COUNCIL ON COURT PROCEDURES

Minutes of Meeting of November 7, 1987

Oregon State Bar Offices, Meeting Room No. 2

Lake Oswego, Oregon

Present:

John H. Buttler
Raymond J. Conboy
Lafayette G. Harter
Robert E. Jones
Henry Kantor
Ronald Marceau
Jack L. Mattison
Robert B. McConville
James E. Redman
R. William Riggs
Martha Rodman
J. Michael Starr
Elizabeth Yeats

(Also present was Douglas A. Haldane, Executive Director)

The meeting of the Council on Court Procedures was convened at 9:10 a.m. by John H. Buttler. The first order of business was to elect a new Chairman for the Council following the expiration of the term of Joe Bailey, the immediate past Chairman.

Mike Starr nominated Ray Conboy as Chairman. The nomination was seconded by Mr. Riggs. Mr. Conboy was elected without opposition.

Mr. Starr nominated Mr. Marceau as Vice-Chairman of the Council. The nomination was seconded by Mr. Conboy. Mr. Marceau was elected Vice-Chairman without opposition.

Mr. Starr then nominated Mr. Harter as Treasurer. Ms. Rodman seconded that nomination, and Mr. Harter was elected Treasurer.

Mr. Haldane reported to the Council regarding action taken by the 1987 Legislative Assembly concerning Council amendments. He pointed out that all amendments and changes made to the Oregon Rules of Civil Procedure by the Council had survived the legislative session, with the exception of amendments to ORCP 17 and ORCP 39. The Council's proposals for changes to those two rules were amended by the legislature, but only slightly. The intent of the Council in adopting those rule changes appears to have been carried out by the legislature.

Mr. Haldane then pointed out that there were continuing concerns regarding ORCP 69 and the lack of any requirement that notice be given prior to taking an order of default. Mr. Haldane

reviewed the Council's actions on ORCP 69 during the last biennium. It was suggested that, given the continuing concern among members of the Bar regarding the lack of any notice requirement prior to taking an order of default, the Council should take another look at the issue.

Mr. Conboy appointed Judge McConville and Mr. Starr as a subcommittee to look into the problems posed by the current Rule 69.

Mr. Haldane then explained the changes to the Oregon Rules of Civil Procedure which were made by the 1987 Legislature.

Rule 18 was amended as a part of the "tort reform" legislation to provide that the amount of non-economic damages being sought in a civil action will not be stated specifically in the complaint, nor will the amount of damages be contained in the prayer. It was mentioned that there may be some jurisdictional problems with the rule as amended in that, without stating the amount of damages specifically, there might not be an adequate pleading to establish jurisdiction in the circuit court now that the district court has exclusive jurisdiction in certain civil actions.

It was pointed out that Chapter 714 of Oregon Laws 1987 provides for a transfer of cases from district court to circuit court and from circuit court to district court when these jurisdictional problems are raised by motion. There remains some concern, particularly regarding waiver of jurisdictional problems contained in Chapter 714, Oregon Laws, 1987, that the jurisdictional problem remains. Mr. Haldane was asked to look into this matter further and give a report back to the Council.

The legislature also amended ORCP 68 A. to provide, as "costs" which may be recovered in an action, costs incurred in recordation of any documents where recordation is required to give notice of the creation, modification, or termination of an interest in real property. There was no further discussion regarding ORCP 68 A.

ORCP 70 was also amended by the legislature to provide that a summary of judgment be provided with each judgment for the payment of money. Some concerns were expressed regarding the drafting of the changes to ORCP 70, as well as some confusion as to the actual requirements. It was suggested that the Chief Justice would be addressing some of these problems by rule. It is a matter that will be of continuing concern to the Council as experience under the new ORCP is gained.

ORCP 83 E., 84 A., and 84 C. were all amended by the legislature to provide for the recording in the County Clerk Lien Record of orders providing for provisional process when real

Record of orders providing for provisional process when real property is involved.

ORCP 84 D. was amended to provide specifically that personal property is attachable by writ of garnishment.

Mr. Haldane brought to the Council's attention the letter of Kevin Staples of June 29, 1987, suggesting that there should no longer be any requirement that summons be issued by a "resident" attorney, especially since Oregon no longer requires that an attorney be a resident in order to practice law in the state of Oregon. The Council adopted an amendment to ORCP 7 B., striking the word "resident."

The Council was made aware of Judge Ashmanskas's letter of June 16, 1987 regarding the use of alternate jurors. Judge Riggs suggested that Judge Ashmanskas be given an opportunity to discuss this suggestion directly with the Council. Judge Riggs was asked to contact Judge Ashmanskas and invite him to attend a Council meeting for that purpose. Judge Riggs agreed to report back to the Council at its next meeting.

The meeting was adjourned at 11:15 a.m.

Respectfully submitted,

Douglas A. Haldane
Executive Director

DAH:gh

UNIVERSITY OF OREGON

October 2, 1987

M E M O R A N D U M

TO: MEMBERS, COUNCIL ON COURT PROCEDURES

FROM: Douglas A. Haldane
Executive Director

RE: MEETING ON SATURDAY, NOVEMBER 7, 1987

We are still awaiting announcement of the appointments to the Council by the Circuit Judges Association and the District Judges Association. Appointments by the Oregon State Bar have been made, and it is our understanding that the judges will be appointed sometime in October. For that reason, I am scheduling a meeting of the Council for:

SATURDAY, NOVEMBER 7, 1987, 9:00 A.M.

Place: Meeting Room No. 2
Oregon State Bar Offices
5200 SW Meadow Road
Lake Oswego, Oregon

The first order of business at that meeting will be to elect a Chairman, Vice-Chairman, and Treasurer to serve as Council officers during the biennium.

The Council will wish to welcome its new members: Elizabeth Yeats, Henry Kantor, Larry Thorp, Judith Miller, and The Hon. Linda Bergman. William Schroeder and Michael Starr have been reappointed.

Although it is still a bit confusing, I will have a report on legislative action regarding the ORCP at the November 7 meeting and will be asking the Council to set its agenda for the biennium.

DAH:gh

cc: Chief Justice Edwin J. Peterson
The Hon. Frank L. Bearden, President, ODCJA
The Hon. Duane R. Ertsgaard, President, OCCJA

UNIVERSITY OF OREGON

October 30, 1987

M E M O R A N D U M

TO: MEMBERS, COUNCIL ON COURT PROCEDURES

FROM: Douglas A. Haldane, Executive Director

RE: COUNCIL MEETING: Saturday, November 7, 1987
Meeting Room No. 2
Oregon State Bar Offices
5200 SW Meadow Road
Lake Oswego, Oregon

Enclosed is correspondence I have received relating to various problems that people see in the ORCP. You may wish to review their suggestions prior to the November 7 meeting.

Also enclosed are changes to the ORCP which were made by the 1987 Legislature. The Council may wish to review these amendments, with a particular eye toward the amendments to ORCP 70 A.

It is imperative that we have a quorum at the November 7, 1987 meeting if the Council is to begin its work for the biennium. The Council will need to elect a new Chair, Vice-Chair, and Treasurer.

DAH:gh

Enclosures

SCHOOL OF LAW • EUGENE, OREGON 97403-1221 • TELEPHONE (503) 686-3837

CIRCUIT COURT OF OREGON
FOURTH JUDICIAL DISTRICT
MULTNOMAH COUNTY COURTHOUSE
1021 S.W. 4TH AVENUE
PORTLAND, OREGON 97204

R. WILLIAM RIGGS
JUDGE

COURTROOM 512
(503) 248-3250

April 17, 1987

Mr. Douglas A. Haldane, Executive Director
Council on Court Procedures
c/o University of Oregon School of Law
Eugene, Oregon 97403

Dear Doug:

Enclosed is a copy of a memo I recently received from Judge Clifford B. Olsen of our circuit bench here in Multnomah County. I have discussed the matter with Judge Olsen and suggested that he write to me regarding his concern about Rule 59 c(6).

I agree with Judge Olsen's observations that Rule 59 c(6) needs to be amended to provide for release of juries during the noon hour. I suspect that many judges do this anyway, but a strict reading of the rule seems to permit release of the jury only for evenings during deliberation and not for noon hours. It seems sensible to take the position that if juries can be released to go home in the evening to be with their families during deliberation, there should be nothing to prevent judges from releasing them during the noon hour as well. It would also be a significant savings in meal costs for the state.

I would appreciate it if you would include this issue on our agenda.

Sincerely,

R. William Riggs

RWR/jim
cc: Judge Olsen

CIRCUIT COURT OF OREGON
FOURTH JUDICIAL DISTRICT
MULTNOMAH COUNTY COURTHOUSE
1021 S.W. 4TH AVENUE
PORTLAND, OREGON 97204
248-3247

CLIFFORD B. OLSEN
JUDGE

April 15, 1987

To: Judge R. William Riggs

From: Judge Clifford B. Olsen

Subject: ORCP 59 c(6)

As you know we are authorized under the rules to "allow the jury to separate for the evening...". We are not authorized to allow the jury to separate for lunch.

I propose Rule 59 c(6) be amended to read:

> "the court in its discretion may allow the jury to separate <u>for the noon hour and</u> for the evening during its deliberation when the court etc. etc."

By this simple amendment we can avoid ordering many jury meals and thereby affect substantial savings.

LARRY DAWSON, P.C.
ATTORNEY AT LAW
SUITE 453
200 MARKET BUILDING
200 S. W. MARKET STREET
PORTLAND, OREGON 97201

TELEPHONE
(503) 225-0090

May 6, 1987

Douglas A. Haldane
Executive Director
Council on Court Procedures
University of Oregon
School of Law
Eugene, Oregon 97403

Dear Mr. Haldane:

I suggest that the Council consider an amendment to ORCP 22C. That rule presently requires a defendant to file a third party action within 90 days after service of the plaintiff's summons and complaint on the defendant unless the defendant can thereafter obtain leave of court and consent of those parties who have appeared in the litigation.

I propose that the rule be amended to create an exception to the 90 day limitation when the defendant has in good faith within that time period filed a potentially dispositive motion addressed to the plaintiff's complaint. Under the present rule, it is possible that the defendant may file a motion which will result in the dismissal with prejudice of the plaintiff's complaint; e.g., a claim that the case is barred by the statute of limitations or that a claim for relief has not been stated. If access to the court or the fact that a court takes the motion under advisement precludes decision on that motion within the 90 day period, the defendant must file his third party complaint unless he is willing to risk being able to obtain leave of court and consent of his adversaries to a later filing. The potential result is that a third party will suffer the trauma of being served with a summons and complaint and perhaps even incurring attorney's fees to defend a third party complaint which may become moot by the court's decision on the defendant's motion. The problems caused the third party defendant in such a situation seem to me to be a greater evil than the relatively brief delay which would be caused by permitting the third party complaint to be brought within a determined number of days after the dispositive motion is decided.

I became aware of the problem presented by the present rule in defending a case under the Landlord and Tenant Act. The tenant sued my client, the landlord, for an alleged defective condition of the house which he had rented to the plaintiff's sister. I moved to dismiss the plaintiff's claim, which was premised in strict liability, for failure to state a claim for relief. The court took the matter under advisement, so that I was compelled to file a third party complaint against the tenant before the motion was decided. In this case, the court did not grant the motion to dismiss, but if it had, the third party defendant would have needlessly incurred expense in preparation to defend a claim which may have no longer existed. Certainly there are many more examples which illustrate the problem presented by the present rule.

