be found within the state. The statute is fair, workable and provides a certainty of adequate service that will not exist under the proposed rules.

Pleading

Rule 21F requires that all motions be made at the same time except those motions in subsection G(2). Rule 21F should be modified to provide that a motion challenging jurisdiction would not need to include all other available motions. Motions challenging jurisdictions should be handled separately to avoid unnecessary time and expense for counsel and courts in preparing and arguing all available motions. If the motion challenging jurisdiction is successful, all of their motions are moot and unnecessary.

Parties

Rule 33B, "Intervention of right," does not recognize any existing common law right of intervention. The rule should be modified to provide: "At any time before trial, any person shall be permitted to intervene in an action when a statute of this state, these rules, or the common law, confers an unconditional right to intervene.

Discovery

The Committee objects to that portion of Rule 44D which requires a party to either obtain a medical report from

MEMORANDUM

TO: JOINT HOUSE AND SENATE JUDICIARY COMMITTEES
FROM: Fred Merrill
DATE: April 11, 1979

I. The following suggested changes by the Bar Procedure and Practice Committee were endorsed by the Council on Court Procedures at their April 7, 1979, meeting.

A. Rule 21

F. Consolidation of defenses in motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule, except a motion to dismiss for lack of jurisdiction over the person or insufficiency of summons or process or insufficiency of service of summons or process, but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subsection G.(2) of this rule on any of the grounds there stated. A party may make one motion to dismiss for lack of jurisdiction over the person or insufficiency of summons or process or insufficiency of service of summons or process without consolidation of defenses required by this section.

REASON. The Bar Committee pointed out that in some cases an attorney feels he or she has a good basis for dismissal for lack of personal jurisdiction. If that is sustained the case is dismissed without any necessity for detailed investigation of the rest of the case. Allowing the attorney one motion to raise personal jurisdiction without preclusion will avoid time and expense to investigate the entire case.

B. Rule 33

B. Intervention of right. At any time before trial, any person shall be permitted to intervene in an action when a statute of this state, [or] these rules, or the common law, confers an unconditional right to intervene.

REASON. This clarifies Council intent relating to intervention.

C. Rule 55

A. Defined; form. A subpoena is a writ or order directed to a person and requires the attendance of such person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned. It also requires that the witness remain till the testimony is closed unless sooner discharged, but at the end of each day's attendance a witness may demand of the party, or the party's attorney, the payment of legal witness fees for the next following day and if not then paid, he is not obliged to remain longer in attendance.

Every subpoena shall state the name of the court and the title of the action.

REASON. This appears in the existing statute and was deleted as unnecessary. After discussion with Committee representatives, it appears there may be some disagreement about the continuing obligation of a witness to attend, and the sentence should be added.

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G.(2) A defense that a plaintiff has not the legal capacity to sue, that the party asserting the claim is not the real party in interest, or that the action has not been commenced within the time limited by statute, is waived if it is neither made by motion under this rule nor included in a responsive pleading or an amendment

thereof. Leave of court to amend a pleading to assert the defenses referred to in this subsection shall only be granted upon a showing by the party seeking to amend that such party did not know and reasonably could not have known of the existence of the defense or that other circumstances make denial of leave to amend unjust.

G. [(2)] (3) A defense of failure to state ultimate facts constituting a claim, [a defense that the action has not been commenced within the time limited by statute,] a defense of failure to join a party indispensable under Rule 29, and an objection of failure to state a legal defense to a claim or insufficiency of new matter in a reply to avoid a defense, may be made in any pleading permitted or ordered under Rule 13 B. or by motion for judgment on the pleadings, or at the trial on the merits. The objection or defense, if made at trial, shall be disposed of as provided in Rule 23 B. in light of any evidence that may have been received.

G. [(3)] (4) If it appears by motion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court shall dismiss the action.

Item 4, page 3, 7 D.(2)(d), ORCP D.(4)(c). The Council discussed the questions of when 30 days begin to run for default purposes under ORCP D.(4)(c) in a motor vehicle case and when service is complete under ORCP 7 D.(2)(d). The Council generally discussed the desirability of service upon the Department of Motor Vehicles as a service method in motor vehicle cases, and the Executive Director was asked to prepare a draft of a rule providing such service for discussion at the next meeting.

Item 5, page 5, ORCP 9 B. On motion made by Charles Paulson, seconded by Lyle Velure, the Council unanimously voted to add the following language to section 9 B.: Service of any notice or other paper to bring a party into contempt may only be upon such party personally.

