

Rule 60

Motion for a Directed Verdict

Rule 60 does make a substantial change in Oregon trial practice by eliminating the device of a judgment of nonsuit. It adopts the concept of Rule 50(a) FRCP. It may be noted that the remainder of Rule 50 is embodied in Rule 63 relating to "Judgment Notwithstanding the Verdict." No reason is given by the Council for separating the two motions.

In my opinion elimination of the nonsuit concept is a step forward and will do away with certain confusing decisions of the Oregon Supreme Court. (Compare Karoblis v. Liebert, 263 Or 64, 75, 501 P2d 315 (1972), with Adamson v. West Valley Associates, 274 Or 11, 17, 544 P2d 578 (1976).)

100-1

RULE 60

MOTION FOR A DIRECTED VERDICT

Any party may move for a directed verdict at the close of the evidence offered by an opponent or at the close of all the evidence. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury. If a motion for directed verdict is made by the defendant, the court may, at its discretion, give a judgment of dismissal without prejudice under Rule 54 rather than direct a verdict.

COMMENT: This rule completely changes prior Oregon practice by eliminating the non-suit provision. Under prior practice a non-suit is a dismissal without prejudice and a decree of dismissal after the trial of the fact is a dismissal with prejudice. The rule should be re-written to embody the following ORS statutes which preserve the distinction and preserve the rights of all parties.

ORS 18.220 Decree of dismissal after trial.

"Whenever upon the trial of a suit it is determined that the plaintiff is not entitled to the relief claimed or any part thereof, a decree shall be given dismissing the suit, and such decree shall have the effect to bar another suit for the same cause or any part thereof, unless such determination is on account of a failure of proof on the part of the plaintiff, in which case the court may, on motion of the plaintiff, give such decree without prejudice to another suit by the plaintiff for the same cause or any part thereof."

ORS 18.230 When judgment of nonsuit given.

"(1) A judgment of nonsuit may be given:

(a) As a matter of right on motion of the plaintiff filed with the court and served on the defendant not less than five days prior to the day of trial if no counterclaim has been pleaded; if a counterclaim has been pleaded or if it is less than five days prior to the day of trial, the allowance of the motion shall be subject to the discretion of the court.

(b) On motion of either party upon the written consent of the other filed with the clerk.

(c) On motion of the defendant, when the action is called for trial, and the plaintiff fails to appear, or when after the trial has begun, and before the final submission of the cause, the plaintiff abandons it, or when upon the trial the plaintiff fails to prove a cause sufficient to be submitted to the jury, or upon a trial without a jury when the evidence is not sufficient to establish a prima facie case for plaintiff.

(2) A judgment of nonsuit may be given against a defendant asserting a counterclaim or cross-claim in the same manner and upon the same grounds set forth in paragraph (c) of subsection (1) of this section.

(3) A motion for judgment of nonsuit is not a waiver of the right of the moving party to present evidence if the motion is denied."

ORS 18.240 Cause not sufficient to be submitted to jury, defined.

"A cause not sufficient to be submitted to the jury is one which, if the jury were to find a verdict for the plaintiff, upon any or all of the issues to be tried, the court ought, if required, to set aside for want of evidence to support it."

ORS 18.250 Effect of judgment of nonsuit.

"When a judgment of nonsuit is given, the action is dismissed; but such judgment shall not have the effect to bar another action for the same cause."

Item 14, page 8, ORCP 36 A. The Council decided that the language from the federal rule should not be included in this section.

Item 15 and 16, page 8, ORCP 36 B.(3) and ORCP 46 A.(2). Judge Wells moved, seconded by Austin Crowe, that "and subsection B.(4) of this rule" should be deleted from the first sentence of 36 B.(3) and that "to furnish a written statement under 36 B.(4), or if a party fails" should be deleted from the first sentence of 46 A.(2). The motion passed unanimously.

Item 17, page 9, ORCP 46 D. Judge Wells moved, seconded by Austin Crowe, to delete the following language from 46 D.: ["or (3) to inform a party seeking discovery of the existence and limits of any liability insurance policy under Rule 36 that there is a question regarding the existence of coverage,"]. The motion passed unanimously.

Item 18, page 9, ORCP 52 A. Judge Sloper moved, seconded by Judge Wells, that the last sentence of section A. be changed to read as follows: "At its discretion, the court may grant a postponement, with or without terms." The motion passed unanimously.

Item 19, page 9, ORCP 55 D. On motion made by Judge Casciato, seconded by Judge Wells, the Council unanimously voted to change "over 18 years of age" to "18 years of age or older" in 55 D.(1) to conform to ORCP 7 E. and 7 F.(2) (a).

Item 20, page 9, ORCP 55 F.(2). The Council discussed the suggestion of adding "by subpoena" after "required" in both sentences of F.(2). It was pointed out that the section does not make any distinction between "parties" and "non-parties" and a suggestion was made to include the language "a resident of this state and not a party." The Council decided to defer action until consideration of a redraft of the section.

Item 21, page 10, ORCP 60. On motion made by Judge Sloper, seconded by Austin Crowe, the Council unanimously voted to change "defendant" to "party against whom the claim is asserted" in the last sentence of the rule.

Item 22, page 10, ORCP 62. The Executive Director was asked to prepare a draft of ORCP 62 which would not require findings of fact or conclusions of law for cases subject to de novo review upon appeal.

Judge Jackson stated that the judgments subcommittee would be meeting soon and would have a report at the next meeting.

Don McEwen stated that he had written a letter to all circuit court judges requesting their views and comments regarding any problems with third party practice.

The Council discussed the question of use of Rule 36 B. to authorize interrogatories relating to expert witnesses. It was pointed out that:

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COMMENT

The language was changed in the last sentence because the motion could be made by a plaintiff against a counterclaim and the court might wish to dismiss the counterclaim without prejudice. See 54 C.

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