Sincerely,

Larry Dawson (sic)

Larry Dawson

LD:ser

WARREN, ALLEN & BROOKSHIRE
ATTORNEYS AT LAW

CARLTON D. WARREN
WARNER E. ALLEN
DENNIS P. BROOKSHIRE
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850 N.E. 122ND AVENUE
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May 8, 1987

Mr. Douglas A. Haldane
Executive Director
Counsel and Court Procedures
University of Oregon
School of Law
Eugene, OR 97403

Dear Professor Haldane:

I read, with interest, your article on Proposed Amendments to the ORCP in the most recent issue of the Oregon Litigation Journal.

I wholeheartedly agree with your comments regarding ORCP 69 and a ten day notice of intent to take a default order. Both myself and Mr. Brookshire of this office have, on numerous occasions, discussed the somewhat illogical approach of the Denkers case which does not require a ten day notice before order, but only before judgment by default, which in some cases is a foregone conclusion after the entry of the order of default.

While I agree that the rule should be changed to provide for ten day notice prior to a default order, I am concerned that the Council would limit the additional requirement of the ten day notice for judgment by default to cases in which it is necessary to receive evidence prior to the entry of judgment; the prima facie situation.

One of the reasons I feel that the ten day notice before judgment by default should apply to all cases is the recent Supreme Court opinion in Rajneesh Foundation International v. McGreer, 303 Or 139 ____ P2d ____ (1987). In that case, the court determined that even after an order of default has been entered, a party can file a motion against the complaint contending that it fails to state a valid claim for relief. However, in footnote 3, page 144, the court indicated that its holding that a Rule 21A(8) Motion would be proper after a party has been defaulted did not mean that a default judgment is subject to collateral attack on the ground that the pleadings were insuf-

ficient to support it. If the defaulted party, in a non-prima facie case, is not given notice at the time after which judgment may be entered, he may lose a valuable opportunity to challenge the sufficiency of the complaint, and would be unable to collaterally attack the judgment entered.

Thank you for allowing me the opportunity to comment, and I appreciate your work on the ORCP.

Sincerely,

WARREN, ALLEN & BROOKSHIRE

Michael J. Hargis

MJH/lw

Council on Ct Proc

DONALD C. ASHMANSKAS
Judge

Washington County Courthouse
Hillsboro, Oregon 97124
(503) 640-3587

CIRCUIT COURT OF OREGON
TWENTIETH JUDICIAL DISTRICT

June 16, 1987

Douglas A. Haldane
Executive Director
Council on Court Procedures
University of Oregon School of Law
Eugene, Oregon 97403

Re: ORCP 57F - Alternate Jurors

Dear Doug:

ORCP 57F provides for the replacement of regular jurors by alternate jurors "prior to the time the jury retired to consider its verdict." The rule also provides that an alternate juror who does not replace a regular juror shall be discharged "as the jury retires to consider its verdict." In brief, alternate jurors cannot replace regular jurors after the jury retires to deliberate its verdict.

In light of the recent fraud trial of the former Secretary of Labor, Raymond J. Donovan, may I suggest that the Council consider a revision of ORCP 57F to allow the use of alternate jurors after deliberations have begun, with whatever limitations the Council believes appropriate.

As you may recall from the press reports, Mr. Donovan and seven other defendants, a three-man prosecution team, nine defense counsel, 12 regular jurors and three alternate jurors spent more than eight months in court hearing from some 40 witnesses and viewing 900 exhibits. After about five hours of deliberation, one of the regular jurors was disqualified by the trial judge after locking herself in a bathroom, chanting "The Lord is my Shepherd" over and over, and after a psychiatrist examined her and declared her "grossly unfit" to continue as a juror. Over the objections of the defendants, the trial judge (citing the ambiguities of New York law) replaced the distraught regular juror with one of the three alternate jurors. The jury then proceeded to acquit the defendants after another five hours of deliberation.

If this trial had been held in Oregon (with the unambiguous language of ORCP 57F) and the parties did not agree to allow 11 jurors to deliberate and reach a verdict, I believe the trial judge would have to declare a mistrial under these circumstances.

Thank you for your consideration of this request.

Sincerely,

DONALD C. ASHMANSKAS
Circuit Court Judge

DCA:jmc

cc: Joe D. Bailey

Council on CJ Procedures

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WILLIAM H. REED
KEVIN G. STAPLES
ZACHARY H. STOUMBOS
JACKSON H. WELCH
DALE V. WHITESIDES

June 29, 1987

Douglas A. Haldene
899 Pearl Street
PO Box 11544
Eugene, OR 97440

Dear Mr. Haldene:

This letter is in response to our phone conversation of June 25, 1987. Oregon Civil Rule 7(b) states that "a summons is issued when subscribed by plaintiff or a resident attorney of this state." To the extent that "resident" means an attorney either living in or working in the state of Oregon, I would suggest that it needs to be changed based on the rules for admission to practice, specifically Rule 1.10(1).

Thank you for any assistance you can give me in this matter.

Sincerely,

Kevin G. Staples

KEVIN G. STAPLES

KGS/tlk

RECEIVED JUL 0 1 1987

A38-87-L2

THE SUPREME COURT
Edwin J. Peterson
Chief Justice

Salem, Oregon 97310
Telephone 378-6026

August 27, 1987

MEMORANDUM

TO: Presiding Judges
Trial Court Administrators
Trial Court Clerks
Board of Bar Governors
Oregon Trial Lawyers Association
Oregon Criminal Defense Lawyers Association
Practice and Procedure Committee of the Oregon State Bar
Judicial Administration Committee of the Oregon State Bar
UTCR Committee
Council on Court Procedure

FROM: Chief Justice Edwin J. Peterson
Supreme Court of Oregon

RE: Procedural Problem Created by Prohibition Against Pleading Amount of Noneconomic Damages in Tort Reform Bill; SB 323, 1987 Or Laws Ch. 774

The attached memorandum explains a problem concerning the recently passed tort reform legislation. I lean toward following Mr. Swank's recommendations, but thought you should have a chance to comment. Unless someone makes a better suggestion and sends it to me before the 15th of September, I will issue an order directing the trial courts to follow the recommendations. If you have any comments, please contact Mr. Swank at 378-6046 in Salem before the 15th of September. Written comments are preferred.

EJP:dc/91860

Attachment

August 27, 1987

MEMORANDUM

TO: Chief Justice Edwin J. Peterson

FROM: Bradd A Swank
Management/Legal Analyst

RE: Procedural Problem Created by Prohibition Against Pleading Amount of Noneconomic Damages in Tort Reform Bill

PROBLEM

Judge Robert Paul Jones sent a memo to Chief Justice Peterson pointing out procedural problems created by the tort reform bill. The problem is created because section 12a, chapter 774, 1987 Oregon Laws (1987 SB 323, copy attached) will take effect on September 27, 1987, and will prohibit a pleading from specifying the amount of "noneconomic" damages sought in a suit. Because the entire amount of damages sought will not be shown in the pleadings, Judge Jones feels that the courts will encounter the following procedural problems:

1. How to tell whether district court or circuit court has jurisdiction over the suit.

2. How to tell whether the amount sought in a circuit court case is within the $25,000 limit that would subject the case to mandatory arbitration under ORS 33.360 (as amended by chapter 116, Oregon Laws 1987).

In his July 9, 1987 memo, Judge Jones suggested that a possible solution to the problem might be to require the plaintiff's attorney to file a statement, contemporaneously with the filing of the complaint, that the amount of noneconomic damages sought exceeds certain jurisdictional levels. In a July 16, 1987 letter to Chief Justice Peterson, Presiding Judge Frank Bearden suggests solving the problem by providing a

certification form at the civil filing window that would be required by court rule and would certify that the case is within the circuit or district court jurisdictional limit and is inside or outside the mandatory arbitration limit.

Bill Linden requested that I review the problem and make recommendations about how to address it. After discussing the problem with both you and Mr. Linden, my review and recommendations are as follows:

DISCUSSION

The question of whether a case is within the mandatory arbitration amount does not arise with cases in district court. Chapter 125, Oregon Laws 1987 (1987 HB 2092), amended ORS 33.360 to make the mandatory arbitration limits for district court $10,000. The bill takes effect on September 27, 1987, (the same day as the "tort reform" bill) and will make the arbitration limits for district court the same as the jurisdictional limit under ORS 46.060; therefore, all district court cases will be subject to mandatory arbitration in those district courts with a mandatory arbitration program unless removed from arbitration by a presiding judge under ORS 33.360(2).

The next problem, whether a case is within the jurisdiction of circuit or district court, is solved by chapter 714, Oregon Laws 1987 (1987 HB 2293, copy attached). This bill (which also takes effect September 27, 1987) establishes a procedure for the transfer of cases between circuit and district court when the cases are not within the respective jurisdictional limits. The bill provides that parties are <u>required</u> (see sections 2 and 4, chapter 714, Oregon Laws 1987) to file a motion to transfer the case to the other court when they know that the case is not within the jurisdiction of the court where the case was filed. If the parties do not file a motion, the court is <u>required</u> to transfer the case on its own motion if it is aware that a claim is outside the jurisdiction (see sections 2 and 4, chapter 714, Oregon Laws 1987).

By using the procedure in HB 2293 to address the problems raised by SB 323, the responsibility to resolve the issue of jurisdictional amounts rests on the parties with the greatest interest and with the information. The parties have the information about amounts sought that are not on the face of

the complaint (section 12a of SB 323 provides a procedure for an adverse party to request and receive the amount of damages sought). The solution worked out by the legislature has the advantage of making the argument over jurisdictional amounts part of the motion practice.

The problem of arbitration in circuit court seems to be much the same as the transfer problem the legislature addressed in HB 2293. If noneconomic damages are sought, the court will not know, from the face of the pleading, whether the case is subject to mandatory arbitration. The solutions proposed by Judges Jones and Bearden both require additional paperwork in every case. This would increase the workload of attorneys and of the court clerks and, possibly, increase overall costs. One of the suggestions would require the courts to prepare an additional form. I do not believe that the additional work is necessary. I think that the problem can be addressed similarly to the way the legislature addressed the transfer problem in HB 2293.

RECOMMENDATIONS

I recommend that the questions of jurisdictional amount and of qualification for arbitration be resolved from the face of the claim, counterclaim, crossclaim, or third party claim, even though this will not include amounts that might be claimed for noneconomic damages.

On the question of district/circuit court <u>jurisdiction</u>, this would mean that a case filed in district court or circuit court would remain there unless the parties or the court transfers the case under the new procedures in 1987 HB 2293. It is the responsibility of the parties to file motions to transfer the case under sections 2 or 4 of HB 2293 when the case is not within the jurisdictional amount. If they do not, the court will do so on its own motion if it is aware that the case is outside its jurisdiction.