Item 6, page 5, ORCP 10 C. On motion made by Judge Dale, seconded by Austin Crowe, the Council unanimously voted that section 10 C. should be prefaced by "Except for service of summons, . . .".

Item 7, page 5, ORCP 21 A.(7), 21 G.(3), and ORCP 30; and Item 8, page 6, ORCP 21 A. The Council discussed the problems raised under these sections and suggested any confusion might be alleviated by official commentary to the rules rather than by making any changes at this time.

Item 9, page 6, ORCP 21 F. It was unanimously decided that the cross reference to G.(2) should be changed to G.(3).

Item 10, page 6, ORS 57.779. The Council discussed the language of ORS 57.779(2) set out in the staff memorandum and its inconsistency with ORCP 13 C., 21 A., C., F., and G. Don McEwen made a motion, seconded by Judge Jackson, that a letter be written to the Corporation Commissioner suggesting an amendment to ORS 57.779(2). The motion passed unanimously.

Item 11, page 7, 23 D. and E. A motion was made by Charles Paulson, seconded by David Vandenberg, to add the following sentence to 23 D. and E.: If the motion is denied, the objection or defense asserted by such motion shall not be deemed waived by filing a responsive pleading. A discussion followed. Council members indicated they favored the concept. It was, however, suggested that this language might be combined with the existing last sentence of 23 D. and E. The Executive Director was asked to try a redraft of those sections. It was decided to defer action until further consideration of a redraft.

Item 12, page 8, ORCP 26 A. Judge Wells moved, seconded by Judge Jackson, that "conservator" should be included after "guardian" in the second sentence of section A. The motion passed unanimously.

Item 13, page 8, ORCP 31 B. The Council decided that "thereafter" should not be removed from this section and that the rule should not be changed.

ORCP 23 D.

D. Amendment or pleading over after motion; non-waiver of defenses or objections. When a motion to dismiss or a motion to strike an entire pleading or a motion for a judgment on the pleadings under Rule 21 is allowed, the court may, upon such terms as may be proper, allow the party to file an amended pleading. In all cases where part of a pleading is ordered stricken, the court, in its discretion, may require that an amended pleading be filed omitting the matter ordered stricken. By filing any amended pleading pursuant to this section, the party filing such amended pleading shall not be deemed thereby to have waived the right to challenge the correctness of the court's ruling.

E. Filing of amended pleading; objections to amended pleading not waived. If any amended pleading is filed, whether pursuant to sections A., B., or D. of this rule or pursuant to other rule or statute, a party who has filed a motion to strike, motion to dismiss, or motion for judgment on the pleadings does not waive any defenses or objections asserted against the original pleading by filing a responsive pleading or failing to reassert the defenses or objections.

* * *

ORCP 21 H. (adding section to ORCP 21)

H. Denial of motion; non-waiver by filing responsive pleading. If a motion to dismiss, motion for judgment on the pleadings, or motion to strike is denied, the party making the

21 H. CONTINUED

motion shall not waive any defense or objection asserted therein by filing a responsive pleading.

COMMENT

This is an attempt to clarify the waiver rules of 23 D. and E. and the rule suggested in Item 11, page 7, of the May 5, 1980, staff memorandum. It recognizes that we are dealing with three separate rules. The first two deal with the result of an amended pleading:

(1) 22 D. says that when a motion is made and succeeds and parties plead over rather than standing on their pleadings, they do not waive their position that the judge erred in granting the motion.

(2) 22 E. says that any time an amended pleading is filed, whether voluntarily or as the result of a successful motion, the opposing party does not have to reassert defenses or objections made to matters in the original pleading which are also in the amended pleading.

The last rule (21 H.) has nothing to do with amendments but comes up only when a motion is unsuccessfully made. The pleading attacked stands, and there is no amended pleading. This waiver rule makes clear that by filing a responsive pleading, the party making the unsuccessful motion waives nothing. This waiver rule was added to ORCP 21 rather than to ORCP 23 because it relates to the effect of pleading over after a motion, and not to amendments.

* * *

55 F. (2)

F.(2) Place of examination. A resident of this state who is not a party to the action may be required by subpoena to attend an examination only in the county wherein such person resides, is employed, or transacts business in person, or at such other convenient place as is fixed by an order of court.

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COMMENT

When Rule 21 G. was revised by the 1979 Legislature, the cross reference in Rule 21 F. was not changed.

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