

RULE 23

AMENDED AND SUPPLEMENTAL PLEADINGS

B. Amendments to conform to the evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended [and shall do so freely] when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice such party in maintaining an action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

* * *

[D. Amendment or pleading over after motion. 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. If an amended

pleading is filed, the party filing the motion 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. If any motion is disallowed, the party filing the motion shall file a responsive pleading if any is required. 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. Amended pleading where part of pleading stricken.

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. If an amended pleading is filed, the party filing the motion to strike does not waive any defense or objection asserted against the original pleading by filing a responsive pleading or failing to reassert the defense or objection. By complying with the court's order, 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 upon the motion to strike.]

COMMENT

The wording of section B. relating to amendments after the commencement of trial was changed slightly to give the trial judge more discretion in determining whether an amendment should be allowed under all of the circumstances. Some trial judges asserted that with the language that was removed, they would always have to allow amendment, no matter what circumstances were involved.

Subsections D. and E. are replaced by Rule 25.

COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held February 16, 1980

Judge Dale's Courtroom

Multnomah County Courthouse

Portland, Oregon

Present:	Darst B. Atherly	Garr M. King
	Carl Burnham, Jr.	Hon. Berkeley Lent
	Anthony L. Casciato	Charles P.A. Paulson
	Austin W. Crowe, Jr.	David R. Vandenberg, Jr.
	William M. Dale, Jr.	Lyle C. Velure
	Wendell E. Gronso	Hon. William W. Wells
	William L. Jackson	
Absent:	John Buttler	Donald W. McEwen
	John M. Copenhaver	Frank H. Pozzi
	James O. Garrett	Robert W. Redding
	Laird Kirkpatrick	Val D. Sloper
	Harriet R. Krauss	James C. Tait

The meeting was called to order by Judge William M. Dale, Jr., Vice Chairman, at 9:30 a.m., in Judge Dale's Courtroom in the Multnomah County Courthouse, Portland, Oregon.

The following guests were in attendance:

Hon. Albert R. Musick
Bruce C. Hamlin
Robert Harris
Jerry LaBarre (representing OTLA)
William E. Rosell

The minutes of the meeting held January 19, 1980, as modified by the inclusion of Judge Wells in the absent category, were unanimously approved.

Garr M. King suggested that the draft of 36 B.(4), submitted to the Council as requested at the last meeting, be sent to the Oregon State Bar Procedure and Practice Committee, the Oregon Trial Lawyers Association, and the Oregon Association of Defense Counsel before further consideration by the Council. The Executive Director was asked to do this and to request that a response be given in 30 days.

The Council next discussed ORCP 23 B. and the comments of Judge Musick in relation to that rule. A letter from Circuit Judge Edward Allen on the same subject was distributed to the Council. Garr King moved, seconded by Wendell Gronso, to amend Rule 23 B. by removing "and shall do so freely" from the section. The motion passed, with Charles Paulson, Darst Atherly, Lyle Velure, and David Vandenberg opposing it.

ORIGINAL

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.

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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

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[F.] D. How amendment made. When any pleading is amended before trial, mere clerical errors excepted, it shall be done by filing a new pleading, to be called the amended pleading, or by interlineation, deletion, or otherwise. Such amended pleading shall be complete in itself, without reference to the original or any preceding amended one.

[G.] E. Supplemental pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading it shall so order, specifying the time therefor.

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