As for the question of <u>mandatory arbitration in circuit courts</u> in a circuit court with a mandatory arbitration program, any case where the claim for relief did not seek more than $25,000

on its face (without considering noneconomic damages) would be assigned to mandatory arbitration unless one of the following occurs:

a. The party, at the time of filing the pleading (including a claim, counterclaim, crossclaim or third party claim), gives the court and the other side notice that an amount will be sought that removes the case from mandatory arbitration. This could be accomplished without specifying the amount that will be sought as noneconomic damages simply by placing the words "NOT SUBJECT TO MANDATORY ARBITRATION" in the document title (a draft UTCR that would make this change is attached).

b. Any party files a notice, prior to referral to arbitration, that the case is not subject to arbitration. The notice should state why.

c. The court orders the case removed from mandatory arbitration (for "good cause shown," ORS 33.360(2)).

The use of pleadings and motion practice in the manner proposed by these recommendations appears consistent with the legislative intent in the "tort reform" bill to keep amounts of noneconomic damages out of the pleadings. The proposed solutions also prevent substantial additional workloads for attorneys and court clerks by avoiding additional filings in many cases.

I suggest that the Chief Justice adopt a rule or issue an order under ORS 1.002 establishing the practices recommended in this memo until the matter can be further reviewed either as part of the Uniform Trial Court Rule process or as part of the Oregon Rules of Civil Procedure process.

The legislation takes effect on September 27, 1987. It is now late in August. Because of the timing in relation to the UTCR and ORCP cycle, neither ORCP nor UTCR changes can be made before the legislation takes effect. The printing and distribution of the UTCR for this year has already taken place. The local rules that might otherwise address this question are required to be submitted for review on September 1, 1987, and are probably already too far along to address the problem. (I have, however, prepared a draft UTCR in case the Chief Justice chooses this approach.)

Whatever approach the Chief Justice chooses, it should continue in effect until superseded by either a UTCR or ORCP developed in the normal course of affairs. This problem does, however, need an immediate solution that will be in place when the involved legislation takes effect. It is a problem that appears to be best addressed in a uniform, statewide manner.

Kingsley Click tells me that the UTCR Committee has expressed an interest in spending part of the next year dealing with some issues relating to arbitration. It might be appropriate for them to more fully consider these issues as part of their broader consideration of arbitration.

I know that my recommendations seem simple. If you think of some wrinkle I have missed or problem I haven't addressed, let me know.

BAS:dc/91860

PROPOSED UNIFORM TRIAL COURT RULE
OR COURT ORDER

The Uniform Trial Court Rules are amended by adding the following paragraph to subsection (11) of Rule 2.010:

"(c) In the title of any pleading in circuit court where the amount of claim would subject the case to mandatory arbitration under ORS 33.360, the party preparing the pleading shall include the words "CLAIM NOT SUBJECT TO MANDATORY ARBITRATION" if the party knows that an amount will be sought that exceeds the mandatory arbitration limit under ORS 33.360 but that the amount sought will not be shown in the pleadings because of ORCP 18B. This language will be sufficient to provide the court and other parties with notice that an amount will be sought that is in excess of the mandatory arbitration limit. Signature of the pleadings will constitute verification of such notice under ORCP 17."

BAS:dc/91860

SECTION 12a. ORCP 18 is amended to read:

RULE 18

CLAIMS FOR RELIEF

Claims for relief. A. A pleading which asserts a claim for relief, whether an original claim, counterclaim, cross-claim, or third party claim, shall contain:

A.(1) A plain and concise statement of the ultimate facts constituting a claim for relief without unnecessary repetition.

[*B.*] A.(2) A demand of the relief which the party claims; if recovery of money or damages is demanded, the amount thereof shall be stated, **except as provided in section B. of this rule;** relief in the alternative or of several different types may be demanded.

B.(1) The amount sought in a civil action for noneconomic damages, as defined in section 6 of this Act, shall not be pleaded in a complaint, counterclaim, cross-claim or third-party claim.

B.(2) The prayer in such actions shall contain only a demand for the payment of damages without specifying the amount.

B.(3) The party making the claim may supply to any adverse party a statement of the amount claimed for such damages, and shall do so within 10 days of a request for such statement. The request and the statement shall not be made a part of the trial court file.

weekly wage nor less than the amount of 90 percent of wages a week or the amount of $50 a week, whichever amount is lesser. Notwithstanding the limitation imposed by this subsection, an injured worker who is not otherwise eligible to receive an increase in benefits for the fiscal year in which compensation is paid shall have the benefits increased each fiscal year by the percentage which the applicable average weekly wage has increased since the previous fiscal year.

(2)(a) For the purpose of this section, the weekly wage of workers shall be ascertained by multiplying the daily wage the worker was receiving [*at the time of injury*]:

[*(a)*] (A) By 3, if the worker was regularly employed not more than three days a week.

[*(b)*] (B) By 4, if the worker was regularly employed four days a week.

[*(c)*] (C) By 5, if the worker was regularly employed five days a week.

[*(d)*] (D) By 6, if the worker was regularly employed six days a week.

[*(e)*] (E) By 7, if the worker was regularly employed seven days a week.

(b) For the purpose of this section:

(A) The benefits of a worker who incurs an injury shall be based on the wage of the worker at the time of injury.

(B) The benefits of a worker who incurs an occupational disease shall be based on the wage of the worker at the time there is medical verification that the worker is unable to work because of the disability caused by the occupational disease. If the worker is not working at the time that there is medical verification that the worker is unable to work because of the disability caused by the occupational disease, the benefits shall be based on the wage of the worker at the worker's last regular employment.

(c) As used in this subsection, "regularly employed" means actual employment or availability for such employment. For workers not regularly employed and for workers with no remuneration or whose remuneration is not based solely upon daily or weekly wages, the director, by rule, may prescribe methods for establishing the worker's weekly wage.

(3) No disability payment is recoverable for temporary total disability suffered during the first three calendar days after the worker leaves work as a result of the compensable injury unless the total disability continues for a period of 14 days or the worker is an inpatient in a hospital. If the worker leaves work the day of the injury, that day shall be considered the first day of the three-day period.

SECTION 8. This Act takes effect January 1, 1988.

Approved by the Governor July 16, 1987

Filed in the office of Secretary of State July 16, 1987

CHAPTER 714

AN ACT HB 2293

Relating to courts; creating new provisions; amending ORS 46.060, 46.075, 46.084 and 46.461 and ORCP 21 G.; and repealing ORS 46.063 and 46.070.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Section 2 of this Act is added to and made a part of ORS 46.060 to 46.080.

SECTION 2. (1) When it appears to any party that a civil action commenced in a district court involves any claim that is not within the jurisdiction of the district court but is within the jurisdiction of the circuit court, that party shall file a motion requesting transfer and the district court shall not dismiss the action but shall order transfer of the entire action to the circuit court. If no motion is made by a party, the court shall transfer the case on its own motion if the court is aware that a claim is outside the jurisdiction of the court.

(2) In any civil action commenced in a district court a defendant may plead a counterclaim or cross-claim in excess of the jurisdiction of the court. If a defendant pleads a counterclaim or cross-claim in excess of the jurisdiction of the district court, the court shall not dismiss the action but shall, on motion of a party or if no motion is made by a party, on its own motion, order transfer of the entire action to the circuit court. In any civil action commenced in a district court wherein the amount claimed by the plaintiff is not in excess of the jurisdiction of the court and the amount claimed by a defendant by way of counterclaim or cross-claim is not in excess of the jurisdiction of the court, the court shall have jurisdiction of the action notwithstanding that the combined amount of the claim, counterclaim and cross-claim exceeds $10,000.

(3) A motion to transfer made by a party or an order to transfer made by a district court on its own motion under this section shall be made not less than 14 days before the date set for trial of the action in the court. If no party has made a motion to transfer and the court is otherwise unaware that a claim is outside the jurisdiction of the court and as a result the court has failed to order a transfer of the case, all objections that jurisdiction is not in the district court but is in the circuit court shall be considered waived, and a judgment of the district court in the action shall not be void or voidable or subject to direct or collateral attack on the ground that jurisdiction was not in the district court but was in the circuit court. However, nothing in this section shall be construed to allow a party to agree to waive the jurisdictional limits of the court where the party is aware more than 14 days in

advance of the date set for trial of the action that a claim is not within the jurisdiction of the court.

(4) An order of a district court to transfer under this section may be reviewed on appeal of a judgment of the circuit court in the action by any party who did not make or agree to the motion to transfer. An order of a district court denying a motion of a party to transfer under this section may be reviewed on appeal of a judgment of the district court in the action by the party making the motion. No error in the ruling or order of district court on a motion to transfer under this section shall cause reversal of a judgment unless the error substantially affects the rights of a party and requires a new trial. If an appellate court reverses a judgment of a district or circuit court because of error by a district court in the ruling or order on a motion to transfer under this section, the appellate court shall direct that the district or circuit court transfer the action to the proper court.

(5) This section does not apply to any proceedings under ORS chapter 107 or 109 or to probate, conservatorship, guardianship, change of name or juvenile proceedings.

SECTION 3. ORS 46.075 is amended to read:

46.075. (1) [*The district court shall order the transfer to the circuit court of every cause authorized by this chapter to be so transferred.*] Within 10 days [*therefrom*] **after a district court orders transfer of an action to the circuit court under section 2 of this 1987 Act** the clerk of the district court shall file with the clerk of the circuit court a transcript of the [*cause*] **action** including all the material entries in the [*register*] **records** of the district court and all of the original papers relating to the [*case*] **action.** Thereupon the district court shall proceed no further with the [*cause*] **action.** The [*case*] **action** shall be considered transferred to the circuit court which shall then have jurisdiction to try and determine the [*cause*] **action.**

(2) The responding party shall have 10 days after the final date allowed for the transcript and original papers to be filed in the circuit court within which to plead further. If the district court clerk fails to file the transcript and original papers within the time specified, [*a*] **the presiding** judge of the circuit court may order that clerk to do so within a specified time.

(3) Except as provided in ORS 46.461, when the district court orders the transfer **of an action** to the circuit court [*of a cause*]:

(a) The plaintiff, in addition to the fee paid to the district court clerk as required by ORS 46.221 (1)(a), shall pay to the circuit court clerk an amount equal to the difference between that fee and the filing fee required of a plaintiff by ORS 21.110.

(b) The defendant, in addition to the fee paid to the district court clerk as required by ORS 46.221 (1)(b), shall pay to the circuit court clerk an amount equal to the difference between that fee and the filing fee required of a defendant by ORS 21.110.

(c) The party pleading an original claim, counterclaim or cross-claim in excess of the jurisdiction of the district court shall pay to the district court clerk the transfer fee required by ORS 46.221 (1)(k).

(4) If the moving party prevails in the circuit court, the required transfer fee paid by that party may be taxed as costs and disbursements.

SECTION 4. (1) When it appears to any party that a civil action commenced in a circuit court involves any claim that is not within the jurisdiction of the circuit court but is within the jurisdiction of the district court, that party shall file a motion requesting transfer and the circuit court shall not dismiss the action but shall order transfer of the entire action to the district court. If no motion is made by a party, the court shall transfer the case on its own motion if the court is aware that a claim is outside the jurisdiction of the court.

(2) In any civil action commenced in a circuit court wherein the amount claimed by the plaintiff is in excess of $10,000 and the amount claimed by a defendant by way of counterclaim or cross-claim is not in excess of $10,000, the court shall retain jurisdiction of the action notwithstanding that the amount of the counterclaim or cross-claim does not exceed $10,000.

(3) A motion to transfer made by a party or an order to transfer made by a circuit court on its own motion under this section shall be made not less than 14 days before the date set for trial of the action in the court. All objections that jurisdiction is not in the circuit court but is in the district court shall be considered waived, and a judgment of the circuit court in the action shall not be void or voidable or subject to direct or collateral attack on the ground that jurisdiction was not in the circuit court but was in the district court. However, nothing in this section shall be construed to allow a party to agree to waive the jurisdictional limits of the court where the party is aware more than 14 days in advance of the date set for trial of the action that a claim is not within the jurisdiction of the court.

(4) An order of a circuit court to transfer under this section may be reviewed on appeal of a judgment of the district court in the action by any party who did not make or agree to the motion to transfer. An order of a circuit court denying a motion of a party to transfer under this section may be reviewed on appeal of a judgment of the circuit court in the action by the party making the motion. No error in the ruling or order of a circuit court on a motion to transfer under this section shall cause reversal of a judgment unless the error substantially affects the rights of a party and requires a new trial. If an appellate court reverses a judgment of a circuit or district court because of error by a circuit court in the ruling or order on a motion to transfer under this section, the

appellate court shall direct that the circuit or district court transfer the action to the proper court.

SECTION 5. (1) Within 10 days after a circuit court orders transfer of an action to the district court under section 4 of this Act the clerk of the circuit court shall file with the clerk of the district court a transcript of the action including all the material entries in the records of the circuit court and all of the original papers relating to the action. Thereupon the circuit court shall proceed no further with the action. The action shall be considered transferred to the district court which shall then have jurisdiction to try and determine the action.

(2) The responding party shall have 10 days after the final date allowed for the transcript and original papers to be filed in the district court within which to plead further. If the circuit court clerk fails to file the transcript and original papers within the time specified, the presiding judge of the district court may order that clerk do so within a specified time.

SECTION 6. ORCP 21 G. is amended to read:

G. Waiver or preservation of certain defenses.

G.(1) A defense of lack of jurisdiction over the person, 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, 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 the defense is neither made by motion under this rule nor included in a responsive pleading. The defenses 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.(3) A defense of failure to state ultimate facts constituting a claim, 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.(4) **Except as provided in sections 2 and 4 of this 1987 Act,** if it appears by motion of the parties or otherwise that the court lacks jurisdiction over the subje matter, the court shall dismiss the action.

SECTION 7. ORS 46.084 is amended to read:

46.084. **(1) Except as provided in subsection (** of this section,** while the title to real property may l controverted or questioned in an action in district cou the judgment in [*said*] the action shall in no way affect determine title between the parties or otherwise.

(2) In an action in a district court involvin title to real property and in which objections to th jurisdiction of the court are considered waived a provided in subsection (3) of section 2 of this 198 Act, a judgment of the court that would affect o determine title to the real property and that i docketed in the judgment docket of the circui court shall, from the time of that docketing, affec or determine title to the real property as if it wer a judgment of the circuit court where it is dock eted.

SECTION 8. ORS 46.060 is amended to read:

46.060. (1) Except as provided in subsection (2) o this section, the district courts shall have exclusive juris diction in the following cases:

(a) For the recovery of money or damages only whe the amount claimed does not exceed $10,000. When, i such a case arising out of contract, the ends of justice demand that an account be taken or that the contract be reformed or canceled, the district court shall have jurisdiction to decree such accounting, reformation or cancellation.

(b) For the recovery of specific personal property when the value of the property claimed and the damages for the detention do not exceed $10,000.

(c) For the recovery of any penalty or forfeiture, whether given by statute or arising out of contract, not exceeding $10,000.

(d) To give judgment without trial upon the confession of the defendant for any of the causes of action specified in this section, except for a penalty or forfeiture imposed by statute.

(e) To hear and determine actions of forcible entry and detainer.

(f) To enforce, marshal and foreclose liens upon personal property where the amount claimed for such liens does not exceed $10,000, and to render personal judgment therein in favor of any party.

(g) Actions and proceedings of interpleader and in the nature thereof, when the amount of money or the value of the property involved does not exceed $10,000.

(h) Actions and proceedings, whether legal or equitable, to preserve the property or rights of any party to an action of which the court has jurisdiction, and to enforce the collection of its own judgments, including all actions and proceedings in the nature of creditors' bills, and, in aid of execution, to subject the interest of a judgment

debtor in personal property to the payment of such judgment. District courts shall not have jurisdiction to appoint receivers.

(i) Actions or suits for injunctive relief under ORS 91.700 to 91.935 when the amount of any damages claimed does not exceed $10,000.

(2) The jurisdiction granted the district court in subsection (1) of this section does not affect the jurisdiction of any justice court, and in a county with no district court, the circuit court has jurisdiction to hear all matters otherwise assigned to the district court.

(3) Whenever an action or proceeding is brought in a district court, the court shall have jurisdiction to hear and determine, preserve and enforce all rights involved therein, including all cases in equity when pleaded as defensive matter, and to exercise all legal and equitable remedies necessary or proper for complete determination of the rights of the parties, subject to the limitations imposed by this section.

[(4) Whenever it shall appear from the pleadings in any cause that the title to real property is in dispute, the court shall order the pleading raising that question stricken, unless within five days the party who has raised such issue shall file with the clerk of the district court a written motion for the transfer of the cause to the circuit court, accompanied by the required transfer fee.]

[(5)] (4) For purposes of this section, the amount claimed, value of property, damages or any amount in controversy does not include any amount claimed as costs and disbursements or attorney fees as defined by ORCP 68 A.

SECTION 9. ORS 46.461 is amended to read:

46.461. (1) The defendant in an action in the small claims department may assert as a counterclaim any claim that, on the date of issuance of notice pursuant to ORS 46.445, the defendant may have against the plaintiff and that arises out of the same transaction or occurrence that is the subject matter of the claim filed by the plaintiff.

(2) If the amount or value of the counterclaim exceeds $1,500, the court shall strike the counterclaim and proceed to hear and dispose of the case as though the counterclaim had not been asserted unless the defendant files with the counterclaim a motion requesting that the case be transferred from the small claims department to a court of appropriate jurisdiction. After the transfer the plaintiff's claim will not be limited to the amount stated in the claim filed with the small claims department, though it must involve the same controversy.

(3)(a) If the amount or value of the counterclaim exceeds that specified in subsection (2) of this section, but does not exceed the jurisdictional limit of the district court for a counterclaim, and the defendant files a motion requesting transfer as provided in subsection (2) of this section, the case shall be transferred to the district court. The clerk of the court shall notify the plaintiff and defendant, by mail, of the transfer. The notice to the plaintiff shall contain a copy of the counterclaim and shall instruct the plaintiff to file with the court and serve by mail on the defendant, within 20 days following the mailing of the notice, a reply to the counterclaim and, if the plaintiff proposes to increase the amount of the claim originally filed with the small claims department, an amended claim for the increased amount. Proof of service on the defendant of the plaintiff's reply and amended claim may be made by certificate of the plaintiff or plaintiff's attorney attached to the reply and amended claim filed with the court. The defendant is not required to answer an amended claim of the plaintiff.

(b) Upon filing the motion requesting transfer, the defendant shall pay to the clerk of the court the [*required*] transfer fee **required by ORS 46.221 (1)(k)** and an amount equal to the difference between the fee paid by the defendant as required by ORS 46.221 (1)(i) and the fee required of a defendant by ORS 46.221 (1)(b). Upon filing a reply to the counterclaim, the plaintiff shall pay to the clerk of the court an amount equal to the difference between the fee paid by the plaintiff as required by ORS 46.221 (1)(i) and the fee required of a plaintiff by ORS 46.221 (1)(a).

(4)(a) If the amount or value of the counterclaim exceeds the jurisdictional limit of the district court for a counterclaim and the defendant files a motion requesting transfer as provided in subsection (2) of this section, the **district court shall order transfer of the case to the circuit court and** the case shall be transferred [*to the circuit court*] and [*be*] governed as provided in ORS 46.075 *[(1), (2) and (4)]* **(1) and (2)**. The clerk of the district court shall notify the plaintiff and defendant, by mail within 10 days following the order of transfer, of the transfer. The notice to the plaintiff shall contain a copy of the counterclaim and shall inform the plaintiff as to further pleading by the plaintiff in the circuit court.

(b) Upon filing the motion requesting transfer, the defendant shall pay to the clerk of the district court the [*required*] transfer fee **required by ORS 46.221 (1)(k)**, and thereafter the defendant shall pay to the clerk of the circuit court an amount equal to the difference between the fee paid by the defendant as required by ORS 46.221 (1)(i) and the filing fee required of a defendant by ORS 21.110. Upon filing a reply to the counterclaim, the plaintiff shall pay to the clerk of the circuit court an amount equal to the difference between the fee paid by the plaintiff as required by ORS 46.221 (1)(i) and the filing fee required of a plaintiff by ORS 21.110.

SECTION 10. ORS 46.063 and 46.070 are repealed.

SECTION 11. This Act is not applicable in respect to actions commenced in a district or circuit court before the effective date of this Act, and those actions shall be governed by applicable statutes and rules as if this Act had not been enacted.

W. RONALD ORLEBEKE
LAWRENCE W. HUTCHINGS
A. DUANE PINKERTON II *

* ALSO ADMITTED TO PRACTICE IN OREGON AND ALASKA

ORLEBEKE, HUTCHINGS & PINKERTON
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CONCORD, CA 94522-0417

September 24, 1987

Donald W. McEwen
Chairman, Council on Court Procedure
University of Oregon Law School
Eugene, OR

Re: Procedures on Default

Gentlemen:

I am writing at the request of the Oregon State Bar Procedure and Practice Committee.

For the past three years, we have attempted to resolve what we consider to be a substantial procedural defect in the manner in which Oregon cases are brought to default of judgment.

The present procedure, under Oregon rules, requires notice prior to taking a judgment against a party. The procedures as they are, technically required in Oregon courts do not require notice prior to taking order of default.

The Oregon State Bar Procedure and Practice Committee wishes to see Oregon adopt rules which will require giving notice of intention to take default when a party is aware that an attorney represents the party against whom the default is being taken.

The reasons which we believe speak for this change, are that there is a likelihood that either the lawyer, the PLF or the innocent client may suffer financial damages due to efforts to set aside defaults when the problem occurred through some misunderstanding about an extension of time to answer.

We have tried to suggest changes in rules and procedures, and have been rebuffed. Our specific suggestions have been either misunderstood or disregarded.

Our motive is to avoid costly court battles over whether or not default orders should be set aside when the parties had

retained attorneys and intended to answer complaints.

As this next year of labor on your committees begins, will you please give attention to our concern.

Feel free to consult the Procedure and Practice Committee for their thoughts on this matter and to obtain our proposed revisions.

My term on the committee expires October 1, 1987 and therefore I suggest that you communicate with last year's secretary Janice M. Stewart, McEwen, Gisvold, et al., 1408 Standard Plaza, 1100 SW Sixth Avenue, Portland, OR 97204.

Very Truly Yours,

A. Duane Pinkerton, II
Chairman
Oregon State Bar
Procedure & Practice Committee

ADP:lhj

cc: Edwin J. Petersen
Kingsley Click

ZIKES, KAYSER, FREED, SMITH & HEALD, PC
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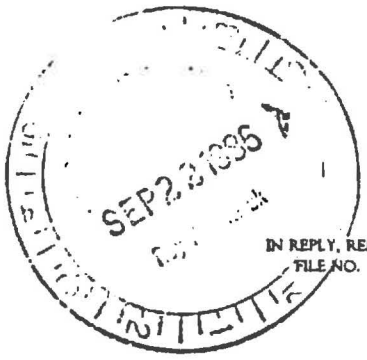

DENNY Z. ZIKES
BRUCE D. KAYSER
DENNIS N. FREED
M. ROBERT F. SMITH
JOHN H. HEALD

JAY R. CHOCK
RICHARD L. GRANT*

*ALSO ADMITTED IN WASHINGTON

IN REPLY, REFER TO OUR FILE NO.

September 18, 1986

Roy Kilpatrick
Kilpatricks & Pope
Chairman Council on Court Proceedures
Box A
Mt. Vernon, OR 97865

Dear Mr. Kilpatrick:

I am writing concerning ORCP 68 A(2) with regard to the expenses of taking depositions. Under the former ORCP 68 A(2) "costs and disbursements" expressly included "the necessary expenses of taking depositions". That language has been deleted under the current version of ORCP 68 A(2) and the following language has been added:

> "The expenses of taking depositions shall not be allowed, even though the depositions are used at trial, except as otherwise provided by rule or statute."

The current comments to ORCP provide in relevant part:

> "The Council did not change the items recoverable as disbursements. Discovery deposition cost remain nonrecoverable because the rule refers to 'necessary'.deposition cost."

Since there is no reference in the current ORCP 68 A(2) to "necessary" deposition costs, the current comment to ORCP 68 A(2) that references to "necessary" deposition costs seems puzzling to me.

I would appreciate whatever clarification you might offer. Thank you in advance for your consideration.

Yours truly,

John H. Heald

JHH:jlr

EXPLANATION OF NEED FOR CHIEF JUSTICE ORDER

Section 12a of Chapter 774, 1987 Oregon Laws, is effective on September 27, 1987. It amends ORCP 18 to prohibit the pleading of an amount for noneconomic damages in a civil action. A number of the courts in this state have adopted a mandatory arbitration program under ORS 33.350 to 33.400.

The prohibition against pleading noneconomic damages will not cause problems concerning mandatory arbitration in district courts because chapter 125, Oregon Laws 1987, makes the mandatory arbitration limit the same as the jurisdictional limit in district court. Nor does it create problems concerning trial court jurisdiction because chapter 714, Oregon Laws 1987, provides a transfer procedure that will solve this problem. It does raise questions, however, about mandatory arbitration in circuit courts. Without knowing the amount of noneconomic damages that will be sought, how are circuit courts to know whether the amount sought will be within the limit [established by ORS 33.360(1)(a) as amended by section 1, chapter 116, Oregon Laws 1987] that subjects the case to mandatory arbitration? This order addresses that problem.

In August, I sent a memorandum discussing the solution established by this rule to more than 100 people (including judges, court administrators, court clerks, various members and committees of the Oregon Bar and various associations of lawyers) to solicit comment and possible alternative suggestions. After considering the comments and suggested alternatives, the solution established by this order appeared to be the most workable. This solution may not be perfect, but for the time being courts and attorneys will follow the procedure set out in this order.

/95370

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of Pleadings and Assignment of Cases to Mandatory Arbitration Programs	)	No. 87-47
	)	ORDER ADOPTING PROCEDURES FOR ASSIGNING CASES TO MANDATORY ARBITRATION

By virtue of the authority vested in me as Chief Justice of the Supreme Court by ORS 1.002(1)(a), circuit courts with a mandatory arbitration program shall comply with the following procedure:

1. All civil actions filed in circuit court that appear on the face of the pleadings (without consideration of noneconomic damages, ORCP 18B) to be subject to mandatory arbitration under ORS 33.360(1) will be assigned to arbitration unless one of the following occurs:

   a. The title of a pleading in the case (including a claim, counterclaim, cross claim or third party claim) contains the words "CLAIM NOT SUBJECT TO MANDATORY ARBITRATION." When a party places this language in the title of the pleading, the party gives notice to the court and other parties that the party will seek an amount in excess of the mandatory arbitration limit and has not pleaded the amount because of ORCP 18B. This language shall not be in the title of a pleading for any other purpose. A party's signature on pleadings containing such language constitutes the party's certificate of such notice under ORCP 17.

   b. Any party files a notice, prior to referral to arbitration, that the case is not subject to mandatory arbitration. The notice must state grounds sufficient, under ORS 33.360, to remove the case from mandatory arbitration.

   c. The court orders the case removed from mandatory arbitration under ORS 33.360(2).

2. Notice under either part 1.a. or 1.b. of this order does not prevent any party from asserting by appropriate motion, that the case is subject to mandatory arbitration.

3. A party who gives notice under part 1.a. or 1.b. of this order shall be sanctioned under UTCR 1.090(2) or ORCP 17 if the court determines that there was not good ground to support the notice or that the notice was given only for the purpose of avoiding mandatory arbitration.

4. For purposes of identification, this order may be referred to as UTCR 2.070.

5. This order is effective on September 27, 1987.

Dated this 21st day of September, 1987.

Edwin J. Peterson
Chief Justice

/95370

A41-87-L2

R. WILLIAM LINDEN, JR.
State Court Administrator

(503) 378-6046

JUDICIAL DEPARTMENT

Supreme Court Building
Salem, Oregon 97310

September 24, 1987

MEMORANDUM

TO: All Judges
Trial Court Administrators
Trial Court Clerks
Keith Burns, President, Oregon State Bar
Celene Greene, Executive Director, Oregon State Bar
John Soennichsen, Oregon State Bar
James H. Gidley, President, Oregon Association of Defense Counsel
Prudie Gilbert, Executive Director, Oregon Trial Lawyers Association
A. Duane Pinkerton, Chair, Procedure and Practice Committee of the Oregon State Bar
Laurence E. Thorp, Chair, Judicial Administration Committee of the Oregon State Bar
Paul Connolly, Chair, UTCR Committee
Douglas Haldane, Executive Director, Council on Court Procedures
Presidents of local Bar Associations

FROM: Bradd A Swank
Managment/Legal Analyst

RE: Procedural Problem Created by Prohibition Against Pleading Amount of Noneconomic Damages in Tort Reform Bill; SB 323, 1987 Or Laws Ch. 774

The attached order of the Chief Justice of the Oregon Supreme Court addresses a problem relating to the recently passed tort reform legislation, SB 323. The order is accompanied by an explanation. The Chief Justice asked me to make sure you received a copy of this order.

BAS:klb/96170

Attachment

CHURCHILL, LEONARD, BROWN & DONALDSON
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ROBERT W. DONALDSON
GORDON R. HANNA
RICHARD L. HENDRIE, JR.
MARK W. HOHLT
DAVID H. LEONARD
KATHY A. LINCOLN
PAUL C. LODINE *
ROCHELLE NEDEAU
STEPHEN T. TWEET

*ALSO ADMITTED TO PRACTICE IN WASHINGTON

October 7, 1987

The Hon. Edwin J. Peterson
Supreme Court of Oregon
Salem, OR 97310

Re: ORCP 69

Dear Chief Justice Peterson:

I have received your letter dated September 29, 1987, and have talked to Doug Haldane. Doug indicates that the council on Court Procedure has grappled with the problems and issues raised by Dwayne Pinkerton in his letter of September 24, 1987, to you. As I understand it, the council decided that placing a limit on the notice prior to the entry of a default order may create Equal Protection Doctrine problems, and, therefore, decided to rely upon the disciplinary rules which provide that local custom and practice regarding the need to provide notice to opposing counsel should govern. Doug mentioned that this issue has arisen at least once in Lane County and that a finding had been made that the local custom and practice of its bar contemplated a kind of notice prior to taking a default order.

We then discussed the possibility that the Uniform Trial Court Rules might serve a function in providing notice about what is the custom and practice on a court by court basis. I indicated that perhaps the Uniform Trial Court Rule would require each court to adopt a supplementary rule describing their local custom and practice. Rule making itself would provide a useful function to the local bar and bench in getting them to decide what is their local custom and what their practice should be. Moreover, such a supplementary rule would provide notice to out-of-county attorneys as to what the practice was in every specific county.

Doug and I appear to agree that this approach by the Uniform Trial Court Rules committee would complement the work of the council on ORCP 69.

It would be my recommendation, however, that you not wait until the next round of Uniform Trial Court Rules to exact from the local courts these kinds of supplementary rules, but initiate the process in short order. By requiring each court to submit its supplementary rule say by the end of

November, this would give the Judicial Department time to include those supplementary rules in the upcoming set of amended supplementary rules.

As always, I am more than pleased to discuss this matter with you and Doug.

Very truly yours,

CHURCHILL, LEONARD,
BROWN & DONALDSON

Paul R. J. Connolly

PRJC9:jlh3
cc: Doug Haldane
Bradd Swank

CHANGES TO THE ORCP MADE BY THE 1987 LEGISLATURE

ORCP	Chapter	Section	Bill No.
17	774	12	SB 323
18	774	12A	SB 323
21 G	714	6	HB 2293
39	275	2	HB 2298
68 A	586	43	HB 2323
70 A	873	19	SB 566
83 E	586	44	HB 2323
84 A	586	45	HB 2323
84 C	586	46	HB 2323
84 D	873	20	SB 566

SECTION 10. (1) It is a complete defense in any civil action for personal injury or wrongful death based on ordinary negligence that:

(a) The person damaged was engaged in conduct at the time that would constitute aggravated murder, murder or a Class A or a Class B felony; and

(b) The felonious conduct was a substantial factor contributing to the injury or death.

(2) To establish the defense described in this section, the defendant must prove beyond a reasonable doubt the fact that the person damaged was engaged in conduct that would constitute aggravated murder, murder or a Class A or a Class B felony.

(3) Nothing in this section affects any right of action under 42 U.S.C. §1983.

FRIVOLOUS ACTIONS

SECTION 11. (1) In order to bring a claim for wrongful use of a civil proceeding against another, a person shall not be required to plead or prove special injury beyond the expense and other consequences normally associated with defending against unfounded legal claims.

(2) The filing of a civil action within 60 days of the running of the statute of limitations for the purpose of preserving and evaluating the claim when the action is dismissed within 120 days after the date of filing shall not constitute grounds for a claim for wrongful use of a civil proceeding under subsection (1) of this section.

(3) A claim for damages for wrongful use of a civil proceeding shall be brought in an original action after the proceeding which is the subject matter of the claim is concluded.

SECTION 12. ORCP 17, as amended by promulgation December 13, 1986, by the Council on Court Procedures, is amended to read:

[*Signatures of Pleadings*]

Signing of Pleadings, Motions and Other Papers; Sanctions

RULE 17

A. Signing by party or attorney; certificate. Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record who is an active member of the Oregon State Bar. A party who is not represented by an attorney shall sign the pleading, motion[,] or other paper and state [*that party's*] **the address of the party.** [*Except when otherwise specifically provided by rule or statute,*] Pleadings need not be verified or accompanied by affidavit. The signature constitutes a [*certification*] **certificate** that the person [*signing*] has read the pleading, motion[,] or other paper, [;] that to the best of [*that person's*] **the** knowledge, information[,] and belief **of the person** formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification[,] or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

B. Pleadings, motions[,] and other papers not signed. If a pleading, motion[,] or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.

C. Sanctions. If a pleading, motion[,] or other paper is signed in violation of this rule, the court upon motion or upon its own initiative shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion[,] or other paper, including a reasonable attorney fee.

SECTION 12a. ORCP 18 is amended to read:

RULE 18

CLAIMS FOR RELIEF

Claims for relief. **A.** A pleading which asserts a claim for relief, whether an original claim, counterclaim, cross-claim, or third party claim, shall contain:

A.(1) A plain and concise statement of the ultimate facts constituting a claim for relief without unnecessary repetition.

[*B.*] **A.(2)** A demand of the relief which the party claims; if recovery of money or damages is demanded, the amount thereof shall be stated, **except as provided in section B. of this rule;** relief in the alternative or of several different types may be demanded.

B.(1) The amount sought in a civil action for noneconomic damages, as defined in section 6 of this Act, shall not be pleaded in a complaint, counterclaim, cross-claim or third-party claim.

B.(2) The prayer in such actions shall contain only a demand for the payment of damages without specifying the amount.

B.(3) The party making the claim may supply to any adverse party a statement of the amount claimed for such damages, and shall do so within 10 days of a request for such statement. The

request and the statement shall not be made a part of the trial court file.

LIQUOR LIABILITY

SECTION 13. ORS 30.950 is amended to read:

30.950. No licensee, [*or*] permittee **or social host** is liable for damages incurred or caused by intoxicated patrons **or guests** off the [*licensee's or permittee's business*] **licensee, permittee or social host's** premises unless:

(1) The licensee, [*or*] permittee **or social host** has served or provided the patron alcoholic beverages [*when such patron*] **to the patron or guest while the patron or guest** was visibly intoxicated; **and** [.]

(2) The plaintiff proves by clear and convincing evidence that the patron or guest was served alcoholic beverages while visibly intoxicated.

SECTION 14. ORS 30.955 is repealed.

SECTION 15. (1) The police shall notify the Oregon Liquor Control Commission of the name of the alleged provider of alcoholic liquor when:

(a) The police investigate any motor vehicle accident where someone other than the operator is injured or incurs property damage;

(b) The operator appears to have consumed alcoholic liquor;

(c) A citation is issued against the operator that is related to the consumption of alcoholic liquor or could have been issued if the operator had survived; and

(d) The provider of the alcoholic liquor is alleged to be a licensee or permittee of the commission.

(2) The notice shall include the name and address of the operator involved and the name and address of the person who named the alleged provider, if the person is other than the operator.

(3) Upon receipt of the notice described in subsection (1) of this section, the commission shall cause the licensee or permittee named as the alleged provider to be notified of receipt of the notice and of its content. A copy of the notice shall be retained in the files of the commission and shall be open to inspection by the person injured or damaged by the motor vehicle operator or a representative of the person.

(4) The police shall notify the alleged social host when the circumstances described in subsection (1) of this section occur and the alleged social host is named as the provider of the alcoholic liquor. The notice shall include the information described in subsection (2) of this section.

SECTION 16. (1) The Insurance Commissioner shall conduct a study and report the results and recommendations to the Sixty-fifth Legislative Assembly on the following:

(a) The feasibility of a two-way or three-way insurance structure to insure liquor licensees;

(b) The practical and legal implications of a tax supported insured system with the tax being levied on wholesale and retail liquor licensees;

(c) Restrictions on premiums;

(d) Alternative systems such as the the Oregon State Bar Professional Liability Fund; and

(e) Other considerations relevant to insurance for liquor licenses.

(2) The report shall include an actuarial study done by the Insurance Commissioner of the costs of insurance for liquor licensees, including frequency and nature of claim, rates, damage awards and other relevant matters.

NONPROFIT CORPORATIONS

SECTION 17. ORS 61.205 is amended to read:

61.205. (1) A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the corporation) by reason of the fact that the person is or was a director, officer, employe or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employe or agent of another corporation, against expenses, [*(*]including attorney fees[*)*], judgments, fines and amounts paid in settlement actually and reasonably incurred by the person in connection with the action, suit or proceeding if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe the conduct of the person was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that the conduct of the person was unlawful.

(2) A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that the person is or was a director, officer, employe or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employe or agent of

appellate court shall direct that the circuit or district court transfer the action to the proper court.

SECTION 5. (1) Within 10 days after a circuit court orders transfer of an action to the district court under section 4 of this Act the clerk of the circuit court shall file with the clerk of the district court a transcript of the action including all the material entries in the records of the circuit court and all of the original papers relating to the action. Thereupon the circuit court shall proceed no further with the action. The action shall be considered transferred to the district court which shall then have jurisdiction to try and determine the action.

(2) The responding party shall have 10 days after the final date allowed for the transcript and original papers to be filed in the district court within which to plead further. If the circuit court clerk fails to file the transcript and original papers within the time specified, the presiding judge of the district court may order that clerk do so within a specified time.

SECTION 6. ORCP 21 G. is amended to read:

G. Waiver or preservation of certain defenses.

G.(1) A defense of lack of jurisdiction over the person, 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, 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 the defense is neither made by motion under this rule nor included in a responsive pleading. The defenses 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.(3) A defense of failure to state ultimate facts constituting a claim, 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.(4) **Except as provided in sections 2 and 4 of this 1987 Act,** 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.

SECTION 7. ORS 46.084 is amended to read:

46.084. **(1) Except as provided in subsection (2) of this section,** while the title to real property may be controverted or questioned in an action in district court, the judgment in [*said*] **the** action shall in no way affect or determine title between the parties or otherwise.

(2) In an action in a district court involving title to real property and in which objections to the jurisdiction of the court are considered waived as provided in subsection (3) of section 2 of this 1987 Act, a judgment of the court that would affect or determine title to the real property and that is docketed in the judgment docket of the circuit court shall, from the time of that docketing, affect or determine title to the real property as if it were a judgment of the circuit court where it is docketed.

SECTION 8. ORS 46.060 is amended to read:

46.060. (1) Except as provided in subsection (2) of this section, the district courts shall have exclusive jurisdiction in the following cases:

(a) For the recovery of money or damages only when the amount claimed does not exceed $10,000. When, in such a case arising out of contract, the ends of justice demand that an account be taken or that the contract be reformed or canceled, the district court shall have jurisdiction to decree such accounting, reformation or cancellation.

(b) For the recovery of specific personal property when the value of the property claimed and the damages for the detention do not exceed $10,000.

(c) For the recovery of any penalty or forfeiture, whether given by statute or arising out of contract, not exceeding $10,000.

(d) To give judgment without trial upon the confession of the defendant for any of the causes of action specified in this section, except for a penalty or forfeiture imposed by statute.

(e) To hear and determine actions of forcible entry and detainer.

(f) To enforce, marshal and foreclose liens upon personal property where the amount claimed for such liens does not exceed $10,000, and to render personal judgment therein in favor of any party.

(g) Actions and proceedings of interpleader and in the nature thereof, when the amount of money or the value of the property involved does not exceed $10,000.

(h) Actions and proceedings, whether legal or equitable, to preserve the property or rights of any party to an action of which the court has jurisdiction, and to enforce the collection of its own judgments, including all actions and proceedings in the nature of creditors' bills, and, in aid of execution, to subject the interest of a judgment

(d) The party offering the deposition has been unable to procure the attendance of the witness by subpena; or

(e) Upon application and notice, such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used; **or** [.]

(f) The deposition was taken in the same proceeding pursuant to ORCP 39 I.

SECTION 2. ORCP 39, as amended by promulgation on December 13, 1986, by the Council on Court Procedures, is amended to read:

RULE 39

DEPOSITIONS UPON ORAL EXAMINATION

A. When deposition may be taken. After the service of summons or the appearance of the defendant in any action, or in a special proceeding at any time after a question of fact has arisen, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) a special notice is given as provided in subsection C.(2) of this Rule. The attendance of a witness may be compelled by subpoena as provided in Rule 55.

B. Order for deposition or production of prisoner. The deposition of a person confined in a prison or jail may only be taken by leave of court. The deposition shall be taken on such terms as the court prescribes, and the court may order that the deposition be taken at the place of confinement or, when the prisoner is confined in this state, may order temporary removal and production of the prisoner for purposes of the deposition.

C. Notice of examination.

C.(1) General requirements. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify such person or the particular class or group to which such person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

C.(2) Special notice. Leave of court is not required for the taking of a deposition by plaintiff if the notice (a) states that the person to be examined is about to go out of the state, or is bound on a voyage to sea, and will be unavailable for examination unless the deposition is taken before the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, and (b) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and such signature constitutes a certification by the attorney that to the best of such attorney's knowledge, information, and belief the statement and supporting facts are true.

If a party shows that when served with notice under this subsection, the party was unable through the exercise of diligence to obtain counsel to represent such party at the taking of the deposition, the deposition may not be used against such party.

C.(3) Shorter or longer time. The court may for cause shown enlarge or shorten the time for taking the deposition.

C.(4) Non-stenographic recording. The notice of deposition required under subsection (1) of this section may provide that the testimony be recorded by other than stenographic means, in which event the notice shall designate the manner of recording and preserving the deposition. A court may require that the deposition be taken by stenographic means if necessary to assure that the recording be accurate.

C.(5) Production of documents and things. The notice to a party deponent may be accompanied by a request made in compliance with Rule 43 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 43 shall apply to the request.

C.(6) Deposition of organization. A party may in the notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf, and shall set forth, for each person designated, the matters on which such person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection does not preclude taking a deposition by any other procedure authorized in these rules.

C.(7) Deposition by telephone. The court may upon motion order that testimony at a deposition be taken by telephone, in which event the order shall designate the conditions of taking testimony, the manner of recording the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy.

D. Examination and cross-examination; record of examination; oath; objections. Examination and cross-

examination of witnesses may proceed as permitted at the trial. The person described in Rule 38 shall put the witness on oath. The testimony of the witness shall be recorded either stenographically or as provided in subsection C.(4) of this rule. If testimony is recorded pursuant to subsection C.(4) of this rule, the party taking the deposition shall retain the original recording without alteration, unless the recording is filed with the court pursuant to subsection G.(2) of this rule, until the final disposition of the action. If requested by one of the parties, the testimony shall be transcribed upon the payment of the reasonable charges therefor. All objections made at the time of the examination to the qualifications of the person taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted upon the [*transcription or recording*] **record**. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions on the party taking the deposition who shall propound them to the witness and see that the answers thereto are recorded verbatim.

E. Motion to terminate or limit examination. At any time during the taking of a deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted or hindered in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or any party, the court in which the action is pending or the court in the county where the deposition is being taken shall rule on any question presented by the motion and may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 36 C. If the order terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 46 A.(4) apply to the award of expenses incurred in relation to the motion.

F. Submission to witness; changes; statement.

F.(1) Necessity of submission to witness for examination. When the testimony is taken by stenographic means, or is recorded by other than stenographic means as provided in subsection C.(4) of this rule, and if any party or the witness so requests at the time the deposition is taken, the recording or transcription shall be submitted to the witness for examination, changes, if any, and statement of correctness. With leave of court such request may be made by a party or witness at any time before trial.

F.(2) Procedure after examination. Any changes which the witness desires to make shall be entered upon the transcription or stated in a writing to accompany the recording by the party taking the deposition, together with a statement of the reasons given by the witness for making them. Notice of such changes and reasons shall promptly be served upon all parties by the party taking the deposition. The witness shall then state in writing that the transcription or recording is correct subject to the changes, if any, made by the witness, unless the parties waive the statement or the witness is physically unable to make such statement or cannot be found. If the statement is not made by the witness within 30 days, or within a lesser time upon court order, after the deposition is submitted to the witness, the party taking the deposition shall state on the transcription or in a writing to accompany the recording the fact of waiver, or the physical incapacity or absence of the witness, or the fact of refusal of the witness to make the statement, together with the reasons, if any, given therefor; and the deposition may then be used as fully as though the statement had been made unless, on a motion to suppress under Rule 41 D., the court finds that the reasons given for the refusal to make the statement require rejection of the deposition in whole or in part.

F.(3) No request for examination. If no examination by the witness is requested, no statement by the witness as to the correctness of the transcription or recording is required.

G. Certification; filing; exhibits; copies.

G.(1) Certification. When a deposition is stenographically taken, the stenographic reporter shall certify, under oath, on the transcript that the witness was sworn in the reporter's presence and that the transcript is a true record of the testimony given by the witness. When a deposition is recorded by other than stenographic means as provided in subsection C.(4) of this rule, and thereafter transcribed, the person transcribing it shall certify, under oath, on the transcript that such person heard the witness sworn on the recording and that the transcript is a correct transcription of the recording. When a recording or a non-stenographic deposition or a transcription of such recording or non-stenographic deposition is to be used at any proceeding in the action or is filed with the court, the party taking the deposition, or such party's attorney, shall certify under oath that the recording, either filed or furnished to the person making the transcription, is a true, complete, and accurate recording of the deposition of the witness and that the recording has not been altered.

G.(2) Filing. If requested by any party, the transcript or the recording of the deposition shall be filed with the court where the action is pending. When a deposition is stenographically taken, the stenographic reporter or, in the case of a deposition taken pursuant to subsection C.(4) of this rule, the party taking the deposition shall enclose it in a sealed envelope, directed to the clerk of the court or the justice of the peace before whom the action is pending or such other person as may by writing be agreed upon, and deliver or forward it accordingly by mail or other usual channel of conveyance. If a recording of a deposition has been filed with the court, it may be

transcribed upon request of any party under such terms and conditions as the court may direct.

G.(3) Exhibits. Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party. Whenever the person producing materials desires to retain the originals, such person may substitute copies of the originals, or afford each party an opportunity to make copies thereof. In the event the original materials are retained by the person producing them, they shall be marked for identification and the person producing them shall afford each party the subsequent opportunity to compare any copy with the original. The person producing the materials shall also be required to retain the original materials for subsequent use in any proceeding in the same action. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

G.(4) Copies. Upon payment of reasonable charges therefor, the stenographic reporter or, in the case of a deposition taken pursuant to subsection C.(4) of this rule, the party taking the deposition shall furnish a copy of the deposition to any party or to the deponent.

H. Payment of expenses upon failure to appear.

H.(1) Failure of party to attend. If the party giving the notice of the taking of the deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court in which the action is pending may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by such other party and the attorney for such other party in so attending, including reasonable attorney's fees.

H.(2) Failure of witness to attend. If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because the attending party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by such other party and the attorney for such other party in so attending, including reasonable attorney's fees.

I. Perpetuation of testimony after commencement of action.

I.(1) After commencement of any action, any party wishing to perpetuate the testimony of a witness for the purpose of trial or hearing may do so by serving a perpetuation deposition notice.

I.(2) The notice is subject to subsections C.(1)[-] **through** (7) of this rule and shall additionally state:

I.(2)(a) A brief description of the subject areas of testimony of the witness; and

I.(2)(b) The manner of recording the deposition.

I.(3) Prior to the time set for the deposition, any other party may object to the perpetuation deposition. Such objection shall be governed by the standards of Rule 36 C. At any hearing on such an objection, the burden shall be on the party seeking perpetuation to show that: **(a)** the witness may be unavailable as defined in ORS [*40.465 (1) for the trial or hearing, or that*] **40.465 (1)(d) or (e) or ORS 45.250 (2)(a) through (d); or (b) it would be an undue hardship on the witness to appear at the trial or hearing; or (c)** other good cause exists for allowing the perpetuation. If no objection is filed, or if perpetuation is allowed, the testimony taken shall be admissible at any subsequent trial or hearing in the [*case*] **action**, subject to the Oregon [*Rules of*] Evidence **Code**.

I.(4) Any perpetuation deposition shall be taken not less than seven days before the trial or hearing on not less than [*fourteen*] **14** days' notice, unless [*good cause is shown*] **the court in which the action is pending allows a shorter period upon a showing of good cause.**

I.(5) To the extent that a discovery deposition is allowed by law, any party [*other than the one giving notice*] may conduct a discovery deposition of the witness prior to the perpetuation deposition.

I.(6) The perpetuation examination shall proceed as set forth in subsection D. [*herein*] **of this rule.** All objections to any testimony or evidence taken at the deposition shall be made at the time and noted upon the [*transcription or recording*] **record.** The court before which the testimony is offered shall rule on any objections before the testimony is offered. Any objections not made at the deposition shall be deemed waived.

SECTION 3. ORS 40.450 is amended to read:

40.450. As used in ORS 40.450 to 40.475, unless the context requires otherwise:

(1) A "statement" is:

(a) An oral or written assertion; or

(b) Nonverbal conduct of a person, if intended as an assertion.

(2) A "declarant" is a person who makes a statement.

(3) "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(4) A statement is not hearsay if:

(a) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

(A) Inconsistent with the testimony of the witness and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition;

(B) Consistent with the testimony of the witness and is offered to rebut an inconsistent statement or an express or implied charge against the witness of recent fabrication or improper influence or motive; or

transactions unless the purchaser, security interest holder or lienholder had actual knowledge of the lien:

(a) Securities as defined in ORS 78.1020;

(b) Retail purchases in the ordinary course of business;

(c) Casual sales of personal property;

(d) Attorney's liens;

(e) Insurance contract loans; or

(f) Passbook loans.

SECTION 42. ORS 314.430 is amended to read:

314.430. (1) If any tax imposed under ORS chapter 118, 119, 316, 317 or 318 or any portion of such tax is not paid within 30 days after it becomes due (or within five days, in the case of the termination of the tax year by the department under the provisions of ORS 314.440) and no provision is made to secure the payment thereof by bond, deposit or otherwise, pursuant to regulations promulgated by the department, the department may issue a warrant directed to the sheriff of any county of the state commanding the sheriff to levy upon and sell the real and personal property of the taxpayer found within that county, for the payment of the amount of the tax, with the added penalties, interest, collection charge and the sheriff's cost of executing the warrant, and to return such warrant to the department and pay to it the money collected by virtue thereof by a time to be therein specified, not less than 60 days from the date of the warrant.

(2) The sheriff shall, within five days after the receipt of the warrant, record with the clerk of the county a copy thereof, and thereupon the clerk shall enter in the County Clerk Lien Record the name of the taxpayer mentioned in the warrant, and the amount of the tax or portion thereof and penalties for which the warrant is issued and the date when such copy is recorded. Thereupon the amount of the warrant so recorded shall become a lien upon the title to and interest in property of the taxpayer against whom it is issued in the same manner as a judgment duly [*docketed*] **recorded.** The sheriff thereupon shall proceed upon the same in all respects, with like effect and in the same manner prescribed by law in respect to executions issued against property upon judgment of a court of record, and shall be entitled to the same fees for services in executing the warrant, to be added to and collected as a part of the warrant liability.

(3) In the discretion of the department a warrant of like terms, force and effect may be issued and directed to any agent authorized to collect taxes, and in the execution thereof the agent shall have all the powers conferred by law upon sheriffs, but is entitled to no fee or compensation in excess of actual expenses paid in the performance of such duty.

(4) If a warrant is returned not satisfied in full, the department shall have the same remedies to enforce the claim for taxes against the taxpayer as if the people of the state had recovered judgment against the taxpayer for the amount of the tax, and shall balance the assessment record of the taxpayer by transferring the unpaid deficiency to the taxpayer's delinquent record.

SECTION 43. ORCP 68 A. is amended to read:

A. Definitions. As used in this rule:

A.(1) Attorney fees. "Attorney fees" are the reasonable value of legal services related to the prosecution or defense of an action.

A.(2) Costs and disbursements. "Costs and disbursements" are reasonable and necessary expenses incurred in the prosecution or defense of an action other than for legal services, and include the fees of officers and witnesses; the expense of publication of summonses or notices, and the postage where the same are served by mail; the compensation of referees; the necessary expense of copying of any public record, book, or document used as evidence on the trial; **recordation of any document where recordation is required to give notice of the creation, modification or termination of an interest in real property;** a reasonable sum paid a person for executing any bond, recognizance, undertaking, stipulation, or other obligation therein; and any other expense specifically allowed by agreement, by these rules, or by other rule or statute. The expense of taking depositions shall not be allowed, even though the depositions are used at trial, except as otherwise provided by rule or statute.

SECTION 44. ORCP 83 E. is amended to read:

E. Issuance of provisional process where damage to property threatened. Subject to section B. of this rule, if the court finds that before hearing on a show cause order the defendant or other person in possession or control of the claimed property is engaging in, or is about to engage in, conduct which would place the claimed property in danger of destruction, serious harm, concealment, removal from this state, or transfer to an innocent purchaser or that the defendant or other person in possession or control of the claimed property would not comply with a temporary restraining order, and if Rule 82 A. has been complied with, the court shall order issuance of provisional process in property which probably would be the subject of such destruction, harm, concealment, removal, transfer, or violation. **Where real property is subject to provisional process as provided by this section, the plaintiff shall have recorded in the County Clerk Lien Record a certified copy of that order.**

SECTION 45. ORCP 84 A. is amended to read:

A. Actions in which attachment allowed.

A.(1) Order for provisional process. Before a writ of attachment may be issued or any property attached by any means provided by this rule, the plaintiff must obtain, **and have recorded in the County Clerk Lien Record,** an order under Rule 83 that provisional process may issue.

A.(2) Actions in which attachment allowed. The plaintiff, at the time of issuing the summons or any time afterwards, may have the property of the defendant

ched, as security for the satisfaction of any judgment that may be recovered, in the following cases:

A.(2)(a) An action upon a contract, expressed or implied, for the direct payment of money, when the contract is not secured by mortgage, lien, or pledge, or when it is so secured but such security has been rendered nugatory by act of the defendant.

A.(2)(b) An action against a defendant not residing in this state to recover a sum of money as damages for breach of any contract, expressed or implied, other than a contract of marriage.

A.(2)(c) An action against a defendant not residing in this state to recover a sum of money as damages for injury to property in this state.

A.(3) Exception for bank. Notwithstanding subsection (2) of this section, no attachment shall be issued against any bank or its property before final judgment as security for the satisfaction of any judgment that may be recovered against such bank.

SECTION 46. ORCP 84 C. is amended to read:

C. Attachment by claim of lien.

C.(1) Property subject to claim of lien. When attachment is authorized, the plaintiff may attach the defendant's real property by filing a claim of lien.

C.(2) Form of claim; filing.

C.(2)(a) Form. The claim of lien must be signed by the plaintiff or plaintiff's attorney and must:

C.(2)(a)(i) Identify the action by names of parties, court, docket number, and judgment demanded;

C.(2)(a)(ii) Describe the particular property attached in a manner sufficient to identify it;

C.(2)(a)(iii) Have a certified copy of the order authorizing the claim of lien attached to the claim of lien.

C.(2)(a)(iv) State that an attachment lien is claimed on the property.

C.(2)(b) Filing. A claim of attachment lien in real property shall be filed with the clerk of the court that authorized the claim and with the county clerk of the county in which the property is located. The county clerk shall certify upon every claim of lien so filed the time when it was received. Upon receiving the claim of lien, the county clerk shall immediately [*file such claim of lien in the county clerk's office, and record it in a book to be kept for that purpose*] **record it in the County Clerk Lien Record.** When the claim of lien is so [*filed for record*] **recorded,** the lien in favor of the plaintiff attaches to the real property described in the claim of lien. Whenever such lien is discharged, the county clerk shall enter upon the margin of the page on which the claim of lien is recorded a minute of the discharge.

SECTION 47. ORS 93.760 is amended to read:

93.760. [*(1)*] Copies of documents, orders and decrees in proceedings in the District Court of the United States for the District of Oregon, which have been certified by the clerk of such court, and which affect title to real property in this state, shall be entitled to be recorded in the deed records of any county in which such real property is located.

[*(2) Whenever any person presents to the county clerk a certificate from the clerk of the United States District Court of the foreclosure of any mortgage on real estate the county clerk shall make the record required by ORS 93.720.*]

SECTION 48. The County Clerk Lien Record in each county where the real property is located is the place of recording a lien filed pursuant to CERCLA, 100 U.S. Stat 1630.

SECTION 48a. ORS 223.620 is amended to read:

223.620. Suits authorized by ORS 223.610 shall be governed by ORS 88.010 to 88.100[, *93.720,*] and 93.760 and by all other laws relating to suits in equity insofar as applicable, except as otherwise provided in ORS 223.610 to 223.650.

SECTION 49. ORS 93.720 and 205.340 are repealed.

SECTION 50. This Act is effective January 1, 1988, and shall apply to all documents recorded on or after January 1, 1988.

SECTION 51. Nothing in this Act affects the validity of any lien on real property created by any document filed, docketed or recorded in accordance with then existing laws regarding the filing, docketing or recording of liens prior to the effective date of this Act.

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Filed in the office of Secretary of State July 13, 1987

garnishee, and the other duplicate original shall be filed with the clerk in the court record.] Any pending proceedings in such case for the sale upon execution of any property so garnished shall, as to all property covered by the release, thereupon be terminated and be considered of no effect. [*All costs are to be paid by the plaintiff.*]

[*(2)*] **(4)** Upon receipt by the garnishee of the duplicate original release, the garnishee, and all property subject to such garnishment, shall to the extent stated in the release, be released from all liability arising by reason of the issuance and service of the writ of garnishment, or by reason of the garnishee's return thereon as though the garnishment documents had not been served. The garnishee may rely upon any such release so received without any obligation to inquire into the authority therefor.

[*(3) The authority vested by this section in the clerk of the court to issue releases is not exclusive but in addition to the authority of the court having jurisdiction of the cause to release, discharge or dissolve garnishments.*]

SECTION 19. ORCP 70 A. is amended to read:

A. Form. Every judgment shall be in writing plainly labeled as a judgment and set forth in a separate document. A default or stipulated judgment may have appended or subjoined thereto such affidavits, certificates, motions, stipulations, and exhibits as may be necessary or proper in support of the entry thereof.

A.(1) Content. No particular form of words is required, but every judgment shall:

A.(1)(a) Specify clearly the party or parties in whose favor it is given and against whom it is given and the relief granted or other determination of the action.

A.(1)(b) [*The judgment shall*] Be signed by the court or judge rendering such judgment or, in the case of judgment entered pursuant to Rule 69 B.(1), by the clerk.

A.(1)(c) If the judgment provides for the payment of money, contain a summary of the type described in section 70 A.(2) of this rule.

A.(2) Summary. When required under section 70 A.(1)(c) of this rule a judgment shall comply with the requirements of this part. These requirements relating to a summary are not jurisdictional for purposes of appellate review and are subject to the requirements under section 70 A.(3) of this rule. A summary shall include all of the following:

A.(2)(a) The names of the judgment creditor and the creditor's attorney.

A.(2)(b) The name of the judgment debtor.

A.(2)(c) The amount of the judgment.

A.(2)(d) The interest owed to the date of the judgment, either as a specific amount or as accrual information, including the rate or rates of interest, the balance or balances upon which interest accrues, the date or dates from which interest at each rate on each balance runs, and whether interest is simple or compounded and, if compounded, at what intervals.

A.(2)(e) Any specific amounts awarded in the judgment that are taxable as costs or attorney fees.

A.(2)(f) Post-judgment interest accrual information, including the rate or rates of interest, the balance or balances upon which interest accrues, the date or dates from which interest at each rate on each balance runs, and whether interest is simple or compounded and, if compounded, at what intervals.

A.(2)(g) For judgments that accrue on a periodic basis, any accrued arrearages, required further payments per period and accrual dates.

A.(3) Submitting and certifying summary. The following apply to the summary described under section 70 A.(2) of this rule:

A.(3)(a) The summary shall be served on the opposing parties who are not in default or on their attorneys of record as required under ORCP 9.

A.(3)(b) The attorney for the party in whose favor the judgment is rendered or the party directed to prepare the judgment shall certify on the summary that the information in the summary accurately reflects the judgment.

SECTION 20. ORCP 84 D. is amended to read:

D. Writ of attachment.

D.(1) Issuance; contents; to whom directed; issuance of several writs. If directed by an order authorizing provisional process under Rule 83, the clerk shall issue a writ of attachment. The writ shall be directed to the sheriff of any county in which property of the defendant may be, and shall require the sheriff to attach and safely keep all the property of the defendant within the county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which shall be stated in conformity with the complaint, together with costs and expenses. Several writs may be issued at the same time to the sheriffs of different counties.

D.(2) Manner of executing writ. The sheriff to whom the writ is directed and delivered shall note upon the writ the date of such delivery, and shall execute the writ without delay, as follows:

D.(2)(a) Personal property not in possession of third party. Tangible personal property not in the possession of a third person shall be attached by taking it into the sheriff's custody. If any property attached is perishable, or livestock, where the cost of keeping is great, the sheriff shall sell the same in the manner in which property is sold on execution. The proceeds thereof and other property attached shall be retained by the sheriff to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment. Plaintiff's lien shall attach when the property is taken into the sheriff's custody.

D.(2)(b) Other personal property. Tangible and intangible personal property in the possession, control or custody of or debts or other monetary obligations owing by a third person shall be attached **by writs of garnishment issued by the clerk of a court** as provided in ORS 29.125 to 29.375.

D.(3) Return of writ; inventory. When the writ of attachment has been fully executed or discharged, the sheriff shall return the same, with the sheriff's proceedings indorsed thereon, to the clerk of the court where the action was commenced, and the sheriff shall make a full inventory of the property attached and return the same with the writ.

D.(4) Indemnity to sheriff. Whenever a writ of attachment is delivered to the sheriff, if the sheriff has actual notice of any third party claim to the personal property to be levied on or is in doubt as to ownership of the property, or of encumbrances thereon, or damage to the property held that may result by reason of its perishable character, such sheriff may require the plaintiff to file with the sheriff a surety bond, indemnifying the sheriff and the sheriff's bondsmen against any loss or damage by reason of the illegality of any holding or sale on execution, or by reason of damage to any personal property held under attachment. Unless a lesser amount is acceptable to the sheriff, the bond shall be in double the amount of the estimated value of the property to be seized.

SECTION 21. ORS 18.335 is amended to read:

18.335. **(1)** In every proceeding, the clerk shall attach together, file and maintain in the office of the clerk until all actions in such proceeding have been completed and any judgment entered in such proceeding either has expired or has been satisfied, in the order of their filing, all **the following:**

(a) The original papers filed in the court, whether before or after judgment, including but not limited to the summons and proof of service, pleadings, motions, affidavits, depositions, stipulations[,] **and** orders. [,]

(b) The judgment. [*and*]

(c) The notice of appeal and the undertaking on appeal, if any.

(2) The court in which the judgment was originally entered is the only court with authority to issue post-judgment process under ORS chapter 23 or 29 against personal property involving that judgment. This subsection does not apply to justice courts. If a judgment is a foreign judgment registered in this state, then the court in this state where the judgment was first filed is the only court with authority to issue post-judgment process against personal property involving that judgment.

SECTION 22. ORS 23.168 is amended to read:

23.168. Except as provided in ORS 23.445, the judgment debtor's claim of exemption shall, upon application of either plaintiff or judgment debtor, be adjudicated in a summary manner at a hearing in [*the court out of which the execution issued.*] **the following court:**

(1) The court out of which the execution issued.

(2) In the case of garnishment, the court where the judgment was originally entered or, if a foreign judgment registered in this state, in the court where the judgment was originally filed.

SECTION 23. ORS 23.720 is amended to read:

23.720. (1)(a) On the appearance of the judgment debtor, the judgment debtor may be examined on oath concerning the judgment debtor's property. Examination of the judgment debtor, if required by the plaintiff in the writ, shall be reduced to writing, and filed with the clerk by whom the execution was issued. Both parties may examine witnesses in their own behalf. The power to call witnesses includes the power to subpena them.

(b) If by examination of the judgment debtor it appears that the judgment debtor has any property liable to execution **or garnishment**, the court or judge before whom the proceeding takes place, or to whom the report of the referee is made, shall make an order requiring the judgment debtor to apply the same in satisfaction of the judgment, or that such property be levied on by execution, **or garnishment** or both, as may seem most likely to effect the object of the proceeding.

(2)(a) At any time after judgment, plaintiff may serve personally or in the same manner as a summons, or by any form of mail addressed to the judgment debtor and requesting a receipt, written interrogatories concerning the judgment debtor's property and financial affairs. The interrogatories shall notify the judgment debtor that the judgment debtor's failure to answer the interrogatories truthfully shall subject the judgment debtor to the penalties for false swearing contained in ORS 162.075 and for contempt of court as provided in ORS 33.020.

(b) Within 20 days after receipt of the interrogatories the judgment debtor shall answer all questions under oath and return the original interrogatories to the judgment creditor or the judgment creditor's attorney, and shall retain a copy thereof.

(c) Failure of the judgment debtor to comply with the provisions of this section is an indirect contempt of the authority of the court and the judgment creditor may proceed as provided in ORS 33.040.

SECTION 24. ORS 23.730 is amended to read:

23.730. At the time of allowing the order prescribed in ORS 23.710, or at any time thereafter pending the proceeding, the court or judge may make an order restraining the judgment debtor from selling, transferring, or in any manner disposing of any property of the judgment debtor liable to execution **or garnishment**, pending the proceeding.

SECTION 25. ORS 24.125 is amended to read: