COUNCIL ON COURT PROCEDURES

Saturday, September 17, 1988 Meeting
9:30 a.m.

University of Oregon School of Law (Room 121)
Eugene, Oregon

A G E N D A

1. Public Comment

2. Minutes of the meeting of June 25, 1988

3. ORCP 71 - proposed statute (Merrill memo of 5-11-88 and Thorp memo of 5-17-88) (deferred from last meeting)

4. Satisfaction of judgment (report - Judge Liepe)

5. ORCP 44 (Diana Godwin letter of June 21, 1988 - Merrill memo)

6. ORCP 70 A(2) (Merrill memo)

7. ORCP 80 F(3) (Merrill Memo)

8. ORCP 4 E (Merrill memo)

9. ORCP 69 B(2) (Merrill memo)

10. ORCP 69 B (Procedure and Practice Committee)

11. Review of cases interpreting ORCP 21-64

12. Amendment to change plaintiff (letter of Judge Liepe of August 9, 1988 - Merrill letter of September 9, 1988)

13. Application of ORCP to writs (letter of Justice Jones of July 11, 1988 - Merrill letter of September 9, 1988)

14. ORCP 18 B (letter of Robert Newell of August 25, 1988)

15. Method and timing of publication of amendments (attached)

16. NEW BUSINESS

COUNCIL ON COURT PROCEDURES

Minutes of Meeting of September 17, 1988

University of Oregon School of Law, Room 121

Eugene, Oregon

Present:	Raymond J. Conboy	Richard P. Noble
	L. G. Harter	Steven H. Pratt
	Winfrid Liepe	James E. Redman
	R. B. McConville	Martha Rodman
	R. L. Marceau	J. Michael Starr
	Jack L. Mattison	Laurence Thorp
Absent:	Richard L. Barron	John V. Kelly
	John H. Buttler	Paul J. Lipscomb
	Lee Johnson	Wm. F. Schroeder
	Robert E. Jones	Elizabeth H. Yeats
	Henry Kantor	

Diana Godwin, on behalf of the Oregon Psychological Association, and Kathryn S. Augustson, representing the Oregon State Bar Procedure and Practice Committee, were also present.

(Also present were Fredric R. Merrill, Executive Director, and Gilma J. Henthorne, Management Assistant)

The meeting was called to order by Chairer Raymond J. Conboy at 9:30 a.m.

The Chairer announced that Judge Riggs had submitted his resignation as a member of the Council and that an appointment would be made to fill his unexpired term.

The Chairer asked members of the public in attendance to present any statements they wished to make. None was received at this time. Ms. Godwin and Ms. Augustson appeared later and presented their views concerning ORCP 44 and ORCP 69, respectively.

Agenda Item No. 3: ORCP 71 - proposed statute (Merrill memo of 5/11/88 and Thorp memo of 5/17/88). Larry Thorp reported that the Council had received a letter and proposal (attached to the Executive Director's memorandum of September 9, 1988) from James Nass, Legal Counsel, State Court Administrator's Office. The letter states that Chief Judge Joseph and Chief Justice Peterson

are in general agreement that the trial courts ought to have the authority to rule on motions filed under both ORCP 71 A and 71 B during the pendency of an appeal, but that they did not believe that it was necessary to obtain leave of the appellate court before a motion could be filed in court for relief under ORCP 71 A or ORCP 71 B. Based upon the suggestions in the letter, Larry Thorp presented the following revision of ORCP 71 A and recommended the following amendment of ORS 19.033:

RULE 71

A. Clerical mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own motion or on the motion of any party and after such notice to all parties who have appeared, if any, as the court orders. [During the pendency of an appeal, a judgment may be corrected under this section only with leave of the appellate court.]

B. Mistakes; inadvertence; excusable neglect; newly discovered evidence, etc.

B.(1) By motion. On motion and upon such terms as are just, the court may relieve a party or such party's legal representative from a judgment for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 64 F; (c) fraud, misrepresentation, or other misconduct of an adverse party; (d) the judgment is void; or (e) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. A motion for reasons (a), (b), and (c) shall be accompanied by a pleading or motion under Rule 21 A which contains an assertion of a claim or defense. The motion shall be made within a reasonable time, and for reasons (a), (b), and (c) not more than one year after receipt of notice by the moving party of the judgment. A copy of a motion filed within one year after receipt of notice by the moving part of the judgment. A copy of a motion filed within one year after the entry of the judgment shall be served on all parties as provided in Rule 9 B., and all other motions filed under this rule shall be served as provided in Rule 7. A motion under this section does not affect the finality of a judgment or suspend its operation.

B.(2) When appeal pending. [With leave of the appellate court, and subject to the time limitations of subsection (1) of this section, a] A motion under [this

section] **sections A or B** may be filed with **and decided by** the trial court during the time an appeal from a judgment is pending before an appellate court [but no relief may be granted by the trial court during the pendency of an appeal]. **The moving party shall serve a copy of the motion on the appellate court.** [Leave to file the motion need not be obtained from any appellate court, except during such time as an appeal from the judgment is actually pending before such court.] **The moving party shall file a copy of the trial court's order in the appellate court within seven days of the date of the trial court order. Any necessary modification of the appeal required by the court order shall be pursuant to rule of the appellate court.**

* * * *

ORS 19.033

(1) * * * *

(2) * * * *

(3) * * * *

(4) Notwithstanding the filing of a notice of appeal, the trial court shall have jurisdiction[,]:

(a) With leave of the appellate court, to enter an appealable judgment if the appellate court determines that:

[(a)] **(i)** At the time of the filing of the notice of appeal the trial court intended to enter an appealable judgment; and

[(b)] **(ii)** The judgment from which the appeal is taken is defective in form or was entered at a time when the trial court did not have jurisdiction of the cause under subsection (1) of this section, or the trial court had not yet entered an appealable judgment.

(b) To enter an order under ORCP 71.

(5) * * * *

Larry Thorpe made a motion, seconded by Steve Pratt, that the amendment of ORCP 71 A be adopted and the amendment of ORS 19.033 be recommended, with a revision in 71 A so that the final sentence would read:

"During the pendency of an appeal, a judgment may be corrected as provided in 71 B(2)."

The motion passed unanimously.

Agenda Item No. 4: Satisfaction of judgment (report - Judge Liepe). Judge Liepe had prepared a draft of a new rule (Rule 74) (attached to these minutes as Exhibit No. 1) pertaining to satisfaction of money judgments. Copies were distributed to members of the Council at the meeting. Judge Liepe stated that the purpose of the proposed rule would be to provide a procedure for compelling entry of satisfaction when a judgment has been paid in full and that the procedure would put the burden on the parties.

After discussion, the Executive Director was asked to send the proposal to the Debtor/Creditor Section of the Oregon State Bar and to Karen Hightower with the State Court Administrator's Committee (which has been working on these issues) and to obtain comment from those committees. It was suggested that action on the proposal probably could not be completed by December, but the proposal would be considered for action during the next biennium.

Agenda Item No. 5: ORCP 44 (Diana Godwin letter of June 21, 1988 - Merrill memo). Diana Godwin, speaking on behalf of her client, the Oregon Psychological Association, stated that the language of ORCP 44, which allows a court to order a party "to submit to a physical or mental examination by a physician", has been interpreted and applied literally by some courts in Oregon to preclude licensed psychologists from conducting mental examinations. She submitted a requested amendment to ORCP 44 to allow either a physician or psychologist to conduct a mental examination of a party (attached to these minutes as Exhibit No. 2).

After a lengthy discussion, a motion was made by Steve Pratt, seconded by Judge McConville, to adopt an amendment to ORCP 44 which would allow examinations to be conducted by a "... physician or licensed psychologist under Chapter 675 ..." The motion failed, with seven opposed and five in favor.

Judge McConville then made a motion that the term "examiner", instead of "physician", be used in ORCP 44. A motion to table the motion passed with eight in favor and four opposed.

A motion was made by Judge Liepe, seconded by Judge McConville, that some term be substituted for "physician" in ORCP 44. The motion failed with seven opposed and five in favor.

Agenda Item No. 6: ORCP 70 A(2) (Merrill memo). The Executive Director presented the following proposed amendment to ORCP 70:

RULE 70

* * * *

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

A(2) Summary. When required under paragraph [section] 70 A(1)(c) of this rule a judgment shall comply with the requirements of this section [part]. These requirements relating to a summary are not jurisdictional for purposes of appellate review and are subject to the requirements under subsection 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[.], excluding any amount awarded as costs and disbursements or awarded for attorney fees under Rule 68.

(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 and attorney fees.]

A(2)[(f)](e) 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, at what intervals.

A(2)[(g)](f) 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 subsection 70 A(2) of this rule:

* * * *

STAFF COMMENT - 1988

The Council was concerned that the summary of judgment requirement added by the 1986 Legislative Assembly created problems when applied to items awarded under ORCP 68. ORCP 68 contemplates, and it is common practice, that the amount of attorney fees and costs and disbursements are determined after entry of the principal judgment. It may be difficult to include these amounts in the summary contained in the principal judgment. The Council amended ORCP 70 A(2) to exclude amounts awarded under ORCP 68 from the summary of judgment requirement. The Council felt that including costs and disbursements and attorney fees in the summary was of relatively little benefit. This portion of the judgment is usually a simple monetary amount, clearly listed in the cost bill or directed by the court, and it is unnecessary to repeat it in a summary.

It was suggested that the words "of this rule" be deleted as appropriate and, with that change, the Council voted unanimously to adopt the amendment.

Agenda Item No. 7: ORCP 80 F(3) (Merrill memo). The Executive Director presented the following proposed amendment to ORCP 80:

RULE 80

* * * *

F.(3) Form and service of notices. Any notice required by this [rule] section [(except petitions for the sale of perishable property, or other personal property, the keeping of which will involve expense or loss)] shall be [addressed to] served in the manner provided in Rule 9, at least five days [(10 days for notices under section G of this rule)] before the hearing on any of the matters above described [; or personal service of such notice may be made on the person to be notified or such person's attorney not less than five days (10 days for notices under section G of this rule) before such hearing], unless a different period is fixed by order of the court. [Proof of mailing or personal service must be filed with the clerk before the hearing. If upon hearing it appears to the satisfaction of

the court that the notice has been regularly given, the court shall so find in its order.]

STAFF COMMENT - 1988

ORCP 80 F(3) was amended by the Council to eliminate an apparent drafting error in the original rule and to simplify the rule. The detailed language directing form of service in subsection 80 F(3) was apparently included in the subsection because notices covered in section F of Rule 80 are those directed to persons who are not parties to the proceedings. ORCP 9 only refers to service of papers upon parties. The subsection, however, referred to notices under the "rule", not the "section", and created an ambiguity as to the required manner of service for notices under other sections of Rule 80, such as sections C, D and G. The Council changed this. It also opted to provide for service in the same manner as service on parties under ORCP 9. The Council also added explicit authority for the Court to vary the notice period and eliminated the parenthetical exception to the notice requirement for petitions for the sale of perishable property. It was unclear in such situations whether notice was not required or the judge could vary the notice requirement. The Council assumed that, with explicit authority to vary the notice requirement, the Court could take care of any emergency situation involving sale of perishable property. Finally, the Council eliminated the last two sentences of the original rule, which required filing of proof of service before the hearing and finding by the court of the adequacy of notice. Filing and proof of service are explicitly required by ORCP 9 C which would apply to notices served under ORCP 80 F because service of such notices must be in the manner provided for by ORCP 9. There seemed to be no stronger reason to direct the Court to make reference to the adequacy of service in an order entered under ORCP 80 F than any other type of order.

A motion was made by Larry Thorp, seconded by Mike Starr, to adopt the amendment, and the motion was unanimously passed.

Agenda Item No. 8: ORCP 4 E (Merrill memo). The Executive Director presented the following proposed amendment to ORCP 4 E:

RULE 4

* * * *

E. Local services, goods, or contracts. In any action or proceeding which:

E(1) Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this state[,] or to pay for services to be performed in this state by the plaintiff [, or to guarantee payment for such services]; or

E(2) arises out of services actually performed for the plaintiff by the defendant within this state or services actually performed for the defendant by the plaintiff within this state, if such performance within this state was authorized or ratified by the defendant [or payment for such services was guaranteed by the defendant]; or

E(3) Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this state or to send from this state goods, documents of title, or other things of value [or to guarantee payment for such goods, documents, or things]; or

E(4) Relates to goods, documents of title, or other things of value sent from this state by the [plaintiff] defendant to the [defendant] plaintiff or to a third person on the [defendant's] plaintiff's order or direction [or sent to a third person when payment for such goods, documents, or things was guaranteed by defendant]; or

E(5) Relates to goods, documents of title, or other things of value actually received in this state by the plaintiff [in this state] from the defendant or by the defendant from the plaintiff, without regard to where delivery to carrier occurred.

STAFF COMMENT - 1988

The Council amended ORCP 4 E to make the language more consistent with constitutional limits in the area covered.

The Council amended subsections 4 E(1)-(4) to eliminate reference to jurisdiction based solely upon guarantee of payment. State ex rel Sweere v. Crookham, 289 Or. 3, 609 P.2d 361 (1980.

ORCP 4 E(4) was amended to eliminate jurisdiction based solely upon receipt of goods sent from the state by the seller to the defendant-purchaser, and to permit jurisdiction based upon a defendant-seller sending goods to a plaintiff-buyer outside the state. The form of jurisdiction included is within constitutional limits but the form excluded is of doubtful constitutionality. Neptune Microfloc, Inc. v. First Florida Utilities, 262 Or. 494, 495 P.2d 263 (1972).

ORCP 4 E(5) was amended to provide that, if a defendant either sends goods into the state or receives goods sent into the state, there is a basis for jurisdiction.

The following modifications were suggested for the comment. In the third paragraph, fourth line, the words "from Oregon" should be inserted after "...sending goods". In the last paragraph the words "documents of title, or other things of value" should be added after both "sends goods" and "receives goods", and at the end of the sentence the words "over claims relating to these matters" should be added.

A motion was made by Larry Thorpe, seconded by Judge McConville, to adopt the amendment, and the motion passed unanimously.

ORCP 69 B(2) (Merrill memo). The Executive Director presented the following proposed amendment to ORCP 69 B(2):

RULE 69

* * * *

B.(2) By the court. In all other cases, the party seeking a judgment by default shall apply to the court therefor, but no judgment by default shall be entered against a minor or an incapacitated person unless [they] **the minor or incapacitated person** [have] **has** a general guardian or [they] **the minor or incapacitated person** [are] **is** represented in the action by another representative as provided in Rule 27.

It was suggested that the last reference to "the minor or incapacitated person" was superfluous and should be deleted. Subject to this suggestion, a motion was made by Larry Thorp, seconded by Judge McConville, to adopt the amendment. The motion passed unanimously.

ADDITIONAL AGENDA ITEM - ORCP 7 D(4) (Merrill memo of September 15, 1988). The Executive Director presented the following proposed amendment to ORCP 7:

RULE 7

D. Manner of service.

* * *

D(2)d) **Service by mail.** Service by mail, when required or allowed by this rule, shall be mailed by mailing a true copy of the summons and a true copy of the complaint to the defendant by certified or registered mail, return receipt requested. For the purpose of computing any period of time prescribed or allowed by these rules, service by mail shall be complete three days after such mailing if the address to which it was mailed is within this state and seven days after mailing if the address to which it is mailed is outside this state.

* * *

D. Particular actions involving motor vehicles.

D(4)(a)i) In any action arising out of any accident, collision, or liability in which a motor vehicle may be involved while being operated upon the roads, highways, and streets of this state, any defendant who operated such motor vehicle, or caused such motor vehicle to be operated on the defendant's behalf, except a defendant which is a foreign corporation maintaining a registered agent within this state, may be served with summons by personal service upon the Motor Vehicles Division and mailing, in accordance with paragraph 7 D(2)(d) of this rule, a copy of the summons and complaint to the defendant and the defendant's insurance carrier if known.

D(4)(a)(ii) Summons may be served by leaving one copy of the summons and complaint with a fee of $12.50 in the hands of the Administrator of the Motor Vehicles Division or in the Administrator's office or at any office the Administrator authorizes to accept summons. The plaintiff, as soon as reasonably possible, shall cause to be mailed, in accordance with paragraph 7 D(2)(d) of this rule, a true copy of the summons and complaint to the defendant at the address given by the defendant at the time of the accident or collision that is the subject of the action, the most recent address as shown by the Motor Vehicles Division's driver records, and any other address of the defendant known to the plaintiff, which might result in actual notice and the defendant's insurance carrier if known. For purposes of computing any period of time prescribed or allowed by these rules, service under this paragraph shall be complete upon such mailing.

Judge Liepe stated that if the suggestion was not accepted and ordinary mail specified, ORCP 7 D(4)(c), regarding default, would have to be changed. It was also suggested that the reference to the necessity that the letter mailed to the defendant be "received or rejected" in D(4)(c) was confusing.

A motion was made by Judge Liepe, seconded by Martha Rodman, to adopt the changes as shown and the motion passed unanimously. The Executive Director stated that he would submit something for consideration by the Council relating to the "received or rejected" language at the next meeting.

ORCP 69 B (Oregon State Bar Procedure and Practice Committee suggested amendment). Kathryn S. Augustson, speaking on behalf of the Oregon State Bar Procedure and Practice Committee, presented a proposed amendment to ORCP 69 A and B (attached to these minutes as Exhibit No. 3) She stated that it was the consensus of the Committee that a party, who has either filed an appearance or who has given written notice of an intent to appear, should be given notice before an order of default is entered. She also stated that the OSB Committee recommended deletion of the notice before entry of judgment, in 69 B(2), by a divided vote.

After considerable discussion, it was the consensus of the Council that the OSB Procedure and Practice Committee's amendments to ORCP 69 be placed on the agenda for consideration at the next meeting and that notice of Council consideration of the amendment, along with other matters, would be published in the Bar Bulletin.

Agenda Item No. 11 (review of cases interpreting ORCP 21-64). The Executive Director suggested that any problems revealed by the cases interpreting these rules be considered at the next meeting, with the understanding that no action would probably be taken until the next biennium.

Agenda Item No. 12 (amendment to change plaintiff) (letter of Judge Liepe of August 9, 1988 an Merrill letter of September 9, 1988). The Executive Director suggested that consideration of ORCP 30 be deferred for a later meeting.

Agenda Item No. 13 (application of ORCP to writs) (letter of Justice Jones of July 11, 1988 and Merrill letter of September 9, 1988). The Executive Director recommended that this matter be deferred until the next biennium.

Agenda Item No. 14 (letter of Robert Newell of August 25, 1988). Mr. Newell asked the Council to clarify whether, under

ORCP 18 B, the statement of non-economic damages provided by claimant's counsel functions as a limit on the amount the jury can award. The Council decided to take no action at this time.

Agenda Item No. 15 (method and timing of publication of amendments). The Council discussed the method and timing of publication of notice to the bar and public of the actions it has taken this biennium. The Executive Director stated that he would submit a short review of the tentative amendments agreed to by the Council to date, along with the Practice and Procedure Committee suggestion for ORCP 69, to the Oregon State Bar for publication the **Bar Bulletin** in October. This would comply with the Council bylaws requiring notice of proposed changes prior to the October meeting. He also stated that, unless there was objection from Council members, he or the Chairer would write to the Chief Justice of the Oregon Supreme Court and request that any amendments to rules promulgated by the Council in December be published in the Advance Sheets. There was no objection.

The meeting schedule for the remainder of the biennium is as follows (all in the offices of the Oregon State Bar in Lake Oswego):

Saturday, October 15, 1988, 9:30 a.m.
Saturday, November 12, 1988, 9:30 a.m.
Saturday, December 10, 1988, 9:30 a.m.

The meeting adjourned at 12:42 p.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

M E M O R A N D U M

September 8, 1988

TO: **MEMBERS, COUNCIL ON COURT PROCEDURES**

FROM: Fred Merrill, Executive Director

RE: Miscellaneous matters from previous meetings

Attached are amendments to rules which have been tentatively agreed to at previous meetings and the proposed staff comments. The following rules are to be amended: 10 A, 59 C(6) and 68 B(2).

The following matters remain under consideration from previous meetings.

1. ORCP 71 (plus proposed statute), relating to motions to vacate while cases are on appeal). Covered in previous memoranda.

2. ORCP 44. Federal Rule of Civil Procedure 35 is similar to the Oregon rule and refers to mental and physical examinations by a physician. A quick and sloppy check of most of the other states turned up two which have rules that allow the court to direct physical and mental examinations by an "examiner". Ohio Rule of Civil Procedure 35 and Wisc. Rule of Civil Procedure 804.10. The only rule I could find which makes specific reference to psychologists is Cal. Code of Civil Procedure 3032, which is attached.

There has been remarkably little litigation of the question on the federal level. I found two district court cases that say the court has no authority to direct examination by a psychologist. Soudelier v. Tug Nan Services, Inc., 116 F.2d 429 (E.D. La. 1987) and Matey v. Marroni, 82 FRD 371 (E.D. Pa. 1979). There is one district court opinion, Massey v Manitowoc Company, Inc., 101 FRD 304 (E.D. Pa. 1983) that allows compelled psychological testing by a psychologist. Apparently, there is dispute raging between some of the judges and magistrates in the Eastern District of Louisiana over whether compelled examinations by vocational experts, who are psychologists, not doctors, should be allowed in federal workers' compensation cases. A discussion of a number of unreported contradictory decisions appears in Bates v. McDermott Incorporated and Petroleum Helcopters, Inc., April 12, 1988, which is reported in Westlaw but not FRD.

The term "physician" certainly is broad enough to encompass persons other than MDs. The dictionary definition is " A person skilled in the art of healing. One whose profession is to prescribe remedies for disease." The real issue is whether or not examinations by psychologists should be compelled. The question is whether, given the substantial intrusion into the privacy of a party presented by a mental examination, there is danger of abuse, if persons other than persons with an MD are allowed to conduct the examinations. The only opinion that addresses this is in the Massey case, where the court said:

> I come now to the real dispute involved, whether Dr. Spergel, a licensed psychologist, but who is not a licensed medical doctor, can administer the tests in light of the literal language of Rule 35 that an examination be "by a physician." I conclude that under the circumstances presented a licensed psychologist can be treated as a physician for the purposes of conducting an examination under Rule 35.
>
> In view of the fact that I have already determined that psychological testing may be performed, is there any legitimate reason why only physicians should be permitted to administer the examination? Neither the rule itself nor the advisory committee notes shed light on the subject. One can only assume that because such examinations involve a limited invasion of personal privacy, the main concern involved limiting the individuals permitted to make such examinations to those properly qualified. In any physical examination requiring the examiner to be a physician is quite apparent and logical. However, the study of mental health and thought processes is not within the exclusive domain of physicians. The requirement that the examiner hold a medical degree may not always be necessary. So long as there are adequate assurances that the examiner is qualified to conduct the type of examination given, the purpose of Rule 35 will be satisfied.
>
> The practice of psychology is subject to regulation and control in Pennsylvania. 63 Pa. Stat. Ann. tit. 63 § 1201 (Purdon Supp. 1982). The licensing requirements require that an individual must at the least be of acceptable moral character, be a graduate of an accredited college or university holding a master's degree in psychology or other behavioral science plus four years of experience acceptable to the board, or a doctor's degree and two years experience, and have passed an examination adopted by the board. Id. § 1206. Such requirements provide the necessary safeguards for preventing any abuse of Rule 35. It is perfectly reasonable to allow qualified psychologists to administer psychological tests once it has been determined

psychological testing is appropriate in a particular case. The argument is not mere bootstrapping. Considering their required specialized training and experience, psychologists will in some instances be best qualified to administer examinations that require psychological testing. That is what they have been trained to do. To require that only a medical doctor, who may or may not have received specialized training in psychiatry or psychology, be permitted to administer the tests because Rule 35 permits utilizing only a "physician," would not serve the ends of justice.

3. The following is the draft of ORCP 70 A(2) containing the changes requested by the Council at the last meeting: (note that it was necessary to include A.(1)(c) and A.(3) to get the section subsection labels straight)

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

A(2) Summary. When required under **paragraph** [section] 70 A(1)(c) of this rule a judgment shall comply with the requirements of this **section** [part]. These requirements relating to a summary are not jurisdictional for purposes of appellate review and are subject to the requirements under **sub**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[.]**, excluding any amount awarded as costs and disbursements or awarded for attorney fees under Rule 68.**

(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 and attorney fees.]

A(2)[(f)](e) 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, at what intervals.

A(2)[(g)]__(f)__ 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 __sub__section 70 A(2) of this rule:

* * * *

STAFF COMMENT - 1988

The Council was concerned that the summary of judgment requirement added by the 1986 Legislative Assembly created problems when applied to items awarded under ORCP 68. ORCP 68 contemplates, and it is common practice, that the amount of attorney fees and costs and disbursements are determined after entry of the principal judgment. It may be difficult to include these amounts in the summary contained in the principal judgment. The Council amended ORCP 70 A(2) to exclude amounts awarded under ORCP 68 from the summary of judgment requirement. The Council felt that including costs and disbursements and attorney fees in the summary was of relatively little benefit. This portion of the judgment is usually a simple monetary amount, clearly listed in the cost bill or directed by the court, and it is unnecessary to repeat it in a summary.

As requested, I looked at the Uniform Trial Court Rules. Rule 5.090 prescribes a form of summary under ORCP 70 A. A copy of the form is attached. The form raises some questions. If the Council amends the rule, the Supreme Court needs to be advised so that parts 6 and 7 of the form can be eliminated. The way the form is set up, perhaps no amendment is needed. If this is the standard form for a money judgment case, perhaps 6 and 7 can be left blank and filled in when the appropriate amounts are determined. If these amounts are taken out, will their absence confuse clerks trying to compute satisfaction of judgment?

4. The following is ORCP 80 F(3) with the changes requested by the Council at the last meeting:

F.(3) **Form and service of notices.** Any notice required by this [rule] __section__ [(except petitions for the sale of perishable property, or other personal property, the keeping of which will involve expense or loss)] shall be [addressed to] __served in the manner provided in Rule 9,__ at least five days [(10 days for notices under section G of

this rule)] before the hearing on any of the matters above described [; or personal service of such notice may be made on the person to be notified or such person's attorney not less than five days (10 days for notices under section G of this rule) before such hearing], **unless a different period is fixed by order of the court.** [Proof of mailing or personal service must be filed with the clerk before the hearing. If upon hearing it appears to the satisfaction of the court that the notice has been regularly given, the court shall so find in its order.]

STAFF COMMENT - 1988

ORCP 80 F(3) was amended by the Council to eliminate an apparent drafting error in the original rule and to simplify the rule. The detailed language directing form of service in subsection 80 F(3) was apparently included in the subsection because notices covered in section F of Rule 80 are those directed to persons who are not parties to the proceedings. ORCP 9 only refers to service of papers upon parties. The subsection, however, referred to notices under the "rule", not the "section", and created an ambiguity as to the required manner of service for notices under other sections of Rule 80, such as sections C, D and G. The Council changed this. It also opted to provide for service in the same manner as service on parties under ORCP 9. The Council also added explicit authority for the Court to vary the notice period and eliminated the parenthetical exception to the notice requirement for petitions for the sale of perishable property. It was unclear in such situations whether notice was not required or the judge could vary the notice requirement. The Council assumed that, with explicit authority to vary the notice requirement, the Court could take care of any emergency situation involving sale of perishable property. Finally, the Council eliminated the last two sentences of the original rule, which required filing of proof of service before the hearing and finding by the court of the adequacy of notice. Filing and proof of service are explicitly required by ORCP 9 C which would apply to notices served under ORCP 80 F because service of such notices must be in the manner provided for by ORCP 9. There seemed to be no stronger reason to direct the Court to make reference to the adequacy of service in an order entered under ORCP 80 F than any other type of order.

5. The following is the amendment to ORCP 4 E with the changes suggested by the Council:

E. Local services, goods, or contracts. In any action or proceeding which:

E(1) Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this state[,] **or** to pay for services to be performed in this state by the plaintiff [, or to guarantee payment for such services]; or

E(2) arises out of services actually performed for the plaintiff by the defendant within this state or services actually performed for the defendant by the plaintiff within this state, is such performance within this state was authorized or ratified by the defendant [or payment for such services was guaranteed by the defendant]; or

E(3) Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this state or to send from this state goods, documents of title, or other things of value [or to guarantee payment for such goods, documents, or things]; or

E(4) Relates to goods, documents of title, or other things of value sent from this state by the [plaintiff] **defendant** to the [defendant] **plaintiff or to a third person** on the [defendant's] **plaintiff's** order or direction [or sent to a third person when payment for such goods, documents, or things was guaranteed by defendant]; or

E(5) Relates to goods, documents of title, or other things of value actually received **in this state** by the plaintiff [in this state] from the defendant **or by the defendant from the plaintiff,** without regard to where delivery to carrier occurred.

STAFF COMMENT - 1988

The Council amended ORCP 4 E to make the language more consistent with constitutional limits in the area covered.

The Council amended subsections 4 E(1)-(4) to eliminate reference to jurisdiction based solely upon guarantee of payment. State ex rel Sweere v. Crookham, 289 Or. 3, 609 P.2d 361 (1980.

ORCP 4 E(4) was amended to eliminate jurisdiction based solely upon receipt of goods sent from the state by the seller to the defendant-purchaser, and to permit jurisdiction based upon a defendant-seller sending goods to a plaintiff-buyer outside the state. The form of jurisdiction included is within constitutional limits but the form excluded is of doubtful constitutionality. Neptune

Microfloc, Inc. v. First Florida Utilities, 262 Or. 494, 495 P.2d 263 (1972).

ORCP 4 E(5) was amended to provide that, if a defendant either sends goods into the state or receives goods sent into the state, there is a basis for jurisdiction

6. The following amendment will cure the grammatical problems raised by Judge Joseph in ORCP 69 B(2):

B.(2) **By the court.** In all other cases, the party seeking a judgment by default shall apply to the court therefore, but no judgment by default shall be entered against a minor or an incapacitated person unless [they] **the minor or incapacitated person** [have] **has** a general guardian or [they] **the minor or incapacitated person** [are] **is** represented in the action by another representative as provided in rule 27.

7. The report of the State Bar Procedure and Practice Committee, on page 28 of the 1988 Annual Reports, states : "The committee has approved an amendment to ORCP 69 B to require notice prior to entry of a default order to parties who have filed an appearance or provided written notice of intent to file an appearance. This proposed amendment is being submitted to the Council on Court Procedures." Despite several requests, we have not received a copy of this proposed amendment at this point.

8. According to Bylaw IV of the Council Bylaws, two weeks prior to the October meeting (now scheduled for October 15, 1988), we should publish a description of the substance of the rules and amendments proposed and notice of the October meeting for all members of the Bar. I am trying to contact the Bar office to determine if we can get any publication between September 17 and October 1. This also means that some decision needs to be made at the September 17 meeting regarding the remaining items being considered by the Council.

Enclosures

compliance with an inspection demand, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

If a party then fails to obey an order compelling inspection, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Section 2023. In lieu of or in addition to that sanction, the court may impose a monetary sanction under Section 2023. *(Added by Stats.1986, c. 1334, § 2. Amended by Stats.1987, c. 86, § 13.)*

Former § 2031 was repealed by Stats.1986, c. 1334, § 1, operative July 1, 1987. See, now, this section. For the text of former § 2031, see Appendix, post.

Cross References

Abuse of discovery, sanctions, see § 2023.
Frequency or extent of discovery, restrictions, see § 2019.

§ 2032. Physical or mental examinations

(a) Parties. Any party may obtain discovery, subject to the restrictions set forth in Section 2019, by means of a physical or mental examination of (1) a party to the action, (2) an agent of any party, or (3) a natural person in the custody or under the legal control of a party, in any action in which the mental or physical condition (including the blood group) of that party or other person is in controversy in the action.

(b) Licensed physicians or clinical psychologists. A physical examination conducted under this section shall be performed only by a licensed physician or other appropriate licensed health care practitioner. A mental examination conducted under this section shall be performed only by a licensed physician, or by a licensed clinical psychologist who holds a doctoral degree in psychology and has had at least five years of postgraduate experience in the diagnosis of emotional and mental disorders. Nothing in this section affects tests under the Uniform Act on Blood Tests to Determine Paternity (Chapter 2 (commencing with Section 890) of Division 7 of the Evidence Code).

(c)(1) Cross-complainants; cross-defendants. As used in this subdivision, plaintiff includes a cross-complainant, and defendant includes a cross-defendant.

(2) Demand for physical examination. In any case in which a plaintiff is seeking recovery for personal injuries, any defendant may demand one physical examination of the plaintiff, provided the examination does not include any diagnostic test or procedure that is painful, protracted, or intrusive, and is conducted at a location within 75 miles of the residence of the examinee. A defendant may make this demand without leave of court after that defendant has been served or has appeared in the action, whichever occurs first. This demand shall specify the time, place, manner, conditions, scope, and nature of the examination, as well as the identity and the specialty, if any, of the physician who will perform the examination.

(3) Scheduling. A physical examination demanded under this subdivision shall be scheduled for a date that is at least 30 days after service of the demand for it unless on motion of the party demanding the examination the court has shortened this time.

(4) Service. The defendant shall serve a copy of the demand for this physical examination on the plaintiff and on all other parties who have appeared in the action.

(5) Response by plaintiff. The plaintiff to whom this demand for a physical examination has been directed shall respond to the demand by a written statement that the examinee will comply with the demand as stated, will comply with the demand as specifically modified by the plaintiff, or will refuse, for reasons specified in the response, to submit to the demanded physical examination. Within 20 days after service of the demand the plaintiff to whom the demand is directed shall serve the original of the response to it on the defendant making the demand, and a copy of the response on all other parties who have appeared in the action, unless on motion of the defendant making the demand the court has shortened the time for response, or unless on motion of the plaintiff to whom the demand has been directed, the court has extended the time for response.

(6) Failure to respond; waiver of obligations; order compelling response and compliance. If a plaintiff to whom this demand for a physical examination has been directed fails to serve a timely response to it, that plaintiff waives any objection to the demand. However, the court, on motion, may relieve that plaintiff from this waiver on its determination that (A) the plaintiff has subsequently served a response that is in substantial compliance with paragraph (5), and (B) the plaintiff's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect.

The defendant may move for an order compelling response and compliance with a demand for a physical examination. The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel response and compliance with a demand for a physical examination, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

If a plaintiff then fails to obey the order compelling response and compliance, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Section 2023. In lieu of or in addition to that sanction the court may impose a monetary sanction under Section 2023.

(7) Receipt of response; order compelling compliance. If a defendant who has demanded a physical examination under this subdivision, on receipt of the plaintiff's response to that demand, deems that any modification of the demand, or any refusal to submit to the physical examination is unwarranted, that defendant may move for an order compelling compliance with the demand. This motion shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt

at an informal res
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SUMMARY PURSUANT TO ORCP 70A

1. Judgment Creditor: _____
2. Judgment Creditor's Attorney: _____
3. Judgment Debtors: _____
   _____
   _____
4. Principal Amount of Judgment: $_____
5. Prejudgment [compound/simple] interest from [date] at the rate of _____ percent per annum. [Interest is compounded daily/monthly/quarterly/semi-annually/annually.]
   a. Accrued through _____, 19___: $_____
   b. Per diem thereafter until date judgment is entered: $_____
6. Attorney fees: $_____
7. Costs: $_____
8. Postjudgment [compound/simple] interest at the rate of _____ percent per annum on the total judgment which consists of items 4 plus 5 plus 6 plus 7 from the date judgment is entered until fully paid. [Interest is compounded daily/monthly/quarterly/semi-annually/annually.]

CERTIFICATE OF JUDGMENT SUMMARY

I, _____, attorney for the judgment creditor, certify that the information in the summary accurately reflects the judgment.

DATED this ___ day of _____, 19___.

By: _____
_____

M E M O R A N D U M

September 9, 1988

TO: **MEMBERS, COUNCIL ON COURT PROCEDURES**

FROM: Fred Merrill, Executive Director

RE: Cases relating to ORCP 21-64

Attached is the draft of the materials covering rules in ORCP 21 to 64 which have been the subject of substantial judicial interpretation. The only problems that I noticed were:

1. In Wright v. Hazen, 293 Or 259 (1982), the Supreme Court again held that there is a separate standard for compulsory joinder under ORS 28.110. The statute requires joinder of any interested party. Most of the cases seem to come out with the same result that would be achieved under ORCP 29 A. Why have a separate statutory provision?

2. In Sanok v. Grimes, 294 Or 684, 686-687 n.1 (1983), the Supreme Court noted that some of the language in ORCP 30 is ambiguous. Although the title and the second sentence refer to nonjoinder of parties, the first sentence refers only to misjoinder. The court ruled that ORCP 30 covered nonjoinder and that dismissal of an action, rather than ordering joinder, was only proper for nonjoinder when the missing party could not be joined and joinder was required by ORCP 29 B. Should the ORCP 30 be clarified?

3. The Oregon intervention rule, ORCP 33, continues to be much stricter than the federal rule and the practice in other states. Intervention of right is only available to a party who will be affected directly by the judgment, that is, a party subject to the res judicata affect of the judgment. The federal intervention of right is available when there is a party who would meet the compulsory joinder standards of ORCP 29 A, but the existing parties do not raise the issue. Should the Oregon Rule conform to the federal rule?

4. The Council has never responded to Justice Linde's suggestion in his opinion in Realty Group v. Department of Revenue, 299 Or 377, 385-386 (1985), that the Council revise the procedural portions of the summary judgment rule set out in ORCP 47 C. The pertinent portion of Justice Linde's opinion is attached.

Enclosures

ınd in other statutory or common law
y ingrained professional habits to the
ıs stated by courts are not more
ıe enacted by the legislature. In this
, in ORS 267.380, expressly has made
work of [the] other person and direct
it is to be done" the test of the
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ıl source. Ordinarily, in the absence of
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rtment claimed that the brokers had
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their agreements with their salesper-

nt relies on the following charac-
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during the years at issue by the real
hapter 696, and regulations issued by
ioner pursuant thereto. A real estate
only as an agent of a specific broker
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esperson's occupational activity by
the commissioner. ORS 696.221(1).
ıt advertising, solicitation, and clos-
ıaction be in the broker's name and
ision, and that all funds be promptly
er. OAR 863-10-010(2); 863-10-040
e broker to exercise "personal, daily
ıtes and salespersons and expressly
se' persons act on their own under
id OAR 863-10-043. These super-
ıker's legal obligations, not merely
powers that the broker might choose

to assert or to modify by agreement with one or more salespersons. The broker could lose his own license for failure to exercise supervision over salespersons. Former ORS 696.301(30) (1979).

The Department submitted documents to show that the brokers' agreements with their salespersons corresponded to this obligatory degree of supervision, direction, and control, and the brokers, understandably, do not contend otherwise. They argue, rather, that various legislative actions, such as the removal of the terms "employer" and "employe" from the real estate license law, were intended to permit the status of independent contractors for real estate salespersons for purposes of federal tax law and the workers' compensation law. That may be, but the statutory test of employment for purposes of Oregon's withholding and transit district tax laws remained one person's authority to control and direct the work of another until 1983.[5] The Tax Court concluded that the brokers had the authority as a matter of law, and we agree with that conclusion on the grounds stated in this opinion.

That conclusion also makes unnecessary a remand to correct a procedural error of the Tax Court.

The brokers contend that the Tax Court erred in ruling on the motions for summary judgment without first conducting a hearing. They rely on ORCP 47 C., adopted by the Tax Court's Rule 47, which provides:

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

This rule corresponds to Federal Rule of Civil Procedure 56(c). It should serve as a cautionary lesson against

[5] Oregon Laws 1983, chapter 597, section 6, codified as ORS 316.209, allows qualified real estate salespeople to be treated as independent contractors for tax purposes.

uncritically copying into Oregon law texts used elsewhere in the expectation that this will gain the benefits, first, of someone else's expert drafting and also (somewhat contradictory to the first) of existing judicial interpretations of the text.

The problem with the text of this rule is that the rules nowhere provide an antecedent for the words "the hearing." It is difficult to hold a party to serving a motion "at least 10 days before the time fixed for the hearing," if there is nothing on which to schedule a "hearing" until a motion is filed. The federal courts have read FRCP 56(c) backwards, as an awkward way of saying that no hearing shall be set until at least ten days after the motion for summary judgment is served. They have wrestled with the problem whether the rule precludes them from entering summary judgments without a motion, whether a "hearing" requires oral argument, and if not, whether the rule nonetheless requires ten days' notice to the parties. *See, e.g., Capital Films Corp. v. Charles Fries Productions,* 628 F2d 387 (5th Cir 1980) and cases there cited; 10A Wright, Miller, and Kane, Federal Practice and Procedure 3-40, §§ 2719-20 (1983). The unsatisfactory text of ORCP 47 C. may well deserve the attention of the Council on Court Procedures.

10. The Tax Court, however, has adopted a rule governing pretrial motions which, although stated in the negative, appears to provide for oral argument when requested by counsel.[6] In this case, counsel did request a hearing on the motion filed by Realty Group, Inc., and the Tax Court erred in denying the motion without affording an opportunity for oral argument. This court, however, reviews decisions of the Tax Court "anew upon the record," ORS 305.445, 19.125(3), and has heard oral argument. Neither oral argument before the Tax Court nor the opportunity to submit further affidavits

[6] TC Rule 14 E provides:

"Oral arguments will not be heard on motions, applications or other matters preliminary to trial unless called for by the court or unless specifically requested by counsel. * * *."

The use of "not * * * unless" also is unsatisfactory drafting, because it states only the consequence if an event or condition does not occur. It does not state the consequence if the event or condition does occur but leaves the intention to be inferred. In this case, we infer that the Tax Court intended to provide the opportunity for oral argument if counsel does specifically request it.

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RULE 21-DEFENSES AND OBJECTIONS; HOW PRESENTED

21 A. How Presented

When one party moves to dismiss under ORCP 21 A (1-7), based upon facts which do not appear on the face of the opposing parties pleadings, the court must give the opposing party an opportunity to present evidence and affidavits and must schedule a hearing. Edwards v. Edwards, 87 Or App 188, 190, 741 P2d 928 (1987). The Edwards case involved a motion to dismiss for insufficient service of summons which would always involve presentation of facts beyond the pleadings and require a hearing.

Subject Matter Jurisdiction

Under ORCP 21 A(1), the correct procedure for asserting lack of subject matter jurisdiction is a motion to dismiss and not a summary judgment motion. However, since the defect cannot be waived and should be considered by the trial court on its own motion, even if lack of subject matter jurisdiction is defectively raised by summary judgment motion, it should be considered by the court. Spada v. The Port of Portland, 55 Or App 148, 150, 637 P2d 229 (1981).

Another Action Pending

ORCP 21 A(3), requiring dismissal of a case if there is another action pending between the same parties for the same cause, applies when another case involving the same parties and claims has reached judgment but is on appeal. A case in which the merits remain in dispute at any judicial level is necessarily pending. Beetham v. Georgia Pacific, Corp., 87 Or App 592, 594, 743 P2d 755 (1987).

The Beetham plaintiff had filed claims based on state law for interference with an economic relationship and defamation, as pendent claims in federal court. The plaintiff's federal claim was dismissed and the federal court then refused to pass on the pendant state law claims. The plaintiff appealed. The plaintiff also filed an action to recover on the state law claims in state court. The state trial court held that the claims were not barred by res judicata because the federal court had never passed on the merits. The trial court, however, did dismiss because the federal action was still pending and this dismissal was upheld by the court of appeals. If the federal appeal was unsuccessful, presumably the plaintiff could refile in state court and have his state claims considered. The state court perhaps should have stayed the action pending the outcome of the federal appeal, rather than dismissing it. But see Holmes v. Anthony, 56 Or App 666, 671-672, 643 P2d 372 (1982), where the court of appeals indicated the correct procedure upon sustaining a motion under ORCP 21 A(3) was a dismissal. For another case dismissing an

action because of another action pending, see Dohr v. Marquardt, 71 Or App 765, 768, 694 P2d 576 (1985).

ORCP 21 A(3), authorizing dismissal of an action where there is another action pending involving the same claim and the same parties, applied when one party brought an action on a contract and secured an order compelling arbitration and the other party then filed a separate action seeking a declaration that the contract providing for arbitration was unenforceable and to recover the value of goods and services provided. The court of appeals said the first proceeding was not ended and was still pending until the arbitration was complete and the award was filed and settled. 56 Or App at 668-669.

Another Action Pending

Although the point was not raised by the parties at trial or on appeal, in Pearce v. Glass, 80 Or App 559, 563 n 3, 723 P2d 1031 (1986), the court of appeals noted that, under ORCP 21 A(4), lack of capacity to sue should be raised by answer or motion to dismiss and not by summary judgment motion. If the capacity defect can be remedied, the claim may be reasserted by amended pleading, and that would not be possible after a summary judgment. The capacity defect involved in the case was failure to file an assumed business name, which presumably would be cured by making the necessary filing. See Uhlman v. Kin Daw, 97 Or 681, 694-695, 193 P2d 435 (1920).

Insufficiency of Service Of Summons

In Jordan v. Wiser, 302 Or 50, 57 n 5, 726 P2d 365 (1986), the supreme court pointed out that a motion to dismiss for insufficiency of service of summons under ORCP 21 A(5) is usually based upon evidence that the defendant has in some fashion received the summons in question, but there has been no compliance with the service requirements of ORCP 7. In Easton v. Hurita, 290 Or 689, 703-704, 625 P2d 1290 (1981), the trial court action in granting the motion was upheld where a defendant was aware of and appeared in the action but had never been served with any summons.

Failure to State a Claim

There has been some confusion, involving both courts and litigants, regarding the relationship between motions based upon insufficient pleading and summary judgment motions. Strictly speaking either an ORCP 21 A motion to dismiss for failure to state a claim or, at a later stage in the proceeding, a motion for the judgment on the pleadings are the correct procedures to attack the substantive validity of a claimant's pleading. Although the supreme court stated in dictum in an earlier case (Payless Drug Stores N.W. v. Brown, 300 Or 243, 246, 708 P2d

1143 (1985)) that an objection that a plaintiff has not pleaded a claim upon which relief may be granted may not be raised by summary judgment motion, the court held to the contrary in Johnson v. Johnson, 302 Or 382, 388-389, 730 P2d 1221 (1986). The court relied upon federal practice under the similar Federal Rule, which treats the summary judgment motion as functionally equivalent to a rule 21 motion. The motion should be disposed of under the procedure specified in rule 21 and not by the summary judgment procedure. In most cases, an opportunity to amend would be given if the motion were sustained. The Oregon Court of Appeals followed the supreme court ruling in Humphrey v. Coleman, 86 Or App 511, 514-515, 739 P2d 1081 (1987), but stated "...the better way to test the sufficiency of a complaint is by an ORCP 21 A(8) motion or by a motion for judgment on the pleadings..." See also Moffatt v. Harden, 58 Or App 505, 507 n 1, 648 P2d 1311 (1982).

Upon a motion to dismiss for failure to state a claim under ORCP 21 A(8), the trial court must assume the truth of plaintiff's allegations and of any facts that might conceivably be adduced as proof of those allegations. Ivy v. Transamerica Title Ins. Co., 90 Or App 511, 513-514, 752 P2d 1266 (1988); Spiess v. Johnson, 89 Or App 289, 291, 748 P2d 1020 (1988); Nicholson v. Blachly, 86 Or App 645, 647, 740 P2d 220, aff'd 305 Or 578, 753 P2D 955 (1988); Jackson v. Olson, 77 Or App 41, 46 n 6, 712 P2d 128 (1985); Ollison v. Weinberg Racing Ass'n, Inc., 69 Or App 653, 656, 688 P2d 847 (1984). In this respect, the motion to dismiss for failure to state ultimate facts sufficient to constitute a claim is identical to its predecessor, the general demurrer. See Brennen v. City of Eugene, 285 Or 401, 405, 591 P2d 719 (1979).

A complaint in a declaratory judgment case states a claim under ORCP 21 A(8), if the complaint alleges a justiciable controversy, whether or not it shows that the plaintiff is entitled to relief. Hall v. Boyles, 85 Or App 583, 588, 737 P2d 968 (1987); Reynolds v. State Board of Naturopathic Exam., 80 Or App 438, 441-442, 722 P2d 739 (1986); Lane Education Serv. Dist. v. Swanson, 71 Or App 328, 337, 692 P2d 622 (1984); Goose Hollow Foothills League v. City of Portland, 58 Or App 722, 726, 650 P2d 135 (1982).

A motion to dismiss for failure to state ultimate facts sufficient to constitute a claim under ORCP 21 A(8) is not the proper way to object to the specificity with which an element of plaintiff's claim has been alleged. A party who wants more specific information regarding the factual basis of plaintiff's case must use discovery or a motion to make more definite and certain. 69 Or App at 655-660.

A motion to dismiss for failure to state ultimate facts sufficient to constitute a claim under ORCP 21 A(8), is a proper

method of asserting a failure to plead performance of conditions precedent, as required by ORCP 20 A. Aurora Aviation, Inc. v. AAR Western Skyways, Inc., 75 Or App 598, 601 n 1, 707 P2d 631 (1985).

A motion to dismiss for failure to state a claim under ORCP 21 A(8) is not allowable against a petition in a habeas corpus case. Gage v. Maass, 306 Or 196, 198-203, P2d (1988). The writ is issued immediately after the filing of the petition and the petition drops out of the case. The supreme court suggested that a motion to strike under ORS 34.680 might be available to test the legal sufficiency of the claims in the petitioner's replication.

An ORCP 21 A(8) motion to dismiss for failure to state a claim may be filed after entry of a default order and before entry of judgment. Rajneesh Found. Int'l v. McGreer, 303 Or 139, 144-146, 734 P2d 871 (1987).

If a defendant exercises the option of raising the defense that the complaint fails to state a claim by affirmative defense in the answer, the trial court should not submit the question to the jury. The defense presents a pure question of law for decision by the court. Woolston v. Wells, 297 Or 548, 559 n 9, 687 P2d 144 (1984).

Statute of Limitations

To survive a motion to dismiss on statute of limitation grounds under ORCP 21 A(9), the complaint does not have to show that the action is timely. The complaint is sufficient if it does not reveal on its face that the claim is barred by the statute of limitations. Munsey v. Plumbers Local # 51, 85 Or App 396, 399, 736 P2d 615 (1987). Also, in passing on a motion under ORCP 21 A(9), the court is limited to what appears on the face of the pleading. In a case where an original complaint, which showed a limitations defense, was superseded by an amended complaint which did not reveal the limitations defense, the court could look only at the facts alleged in the amended complaint. O'Gara v. Kaufman, 81 Or App 499, 502-503, 726 P2d 403 (1986).

21 B. Motion for Judgment on the Pleadings

On a motion for judgment on the pleadings under ORCP 21 B, the pleadings are to be liberally construed and the allegations in the pleadings are taken as true. Skinner v. Michaels, 58 Or App 59, 61, 646 P2d 1345, reconsideration allowed 61 Or App 546, 646 P2d 1345 (1982). For an analysis of the distinction between a motion for judgment on the pleadings and a motion for summary judgment, see Johnson v. Johnson, 302 Or 382, 388-389, 730 P2d 1221 (1986), discussed under subsection 21 A, Failure to State a Claim, supra.

21 D. Motion to Make More Definite and Certain

In Haase v. City of Eugene, 85 Or App 107, 109 n 2, 735 P2d 1258 (1987), the court of appeals said: "We are concerned about the use, which we discern here, of a motion for summary judgment to challenge either a complaint that supposedly contains more than one claim not separately stated or one in which the precise nature of the charge is not apparent; those defects are properly addressed only by ORCP 21 motions." The court also said that if a complaint is not challenged by rule 21 motions to strike or to make more definite and certain, it will be construed favorably to the plaintiff on appeal.

Lack of specificity in pleading elements of a claim can only be raised by motion to make more definite and certain under ORCP 21 D and cannot be raised by a motion to dismiss for failure to state a claim, Ollison v. Weinberg Racing Ass'n, Inc., 69 Or App 653, 655-660, 688 P2d 847 (1984), or by raising the matter at trial or on appeal, Shaughnessy v. Spray, 55 Or App 42, 50-52, 637 P2d 182 (1981).

21 E. Motion to Strike

It is incorrect to move to strike under ORCP 21 E on the ground that allegations are "sham and frivolous". The two words have mutually exclusive meanings. No allegation can be both "sham" (good in form but false in fact) and "frivolous " (true in its allegation, but totally insufficient in substance). Warm Springs Forest Prod. Indus. v. EBE Co., 300 Or 617, 625-626, 716 P2d 740 (1986) (Carson, J., dissenting). The supreme court has suggested that trial courts refuse to consider motions to strike alleging that material is both a sham and frivolous. Washington Square, Inc. v. First Lady Beauty Salons, 290 Or 753, 756 n 4, 625 P2d 1311 (1981).

Although ORCP 21 E does not expressly provide for a motion to strike a paragraph within a complaint because the specific allegation is legally insufficient, such an allegation is, in effect, a nullity, and may be stricken as either frivolous or irrelevant. Davis v. Tyee Indus., Inc., 295 Or 467, 482-483 n 14, 668 P2d 1186 (1983). The supreme court suggested that a parties right to recover punitive damages could be challenged by an ORCP 21 E motion directed to the paragraph alleging such damages.

For a discussion of the relationship between a motion to strike for failure to state claims separately and a summary judgment motion, see Haase v. City of Eugene, 85 Or App 107, 109 n 2, 735 P2d 1258 (1987), discussed in section 21 D supra.

21 F. Consolidation of Defenses in Motion

In State Farm Ins. Co. v. Berg, 70 Or App 410, 416-418, 689 P2d 959 (1984), the court of appeals refused to reverse a case where the trial court had allowed a party to make a motion to strike part of a claim, followed by a separate motion to dismiss for failure to state a claim. The court recognized that filing the second motion was improper under ORCP 21 F, but said that the error was not prejudicial. The objection that the pleading failed to state a claim was not waived until after trial and could correctly have been raised by motion for judgment on the pleadings. The court did say: "A fundamental purpose of ORCP 21 is to curb the excessive use of motions for purposes of harassment and delay, and litigants should not be permitted to disregard its provisions with impunity."

In Pacific Protective Wear Distrib. Co. v. Banks, 80 Or App 101, 104, 720 P2d 1320 (1986), after a judgment by default, a defendant filed a motion to vacate judgment under ORCP 71 but did not assert the judgment was void. He then filed a motion to dismiss for lack of personal jurisdiction. The court of appeals concluded that there was no such thing as a motion to dismiss for lack of jurisdiction after entry of judgment. The court, however, treated the motion as one to vacate a void judgment under ORCP 71 B(1)(d). It also concluded that the consolidation and waiver rules of ORCP 21 F and G apply only to motions made under ORCP 21 and not to motions made under ORCP 71.

21 G. Waiver or Preservation of Certain Defenses

Under ORCP 21 G(2), a party may make motions to dismiss under ORCP 21, and not include a motion based upon the statute of limitations, without waiving the limitations defense. The defense may be later asserted by a motion for summary judgment. Workman v. Rajneesh Found. Int'l, 84 Or App 226, 228 n 2, 733 P2d 908 (1987). A defendant, however, who does not assert a statute of limitations defense by motion or in the answer will ordinarily waive the defense. But in Fliegel v. Davis, 73 Or App 546, 548 n 1, 699 P2d 674 (1985), after such a waiver, the defendant asserted the defense by summary judgment motion and the plaintiff did not object to consideration of the issue because it had been waived. The court of appeals held that, despite the waiver, the limitations issue was tried by consent under ORCP 23 B.

Prior to ORCP 21 G(2), if the plaintiff's complaint showed that the claim was barred by the statute of limitations, the defense had to be asserted by demurrer or it was waived. ORCP 21 G(2) changes that rule. Whether or not it appears on the face of the plaintiff's complaint, the limitations defense may either be asserted by motion or included in a pleading. Safeco Ins. Co. v. Tualatin Dev. Co., 50 Or App 521, 523-527, 623 P2d 1112 (1981).

In Metal Tech Corp. v. Metal Teckniques Co., 74 Or App 297,

300 n 1, 703 P2d 237 (1985), the court of appeals said that, under ORCP 21 G(2), defendant's failure to include the defense of lack of capacity to sue in a pre-answer motion or in their answer constituted a waiver of the defense. The claimed lack of capacity was failure of a foreign corporation to obtain a certificate of authority to conduct business in Oregon.

Under ORCP 21 G(3), the defense that the complaint fails to state ultimate facts constituting a claim is not waived if it is not included with other motions made under ORCP 21. State Farm Ins. Co. v. Berg, 70 Or App 410, 417-418, 689 P2d 959 (1984). The defense may be raised in the answer, or by motion for judgment on the pleadings, or raised at the trial. The importance of being able to raise a pleading defect at trial is limited by the last sentence of ORCP 21 G(3), directing that the defense be considered in light of evidence received. If the defense is raised at the trial, and the objection is overruled or denied, on appeal the objection will be considered as if it had been made after verdict. This means that "...where the defect in the pleading, even though material, consists of an omission to state a necessary fact and it appears that the necessary fact could have been added by amendment, the entire record will be examined. The determination of the sufficiency of the pleading is then made by looking at the sufficiency of the evidence to establish the claim rather than the sufficiency of the pleading." Davis v. Tyee Indus., Inc., 295 Or 467, 483, 668 P2d 1186 (1983).

Despite the fact that ORCP 21 G(3) (in contrast to ORS 16.330, rep. 1979, which preceded it) on its face preserves the defense of failure to state a claim only through trial, and not on appeal, the court of appeals has continued to state that failure of a complaint to state a cause of action may be raised for the first time on appeal. Patzer v. Liberty Communications, Inc., 58 Or App 679, 683 n 2, 650 P2d 141 (1982) and Brasel v. CSD, 56 Or App 559, 564, 642 P2d 696 (1982). In both cases, however, the court had already decided to reverse the case on other grounds. It was commenting on the validity of a pleading on grounds not previously raised in the trial court, not reversing a case for a pleading defect not raised before appeal. But see Demars v. Erde, 55 Or App 863, 866, 640 P2d 635 (1982), where the trial court dismissed plaintiffs claim because it had not been brought by the real party in interest and the court of appeals said it would uphold the dismissal on the ground that the complaint failed to state a claim, even though that contention had not been presented to the trial court. Presumably, under the last sentence of ORCP 21 G(3), if a challenge to the legal sufficiency of a pleading can be made upon appeal, it should be considered in light of evidence, if any, that was received at trial. Since the trial court had dismissed before trial in the Demars case, there was no evidence to consider.

Under ORCP 21 G(4), lack of subject matter jurisdiction may

be raised at any time and the trial court always has a duty to consider whether it has jurisdiction. Trout v. Umatilla County School Dist., 77 Or App 95, 98 n 2, 712 P2d 814 (1985). No pre-trial motion is required and the matter may be raised before of after judgment. Holmes v. Oregon Ass'n of Credit Mgmt., 52 Or App 551, 554, 628 P2d 1264 (1981). In Union Oil Co. v. Clackamas County Bd. of Comm'r, 67 Or App 27, 31, 676 P2d 948 (1984), the court of appeals held that, under ORCP 21 G(4), the question of proper jurisdiction of a circuit court could be raised for the first time on appeal. The court said: "The trial court had a duty to examine its own jurisdiction and should have dismissed the case on its own motion."

RULE 22--COUNTERCLAIMS, CROSS-CLAIMS, AND THIRD PARTY CLAIMS

22 A. Counterclaims

ORCP 22 A does not create a compulsory counterclaim rule. A defendant is not required to assert defendant's claims against the plaintiff, as counterclaims, even if they arise from the same transaction as plaintiff's claim. Burlington Northern, Inc. v. Lester, 48 Or App 579, 583-584, 617 P2d 906 (1980); Brandano v. Norpa Dev., Inc., 54 Or App 387, 389-390, 635 P2d 6 (1981). A defendant who does, however, counterclaim, must assert all of defendant's claims against the plaintiff based on the same operative facts. Assertion of additional claims, based upon the same operative facts, in a separate action against the plaintiff will be barred by res judicata. Conner v. Delon Oldsmobile Co., 66 Or App 394, 397-399, 674 P2d 1180 (1984).

In State ex rel. Nagel v. Crookham, 297 Or 20, 22-24, 680 P2d 652 (1984), the supreme court held that a condemnee in a condemnation case, who has a claim for damages against the condemnor, arising out of condemnation related activities, may assert it as a counterclaim. Although the court refered to the liberal joinder provisions for counterclaims in ORCP 22 A, it based its decision upon an interpretation of ORS 35.295, which specifies the proper form of answer in a condemnation proceeding. ORS 35.295 would control the right to assert counterclaims in a condemnation proceeding. See ORCP 1 A. This leaves open the question of whether, under ORS 35.295, a condemnee could bring a counterclaim against the condemnor, which was not related to the condemnation activities.

22 B. Cross-claim Against Codefendant

A defendant may bring an indemnity cross-claim before it pays the obligation that provides the basis for indemnity. ORCP 22 B(2) provides that a cross-claim may include a claim that the defendant against whom it is asserted "may be liable" to the defendant asserting the cross-claim. Kahn v. Weldin, 60 Or App 365, 371-372, 653 P2d 1268 (1982). The court of appeals pointed out that the purpose of the cross-claim rule is to promote the expeditious and economical adjudication in a single action of the entire subject matter arising from a set of facts. This includes claims contingent on the determination of other issues in the case.

22 C. Third Party Practice

An impleaded third party defendant may only assert a claim against the original plaintiff that arises out of the transaction or occurrence that is the subject of the impleader claim. In Flying Tiger Line, Inc. v. Portland Trading Co., 45 Or App 345,

350, 608 P2d 577 (1980), a defendant/third party plaintiff impleaded a third party defendant based upon a contractual obligation to pay the original plaintiff's claim for furnishing shipping services to the defendant/third party plaintiff. The court of appeals held that the third party defendant could not assert a claim in the case against the original plaintiff based upon a separate shipping agreement between the third party defendant and the original plaintiff. The court was actually interpreting langauge identical to ORCP 22 C(1), which appeared in it predecessor, ORS 16.315 (rep. 1979). The court also noted that a claim by the third party defendant against the original plaintiff was correctly denominated a counterclaim and not a cross-claim. 45 Or App at 347 n 1.

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RULE 23-AMENDED AND SUPPLEMENTAL PLEADINGS

23 A. Amendments

ORCP 23 does not apply to amendment of a writ of garnishment. Although the writ is closely related to a pleading, it is not a pleading within the ORCP and is not subject to amendment. Glenn L. Olson, Inc. v. R. L. Thompson Enter., Inc., 306 Or 320, 324-325, P2d (1988).

Under ORCP 23 A, the trial court has broad discretion to determine when justice requires amendment of a complaint. The trial court decision will not be disturbed unless the court abused its discretion. Contractors, Inc. v. Form-Eze Sys., Inc., 68 Or App 124, 129, 681 P2d 148 (1984). Amendments may be made on motion of the parties or sua sponte by the trial court. It also applies to amendment of a pleading to assert a right to attorney fees. Benjamin Franklin Fed. Sav. and Loan Ass'n v. Phillips, 88 Or App 354, 357, 745 P2d 437 (1987).

In Jackson v. Multnomah County, 76 Or App 540, 544, 709 P2d 1153 (1985), a trial court was found not to have abused its discretion by allowing a defendant to file an amended answer on the day of trial. The amendment was not completely outside the scope of the issues framed in the original pleadings and the plaintiff did not show prejudice from the amendment.

In Edwards v. Lewis, 76 Or App 94, 96-97, 707 P2d 1298 (1985), the court of appeals upheld a trial court decision to deny plaintiff leave to amend his complaint before trial, but more than one year after the action was filed. The plaintiff was aware of the facts which he sought to raise by amendment early in the proceeding and could offer no reasonable excuse to the trial court for his delay in raising the new claims.

In making a discretionary decision whether or not to allow amendment of pleadings, the trial judge is not precluded from evaluating whether the amended pleading presents a colorable claim. Where a defendant sought to file a second amended answer to assert fraud, but did not recite facts, which, if proved, would support a finding of fraud, the trial court did not abuse its discretion in denying leave to amend. Jackson County v. Jackson Educ. Serv. Dist., 90 Or App 299, 302-303, 752 P2d 1224 (1988). See also Helms v. Halton Tractor Co., 66 Or App 890, 893, 676 P2d 347 (1984), where the court of appeals affirmed a trial court refusal to allow a plaintiff to amend his complaint at trial to add a new theory because, under the facts shown, the theory would not have justified a recovery.

One case where the court of appeals suggested a trial judge may have abused its discretion, involved a denial of leave to amend. A plaintiff filed an action to foreclose a trust deed and

for a deficiency judgment. Plaintiff then discovered there was a dispute about the availability of a deficiency judgment. Plaintiff moved to amend the complaint to assert an action on the note which was secured by the trust deed. Family Bank of Commerce v. Nelson, 72 Or App 739, 746, 697 P2d 216 (1985). The court said the defendant failed to demonstrate any prejudice that would have been caused by the amendment and that allowing the amendment would have simplified the proceeding.

The court of appeals has had some difficulty deciding whether trial court permission to file an amended complaint can be given after the fact. In Shaughnessy v. Spray, 55 Or App 42, 46, 637 P2d 182 (1981), a plaintiff filed an amended complaint without required leave of court. The plaintiff then secured a court order allowing an amended complaint and filed a second amended complaint. The first amended complaint was clearly within the limitations period. The second, arguably was not. The court held that the trial court had not intended to give after the fact authorization to the first amended complaint, but only to authorize filing of the second. The majority opinion expressed some doubt whether, under ORCP 23 A, the trial court had power to validate an amended complaint by an after the fact order. Judge Butler, in dissent, argued that the subsequent order did validate the first amended complaint. 55 Or App at 53-59.

23 B. Amendments to Conform to the Evidence

Prior to the ORCP, it was not possible to amend pleadings after entry of judgment. See U.S. Nat'l Bank of Oregon v. Smith, 49 Or App 289, 295, 619 P2d 921 (1980), modified on other grounds, 292 Or 125, 637 P2d 139 (1981). ORCP 23 B, however, allows amendments to be made after judgment to conform pleadings to the evidence. It also, after judgment, allows a trial judge to treat pleadings as if they had been amended to conform to evidence submitted. Lutz v. Jawad & Haidar Y. Abulhasan Co., 86 Or App 74, 80-81 n 9, 739 P2d 26, reh'g denied 88 Or App 69, 71, 744 P2d 279 (1987).

ORCP 23 B does not create implied consent to amendment when a party raises a new issue in a trial memorandum filed the day after the trial was completed. ORCP 23 B only requires amendment when issues not raised by the pleadings are in fact tried and evidence is submitted directed to those issues. Sunset Indus., Inc. v. Bartel, 84 Or App 537, 539-340, 734 P2d 897 (1987). See also Gibson Bowles, Inc. v. Montgomery, 51 Or App 313, 319, 625 P2d 670 (1981), where the court of appeals suggested that asserting the existence of an affirmative defense in a trial memorandum, filed the day of trial, did not result in an amendment of the pleadings. On the other hand, in Mund v. English, 69 Or App 289, 291-292, 684 P2d 1248 (1984), there was implied consent, where plaintiff plead the grant of an easement

and then sought an amendment after trial to assert grant of an irrevocable licence. Both parties had addressed the question of irrevocable licence in their trial memorandum. The court of appeals said the test in deciding whether an amendment to conform to the evidence should be allowed was "whether the defendant would be prejudiced by the implied amendment, i.e., whether he had a fair opportunity to defend and whether he could offer any evidence if the case were to be retried on a different theory." The defendant had not asserted any prejudice or suggested that any additional evidence would be needed to meet the new theory.

If evidence is submitted which supports an issue not covered by the pleadings, to have implied consent the evidence must clearly be directed to the new issue. In the Sunset case it appears that the plaintiff plead a claim for lien foreclosure and was granted an award based upon quantum meruit. Although the evidence presented probably revealed the value of improvement made, it was not presented under a quantum meruit theory and there was no implied consent to amendment of the pleadings. See also Mondell v. Grant AMC/Jeep, Inc., 75 Or App 635, 637, 707 P2d 637 (1985).

If a party does present evidence clearly directed to a new issue at trial and the opposing party does not object, this is implied consent to amendment of the pleadings. In Indus. Finishes & Sys. v. Am. Univ. Ins. Co., 79 Or App 614, 616 n 1, 720 P2d 382, reconsideration allowed 80 Or App 743, 724 P2d 333 (1986), one party submitted evidence for a summary judgment hearing clearly directed to an affirmative defense which it had not plead. The court of appeals said ORCP 23 B did apply and the affirmative defense could be asserted for the first time in a motion to reconsider the decision on the summary judgment. In accord Fliegel v. Davis, 73 Or App 546, 548 n 1, 699 P2d 674 (1985); Allen & Gibbons Logging v Ball, 91 Or App 624, 630, P2d (1988).

On the other hand, if the opposing party does object to evidence that goes beyond the pleadings, there is no express or implied consent to try issues beyond the pleadings. Avemco Ins. Co. v. Hill, 76 Or App 185, 190-191, 708 P2d 640 (1985). Also, even though evidence may be presented supporting a different theory than that plead by the plaintiff, if the plaintiff fails to assert that theory to the trial court, ORCP 23 B does not require the appellate court to consider the theory. Central Coast Elec., Inc. v. Mendell, 66 Or App 42, 46 n 1, 672 P2d 1224 (1983).

Even though there is no implied consent, the trial court still has discretion under ORCP 23 B to grant leave to amend during or even after trial. In LaPointe's, Inc. v. Beri, Inc., 73 Or App 773, 778-779, 699 P2d 1173 (1985), a defendant counterclaimed for damages of $80,978.52 and presented evidence

of damages of $87,162.82. The evidence included an element of damages that defendant had not originally included in the claim. Plaintiff objected to the admission of the evidence on the grounds it went beyond the pleading. The defendant moved to amend. The trial court decision to allow the amendment was held not to be an abuse of discretion under ORCP 23 B. Although the plaintiff argued that it was surprised and prejudiced in its ability to meet the amended counterclaim, the court of appeals said their was no evidence of that beyond the plaintiff's assertion. In Holmes v. Oregon Ass'n of Credit Mgmt., Inc., 52 Or App 551, 556-558, 628 P2d 1264 (1981), the court of appeals held that a trial judge should have allowed amendment of the plaintiffs reply to allege the new bases of estoppel to avoid a statute of limitations defense. The court said the amendment did not enlarge the issues or add a new claim or defense but merely expanded the estoppel claim originally made. The defendants made no claim of prejudice and the motion to amend was made before the defendants' case, so they would have had an opportunity to offer evidence on the new estoppel issues.

As demonstrated by the Holmes case and cases under ORCP 21 A, the few occasions when the court of appeals has found abuse of discretion by a trial court, involve a denial of a motion to amend. In Barton v. TraMo, Inc., 69 Or App 295, 303-304, 686 P2d 423 (1984), the plaintiff brought a breach of warranty action under the UCC alleging misrepresentation by sample. At the close of the plaintiff's case in chief, the defendant moved for a directed verdict on the ground that the evidence showed representation by model, not by sample. The plaintiff moved to amend the complaint to allege representation by model and the trial court refused. The court of appeals said the amendment should have been allowed because, although there may have been some confusion over terminology, the parties knew at all times what items were being characterized as samples or models. The amendment would not have enlarged the issues or added any new claim. The court also pointed out that the defendant probably impliedly consented to trial of the issue. The defendant did not object to admission of evidence on the ground that the evidence showed models not samples.

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A discretionary decision to refuse an amendment was upheld, however, in Avemco Ins. Co. v. Hill, 76 Or App 185, 190-191,708 P2d 640, reconsideration allowed 73 Or App 804, 699 P2d 1182 (1985). There, the plaintiff moved to amend his complaint to add a reformation claim to his original complaint seeking a declaratory judgment of coverage under an insurance policy. The motion was made two days after the trial began and after the plaintiff had competed the case in chief. The trial court noted that defendant would be prejudiced because it had not prepared to defend a reformation case.

The court of appeals has relied upon the similarity between

the language of ORCP 23 B and FRCP 15(b) to adopt the general federal rule governing amendment of pleadings during summary judgment motions. If facts appear in affidavits submitted, which go beyond the scope of the pleadings but would justify an amended complaint, the trial court should treat the complaint as if it were amended. Hussey v. Huntsinger, 72 Or App 565, 569, 696 P2d 580 (1985); U.S. Nat'l Bank v. Miller, 74 Or App 405, 409, 703 P2d 246 (1985).

23 C. Relation Back of Amendments

The supreme court has liberally interpreted ORCP 23 C governing relation back of amendments. In Welch v. Bancorp Mgmt. Serv. Adv., Inc., 296 Or 208, 220-223, 675 P2d 172 (1983), the court held that a fifth amended complaint, which added additional allegations of different misrepresentations to a different party as a grounds for a claim of intentional interference with contract, related back to the original complaint for purposes of the statute of limitations. The court noted that the apparent rationale for allowing a post-limitation amendment to relate back and defeat the statute of limitations, is that a party who is notified of litigation concerning certain conduct or a given transaction or occurrence through the original complaint, is given the notice that the statute of limitations was intended to assure.

The Welsh opinion also notes that the language in ORCP 23 C, allowing relation back for a claim or defense arising out of the same "conduct, transaction, or occurrence" as the original complaint, is broader than the Oregon rule prior to the ORCP. The court held that, although the amended complaint alleged different conduct, it still alleged interference with the same contract at substantially the same time and thus was pleading the same transaction as the original complaint.

The language in ORCP 23 C governing relation back when there is a change in parties, has been interpreted in several cases. In Waybrant v. Clackamas County, 54 Or App 740, 742-746, 635 P2d 1365 (1981), the court of appeals said that the language of ORCP 23 C should be read liberally in light of the rule's primary purpose. The court refused to adopt a restrictive interpretation which would limit application of the change of party language to misnomer situations. A defendant sued a county board of commissioners under the tort claims act, within the limitation period, and then substituted the county as the defendant after the limitations period had run. The amended complaint related back to the time of filing the original complaint. The court said the cause of action had not changed and the county had notice of the claim within the limitation period and should have known it was the proper defendant. The original defendants were the only persons authorized to transact business on behalf of the county. The same attorney represented the board members and the

county in the case.

In Bradford v. Dean Distrib. Co., 73 Or App 141, 143, 698 P2d 489 (1985), a plaintiff in a personal injury case was injured by a vehicle driven by an employee of the owner. The plaintiff sued the owner/employer only. After discovering that the employee was not acting within the scope of employment, and after the statute of limitations had run, the plaintiff attempted to join the employee/driver as a defendant. There was no relation back under ORCP 23 C. A mistake as to which of two known potential defendants is liable is not a mistake as to who is a proper party, within the meaning of ORCP 22 C. In Johnson v. MacGregor, 55 Or App 374, 376-377, 637 P2d 1362 (1981), an amended complaint adding new defendants did not relate back to the date of the original complaint because the new defendant had no notice of the institution of the action during the limitations period, as required by ORCP 23 C.

In the Johnson case, the court of appeals also refused to couple ORS 12.0202(2) with ORCP 23 C to find that there was relation back if the new defendants received notice within 60 days of the expiration of the action. The court pointed out that ORS 12.020 does not toll the statute of limitations. It merely provides that, where a complaint is filed within the limitations period, summons may be served for a 60 day period, even though service is beyond the limitations period. The question whether an amended complaint relates back to the original complaint, is governed by ORCP 23 C only. It requires notice to parties added by amendment within the limitation period. 55 Or App at 376 n 2.

Although the language of ORCP 23 C relating to changing parties refers only to "changing the party against whom a claim is asserted," some Oregon cases apply it to changes in parties asserting the claim. The court of appeals has relied upon federal case law interpreting the equivalent provision in the federal rules to conclude that ORCP 23 C also allows relation back in some circumstances after substitution of a plaintiff. Parker v. May, 70 Or App 715, 717-720, 690 P2d 1125 (1984).

In the Parker case, an amended complaint which changed the plaintiff in a personal injury case to the person who had actually been injured, rather than his father, related back to the original complaint for limitations purposes. The court said that ORCP 23 C changed the prior rule in Richard v. Slate, 239 Or 164, 396 P2d 900 (1964). It said that in the Richard case, the focus was on who had asserted a claim, not on whether a claim existed. The focus of ORCP 23 C is on notice to a party, by the original pleading, that the conduct described in the pleading is claimed to have given rise to a claim or defense.

In Sizemore v. Swift, 79 Or App 352, 354-357, 719 P2d 500 (1986), an amendment changing a plaintiff from a beneficiary of

an estate to the personal representative of the estate was held to relate back to the date of the original complaint. The case actually involved the relation back language in ORCP 26 A. The amendment occurred after an objection that the plaintiff in the original complaint was not the real party in interest. The amended complaint also changed the facts asserted in support of the claim slightly. Under the first sentence of ORCP 23 C, the amended complaint still related back, because it involved the same underlying claim.

ORCP 23 C has occasional application to matters other than the statute of limitations. In Castro v. Earl Scheib of Oregon, 65 Or App 179, 182-183, 670 P2d 226 (1983), a plaintiff filed an action without asserting a right to attorney fees in his complaint, before the date of ORCP 68, which required such an assertion, went into effect. The day of trial, after the ORCP 68 went into effect, the plaintiff filed an amended complaint which still did not assert a right to attorneys fees. Attorney fees were allowed. The amended complaint related back to the date of the original complaint and the pleading rule for attorney fees in effect at that time controlled. The court of appeals noted that ORCP 23 C had been in effect when the case was first filed. In Wood Panel Structures, Inc. v. Grangaard, 55 Or App 294, 297-298, 637 P2d 1320 (1981), it held that ORCP 23 C did not apply at all, in a case where the rule had not been in effect when the original complaint was filed, but was in effect when the amended complaint was filed.

ORCP 23 D. How Amendment Made

ORCP 23 D states that an amended pleading shall be complete in itself, without reference to the original or any preceding amended one. A plaintiff cannot rely upon allegations in a superceded pleading, which did not appear in an amended pleading, to avoid a motion to dismiss for failure to state a claim. Worre v. Dep't of Revenue, 299 Or 444, 448 n 4, 703 P2d 230 (1985) (The case actually deals with TC Rule 23 F which is identical to ORCP 23 D). Conversely, a party attacking a complaint on a statute of limitations grounds, cannot rely upon factual allegations appearing in a superceded pleading but not in an amended pleading, to show when the cause of action accrued. O'Gara v. Kaufman, 81 Or App 499, 502-503, 726 P2d 403 (1986).

RULE 29--JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

Generally

In declaratory judgment actions, ORS 28.110 controls joinder of parties, rather than ORCP 29. See ORCP 1. ORS 28.110 provides that "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration...". In Wright v Hazen Investments, Inc. 293 Or 259, 262-266, 648 P2d 360 (1982), a dispute arose between 3 shareholders of a corporation as to ownership of a sublease of real property. Two of the shareholders claimed personal ownership and one claimed ownership by the corporation. One shareholder brought a declaratory judgment action to determine title to the sublease. The corporation was not joined as a party. Neither were the owner of the property, nor the lessor who had subleased. Applying ORS 28.110. the supreme court upheld a court of appeals that the corporation must be joined in the action, but the owner and lessor of the property were not persons whose interests were affected by the declaratory judgment. The supreme court, however, reversed the court of appeals order of remand, which directed that the corporation merely be added as a party and the judgment amended. The supreme court decided that the case must be remanded for dismissal, unless the corporation was joined in a time to be set by the trial court.

The court of appeals has, however, applied ORCP 29 to declaratory judgment actions. In Bird v City of Ashland 84 Or App 325, 327-328, 734 P2d 6 (1987) plaintiffs brought a declaratory judgment action against a city, seeking the invalidation of two deeds conveying property to the city. The plaintiff claimed the deeds violated restrictive covenants applicable to the property. The plaintiffs did not join the grantors of the deeds. The Court of Appeals held sua sponte that the trial court should determine whether the grantors were necessary parties to the action. The Court remanded to determine whether the grantors should be joined under ORCP 29 A, and if they should be joined but could not be, what would be an appropriate determination under ORCP 29 B.

29 A. Persons to be Joined if Feasible

Another case where the court of appeals raised ORCP 29 sua sponte is Bancorp Leasing v Brenner 65 Or App 286, , 672 P2d 357 (1983). A purchaser of computer equipment financed the purchase through a lease arrangement with a financing agency. The equipment was purchased from vendors in Virginia. A dispute arose about the adequacy of the equipment. The financing agency brought an action against the purchaser for unpaid lease payments, but did not join the vendors. The court of appeals

reversed a judgment for the defendant. When it remanded the case, it suggested that the trial court consider the utility of ORCP 29 when the case was before it again. The court apparently considered the vendors at least necessary parties to the case under ORCP 29 A.

The relationship between designation as a necessary party under ORCP 29 and a right to intervene under ORCP 33 is not clear. In Samuels v Hubbard 71 Or App 481, 487-488, 692 P2d 700 (1984), the court of appeals interpreted ORCP 29 A in the course of passing upon a trial court decision to deny leave to intervene under ORCP 33. The plaintiff, a former minister in a California Church of Scientology, filed a tort suit against the founder of the Church. The California Church of Scientology and one of its local Churches sought to intervene. The plaintiff claimed that the tortious acts had been done by the churches acting as agents of the founder. The intervenors argued that they had a right to intervene because the were persons who should be joined, if feasible, under ORCP 29 A. The court said it need not decide whether persons who should be joined under ORCP 29 A had a right to intervene under ORCP 33. It concluded that the churches were not persons who should be joined under ORCP 29 A. Their presence was not necessary for complete relief. There was no danger the existing parties would be exposed to double liability or inconsistent obligations. The court said this was not a case in which intervenors would be bound by a challenged rule or would be deprived or money from a challenged fund.

The court of appeals has not always clearly distinguished between application of ORCP 29 A and B. In Egaas v Columbia County 66 Or App 196, 202, 673 P2d 1372 (1983), a contract purchaser of real property brought an action against a county to quiet title to a 60 foot railroad right of way across the land. The Plaintiff did not join the vendor under the land sale contract. Although it indicated that the plaintiff was entitled to prevail against the county, the court of appeals reversed and remanded to have the vendor joined as a party. The court said that otherwise the status of the right of way would remain unclear between the county and the legal owner of the property. The opinion does not indicate whether anyone raised the question of joinder of a necessary party under ORCP 29 A, prior to trial. If not, the objection would have been waived under ORCP 21 G(3), and the joinder could only have been directed if the vendor was a party who had to be joined under ORCP 29 B. See discussion of the ability to assert an objection at trial 29 A and B in (lacy article). The court of appeals, however, said that the vendor was a "necessary party under ORCP 29 A".

LACY, Indispensable Parties under ORCP 29, 62 OR. L. Rev 317 (1983)

RULE 30--MISJOINDER AND NONJOINDER OF PARTIES

ORCP 30 applies to both misjoinder and nonjoinder of parties. Dismissal is only proper for nonjoinder when there is some legal bar to joinder. In all other cases, the trial court should order joinder of the necessary party, rather than dismiss the action. In Sanok v. Grimes, 294 Or 684, 686-687 n 1, 700, 662 P2d 693 (1983), the supreme court found that the Oregon Department of Revenue was a necessary party to an appeal to the Tax Court from an order of that Department under ORS 305.560(1). The Tax Court had adopted ORCP 30 as one of its rules of procedure. See ORCP 1. The supreme court said that ORCP 30 is ambiguous. The first sentence of the rule refers only to misjoinder. The court, however, concluded that the rule also applied to nonjoinder. It noted that the title of the rule and the comment of the drafters both refer to nonjoinder. The second sentence of the rule also refers to adding parties.

ORCP 30 does not provide authority for consolidation of cases. Consolidation of two existing actions, as opposed to adding parties to one existing action, is governed solely by ORCP 53 A. David Atkeson v. Cupp, 68 Or App 196, 198, 680 P2d 722 (1984).

RULE 32--CLASS ACTIONS

Generally

In Guinasso v. Pacific First Fed. Sav. and Loan Ass'n, 89 Or App 270, 272-274, 749 P2d 577 (1988), the court of appeals held that class members are not parties within the meaning of ORS 19.029. They do not have to be named in or served with the notice of appeal. A notice of appeal, directed to and served only upon the class representatives, is sufficient to permit an appeal from the class action judgment.

32 A. Requirement for Class Action

The court of appeals has refused to allow certification of a class, consisting of borrowers from Washington, Idaho, and Oregon, for purposes of an action to recover interest on tax and insurance reserve funds paid to a single bank. The substantive law of each of the states would apply to transactions involving residents of that state. The substantive law appeared different for each state. The class representatives, who were Oregon residents, therefore did not have claims typical of Washington and Idaho class members as required by ORCP 32 A(3). The representatives could represent only Oregon class members. Guinasso v. Pacific First Fed. Sav. and Loan Ass'n, 89 Or App 270, 280, 749 P2d 577 (1988). The court was reaffirming a prior ruling to this effect in Powell v. Equitable Sav., 57 Or App 110, 112-115, 643 P2d 1331 (1982).

32 B. Class Action Maintainable

In Guinasso v. Pacific First Fed. Sav. and Loan Ass'n, 89 Or App 270, 275-280, 749 P2d 577 (1988), a class was action brought by a group of homeowners against a savings and loan company to recover the proceeds from the defendant's use and investment of advance reserve funds for taxes and insurance. The defendant asserted the same argument previously rejected by the supreme court in Dorenco, Inc. v. Benj. Franklin Fed. Sav. and Loan Ass'n, 281 Or 533, 577 P2d 477 (1978). It claimed that, since it would be necessary to determine in each case whether the class members were aware of and consented to defendant receiving income from the reserve funds, common questions did not predominate in the case as required by ORCP 32 B(3). The court of appeals said that, although ORCP 32 was not in effect when Dorenco was decided, the rule does not alter any of the analysis in Dorenco. Under the circumstances, it is a reasonable inference that the class members were not aware of defendant's beneficial use of their money. Therefore there were no separate issues of knowledge or consent. In the Guinasso case, the defendant produced more elaborate evidence than in Dorenco of borrower knowledge and the extent of industry practice relating to use of reserve funds. The court of appeals said it was still

not enough to overcome the inference and create separate questions of fact for each class member.

32 N. Attorney fees, Costs, Disbursements, and Litigation Expenses

The provisions in ORCP 32 N, relating to court control of attorney fees in class action cases, are primarily designed to protect the interests of class members. Class members may have a small financial stake in the action and may be poorly equipped to defend their interests against their attorneys. In Kalman v. Curry, 88 Or App 398, 400-408, 745 P2d 1232 (1987), the court of appeals upheld a trial court award of attorney fees based upon a written agreement with the association representing the class. The court said that attorney fees are subject to control of the trial court, but any fee agreement between the attorneys and the class must be considered by the court. The court of appeals also said that the trial court correctly awarded fees on an hourly basis, rather than using an alternative fee based upon the percentage of benefits conferred as specified in the agreement because the value of benefits conferred upon the class could not be determined. The court also concluded that the attorneys had waived any claim to interest on the fees and there was no basis for awarding attorney fees incurred in the hearing and appeal related to the award of fees. The court, however, did allow fees for time expended on two other cases seeking the same relief as that covered by the class action. The court rejected an argument that the total fees awarded could not exceed the amount claimed from the defendant as fees in the class action complaint. ORCP 67 C(2) only limits recovery from an opposing party. It does not apply to authorization of attorney fees between the class and their own attorney under ORCP 32 N.

Although the attorneys were not formally parties to the case in Kalman, they filed the petition seeking the order authorizing the fees. They were allowed to appeal the trial court order relating to the fees. The court of appeals said the fee proceeding was ancillary to the class action.

RULE 33--INTERVENTION

Generally

Denial of a petition to intervene by the trial court is an appealable order, regardless of the propriety of the denial. Samuels v. Hubbard, 71 Or App 481, 483-485, 692 P2d 700 (1984). A decision denying a motion to intervene affects a substantial right of the intervenor and, as a practical matter, determines the action so as to prevent a judgment in that action on the intervenor's claim or defense.

33 B. Intervention of Right

In Samuels v. Hubbard, 71 Or App 481, 485-488, 692 P2d 700 (1984), the court of appeals held that it would review denials of a claimed right to intervene, under ORCP 33 B, as matters of law. The intervenors in the case were two Church of Scientology entities that sought to intervene in a tort action against the founder of the Church of Scientology. The plaintiff was a former minister of the church, who alleged that the founder had acted through the intervenors and others to commit the torts. The court said that the intervenors would not be prejudiced by the result of the action against the founder. They were not bound by the judgment. If the plaintiff tried to satisfy any judgment by executing on the intervenors property, the intervenors would have a full opportunity to protect their interests in the execution proceeding. The intervenors also argued that they had a right to intervene because they were parties who should be joined, if feasible, under ORCP 29 A. The court never decided that question. It concluded that the intervenors were not parties who should have been joined under ORC 29 A. See discussion under rule 29 A, supra.

ORCP 33 B does not give a claimant to a motor home the right to intervene in forfeiture proceedings based upon use of the vehicle by a criminal defendant to transport or conceal controlled substances. Although forfeiture proceedings have been held to be civil in nature for some purposes, under ORS 471.665, the forfeiture decision is part of a criminal proceeding and the criminal procedure code continues to apply. State v. Eastman, 73 Or App 60, 63 n 2, 697 P2d 995 (1985).

An assignee for security of the proceeds of a land sale contract does not have a right to intervene, under ORCP 33 B, in a fraud action brought by the purchaser under the contact against the assignor/seller. The court of appeals said that the fraud action was a personal action against the seller. Whether the assignee's remedy against the seller could affect or prejudice the assignee's rights to the proceeds of the contract, could not be litigated in the case. If the assignee was not a party, it was not prejudiced by any result in the case. Gerke v. Burton

Enter., Inc., 80 Or App 714, 722, 723 P2d 1061 (1986). The court also noted that even if the assignee had a right to intervene, failure to seek intervention until after the case was tried and a jury verdict returned waived that right. After the commencement of trial, any intervention decision by the trial court is discretionary. See discussion under ORCP 33 C, infra.

33 C. Permissive Intervention

Trial court rulings on motions for permissive intervention, under ORCP 33 C, are within the discretion of the court and will be reviewed on appeal only for abuse of discretion. Samuels v. Hubbard, 71 Or App 481, 485-486, 692 P2d 700 (1984). The court of appeals held that a trial court did not abuse its discretion in denying intervention by two Church of Scientology entities, in a tort action against the founder of the Church of Scientology. This was true even though intervenors had a contractual obligation to indemnify the defendant for the claims brought. The court found that, under the applicable California law, the intervenors would only be liable for indemnity if they were allowed to control the defense to the extent necessary to protect their interests. If they were not allowed to do so, they would have a defense to the indemnity claims.

In Samuels the court of appeals also stated that ORCP 33 C does not expand the bases of permissive intervention from those under the prior statute, ORS 13.130, repealed 1979. It noted that Oregon has not adopted the broad federal standard which allows permissive intervention when the intervenor's claim or defense and the main action have an issue of law or fact in common. The bases for permissive intervention in Oregon are closer to the standards for intervention of right under FRCP 24 (a)(2).

In Rendler v. Lincoln County, 302 Or 177, 179-185, 728 P2d 21 (1986), the supreme court held that persons who were actual users of a public road, claimed to exist by prescription, are persons who have an interest in the subject matter of litigation between landowners and the county relating to the road. The users could be permitted to intervene under ORCP 33 C by the trial court. The court distinguished earlier cases holding that a taxpayer does not have a sufficient interest to intervene in litigation relating to expenditure of public funds. The court also said that an association, whose members had an interest in the subject matter of litigation, could intervene in litigation to assert the collective interests of its members.

Although ORCP 33 C refers only to trial court authority to allow intervention "before trial", the language used is identical to the prior Oregon intervention statute, ORS 13.130, repealed 1979. In City of Salem v. H.S.B., 75 Or App 556, 566, 707 P2d 73 rev'd on other grounds 302 Or 648, 733 P2d 890 (1985), the court of appeals reaffirmed a pre-ORCP ruling, that the language

used gives the trial judge discretion to allow an intervention after the trial begins. See Barendrecht v. Clark, 244 Or 524, 528, 419 P2d 603 (1966).

RULE 36--GENERAL PROVISIONS GOVERNING DISCOVERY

36 B. Scope of Discovery

ORCP 39 B(1) does not authorize one party to secure the names and location of all persons who have discoverable information concerning the case by simply filing a motion seeking production of the information by an opposing party. Although ORCP 39 B(1) allows discovery of occurrence witnesses, it defines only the scope of discovery. The forms of discovery are described in other rules. There is no rule that requires a party to prepare a list of occurrence witnesses. There are no interrogatories in Oregon practice. ORCP 44 does not apply, because production of an existing document is not sought. The information might be secured by deposition, but requesting a list of names from an opposing party is not a deposition. State ex rel. Union Pacific R.R. v. Crookham, 295 Or 66, 68-70, 663 P2d 763 (1983).

The court of appeals has interpreted the general scope of discovery in ORCP 36 B(1) quite broadly. In Vaughan v. Taylor, 79 Or App 359, 364-366, 718 P2d 1387 (1986), a purchaser of a business was sued by the seller for breach of contract. The purchaser claimed that fraudulent representations had been made about the condition of the business. He asserted fraud as an affirmative defense to the breach of contract claim and counterclaimed to recover damages for fraud. The purchaser believed that some fraudulent statements had been made by a CPA retained to assist the seller. The purchaser also believed that the accountant had made the statements because the accountant was in financial difficulty. The purchaser secured discovery of financial information from a bank about the accountant. The information provided included financial information about the accountants two partners. The court said material does not have to be admissible to be discoverable and a request for discovery often must be couched in broad terms, because the significance of the material sought cannot always be determined until it has been inspected. It said the accountant's financial information was relevant to the subject matter of the action, because it related to the accountant's motive to make false representations. As for the information relating to the other partners financial condition, the court said some of it was revealed because it could not be separated from the involved partner's financial situation. For material that was separable, the court said this was still relevant. The financial strength of the partnership, of which the involved partner was a member, was important in evaluating the involved partners financial situation and motive to defraud.

The Vaughan case actually involved an abuse of process claim brought against the purchaser and his attorney by the three accountants. The court of appeals decided the existence of the

abuse of process claim depended upon the permissible scope of discovery under ORCP 36 B(1). Although the court does suggest that discovery might be within the proper scope of discovery, but still an abuse of process because it was done with an improper purpose, the plaintiffs in the Vaughan case never argued that. See 79 Or App at 362 n 1.

The trial court has discretion to determine whether material lies within the scope of discovery under ORCP 39 B(1) and its ruling will only be reviewed by the appellate court for abuse of discretion. In Banister Continental Corp. v. N.W. Pipeline Corp., 76 Or App 282, 290-291, 709 P2d 1103 (1985), a pipeline contractor sued the owner of the pipeline for breach of two construction contracts. The defendant sought copies of five "diaries" kept by the principals of the plaintiff during the period of the contract. The trial court reviewed the diaries in camera and released some portions that it concluded were discoverable. The court of appeals said it might have decided that many of the released diary entries lacked relevance, but it would not substitute its judgment for that of the trial court.

The supreme court has held that, under ORCP 36 B(3), a trial court could deny a request by a plaintiff in a personal injury case for access to reports and records of plaintiffs medical condition and pictures of the plaintiff in the possession of the defendant. The court held that the plaintiff did not make a showing of substantial need for the material and undue hardship in obtaining the material in some other way. State ex rel. Byers v. Crookham, 304 Or 268, 269, 743 P2d 1115 (1987).

The work product rule set out in ORCP 36 B(3) has also prevented discovery of reports prepared by fire cause experts retained by an insured, relating to a fire which destroyed his barn and truck. In United Pacific Ins. Co. v. Trachsel, 83 Or App 401, 403-405, 731 P2d 1059 (1987), the county fire marshall investigated the fire the day of the fire and concluded that it had been intentionally set. The plaintiff then retained a fire cause expert. The court of appeals held that, under the circumstances, the trial court could have concluded that the investigation was done in anticipation of litigation, as opposed to in the ordinary course of business. The plaintiff had a basis to believe that denial of the claim and litigation were likely. The court also said the trial court had not abused its discretion by failing to order discovery, on the grounds that the insurance company could not obtain the substantial equivalent of the materials by other means. Although the truck had been sold by the insured before trial, this was only done after consultation with the insurance company and after securing their approval. The company also had copies of the fire marshall's investigation report.

36 C. Court Order Limiting Extent of Disclosure

Under ORCP 36 C, only a party or the person from whom discovery is sought may seek a protective order to limit discovery or to quash a subpoena. In Vaughan v. Taylor, 79 Or App 359, 364 nn 5 & 6, 718 P2d 1387 (1986), discovery was sought from a bank relating to financial records of three accountants who were not parties to the case. The court of appeals suggested the non-parties had no standing to object to the discovery, but the bank, as their agent, with an implied contractual or fiduciary duty not to disclose personal financial information about customers, would have had standing to seek a protective order.

If a party subject to discovery fails to secure a protective order under ORCP 36 C, other parties in litigation may use discovered material in any way, including dissemination to the public. Wilson v. Piper Aircraft Corp., 46 Or App 795, 797-800, 613 P2d 104 (1980). The case actually involved a post judgment request to the trial court by a defendant for the return of copies of blueprints, graphs, drawings, reports, and letters of the defendant which had been produced in response to a discovery motion. The material was copied by the plaintiff, and then offered as trial exhibits. The case was decided under the pre-ORCP protective order statute, ORS 41.618, (repealed 1979), but the court of appeals noted that the language was identical to ORCP 36 C.

In Union Pacific R.R. Co. v. Dept. of Revenue, 10 OTR 235 (1986), the tax court said that the guarantee of access to judicial proceedings in the Oregon and Federal constitutions did not prevent restricting public access to materials, subject to discovery under ORCP 36 C. The Department of Revenue sought a protective order to limit public access to confidential material submitted to it by the railroad.

RULE 39--DEPOSITIONS UPON ORAL EXAMINATION

39 C. Notice of Examination

A party seeking production of documents or things in the hands of a non-party to the case may only secure such material through a deposition and use of a subpoena duces tecum. Production cannot be compelled merely by serving a subpoena form directing the non-party to produce the material. Notice of deposition must be given to all parties. A subpoena must be served which directs the witness to appear and testify and produce certain designated material. Vaughan v. Taylor, 79 Or App 359, 363-364, 718 P2d 1387 (1986).

39 G. Certification

Depositions which are taken in accordance with ORCP 39, and which are certified as required by ORCP 39 G(1), are properly part of the record of the trial court and the record on appeal. Excerpts from such depositions may be used in support or opposition to a summary judgment motion. Henderson-Rubio v. The May Dept. Stores Co., 53 Or App 575, 581-582, 632 P2d 1289 (1981).

39 I. Perpetuation of Testimony After Commencement of Action

In State ex rel. Grimm v. Ashmanskas, 298 Or 206, 211-212, 690 P2d 1063 (1984), the supreme court noted that the ORCP and Oregon statutes did not, at that time, distinguish between discovery depositions and depositions taken for purpose of perpetuating testimony. It said, however, that the difference between the two forms of deposition was well known to the practicing bar and reflected in different practice for questions and objections. The court was making the distinction for the purpose of waiver of a physician-patient privilege by a plaintiff taking a discovery deposition of a treating physician. In 1988, ORCP 39 was amended to specifically reflect the difference between discovery and perpetuation depositions. A special form of notice is now required under ORCP 39 I. Presumably, this would provide a formal basis for distinguishing between discovery and perpetuation depositions, for purposes of waiver of privilege or whenever such a distinction is necessary.

RULE 43-PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

43 A. Scope

ORCP 43 cannot be used to force a party to prepare documents or respond to interrogatories. It can only be used to secure existing documents and tangible things in the possession of another party. State ex rel. Union Pacific R.R. Co. v. Crookham, 295 Or 66, 68-70, 663 P2d 763 (1983).

ORCP 43 only provides a method by which a party may require another party to produce documents for inspection and copying. There is no comparable way to simply require a non-party to produce documents for discovery purposes. The party seeking material from a non-party must schedule a deposition and serve a subpoena **duces tecum** under ORCP 39 C(1) and ORCP 55 F(1). Vaughan v. Taylor, 79 Or App 359, 363, 718 P2d 1387 (1986).

RULE 44--PHYSICAL AND MENTAL EXAMINATION OF PERSONS; REPORTS OF EXAMINATIONS

44 A. Order for Examination

Martin v. Bohrer, 84 Or App 7, 9-14, 733 P2d 68 (1987), presents an interesting question, whether a defendant, who secures an examination of the plaintiff by defendant's doctor, is liable for injuries to the plaintiff that occur during the examination. The plaintiff in the personal injury case had claimed spinal injuries. The complaint alleged that "during an independent examination arranged by the defendant, the plaintiff sustained an injury to his right knee as a result of a test performed on the knee by the examining physician". The trial court struck the allegation. The court of appeals remanded the case on the grounds that the allegation was sufficient to allow evidence that might authorize recovery. The majority opinion analyzes the question in terms of responsibility of a tortfeasor for injuries sustained by the plaintiff in the course of medical procedures diagnosing, treating, or evaluating the injuries sustained in the accident. A more direct question would be whether a defendant, who compels a plaintiff to submit to a physical examination, is responsible for injuries incurred during that examination. The majority, however, said that without an explicit claim of agency or other relationship between the defendant and the examining physician "the fact that the defendant requested the examination places no more responsibility on him than he would have if plaintiff had sustained his injury at a deposition." A concurring opinion by Judge Newman states that, if the plaintiff was examined by the physician at the request of the defendant and the injury "...occurred because of a procedure to which the physician asked him to submit, whether or not it was part of an overall evaluation of his condition..", the plaintiff would be entitled to get to the jury. Judge Newman appears to have the better argument.

44 D. Report; Effect of Failure to Comply

A trial court has discretion whether to exclude testimony of a defendant's physician who examined a plaintiff in a personal injury case, but did not prepare and provide a written report to the plaintiff within a reasonable time, as required by ORCP 44 C and D. Although ORCP 44 D(2) provides that, if the report is not furnished as required, the trial court may direct a deposition of the physician or exclude the physician's testimony at trial, the sanctions are not mandatory. Barry v. Don Hall Laboratories, 56 Or App 518, 524-525, 642 P2d 685 (1982). The examination had been conducted six weeks prior to trial. A written report was furnished to the plaintiff on the morning of the first day of trial. The doctor was not called until the end of the second day of trial.

RULE 45--REQUESTS FOR ADMISSION

45 B. Response

A failure to respond to a request for admissions only results in admission if the request was served in conformance with ORCP 9. Loudermilk v Hart, 92 Or App 293, 295-296, 758 P2d 397 (1988)

45 D.Effect of Admission

In Bowers v. Winitzki, 83 Or App 169, 173, 730 P2d 1253 (1986), the defendants admitted, in response to plaintiff's request for admission, that certain powers of attorney were authentic. After trial, the defendants argued that the trial court could consider those powers of attorney in evaluating the sufficiency of plaintiff's evidence, even though the powers of attorney had never been introduced in evidence at the trial. The question was never actually decided. The court of appeals said that, even assuming the documents could be considered, they did not have the affect on the sufficiency of plaintiff's evidence urged by defendant. Whether or not the party requesting an admission is bound by the facts admitted, clearly the party making the admission is. In Amvesco, Inc. v. Key Title Co. of Bend, 77 Or App 333, 335, 713 P2d 614 (1986), the court of appeals said that defendant's responses to plaintiff's requests for admissions could be relied upon by plaintiff, without further evidence, to support an inference of the existence of facts.

A party who, in response to a request for admission, truthfully answers the precise question an opponent asks cannot be held to have implicitly made some other representation. Hussey v. Huntsinger, 72 Or App 565, 569-570, 696 P2d 580 (1985). The plaintiff brought a claim under the Oregon Tort Claims Act. Plaintiff's claimed that notice to the defendant consisted of a letter to a person to whom notice apparently could not be given, which resulted in a telephone call from defendant's lawyer, where oral notice was given. The defendant submitted a request for admission which asked for a "copy" of notice of the claim. Plaintiff attached the letter to the response to the request for admissions, stating the copy of notice of claim was attached. The court of appeals said the plaintiff had attached the only part of the notice process that was in writing, which is all the defendant asked for. That did not implicitly represent that the letter was the exclusive means of notice relied upon. One interesting aspect of the case, not commented on by the court, is that the defendant was using the wrong rule. If the defendant wished the plaintiff to provide a copy of a document in plaintiff's possession, the defendant should have requested production under ORCP 43, not an admission under ORCP 45.

RULE 46--FAILURE TO MAKE DISCOVERY; SANCTIONS

46 B. Failure to Comply with Order

A party whose pleadings are stricken for failure to submit to a deposition and who suffers a default judgment is not a party in default "for want of an answer" within the meaning of ORS 19.020. The defaulted party may appeal. Rajneesh Found. Int'l v. McGreer, 80 Or App 168, 171 n 3, 721 P2d 867 (1986) rev'd, 303 Or 139, 141 n 2, 734 P2d 871 (1987).

In Piercy v. Goldleaf Corp., 79 Or App 254, 256-258, 719 P2d 36 (1986), the court of appeals reversed a trial court order entering a judgment by default against a defendant for failure to appear for a deposition. After repeated attempts to schedule a deposition of the defendant, plaintiff secured a court order directing that the defendant appear on Oct. 18, 1983, or earlier, for a deposition. On Oct. 17, 1983 the defense attorney told the plaintiff that defendant would be available for deposition Oct. 17-21. The defense attorney stated that he was busy on Oct. 18 and, since that was the last day allowed for the defendant to submit to deposition, moved for a default judgment. The court of appeals distinguished a pre-ORCP case, Mestas v. Peters, 280 Or 447, 571 P2d 888 (1977), which involved a similar situation where the court upheld a default order by the trial court. The court said that under ORCP 46 B, sanctions can only be applied for failure to obey a trial court order. In the Piercy case the defendant never absolutely violated the trial court order. In the end it was the plaintiff's action, not the defendant's which resulted in violation of the order.

46 C. Expenses on Failure to Admit

ORCP 46 C says the trial court must award costs where one party refuses to admit and the party requesting the admission proves the truth of the matter, unless there was good reason for failing to admit. The trial court therefore has discretion in awarding costs. In Kitzerow v. Reinhardt, 74 Or App 582, 584 n 1, 704 P2d 132 (1985), the court of appeals upheld a trial court refusal to allow costs. A defendant refused to admit the accuracy of the plaintiff's property survey, which was established as correct at trial. The court said that the survey was not a simple one and showed on its face that several important points were determined approximately. The trial court could properly have concluded that the defendants had good cause to put the plaintiffs to their proof.

46 D. Failure of a Party to Attend own Deposition or Respond to Request for Inspection or to Inform of Question Regarding the Existence of Coverage of Liability Insurance Policy

In Erickson Air-Crane Co. v. United Tech. Corp., 87 Or App

577, 581 n 5, 743 P2d 747, rev'd on other grounds 303 Or 281, 735 P2d 614 (1987), the court of appeals said that even though a party had not produced documents in response to another parties' request for production, the trial court had not abused its discretion in allowing the documents to be used by the nonproducing party to impeach the requesting party's expert witness. The trial court "may make such orders in regard to the failure [to produce] as are just." (Note, the citation given by the court was ORCP 43, but the language quoted is in ORCP 46 D.)

In Martin v. Blakney, 85 Or App 203, 204, 735 P2d 1294 (1987), the court of appeals upheld a trial court dismissal of a plaintiffs complaint with prejudice for failure to appear at a deposition. Two hours before a scheduled deposition, plaintiff's attorney informed defendant that he was unable to attend. The deposition was rescheduled and neither plaintiff nor his attorney appeared. Defendant moved for sanction under ORCP 46 and the plaintiff and his counsel did not appear at the sanction hearing. The court does not cite the exact provision of ORCP 46 relied upon, but the dismissal apparently was authorized under ORCP 46 D. The plaintiff never disobeyed a court order, as required under ORCP 46 B.

The trial court discretion to impose sanctions for failure to comply with discovery is not absolute. In Hahm v. Hills, 70 Or App 275, 277-281, 689 P2d 995 (1984), the plaintiff began taking defendant's deposition and was unable to complete it. The continuation of the deposition was scheduled twice and the defendant did not appear. The plaintiff then filed a motion seeking costs incurred by the nonappearance, and asking for an order that the defendant appear or be held in contempt. At the hearing on the motion, the trial court instead struck the defendants appearance and held him in default. At hearings on motions to reconsider and to vacate the default judgment, the defendant presented evidence that he had been unaware of the scheduled resumption of the deposition because of personal problems. The court of appeals said that, even though ORCP 46 does not have specific language to that effect, pleadings may only be stricken when noncompliance with a discovery order has been wilful or in bad faith, or where noncompliance is occasioned by the fault of the sanctioned party. The most severe sanctions should be imposed only when they are necessary to preserve the integrity of the judicial system or in some other extreme circumstances. The court noted that the trial court has wide discretion in imposing sanction, but held that in this case, there was an insufficient factual predicate for the sanctions used. The court cited both ORCP 46 B and D. The sanctions involved must have been imposed under ORCP 46 D. The defendant never was in violation of a trial court order relating to the deposition.

The court of appeals has also held that a trial court has no

authority, under ORCP 46 D, to impose sanctions upon a party for failure to appear for a deposition when the sanctioned party did not receive notice of the sanction motion, as required by ORCP 9 and 10. State ex rel. Adult and Family Services Div. v. Hamilton, 57 Or App 94, 96-97, 643 P2d 1323 (1982).

RULE 47--SUMMARY JUDGMENT

Generally

After trial, a denial of a motion for summary judgment will not be reviewed on appeal from the final judgment, at least where the basis of the motion is that there is no disputed issue of fact. The reason for the rule is that, while it may be unfair to the party making the motion not to have it reviewed, it would be more unjust to set aside a jury verdict supported by substantial evidence rendered after a full trial because a summary judgment should have been rendered on less evidence. The appellate courts, however, will review the denial of the summary judgment motion when the moving party claims that he must win under the law no matter what the facts may show. Payless Drugstores N.W. v. Brown, 300 Or 243, 245-248, 708 P2d 1143 (1985); Mt. Fir Lumber Co. v. Temple Distrib. Co., 70 Or App 192, 194-198, 688 P2d 1378 (1984); Stromme v. Nasburg and Co., 80 Or App 26, 28-32, 721 P2d 847 (1986). In Mt. Fir, the court of appeals also noted that it is also well established that denial of a motion for summary judgment is also not an appealable order. 70 Or App at 194 n 1.

A denial of a motion for summary judgment may be reviewable in one situation. If both parties move for summary judgment, and the trial court grants a summary judgment for the defendant, and on appeal the appellate court reverses that judgment, the appellate court can also review the denied motion made by the plaintiff. In Cochran v. Connell, 53 Or App 933, 938-940, 632 P2d 1385 (1981), the court of appeals followed this procedure and, after reversing a summary judgment granted to one party, directed the trial court to enter the judgment in favor of the other party on the cross motion. The court pointed out that considering the cross motion on appeal was only proper in a situation where it is absolutely clear to the appellate court that no further exploration of facts is necessary. In McKee v. Gilbert, 62 Or App 310, 312 n 1, 661 P2d 97 (1983), the court said that considering the denied cross motion on appeal was an unusual procedure which was not appropriate for that case. In State ex rel. Redden v. Willamette Recreation, Inc., 54 Or App 156, 160-161, 634 P2d 286 (1981) and Bear Creek Valley Sanitary Auth. v. Hopkins, 53 Or App 212, 214 n 1, 631 P2d 808 (1981), the court also declined to review cross motions for summary judgment after reversing summary judgments granted to the opposing party by the trial court.

An order granting a summary judgment is also not an appealable order. The appeal must be from the judgment entered pursuant to the order. Scheid v. Harvey, 73 Or App 481, 485, 698 P2d 991 (1985). See also ORCP 47 G involving an order for partial summary judgment. Raykovich v. Wilkinson, 59 Or App 560, 561, 651 P2d 747 (1982); Kuvaas v. Cutrell, 50 Or App 529, 532,

623 P2d 1116 (1981).

In Carter v. U.S. Nat'l Bank of Oregon, 304 Or 538, 544-545, 747 P2d 980 (1987), the supreme court said that although a summary judgment proceeding does not involve a decision on contested facts, ~~that is the trial court does not resolve conflicts in the evidence,~~ it does involve an examination of issues of fact, ~~that is the trial court decides if there are any~~. The court therefore concluded the summary judgment procedure involves a "trial" and that a motion to reconsider a summary judgment order was a motion for new trial under ORCP 64. See also Employee Benefits Ins. Co. v. Grill, 300 Or 587, 589, 715 P2d 491 (1986).

A party may file motions to dismiss and not raise the issue of bar by the statute of limitations, without waiving the right to raise the limitation defense by summary judgment motion. Workman v. Rajneesh Found. Int'l, 84 Or App 226, 228 n 2, 733 P2d 908 (1987). A summary judgment motion is an appropriate vehicle for raising a statute of limitations defense.

ORCP 47 applies in domestic relations cases. In Annala and Annala, 47 Or App 423, 426-427, 614 P2d 618 (1980), the court of appeals overruled a trial court decision that summary judgment was inappropriate in a matter involving modification of the support obligations in a dissolution decree.

47 B. For Defending Party

Reversal of a summary judgment ~~for defendant~~ by the court of appeals does not mean that the fact question involved must be submitted to the jury. In Van Osdol v. Knappton Corp., 73 Or App 684, 686-688, 699 P2d 1176 (1985), the court of appeals reversed the granting of a summary judgment for a defendant on the issue of respondeat superior. On remand, the trial court held that it was bound by law of the case to submit the question of respondeat superior to the jury because it involved disputed facts. The trial court refused to grant a directed verdict for the plaintiff on the issue. In Van Osdol v. Knappton Corp., 91 Or App 499, 755 P2d 744 (1988), the court of appeals held that its previous opinion dealt only with the question of whether the defendant was not liable. The court did not pass on the question whether the defendant was liable as a matter of law. The plaintiff could present the question by a motion for directed verdict.

47 C. Motion and Proceedings Thereon

In disposing of a summary judgment motion, the trial court can only consider the pleadings, depositions, and admissions on file, together with the affidavits submitted by the parties, if any. These may include affidavits submitted in relation to previous summary judgment motions. Nofziger v. Kentucky Central

Life Ins. Co., 91 Or App 633, 636 n 2, 758 P2d 348 (1988). Factual assertions of counsel at the oral argument on a summary judgment motion do not provide a basis for denying a motion for summary judgment. Elliot v. Oregon Int'l Mining Co., 60 Or App 474, 479, 654 P2d 663 (1982). A party may not simply attach medical reports and records to its motion for summary judgment. McIntire v. First Far West Life Ins. Co., 49 Or App 253, 255-256, 619 P2d 1300 (1980). Statements in the parties' briefs on a motion for summary judgment do not provide a basis for granting the motion. Falkenstein v. Pishioneri, 80 Or App 203, 206, 720 P2d 1341 (1986). See also dissenting opinion of Judge Rossman in Van Daam v. Hegstrom, 88 Or App 40, 46-48, 744 P2d 269 (1987).

Excerpts from depositions, however, which have been taken in accordance with ORCP 39, may be used. Clapp v. Oregonian Publishing Co., Inc., 83 Or App 575, 577-581, 732 P2d 928 (1987). If a party attaches numerous exhibits to a memorandum of law, and the opposing party makes no objection and deals with the material as if it were properly submitted, any error in considering the material is waived. Lemke v. Western Homes & Land Co., 65 Or App 529, 531-532, 671 P2d 709 (1983).

In Meyer v. Caldwell, 296 Or 100, 104, 672 P2d 342 (1983), the supreme court rejected a claim that a court was required to take live testimony of witnesses at a summary judgment hearing. The court said there was no statutory basis in Oregon for such a requirement. The court of appeals took an even stronger stand in relation to live testimony in Credithrift of Am., Inc. v. Novak, 44 Or App 483, 487 n 1, 605 P2d 1380 (1980), decided under ORS 18.105 (repealed 1979), the former summary judgment statute. It stated that it disapproved of any use of live testimony. It suggested that the taking of live testimony might encourage the trial judge to weigh the evidence.

If facts appear in affidavits submitted to support a motion for summary judgment which raise issues not in the pleadings, but which would justify amendment of the pleadings, the trial court should treat the pleadings as if they were amended. U.S. Nat'l Bank of Oregon v. Miller, 74 Or App 405, 409, 703 P2d 246 (1985); Hussey v. Huntsinger, 72 Or App 565, 569, 696 P2d 580 (1985).

In determining whether there is a genuine issue of material fact in a case, the court should view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of all reasonable and proper inferences that can be drawn from the evidence. Hatfield v. Empire Gen. Life Ins. Co., 89 Or App 190, 193, 748 P2d 152 (1988); Tracer v. Ohio Casualty Ins. Co., 83 Or App 661, 663, 733 P2d 62 (1987); Clapp v. Oregonian Publishing Co., Inc., 83 Or App 575, 577-581, 732 P2d 928 (1987). This includes issues on which the opposing party would have the trial burden. Welch v. Bancorp Management

Advisors, Inc., 296 Or 208, 218-219, 675 P2d 172, reh'g denied, 296 Or 713, 716, 679 P2d 866 (1984); Oregon Bank v. Nautilus Crane & Equip. Corp., 68 Or App 131, 134, 683 P2d 95 (1984). Best v. U.S. Nat'l Bank of Oregon, 78 Or App 1, 3, 714 P2d 1049, aff'd 303 Or 557, 739 P2d 554 (1986); U.S. Nat'l Bank of Oregon v. Miller, 74 Or App 405, 409, 703 P2d 246 (1985); Hodecker v. Butler, 64 Or App 167, 170, 667 P2d 540 (1983); Classic Instruments Inc. v. VDO-Argo Instruments, Inc., 73 Or App 732, 735, 700 P2d 677 (1985); Gorge Leasing Co. v. Hanna, 60 Or App 272, 275-276, 653 P2d 578 (1982); Hunt v. Smith, 56 Or App 74, 76-77, 641 P2d 70 (1982).

Although ORCP 47 C does not explicitly say so, the court of appeals has stated that, in the absence of counteraffidavits or conflicting evidence, facts set out in affidavits supporting a motion for summary judgment will be taken as true. Dargen v. King, 87 Or App 349, 351-352, 742 P2d 72 (1987); Sheppard v. Weekly, 72 Or App 86, 92, 695 P2d 53 (1985); Taylor v. Settecase, 66 Or App 332, 335-336, 673 P2d 1384, reconsideration allowed, 69 Or App 222, 226, 685 P2d 470 (1984). The evidentiary matter in support of the summary judgment motion must still establish the absence of a genuine issue of material fact. W.L. Bostick Family Trust v. Magliocco, 64 Or App 305, 308, 667 P2d 1044 (1983); Crawford v. Stowell, 74 Or App 11, 15, 701 P2d 480 (1985). See also Harrington v. Dederer, 58 Or App 236, 238-239, 648 P2d 409 (1982), where the court of appeals found that material which a defendant has submitted to support its motion for summary judgment showed there was an issue of material fact and said summary judgment should be denied, even though plaintiff had submitted no evidence.

A party may not create a genuine issue of fact by submitting an affidavit contradicting his prior deposition testimony, if the two statements are clearly inconsistent and no attempt is made to explain the inconsistency. However, where the affiant explains or adds to his deposition testimony or the affiant claims that he or she was confused when giving the deposition testimony there may be a genuine issue of fact. Henderson-Rubio v. May Dep't Stores Co., 53 Or App 575, 582-585, 632 P2d 1289 (1981). In Clapp v. Oregonian Publishing Co., 83 Or App 575, 580-581, 732 P2d 928 (1987), a plaintiff's contradicting affidavit did claim that he had been confused in his deposition testimony. The court of appeals refused to accept the claim. The deposition questions were clear and understandable and the testimony clearly and unequivocally showed that the plaintiff had no claim.

An affidavit of a defendant that merely denies the truth of the plaintiff's allegations does not satisfy defendant's burden of proving that there are no material issues of fact, at least where plaintiff has testified on deposition as to the truth of those allegations. Thurman v. Thomas, 70 Or App 159, 162-163, 688 P2d 125 (1984). Cf. Edwards v. Lewis, 76 Or App 94, 97 n 1, 707 P2d

1298 (1985).

A motion for summary judgment is not the correct vehicle to assert that a party has failed to plead facts sufficient to constitute a claim or defense. If a party makes a summary judgment motion on this basis, it is the functional equivalent of a motion to dismiss under ORCP 21 A(8) and should be treated as such by the trial court. Johnson and Johnson, 302 Or 382, 388 n 5, 730 P2d 1221 (1986); Humphrey v. Coleman, 86 Or App 511, 514, 739 P2d 1081 (1987). In Goldstein v. Radakovich, 68 Or App 843, 845-846 n 1, 683 P2d 149 (1984), the court of appeals treated a motion for directed verdict in a nonjury case as a motion for summary judgment. In Wiggins v. Barrett & Assoc., 53 Or App 882, 885, 632 P2d 1373, rev'd on other grounds 295 Or 679, 1132 (1981), the court treated a summary judgment motion as a motion for directed verdict.

A summary judgment motion is also not an appropriate way to raise an objection to the subject matter jurisdiction of the trial court. Spada v. Port of Portland, 55 Or App 148, 150, 637 P2d 229 (1981).

The fact that the parties stipulate or agree that there is no genuine issue as to any material fact does not prevent the trial court from concluding there are disputed facts and refusing to grant a summary judgment. Royal Indus., Inc. v. Harris, 52 Or App 277, 282-283, 628 P2d 418 (1981). The fact that both parties move for summary judgment does not mean that there are not disputed issues of fact in a case. Ducy v. Farmers Ins. Co. of Oregon, 90 Or App 195, 199, 751 P2d 803 (1988); McKee v. Gilbert, 62 Or App 310, 320-321, 661 P2d 97 (1983). A party, however can concede that an opponents motion is well taken and this will be dispositive of the issue. Edwards v. Lewis, 76 Or App 94, 97 n 1, 707 P2d 1298 (1985); Walker v. City of Portland, 71 Or App 693, 698-699, 693 P2d 1349 (1985).

Parties may submit a controversy to the trial court for decision upon stipulated facts. In such case the trial judge weighs the evidence and decides the facts. In Gourley v. O'Donnell, 51 Or App 477, 479-481, 626 P2d 367 (1981), the court of appeals upheld a trial court decision where the parties had originally filed cross motions for summary judgment, and then submitted stipulated facts to the court for decision.

A trial court may not grant a summary judgment on its own motion without following the procedures and requirements of ORCP 47. In Indus. Underwriters v. JKS, Inc., 90 Or App 189, 190, 750 P2d 1216 (1988), the trial judge, on the day set for trial, announced that on his own motion he intended to grant a summary judgment for the defendant. The court of appeals said ORCP 47 provides detailed procedures for summary judgment, including time restrictions and provisions for affidavits and counteraffidavits.

The plaintiff was prepared to try the case, not deal with a summary judgment motion or the issue of whether there were any facts to try. The court, however, did not say that the trial court absolutely lacked authority to grant a summary judgment without motion or to do so on the day of trial.

In Bowers Mechanical, Inc. v. Kent Assoc., 63 Or App 414, 416-417, 664 P2d 436 (1983), the court of appeals held that, under ORCP 9 B and the time limit for filing material in opposition to a motion for summary judgment, a party could mail the opposing material to the moving party up to one day prior to the hearing, even though the moving party would then never see the material prior to the hearing. This led the Council on Court Procedures to change the time limits in ORCP 47 C which now require the last of the material relating to the motion to be submitted 20 days before hearing.

In Realty Group v. Dep't of Revenue, 299 Or 377, 385-386, 702 P2d 1075 (1985), a party argued that the tax court erred in ruling on a motion for summary judgment without conducting a hearing on the motion. The party relied upon ORCP 47 C adopted by the tax court as TCR 47. The court found it unnecessary to rule on the question because a hearing would not have affected the grounds on which it affirmed the tax court decision. It did, however, note that ORCP 47 C is not clearly drafted. It refers to a party serving the motion 10 days before the time fixed for hearing, but there is no direction that there be a hearing. The federal courts have concluded that identical language in the federal rule means that no hearing shall be set until at least ten days after the motion for summary judgment motion is served. The court suggested that the Council on Court procedures look at the rule. The 1984 amendments to the rule did not solve the problems noted.

The reopening of a summary judgment motion to allow submission of additional affidavits or other evidence is analogous to reopening a case after to trial for presentation of new evidence. It is a matter within the discretion of the trial judge, which will not be disturbed absent manifest abuse. Portland Elec. & Plumbing Co. v. Cooke, 51 Or App 555, 558, 626 P2d 397 (1981). In Williams v. Haverfield, 82 Or App 553, 558-559, 728 P2d 924 (1986), however, the court of appeals said the trial court should have considered the additional material submitted by a defendant at a second hearing conducted after refusal of a summary judgment motion. At the first hearing, the parties and the trial court treated assertions in defendant's answer as an affirmative defense, which would not require defendant to make any factual presentation to avoid summary judgment. In the second hearing, the trial court treated the assertions as a counterclaim, which would have required the defendant to make some factual presentation to avoid summary judgment. For a case where the trial court did allow a party to

submit additional material after the summary judgment hearing, see McCraw v. Stapp, 82 Or App 79, 81 n 1, 727 P2d 160 (1986).

47 D. Form of Affidavits; Defense Required

ORCP 47 D requires that affidavits in support of summary judgment motions be made on personal knowledge by a person competent to testify to the matters in the affidavit. Although a party can always testify about their own intent, testimony by one party as to the intent of another party is not proper. Ensley v. Fitzwater, 59 Or App 411, 414-415, 651 P2d 734, rev'd on other grounds 293 Or 158, 645 P2d 1062 (1982). A party's lawyer's affidavit, based upon hearsay, does not comply with the rule and should not be considered by the court. Paulsen v. Continental Porsche Audi, Inc., 49 Or App 793, 799 n 3, 620 P2d 1384 (1980). On the other hand, an affidavit of an attorney reciting matters of fact within the attorney's knowledge is proper and will be considered. Verret v DeHarpport, 49 Or App 801, 803-804, 621 P2d 598 (1980). A lay plaintiff cannot submit an affidavit containing assertions which could only be made by a medical expert. Harris v Erickson 48 Or App 655, 657, 617 P2d 685 (1980). Cf. Biornstad v. Plaid Pantries, Inc., 56 Or App 122, 124, 641 P2d 88 (1982).

The whole scheme of summary judgment is designed to cut off ligation at an early stage, without subjecting the parties to months or years of extensive and expensive litigation, where it appears that one of the parties has no case. Under the summary judgment rule, the party opposing a summary judgment motion may not rest upon mere allegations in that party's pleading. Tiedemann v. Radiation Therapy Consultants, 299 Or 238, 245, 701 P2d 440 (1985); Toothman v. Concel, Inc., 66 Or App 169, 171-172, 673 P2d 562 (1983); Northwest Admin. v. Woodburn Truck Line, Inc., 61 Or App 299, 303, 657 P2d 714 (1983). If the moving party, however, does not demonstrate the absence of any genuine issue of material fact, the opposing party need not put in evidence. The opposing party is not resting on the allegations of their pleading. The moving party has not carried the burden of proving lack of a fact issue. Kutbi v. Thunderlion Enter., Inc., 73 Or App 458, 464, 698 P2d 1044 (1985); Henderson v. Hercules, Inc., 57 Or App 791, 795-796, 646 P2d 658 (1985).

47 E. Affidavit of Attorney When Expert Opinion Required

In submitting an affidavit under ORCP 47 E, it is sufficient and, perhaps advisable, to use the exact language set out in that section. In Moore v. Kaiser Permanente, 91 Or App 262, 264-265, 754 P2d 615 (1988), a plaintiff's attorney in a medical malpractice case submitted an affidavit stating that he had retained an expert who was available and willing to testify to admissible facts which would create issues of fact as to the diagnosis, standard of care, and duty of the defendant. The

court of appeals said that the affidavit did not have to recite that the unnamed expert had actually rendered an opinion or provided facts. They also said the affidavit also does not have to recite on what exact issues the expert will testify. Where, however, as in the case, the affidavit does enumerate the elements upon which the expert will testify, it must give notice of all such elements. The court therefore held that the affidavit did not indicate the experts testimony would create fact issues on damages and causation. In Allen v. Kaiser Found. Hospital, Inc., 76 Or App 5, 9, 707 P2d 1289 (1985), the court of appeals had said that an experts affidavit containing only a conclusion that there was negligence in the particulars stated in the complaint was not permissible in responding to a motion for summary judgment because it did not set forth facts showing a genuine issue of material fact.

In Tiedemann v. Radiation Therapy Consultants, 299 Or 238, 242-249, 701 P2d 440 (1985), the supreme court held that where defendant made a summary judgment motion in a medical malpractice action, and submitted expert testimony that established no negligence, and plaintiff did not submit any affidavit showing negligence, the trial court properly granted a motion for summary judgment. The court recognized that if plaintiff makes a summary judgment motion, supported by an expert affidavit, and defendant does not submit contrary testimony, summary judgment would not be proper because the jury is not bound to accept the expert's testimony. But when a defendant moves for summary judgment and submits an expert's affidavit showing no issue of material fact, the plaintiff must either submit an affidavit of an expert or some other person showing negligence, or submit the plaintiff's attorney's affidavit under ORCP 47 E.

The supreme court decision in Tiedemann appears contrary to the court of appeals holdings in May v. Josephine Memorial Hospital, 70 Or App 620, 623, 690 P2d 1118, rev'd on other grounds 297 Or 525, 686 P2d 1015 (1984) and Bank of Oregon v. Indep. News, Inc., 65 Or App 29, 48-50, 670 P2d 616, aff'd 298 Or 434, 693 P2d 492 (1983), that defendants who supported motions for directed verdict with affidavits of experts had not carried their burden to show no genuine issue of material fact because the jury would not have to accept the experts testimony. The Bank of Oregon case was affirmed by the supreme court, 298 Or 434, 446-447, 693 P2d 35 (1985), but apparently on the ground that plaintiff's non-expert evidence would support a finding in plaintiffs favor. Cf. Felske v. Worland, 63 Or App 442, 445-446, 664 P2d 427 (1983), decided on the ground that the affidavit of defendant's expert did not deal with the issues presented in the case.

47 F. When Affidavits Unavailable

Although ORCP 47 F says that if a party submits an affidavit

showing that the party cannot at the present time secure affidavits to justify opposition to the summary judgement motion, the court may grant a continuance, the continuance may be mandatory. In Harris v. Erickson, 48 Or App 655, 657-661, 617 P2d 685 (1980), the court of appeals reversed a trial court grant of summary judgment against a prison inmate who claimed that he was being prevented from securing evidence from a physician.

RULE 51--ISSUES; TRIAL BY JURY OR BY THE COURT

51 C. Issues of Fact; How Tried

In Rexnord, Inc. v. Ferris, 294 Or 392, 396-403, 657 P2d 673 (1983), the supreme court overruled the court of appeals and held that a party waives right to jury trial by failing to demand trial by jury on an issue before the issue is submitted to a judge. The language in ORCP 51 C says that, if there is a right to jury trial, it can only be waived by some affirmative action of a party. Oregon cases decided under the pre-ORCP statute, ORS 17.035 (repealed 1979), however, had held that failure to demand a jury at the time a case was tried, was a waiver of the right. The court pointed out that the language in ORCP 51 C was taken directly from ORCP 17.035. The Rexnord case involved a situation where both an injunction and punitive damages were sought. After the judge had determined the right to the injunction, the defendant objected to the joinder of injunctive relief and punitive damages in the same case. The defendant, however, did not demand a jury trial on the punitive damages issue or object to consideration of the punitive damages issue based upon a right to jury trial.

51 D. Advisory Jury and Jury Trial by Consent

Order of trial, in a case involving mixed legal and equitable issues, may be crucial to the question of right to a binding decision by a jury. In Sasser v. DeLorme, 56 Or App 630, 632-634, 642 P2d 1192 (1982), plaintiff filed an action seeking an accounting, an equitable remedy, and damages for conversion and for money had and received, legal remedies. The defense to all claims was that funds transferred had been a gift. The parties assumed the legal claims would be tried to a jury and the accounting claim decided by the judge. The parties refused to consent to a binding jury verdict under ORCP 51 D. The court said that the jury would render an advisory verdict in the accounting case as provided in ORCP 51 D. The jury found for the defendant in all three claims and the trial court stated that it would find in accordance with the advisory jury. On appeal, the plaintiff argued that the trial judge was not bound by an advisory verdict and that the court of appeals should review the evidence de novo on the accounting claim. The court said that this was ordinarily the case with an advisory jury on an equitable claim. In this particular case, however, once the jury decided the factual issue in the course of deciding the damage claims, that is, existence of a gift, that decision also disposed of the equitable claim. The existance of the gift was common to all claims and once the jury decided, a contrary decision by the court would be tantamount to collateral review of the juries decision in an equity action. In other words, the judge was bound not by any advisory verdict in the equitable case, but by the earlier verdict on the law claims.

RULE 54--DISMISSAL OF ACTIONS;COMPROMISE

54 A. Voluntary Dismissal; Effect Thereof

If a trial court dismisses a plaintiff's complaint for failure to state a claim, and the plaintiff is unable to plead the claim more fully, the plaintiff may secure a judgment by voluntary dismissal and appeal to test the validity of the trial court ruling. In Paddock v. McDonald, 294 Or 667, 669-672, 661 P2d 545 (1983), the supreme court said this rule applied to a voluntary dismissal under ORCP 54 A(1), as it had to the prior procedure of a voluntary nonsuit. The court also said that a plaintiff, in dismissing and seeking appellate review of the court determination that the complaint failed to state a claim, is required to assert in good faith that it could not plead further. Therefore, if the trial court is upheld, on remand the plaintiff would not be allowed to amend the complaint.

Any other voluntary dismissal under ORCP 54 A(1) is not an appealable order. In Meadowbrook v. Groves, 60 Or App 26, 28-30, 652 P2d 842 (1982), a plaintiff dismissed the case during trial after the trial court refused leave to amend to change the claim for relief. The court of appeals said the court ruling could not be reviewed because the dismissal could not be appealed.

A judgment of dismissal is a final judgment for purposes of awarding attorney fees authorized by statute. The defendant is the prevailing party. Wacker Siltronic Corp. v. Pakos, 58 Or App 40, 43, 646 P2d 1366 (1982); Consortium Co. v. Gradin, 60 Or App 161, 162, 652 P2d 1288 (1982).

54 B. Involuntary Dismissal

When a plaintiff was ordered by the trial court to file an amended complaint, failed to do so for almost two months, and then filed an improperly signed complaint, the trial court had authority to dismiss the case under ORCP 54 A(1) and (3) for failure to obey a court order and failure to prosecute the case. The delay may have resulted from miscommunication among plaintiff's counsel, but the trial court did not abuse its discretion. Bruner v. Cascade Western Corp., 88 Or App 501, 503-505, 746 P2d 231 (1987).

A plaintiff's failure to initiate arbitration after an abatement order pending arbitration by the trial court, can amount to a failure to prosecute the action and lead to an involuntary dismissal under ORCP 54 B(1). The plaintiff has an obligation to demand arbitration, even though defendant moved to abate the action. An involuntary dismissal was upheld in Hilsenbeck v. Quadrant Corp., 53 Or App 341, 347-348, 632 P2d 19 (1981). The plaintiff had failed to initiate arbitration for two months. Defendant filed a motion to dismiss. After two more

months elapsed, the case was dismissed. In Meissner v. Diller, 69 Or App 518, 520-521, 686 P2d 1061 (1984), however, the court of appeals reversed a dismissal entered almost six months after the trial court ordered the action abated pending arbitration. The plaintiff, however, had demanded arbitration, after the motion to dismiss was filed but before dismissal was ordered. The court said that was the key difference. In Hilsenbeck, the plaintiff never demanded arbitration.

The correct motion to test sufficiency of the evidence in a nonjury case is a motion to dismiss under ORCP 54 B(2) and not a directed verdict motion. Usually, however, if a party makes the wrong motion in a case tried without a jury, the court will treat it as a motion to dismiss. Coe v. McElligott, 86 Or App 272, 274 n 1, 739 P2d 57 (1987); Wells v. Carlson, 78 Or App 536, 539, 717 P2d 640 (1986); Sappington v. Brown, 68 Or App 72, 75 n 3, 682 P2d 775 (1984).

In Castro v. Castro, 51 Or App 707, 709-714, 626 P2d 950 (1981), the court of appeals reviewed the history of motions for involuntary dismissal in nonjury cases and the trial judge's role in ruling on such motions. The court said that, under the pre-ORCP procedure of involuntary nonsuit, the trial judge could only dismiss at the close of the plaintiff's evidence in a non jury case if the plaintiff had presented no substantial evidence from which a jury could decide in plaintiff's favor. In ruling on the motion, the trial judge did not weigh the evidence, but only decided if plaintiff had made a prima facia case. The adoption of the voluntary dismissal procedure in ORCP 54 B(2), to replace the nonsuit in nonjury cases, changed the role of the judge. ORCP 54 B(2) specifically refers to the trial judge acting as trier of fact in ruling on the motion to dismiss. The court of appeals held that a trial court may now weigh the evidence and pass on credibility of witnesses in deciding the motion to dismiss. For a case where the court said that dismissal was appropriate if the trial judge weighed the evidence, but would not have been proper under the prior standard, see Greenwood Forest Prod., Inc. v. Sapp, 84 Or App 120, 124-125, 733 P2d 110 (1987).

In Castro, the court of appeals pointed out that justice is more likely to be achieved and appeals reduced, when the trial court does not dismiss in a close case until it hears both sides of the issues and has obtained a complete picture of the controversy. The court suggested that Oregon trial judges adhere to the approach followed in the Fifth Circuit Court of Appeals and only determine the facts at the close of the plaintiff's evidence in unusually clear cases. The court suggested that dismissals under ORCP 54 B(2) should be granted very sparingly. See Fed. Deposit Ins. Co. v. Tempest Fugat, 75 Or App 536, 541, 707 P2d 81 (1985).

The court of appeals also suggested in Castro that dismissal was particularly inappropriate in child custody cases. The trial court should be primarily concerned with the best interest of the child, which can be best determined after the trial court hears from both sides. In McJunkin v. McJunkin, 90 Or App 1, 3, 750 P2d 1464 (1988), the court upheld a dismissal at the close of the plaintiff's case. Castro and McJunkin both involved motions to modify divorce decrees. In McJunkin, the court said that it could be argued that a motion to dismiss a motion is not proper in an equity case, particularly in a matter involving de novo review on appeal. The court did not, however, decide the question because it had not been raised by the parties. 90 Or App at 3. See also Copeland Lumber Yards, Inc. v. Kincaid, 69 Or App 35, 38, 684 P2d 13 (1984); Joseph v. Cohen, 61 Or App 559, 563-564 n 2, 658 P2d 544 (1983).

In one case following Castro, Angus v. Joseph, 60 Or App 546, 550, 655 P2d 208 (1982), the court of appeals cited Castro as establishing a standard for granting an involuntary dismissal as follows: "if the plaintiff has introduced credible evidence on the essential elements of the cause of action, the trial judge having the discretion to discount impeachment evidence, the motion should be denied." The standard given is a bit confusing. In any case, it does not seem to be supported by the opinion in Castro. In Angus the court of appeals did correctly point out that the ruling on the motion to dismiss is not absolutely conclusive. The trial court can reopen the case and permit the plaintiff to present further evidence to cure any deficiency in the plaintiff's case.

When a trial court grants a motion to dismiss with prejudice under ORCP 54 B(2), it must make findings of fact as provided in ORCP 62. The findings must be in writing. Greenwood Forest Prod., Inc. v. Sapp, 84 Or App 120, 125, 733 P2d 110 (1987); Joseph v. Cohen, 61 Or App 559, 562-564, 658 P2d 544 (1983). In the Joseph case, the court of appeals said the apparent purpose for interrelating ORCP 54 B(2) and 62 is to provide the appellate court with a basis for determining how and why the trial court decided that a terminal judgment on the merits was appropriate at the close of the plaintiff's case.

The findings of fact may be included in an opinion or memorandum of decision by the trial court. This includes a letter setting forth findings and reasons for dismissal, which was an opinion in factual effect, even though not so labelled. McJunkin v. McJunkin, 90 Or App 1, 3-5, 750 P2d 1164 (1988).

For purposes of ORCP 54 B(2), and the requirement that findings of fact be made, a dismissal with prejudice can include dismissal of matters within the continuing jurisdiction of the court. In State ex rel. Conn. v. Levine, 58 Or App 203, 208, 647 P2d 985 (1982), the court of appeals said that it was possible to

dismiss a petition to enforce a child support provision in a divorce decree, at the close of the plaintiff's case, but under ORCP B(2) this was the same as a dismissal with prejudice and findings of fact were required.

In Mason v. Wegscheider, 66 Or App 506, 507, 674 P2d 84 (1983), the court of appeals said that ORCP 54 B(2) does not permit a trial court sua sponte to dismiss plaintiffs action without prejudice after both sides have presented evidence. That is technically correct. The court could, as with a directed verdict motion in a jury case, conclude that plaintiff should have another chance and allow a dismissal without prejudice under 54 A(2). See Staff Comment to Rule 54.

In Falk v. Amsberry, 290 Or 839, 843-846, 626 P2d 362 (1981), the supreme court adopted a rule that, in a case tried to the court without a jury, a defendant cannot raise the sufficiency of the plaintiff's evidence on appeal, unless the defendant raised the question at the trial court level by making an ORCP 54 B(2) motion or some timely equivilent motion. The court relied upon dicta in one of its preORCP cases and the holding of the court of appeals in Baldwin v. Miller, 44 Or App 371, 376, 606 P2d 629 (1980). The court of appeals later held that a defendant's renewal of a previously made motion for summary judgment, at the close of the plaintiff's evidence, was not the substantial equivilent of an ORCP 54 B(2) motion. The defendant was not allowed to question the sufficiency of the plaintiff's evidence on appeal. First Interstate Bank v. Silvey Barnes Properties, 80 Or App 197, 200-201, 721 P2d 878 (1986).

It is not entirely clear whether the Falk requirement of an ORCP 54 B(2) motion as a prerequisite to raising sufficiency of the plaintiff's evidence on appeal applies to cases of an equitable nature where the appellate courts review the evidence de novo. Both Falk and Baldwin involved legal claims tried without a jury. In dicta in one case, Millsap v. Eugene Care Center, Inc., 68 Or App 223, 228 n 4, 682 P2d 795 (1984), the court of appeals questioned whether the Falk requirement would apply to cases involving de novo review. In Brown v. D2S Rescources, 61 Or App 8, 12, 656 P2d 946 (1982), however, the court held that the Falk requirement applied to both law and equity cases. The Silvey Barnes case was also an equitable lien forclosure.

In cases involving erroneous involuntary dismissals or inadequate findings under ORCP 54 B, the court of appeals will remand for further proceedings, or to have findings made. Jordan v. Rask, 66 Or App 720, 724, 674 P2d 1211 (1984).

54 E. Compromise; Effect of Acceptance or Rejection

ORCP 54 E only applies when a party offers to allow a

judgment to be taken against ~~them~~ that party. A defendant who sent a check to the plaintiff was not offering to allow a judgment to be taken. When plaintiff recovered less than the amount of the check, the defendant was not entitled to recover costs from the date the check was sent. Becker v. Deleone, 78 Or App 530, 535, 717 P2d 1185 (1986). The offer to compromise and allow entry of judgment must be unconditional. Mt. Shadow Homes, Inc. v. Gray, 61 Or App 230, 232-233, 656 P2d 383 (1983).

When there is an offer to compromise under ORCP 54 E, costs and attorney fees should be included in deciding whether a plaintiff received a more favorable recovery. If it includes costs and attorney fees, the offer of compromise must be compared to the sum of the award, plus costs and reasonable attorney fees incurred up to the time of service of the offer. Carlson v. Blumenstein, 293 Or 494, 503-504, 651 P2d 710 (1982) (applying language of prior statute, ORS 17.055 (repealed 1979). In Carlson, the defendant offered $3,000. The plaintiff recovered $2,586.53 on the principle claim. The court decided that at least $1,000 in attorney fees had been incurred before the offer to compromise. Therefore plaintiffs obtained a more favorable judgment that the offer (at least $3,586.53) and were entitled to full costs and attorney fees. In order for the comparison between offer and award plus costs and attorneys fees to the date of the offer to be made, the record in the case must show the amount of costs and attorneys fees before and after the offer of compromise. If it does not, defendant cannot claim that the plaintiff received less than the offer and cannot receive any costs. Rose v. Goodrich, 65 Or App 655, 657, 672 P2d 65 (1983).

The Carlson formula for comparing offer and recovery assumes that the offer of compromise amount includes both the principal amount and costs and attorney fees. That is not necessarily true under ORCP 54 E. In fact, unless the offer expressly states it covers both principal amount and costs and disbursements and attorney fees, it only covers the principal amount. After judgment is entered for the principal amount, the plaintiff is entitled to recover costs, disbursements and attorney fees by filing a cost bill and following the procedure in ORCP 68. Adler Leather Sportswear Mfg. Co. v. Roberts, 67 Or App 188, 190-192, 677 P2d 757 (1984). If the offer is only for the principal amount, the correct way to decide if the plaintiff recovered more than the offer is to compare only the amount of the offer and the principal amount recovered. The offer actually is for the amount stated, plus costs and attorney fees up to that time. If the offer is rejected the plaintiff gets the amount of the principal recover, plus the same costs and disbursement. In Adler the defendant offered a flat $1,131. After the offer was rejected the plaintiff received $1,130.50 on the principal claim. The plaintiff had $52.50 in costs prior to the offer and apparently no attorney fees were recoverable. The court said the plaintiff received less than the amount of the offer and could only get the

amount awarded plus costs and disbursements up to the date of the offer. The defendant was entitled to his costs and disbursements after that date.

When an offer to allow judgment, plus costs and disbursements and attorney fees to be determined by the court, is accepted, the costs and attorney fees awarded can include costs and attorney fees incurred after the offer. It is only where the offer is rejected, and the plaintiff does not recover more, that no post offer cost or attorneys fees can be given to the plaintiff. Willamette Prod. Credit Ass'n v. Borg-Warner Acceptance Corp., 75 Or App 154 ,159, 706 P2d 577 (1985).

ORCP 54 E is not limited to cases involving money damages. An offer to compromise can include an offer to allow judgment to any effect therein specified. In Kotulski v. Mt. Hood Community College, 62 Or App 452, 457-458, 660 P2d 1083 (1983), plaintiff filed an action seeking an order directing the defendant to release the names and addresses of part time instructors employed by the defendant and a declaratory judgment that this information was a public record. The plaintiff received what they requested. The court of appeals said that the plaintiff recovered more than an offer to compromise, which offered only to furnish the names and addresses, without a concession that this was a public record.

RULE 59--INSTRUCTIONS TO JURY AND DELIBERATION

Generally

A number of the cases involving interpretation of ORCP 59 are criminal cases. ORS 136.330 makes most of the procedures set out in ORCP 59 relating to jury instruction and deliberation applicable in criminal proceedings.

59 B. Charging the Jury

ORCP 59 B directs the court to instruct the jury on all matters of law necessary for their information in giving their verdict. A court, however, is not required to tell the jury that some claims of the parties have been stricken from the case. Since the pleadings are not shown to the jury, there is no reason for the court to instruct the jury about issues no longer presented by the pleadings. Flynn v. Wackenhut Corp., 62 Or App 276, 280, 660 P2d 705 (1983).

The language in ORCP 59 B, requiring that upon motion the instructions be recorded or reduced to writing and furnished to the jury room, is mandatory. In State v. Looper, 76 Or App 231, 233-235, 708 P2d 1190, reconsideration granted, 77 Or App 660, 713 P2d 1099 (1986), a defendant requested that jury instructions be recorded and given to the jury for use during deliberation. The trial court agreed to the electronic recording of the instructions, but refused to send the recording with the jury. There was no way to play the recording back in the jury room. The court told the jury that, if they wished to hear the recording, they could return to the courtroom. The court of appeals first reversed stating that ORCP 59 B requires strict compliance. On petition for reconsideration, however, the court decided that under ORCP 59 C(5), a jury could deliberate in any convenient place, which could include the courtroom. Therefore the jury had the recording with them during deliberation. The court might have more simply decided that the trial judge had substantially complied with the ORCP 59 B.

59 D. Further Instructions

In Carlson v. Piper Aircraft Corp., 57 Or App 695, 697-699, 646 P2d 43 (1982), the court of appeals said one of the reasons for the requirement in ORCP 59 D, that further instructions be given in writing or orally in the presence of, or after notice to, the parties, was to allow the parties to assure a record of the trial court action. When a party failed to make written further instructions part of the record on appeal, the court of appeals refused to consider any error in the instructions.

ORCP 59 D does not absolutely require notice to the parties before reinstruction under all circumstances. In State v. White,

55 Or App 729, 731-732, 639 P2d 1291 (1982), the jury was removed from the courthouse during deliberation because of bomb threat. They resumed deliberation in a nearby office building. The jury requested reinstruction. The court could not find the attorneys. The court of appeals held that, under the circumstances, it was not improper to provide the jury with further written instructions without notice. The court pointed out that the purpose of ORCP 59 D was achieved by the use of written instructions, which were included in the record and subject to review. In State v. Barman, 67 Or App 369, 381-383, 679 P2d 888 (1984), a trial judge, without notice to the attorneys, gave further written instructions on three separate occasions. The court of appeals reversed the case on other grounds and did not consider the propriety of the reinstruction. Judge Van Hoomison, concurring, said that the action should be reversed because the trial judge did not comply with ORCP 59 D. He pointed out that Barman differed from White because the trial judge never tried to give notice to the parties of the reinstruction.

59 E. Comments on Evidence

The inclusion of specific language in ORCP 59 E forbidding a judge to comment on the evidence has been before the appellate courts on several occasions. The most common problem is distinguishing instructions on the law from instructions on matters of fact. In State v. Rainey, 298 Or 459, 466-468, 693 P2d 635 (1985), the supreme court held that an instruction that told the jury that they could infer the existence one fact from the existence of another fact was an impermissible comment on the evidence. See also State v. Conway, 75 Or App 430, 432-437, 707 P2d 618 (1985). The instruction was given by the trial court because of a presumption in a criminal case. The problem should not arise in civil cases because ORS 40.120 provides that presumptions in civil cases shift the burden of proof.

In Charmley v. Lewis, 77 Or App 112, 118, 711 P2d 984, aff'd 302 Or 324, 715 P2d 94 (1985), after evidence of habit was received to prove conduct consistent with habit, one of parties asked for an instruction that "...evidence of a persons habit is not conclusive evidence of what occurred at the time of the accident". The court of appeals said the trial court correctly refused to give the instruction because it was an improper comment on the probative value of the evidence.

Under ORCP 59 E, a trial judge cannot read a medical dictionary definition to the jury. In Creasey v. Hogan, 292 Or 154, 168-171, 637 P2d 114 (1981), the meaning of the term "transverse plane osteotomy" was at issue in a medical malpractice case. No evidence was presented by either side during the trial as to the meaning of the term. The jury asked the trial judge for a definition of the term. The trial judge

gave them the definition in a standard medical dictionary. The supreme court said that, although attorneys generally refer to a prohibition against judicial comment on the evidence, the prohibition includes the presentation of evidence to the jury by the trial judge. The trial judge was submitting evidence of the meaning of a medical term, not giving a proper instruction. The case was actually decided under ORS 17.255 (repealed 1979), the statutory predecessor to ORCP 59, but the same result would be reached under the present rule.

Improper judicial comment on the evidence is not always in the form of instructions. ORCP 59 E does not prevent judicial examination of witnesses. It does not, however, allow the trial judge to frame questions, or make comments in the course of examination, which reflect judgement on the credibility of the witness or convey the judges evaluation of the testimony. The supreme court decided this had happened in State v. Mains, 295 Or 640, 648-662, 669 P2d 1112 (1983). The court decided the error was harmless because it involved only one isolated instance in an extended trial and involved collateral issues. The court did take the occasion to quote one of the more colorful early Oregon judicial opinions, Edwards v. Mt. Hood Const. Co., 64 Or 308, 314-315, 130 P 49 (1913), where Justice McBride cautioned trial judges to follow the example of "the meek and lowly oyster, to consider its ways and be wise' and to keep the judicial mouth shut...".

59 G. Return of Jury Verdict

The requirement in ORCP 59 G(2) and Amended Article VII, Sec. 5(7) of the Oregon constitution, that three fourths of the jury must agree on a civil verdict, generally means that the same nine jurors must agree on each material issue. Where, however, a plaintiff brings a personal injury action against two defendants, whose separate and independent conduct is claimed to have caused the injury, the same nine jurors do not have to agree to the verdict for both defendants. Davis v. Dumont, 52 Or App 73, 76-77, 627 P2d 907 (1981). The court of appeals said when the questions presented in a special verdict are independent, there is no requirement that the same nine jurors agree on each question. The court also held that, in any case, the parties had stipulated that the same nine jurors need not agree as to both defendants.

Since, the same jurors must constitute the three fourths majority for every separate element required for a verdict, the jury poll must be conducted in a manner that shows every juror's vote on every part of the verdict. In Sanford v. Chev. Div. Gen. Motors, 292 Or 590, 612-614, 642 P2d 624 (1982), the jury in a products liability case was given a verdict form that required answers to four separate questions. After a jury poll was requested, the trial judge asked each juror if the verdict

returned was their verdict. All 12 jurors said yes. The supreme court held that the trial judge should have asked each juror if he or she agreed with each part of the verdict. The court noted that this need not involve reading each separate question to each juror. It could be done by merely asking each juror if they agreed with all four questions. The case was reversed for failure to conduct a proper poll. The jury had been split 8-4 shortly before the verdict was returned. In announcing the verdict, before the poll, the foreman said the verdict was 9-3. The case was actually decided under ORS 17.355(rep 1979), but the language involved was identical to ORCP 59 G(2) and (3).

Whether or not jurors, who misunderstood a verdict form and returned a verdict contrary to what they intended, had rendered an "informal or insufficient" verdict, under ORCP 59 G (5) any objection to an improper verdict must be made before the verdict is received and the jury discharged. Any objection not so made is waived. D. C. Thompson and Co v. Hauge, 72 Or App 116, 120, 695 P2d 574, aff'd 300 Or 651, 717 P2d 1169 (1985). Otherwise the trial judge has no chance to cure the problem. On review, the supreme court affirmed the court of appeals decision on the grounds that testimony of jurors, relating to their excercise of mental processes in the jury room, could not be used to establish irregular conduct of the jury as a basis for a new trial under ORCP 64 B. 301 Or 651, 653-660, 717 P2d 1169 (1986). See discussion under ORCP 64 B, infra.

In Brewer v. Erwin, 61 Or App 642, 646-647, 658 P2d 1180 (1983), the trial court submitted an incorrect special verdict form, which neglected to ask whether special damages should be given against one defendant. The jury was asked if that defendant was liable for punitive damages. When the verdict was returned, the defendant objected to an assessment of punitive damages by the jury, without a finding of general damages. The trial court submitted a supplemental special verdict to the jury, asking if the defendant was liable for general damages. The jury said yes. The court of appeals said that under ORCP 59 G (4), after objection, an informal or insufficient verdict may be corrected by the trial court.

59 H. Necessity of Noting Exception on Error in Statement of Issues or Instruction; All Other Exceptions Automatic

The requirement, under ORCP 59 H, that a party except with particularity to an improper instruction is enforced with extreme strictness by the appellate courts. A party who does not except to the giving of a jury instruction or request a proper instruction does not preserve for appeal any error by the trial court in giving the instruction. Bossingham v. Klamath County, 81 Or App 399, 401, 725 P2d 931 (1986); Worley v. OPS, 69 Or App 241, 248-249, 686 P2d 404 (1984); Johnson v. Ranes, 67 Or App 667, 677, 680 P2d 688 (1984).

One of the reasons for requiring exceptions to jury instructions is to point out the error to the trial court and to give it a chance to correct the instruction. Delaney v. Taco Time Int'l, Inc., 297 Or 10, 18, 681 P2d 114 (1984); Menke v. Bruce, 88 Or App 107, 113, 744 P2d 291 (1987); Garrett v Olson, 71 Or App 93, 95-96, 691 P2d 123 (1984); Willamette Essential Oils, Inc. v. Herrold & Jensen 68 Or App 401, 409 n 8, 683 P2d 1374 (1984); Pendergrass v. State of Oregon, 66 Or App 607, 611, 675 P2d 505, rev'd on other grounds 297 Or 643, 686 P2d 369 (1984); State v. Davis, 52 Or App 187, 190, 627 P2d 884 (1981).

A party must also except to the giving of an instruction with particularity. The party must specifically state why the instruction was erroneous. The appellate courts frequently refuse to rule on claimed error in an instruction because the appealing party did not state a reason for an exception or stated the wrong reason. Blair v. Mt. Hood Meadows Dev. Corp., 291 Or 293, 302-304, 630 P2d 293 (1981); Lytle v. City of Portland, 89 Or App 315, 319, 748 P2d 1033 (1988). In Shivers v. Riney, 72 Or App 281, 289-290, 695 P2d 951 (1985), the court of appeals said that the trial court must be presented with a "sound, clear and articulate...exception." The court refused to consider an assignment of error because the objecting party had not clearly stated the basis of their exception. In Delaney v. Taco Time Int'l, Inc., 297 Or 10, 17-18, 681 P2d 114 (1984), a party excepted to an instruction on punitive damages on the grounds that punitive damages were not available in the case. On appeal, the supreme court said this did not state with particularity an objection to the wording of the instruction, as opposed to instructing on punitive damages at all. The court refused to consider the propriety of the language used.

On a few rare occasions the court of appeals has ruled on instruction despite the lack of a particularized exception at the trial court level. They did so in Mariman v. Hultberg, 82 Or App 535, 538-539, 728 P2d 919 (1986), pointing out that from the record it was clear that the trial judge was aware of the reason for the exception even though that reason was not clearly articulated by the excepting party. In Jensen v. Kacy's Markets, Inc., 91 Or App 285, 287-288, 754 P2d 624 (1988), a party only specifically excepted to two portions of an instruction, but wished to object to the entire instruction on appeal. The court of appeals said that the excepting party's explanation to the trial court made clear that they were in fact objecting to the entire instruction and they had preserved a claim of error to all of it.

Sometimes, however, even excepting with particularity is not enough to preserve error. In Oliver v. Major, 66 Or App 47, 49-51, 672 P2d 1227 (1983), the plaintiff in a personal injury action correctly excepted to an instruction which had been given

on the emergency doctrine because there was no evidence to support it. The trial court suggested that even though the instruction may have been incorrect, it would do more harm than good to tell the jury to forget it. Bringing the matter up again would have put a red flag on the subject. The plaintiff did not object or insist that a further instruction be given. The court of appeals held that the plaintiff had waived the error by acquiescing in the trial court procedure to deal with the error.

As explicitly stated in ORCP 59 H, a party does not have to except to a failure to give a requested instruction. Woolston v. Wells, 297 Or 548, 551, 687 P2d 144 (1984). Occasionally a party may avoid the failure to except to an instruction that was actually given by submitting a directly contrary instruction which was not given. In Roberts v. Mitchell Bros. Truck Lines, 289 Or 119, 127-131, 611 P2d 297 (1980), the supreme court said that a party had preserved error relating to an instruction on burden of proof without making an exception. The party had tendered a contrary instruction on the subject which the court refused to give. The court said the question was whether the requested instruction "clearly and directly" called the attention of the trial judge to the error in the instruction that was given. The record in the case showed that the trial judge recognized the issue and the difference between the instructions and clearly ruled against the appealing party.

RULE 60--MOTION FOR DIRECTED VERDICT

The proper motion to test the sufficiency of the evidence in a case tried to a jury is a motion for directed verdict under ORCP 60, not a motion to dismiss under ORCP 54. Dennis v. Mclean, 53 Or App 282, 284-285 n 3, 631 P2d 839 (1981).

On appeal of a denial of a motion for directed verdict, the appellate court will examine the facts to determine if there was sufficient evidence that the jury could reach a verdict in favor of the party against whom the motion was made. Menke v. Bruce, 88 Or App 107, 109, 744 P2d 291 (1987); Free v. Wilmar J. Helric Co., 70 Or App 40, 43, 688 P2d 117 (1984). The evidence will be viewed in the light most favorable to the party moved against. Wiggins v. Barrett & Assoc., Inc., 295 Or 679, 681, 669 P2d 1132, rev'd on other grounds 295 Or 679, 669 P2d 1132 (1983); Paulson v. Western Life Ins. Co., 292 Or 38, 40 n 1, 636 P2d 935 (1981); C.A.R. Tow, Inc. v. Corwin, 76 Or App 192, 194, 708 P2d 644 (1985); Fitch v. Adler, 51 Or App 845, 847, 627 P2d 36 (1981). In a negligence case the court should view the evidence in the light most favorable to the party moved against and give ~~them~~ the benefit of every reasonable inference that may be drawn from the evidence. A directed verdict should be granted only in exceptional cases when a reasonable person could draw but one inference from the facts and that inference supports a finding for the moving party. VanDenBron v. Fred Meyer, Inc., 86 Or App 329, 331, 738 P2d 1011 (1987); Schroeder v. Northrop Serv., Inc., 86 Or App 112, 114, 739 P2d 33 (1987).

The rule that the evidence will be viewed in the light most favorable to the party moved against also applies when there is a motion for directed verdict under ORCP 60, but the court grants a dismissal without prejudice under ORCP 54. Franklin v. Safeco Ins. Co. of America, 303 Or 376, 378 n 1, 737 P2d 1231 (1987).

In order to preserve error relating to the sufficiency of the evidence to send the case to the jury, a party is required to move for a directed verdict or make some timely equivalent assertion of its position. Cf. Falk v. Amsberry, 290 Or 839, 843-845, 626 P2d 362 (1981). A renewal of a previously made motion for summary judgment, at the close of the evidence, is not the substantial equivalent of a motion for directed verdict. First Interstate Bank v. Silvey-Barnes Prop., 80 Or App 197, 200-201, 721 P2d 878 (1986). But cf. Wiggins v. Barrett and Assoc., Inc., 53 Or App 882, 885, 632 P2d 1373, rev'd on other grounds 295 Or 679, 669 P2d 1132 (1981), where for purposes of appeal, the court of appeals treated a motion for summary judgment, made the first time at the close of the plaintiffs case, as a motion for directed verdict. A summary judgment motion could not be properly made at that time. In Holmes v. Oregon Ass'n of Credit Management, 52 Or App 551, 553 n 2, 628 P2d 1264 (1981), the parties and the trial court treated an ORCP 54 motion to dismiss,

made in a case tried to a jury, as if it were a motion for directed verdict. The court of appeals said it would do the same and reviewed the sufficiency of evidence.

A defendant does not waive its right to put on evidence by making an unsuccessful motion for directed verdict at the close of the plaintiff's case. Trout v. Umatilla County School Dist., 77 Or App 95, 99 n 4, 712 P2d 814 (1985).

ORCP 60 requires that a motion for directed verdict assert the specific grounds therefor. A party may not raise a basis for directed verdict on appeal that was not asserted to the trial court. Payless Drug Stores N.W., Inc. v. Brown, 73 Or App 90, 92-93, 698 P2d 45, rev'd on other grounds, 300 Or 243, 708 P2d 1143 (1985); Gardner v. First Escrow Corp., 72 Or App 715, 727, 696 P2d 1172 (1985); Northstar Broadcasting, Inc. v. Tacher Co., Inc., 60 Or App 579, 585 n 4, 655 P2d 200 (1982).

Where there are multiple claims presented in a case, a defendant's general motion for directed verdict must be denied if there is sufficient evidence to go to the jury on any one of the claims. A general motion for directed verdict requests a complete verdict in favor of the moving party. That is only proper where there is no evidence that would support any contrary verdict. To attack the sufficiency of separate claims, the defendant must make a specific motion asking withdrawal of these claims from the jury. Johnson v. Ranes, 67 Or App 667, 674-677, 680 P2d 688 (1984). The correct procedure for challenge of the sufficiency of evidence on less than all of the elements of a case is to request a peremptory instruction to the jury that the moving party is entitled to prevail on one or more elements of the case as a matter of law. This is generally referred to as a partial directed verdict. Hoekstre v. Golden B. Products, 77 Or App 104, 107-108 n 4, 712 P2d 149 (1985).

RULE 61--VERDICTS, GENERAL AND SPECIAL

61 A. General Verdict

ORCP 61 A(2) provides that, when a general verdict is found in favor of a party asserting a claim for money, the jury shall also assess the damages. The court of appeals has interpreted this provision as requiring that, where the damages sought include interest, the jury must award the interest. Langfus, Inc. v. Queirolo, 64 Or App 493, 496-497, 668 P2d 1245 (1983). The case involved a claim for money due on a contract that provided for interest. After the jury decided the money due, the trial court added an interest award in the judgment. The court of appeals said the jury is not required to compute the amount of the interest, but their verdict must include an award of interest.

In another case, however, the court of appeals upheld an award of interest by the trial judge without a jury verdict. Hoekstre v. Golden B. Products, 77 Or App 104, 108-109, 712 P2d 149 (1985). The plaintiff had filed a suit claiming attorney malpractice for allowing a judgment to be entered against the plaintiff. The plaintiff sought to recover the amount of the judgment, plus the interest the plaintiff was required to pay on the judgment. The plaintiff moved for a partial directed verdict on the issue of entitlement to interest. The trial court granted the motion and, after a verdict for the plaintiff in the amount of the judgment, added interest. The court of appeals distinguished the Langfus case on the ground that the Langfus interest depended upon resolution of disputed facts which the jury must decide. It said that, in Hoekstre, if the jury decided that defendant's negligence resulted in a judgment against the plaintiff, there was nothing further to decide relating to interest. The interest accrued on the judgment was a necessary element of damages and the rate of interest was set by statute.

The distinction drawn by the court of appeals between Langfus and Hoekstre is not very clear. There does not seem to be much dispute of facts relating to interest in either case. A better distinction may be that, in Hoekstre, the trial court was asked to take the issue of interest from the jury by a correct motion for partial directed verdict and correctly granted it. Although a motion for partial directed verdict may have been just as proper in Langfus, none was ever made. The parties and the trial court apparently simply ignored the interest issue and the trial court added interest after the jury verdict with no consideration whether the issue should have been submitted to the jury. That is not a proper procedure to remove an issue from the jury.

61 B. Special Verdict

ORCP 61 B provides that where a case is submitted to a jury on a special verdict asking for specific findings on issues of fact, failure to include a material issue in the questions asked does not destroy the validity of the verdict. The trial court can either make the necessary finding itself or, if it fails to do so, it will be deemed to have made a finding consistent with the judgment. For a case where a material question was omitted and the trial court was deemed to have made the necessary finding see: Kendell v. Selles, 61 Or App 527, 530-531, 658 P2d 534 (1983).

61 C. General Verdict Accompanied by Answer to Interrogatories

ORCP 61 C provides a procedure for handling a situation where responses to specific interrogatories are not consistent with the general verdict or with each other. The primary difficulty presented is deciding when there is inconsistency.

In C.I.T. Corp. v. Nielson Logging Co., 75 Or App 267, 269-273, 706 P2d 967 (1985), in an action to recover a deficiency judgment after sale of property securing a loan, the jury rendered a general verdict for the plaintiff in the amount of $8,393. The answers to special interrogatories submitted with the general verdict stated that there was no deficiency after sale, because the sale had not been conducted in a commercially reasonable manner. In such case the collateral is deemed to be worth the amount due on the loan. The trial court decided that the interrogatories were inconsistent with the general verdict and entered a judgment for the defendant based on the interrogatories. The court of appeals interpreted the verdict as stating that, although there was no deficiency, the plaintiff was entitled to recover $8,393 for the costs incurred in the sale, even if it was not a commercially reasonable sale. The general verdict was therefore consistent with the interrogatories and the interrogatories were internally consistent. Judgment should have been entered on the general verdict.

In Kendell v. Selles, 61 Or App 527, 530-531, 658 P2d 534 (1983), a special interrogatory was used which asked a question in different legal terms than had been explained to the jury in the instructions. The court of appeals interpreted the interrogatory and its response as presenting the legal question which the jury had been told they needed to decide. On that basis, the court found the responses to the interrogatories by the jury consistent.

61 D. Action for Specific Personal Property

In Vantz v. Abbett, 81 Or App 418, 420-421, 725 P2d 941 (1986), a defendant counterclaimed for damages for conversion of a front-end loader which was in the possession of the plaintiff. The jury found for the defendant on the conversion claim, but

awarded no damages. The trial judge then ordered the plaintiff to give possession of the front-end loader to the defendant. The court of appeals reversed. Under ORCP 61 D, any action to recover possession of personal property requires that the jury be asked specifically who has the right to possession and what is the value of the property. Whether of not the counterclaim could have been amended after trial to a assert a claim for possession, as opposed to damages for conversion, there was no proper jury verdict to support a judgment relating to possession.

RULE 62--FINDINGS OF FACT

62 A. Necessity

Although ORCP 62 A requires that a party demand special findings of fact before the trial begins, it does not absolutely deny parties who do not request findings before the trial the opportunity to propose findings before judgement is entered. In such a case, the trial court is not required to issue findings, but may do so if it wishes. Union Oil Co. v. Clackamas County Bd. of Comm., 67 Or App 27, 30 n 1, 676 P2d 948 (1984).

Findings of fact must be made by the trial court when granting an involuntary dismissal with prejudice pursuant to ORCP 54 B(2). Failure to make such findings may be reversible error. McJunkin and McJunkin, 90 Or App 1, 4, 750 P2d 1164 (1988); Greenwood Forest Products, Inc. v. Sapp, 84 Or App 120, 124-125, 733 P2d 110 (1987); Joseph v. Cohen, 61 Or App 559, 562-564, 658 P2d 544 (1983). Cf. Int'l Bhd. of Electrical Workers v. Central Lincoln People's Util. Dist., 85 Or App 372, 376 n 3, 736 P2d 606 (1987). In Joseph, the court of appeals expressed some doubt whether the whole procedure described in rule 62 must be followed for an ORCP 54 B(2) dismissal, but found it unnecessary to determine the question for that case. 61 Or App at 564 n 3.

The findings must be in writing. In the Joseph case the trial court made fairly specific oral statements of the reasons for granting the motion to dismiss. The court of appeals held that there must be at least some written memorialization of the findings. It is not necessary that the writing be titled "findings of fact". The last sentence of ORCP 62 A provides that they may be contained in an opinion or a memorandum of decision filed by the court. In the Mcjunkin case, the court of appeals said that a letter from the trial judge to the parties, stating the basis of the dismissal, was sufficient, even though it was not titled an opinion. The writing was an opinion in functional effect. 90 Or App at 4-5. On the other hand, not every letter of a trial judge to the parties commenting on the facts in the case is a finding of fact. In Samuels v. Key Title Co., 63 Or App 627, 630-631, 665 P2d 362 (1983), neither party requested special findings. The trial judge informed the parties of his decision in a letter that had some observations relating to the facts in the case. The appealing party tried to challenge these as findings of fact not supported by the evidence. The court of appeals found no evidence that the trial judge intended to make findings of fact, and characterized the statements in the letter as "casual reflections".

Findings of fact should not be made when a trial court rules on a motion for summary judgment. Klimek v. Continental Ins. Co., 57 Or App 435, 440-441, 645 P2d 553 (1982). The function of the trial court on a motion for summary judgment is to decide

whether there are any issues of fact to be decided, not to decide issues of fact.

62 C. Entry of Judgment

Under ORCP 62 C, the trial judge is required to enter judgment when one of three things happens: (1) when timely objections to findings have been filed and are ruled on by the trial court; (2) when 30 days elapse from the filing of timely objections and the trial court does not rule; and, (3) when the time for filing objections elapses and no objections are filed. Judgments entered before these periods expire go into effect when the applicable period expires. Judgments entered after the period expires are effective when entered. In two cases, the court of appeals has held that, to extend the effective date of judgment 30 days after filing of objections to findings of fact, the objections must be filed within the specified time limit of 10 days after service of such findings on the objecting party. Otherwise the judgment is effective when that ten day period elapses, or whenever after that point the judgment is in fact entered. Mathena and Mathena, 72 Or App 578, 581-582, 696 P2d 587 (1985); Union Oil Co. v. Clackamas County Bd. of Comm., 67 Or App 27, 29-30, 676 P2d 948 (1984). In Mathena, the objections were not filed until 15 days after the findings were served, and a judgment entered the same day was effective that day. In Union Oil, objections were served 13 days after service. A judgment entered one day later was deemed effective that day. In both cases the court pointed out that, although the trial court could have extended the allowable period to file objections under ORCP 62 D, it had not done so.

Any delay in the effective date of a judgment provided by ORCP 62 D only applys where there are in fact special findings. The tolling does not apply when the case is decided by the judge on a general finding of fact. Fox & Sons Constr. Co., Inc. v. Carlton, 42 Or App 689, 691-692, 601 P2d 835 (1979) (decided under prior statute, ORS 14.431 (4) (repealed 1979)).

62 E. Necessity

Although under ORCP 62 E, no special findings of fact are necessary for purposes of appellate review, lack of findings does limit the opportunity to attack the factual findings of the trial court. It is impossible to attack the judges decision on the ground that the findings are insufficient to support the judges conclusions of law. Findings are insufficient to support the conclusions when they are so inconsistent, confusing, vague or indefinite that the court cannot determine what the trial court intended. Ierulli v. Lutz Dev. Co., 73 Or App 311, 315-316, 698 P2d 504 (1985). In the absence of any request for specific findings, the appellate court will assume that the trial court found facts consistent with its general conclusion. Glenn L.

Olson, Inc. v. R.L. Thompson Enter., Inc., 88 Or App 309, 314, 745 P2d 1227 rev'd on other grounds 306 Or 320, ___ P2d ___ (1988); Callan v. Confed. of Oregon School Adm'rs, 79 Or App 73, 79, 717 P2d 1252 (1986). Another way to state the point is that a general decision by the trial court, without specific findings of fact, is equivalent to a general verdict by a jury. See discussion under ORCP 62 F, infra.

In the Ierulli case, the court of appeals followed cases prior to the ORCP, and extended this rule to situations where special findings of fact are requested and the court fails to make any finding of fact on a material fact necessary to support the judgment. See Ball v. Gladden, 250 Or 485, 487, 443 P2d 621 (1968). The court said, as to facts not expressly stated in the special findings of fact, they would presume that the trial court found facts consistent with the ultimate conclusions of law. Judge Buttler dissented, stating that the appellate court was only entitled to presume there were consistent factual findings when no special findings were entered.

In Ierulli, the court of appeals also stated that, in addition to failure to support the conclusions of law, findings of fact can be inadequate when they are unresponsive to or outside issues framed by the pleadings and when they are not supported by any competent, substantial evidence. The court did not consider these matters in the case because there was no transcript of the proceedings. (The court suggested having a trial without a court reporter present is tantamount to waiving appeal). It appears that, in the absence of specific findings of fact, it would be impossible to challenge the trial court decision on the ground that facts were found which were unresponsive to or outside the pleadings. The appellate court would simply assume that the findings had been responsive to the issues. In the final analysis then, failure to request specific and complete findings of fact results in limiting appellate review of the trial court fact finding to the question of the sufficiency of the evidence to support the trial court decision.

The supreme court has also decided that if a trial judge decides a case without special findings of fact, the sufficiency of the evidence to support the decision cannot be challenged on appeal unless it was challenged in the trial court by an ORCP 54 B(2) motion to dismiss. Falk v. Amsberry, 290 Or 839, 841-847, 626 P2d 362 (1981). See discussion under ORCP 54 B, supra. The court of appeals has decided that the same rule applies to challenging the sufficiency of evidence to support special findings of fact. Sappington v. Brown, 68 Or App 72, 77-78, 682 P2d 775 (1984). Although ORCP 62 E eliminates the requirement of objecting to findings of fact for purposes of appellate review, it does not eliminate the rule that there must be a timely and specific assertion of error at the trial court level. ORCP 62 E means that, if the sufficiency of evidence is asserted in the

trial court by an ORCP 54 B(2), or other equivalent and timely motion, the objecting party is not required to also object to findings of fact after the motion is denied. A litigant, however, who does not make a timely motion attacking sufficiency of the opponents evidence cannot do so an appeal asserting the litigant is attacking the court's findings of fact.

62 F. Effect of Findings of Fact

In actions seeking a legal remedy, a trial judge's special findings of fact have the same force and effect and are equally conclusive as the verdict of a jury. Campbell v. Karb, 303 Or 592, 596, 740 P2d 750 (1987); Illingworth v. Bushong, 297 Or 675, 694, 688 P2d 379 (1984); Ben Rybke Co. v. Royal Globe Ins. Co., 55 Or App 833, 842, 640 P2d 620, aff'd 293 Or 513, 651 P2d 138 (1982). A decision by a trial court to award punitive damages has the same force and effect as a jury assessment of such damages. Duty v. First State Bank of Oregon, 71 Or App 611, 620-621, 693 P2d 1308 (1984). Where no special findings of fact are requested, a trial court's general finding in favor of a party has the same effect as a general verdict. Delassio v. Garcia, 69 Or App 693, 696, 687 P2d 808 (1984); Wall Street Properties, Inc. v. Gassner, 53 Or App 650, 660 n 3, 632 P2d 1310 (1981).

Although in Campbell and Illingworth, the supreme court stated that the findings of fact must be accepted unless the appellate court can say affirmatively there is no evidence to support them, a more correct statement is that there must be substantial evidence to support the findings. Litvin v. Engesether, 67 Or App 240, 249, 678 P2d 1232 (1984). See also City of Salem v. Clearwater Constr. Co., 84 Or App 674, 677, 735 P2d 373 (1987). In another case, the court of appeals stated that, under ORCP 62 F, an appellate court is bound by the trial court findings of fact if there is competent evidence to support them. Nourigat v. Preferred Risk Mutual Ins. Co., 59 Or App 362, 366, 650 P2d 1075 (1982).

The Oregon standard of review of findings of fact, therefore, differs from that in the federal rules. Under FRCP 52(a), findings which are "clearly erroneous" can be set aside. That test allows the reviewing court to conclude that on all of the evidence a mistake has been clearly committed and to reverse the decision. The Oregon standard, requiring acceptance of the finding of fact if there is any substantial evidence to support it is much stricter. Cf. Joseph v. Cohen, 61 Or App 559, 664 n 2, 658 P2d 544 (1983).

RULE 63--JUDGMENT NOTWITHSTANDING THE VERDICT

Generally

A denial of a motion for judgment notwithstanding the verdict under ORCP 64 is not an appealable order. Am. Fed. Sav. and Loan Ass'n v. Rice, 76 Or App 635, 642, 711 P2d 150 (1985). The appeal should be from the final judgment, with error directed to the refusal to direct the verdict. Meyers v. Oasis Sanitorium, Inc., 224 Or 414, 418, 356 P2d 159 (1960). The order granting a motion for judgment notwithstanding the verdict is not an appealable order either. Appeal must be from the judgment entered as a result of that order. Ragnone v. Portland School Dist. No. 1 J, 289 Or 339, 341-345, 613 P2d 1052 (1980).

A trial court cannot vacate an order denying a motion for judgment withstanding the verdict, after the time for appeal has expired, solely for the purpose of extending the time for appeal. Simpson v. Simpson, 73 Or App 1, 5, 697 P2d 570, rev'd on other grounds, 299 Or 578, 704 P2d 509 (1985).

63 A. Grounds

In deciding whether to grant a judgment notwithstanding the verdict, the trial court must view the evidence in the light most favorable to the party against whom the motion is made. The trial court cannot weigh the evidence and must resolve any conflict in the evidence in favor of the party against whom the motion is made. Wells v. Home Purchasing Corp., 84 Or App 103, 106, 733 P2d 898 (1987); Audas v. Montgomery Ward, Inc., 79 Or App 718, 720, 719 P2d 1334 (1986); Caldwell v. Pop's Homes, Inc., 54 Or App 104, 106-107, 634 P2d 471 (1981).

A motion for directed verdict must be made before the moving party may move for a judgment notwithstanding the verdict. The motion for judgment notwithstanding the verdict must be based upon the same grounds asserted to the trial court as the basis for the directed verdict. Gardner v. First Escrow Corp., 72 Or App 715, 727-728, 696 P2d 1172 (1985). In Owens v. Haug, 61 Or App 513, 515-516, 658 P2d 523 (1983), however, the court of appeals held that other motions which clearly raise the sufficiency of evidence before a case is submitted to a jury may permit a later entry of a judgment notwithstanding the verdict under ORCP 63 A. A party had moved to strike allegations in a plaintiffs complaint relating an issue and objected to submission of the issue to the jury, on the grounds there was no evidence to support a jury finding on the issue. The court said the trial judge clearly understood the basis of the motion and was not misled because the party failed to use the exact language of ORCP 60 and move for a directed verdict.

The plain language of ORCP 63 A precludes entry of a

judgment notwithstanding the verdict in the absence of a motion by a party. Klinicki v. Lundgren, 67 Or App 160, 167-168, 678 P2d 1250, aff'd, 299 Or 578, 704 P2d 509 (1985).

63 C. Alternative Motion for New Trial

Where alternative motions for judgment notwithstanding the verdict and new trial are made, and the trial court grants the motion for judgment notwithstanding the verdict but, as required by ORCP 62 C, enters an order indicating it would deny the motion for new trial, no cross appeal is required to contest the ruling on the motion for new trial after appeal of the order granting the judgment notwithstanding the verdict. This is specifically provided by ORS 19.130(2). Hillstrom v. McDonald's Corp., 88 Or App 444, 446 n 1, 746 P2d 222 (1987).

63 D. Time for Motion and Ruling

A trial court order granting a motion for judgment notwithstanding a verdict, given more than after 55 days of entry of judgment is absolutely void under ORCP 64 D. This is true even though the party opposing the motion was aware of the 55 day limit and submitted a lengthy memorandum on the motion on the 54th day and acquiesced in a continuance of a hearing scheduled the 55th day to allow time for the court and parties to read the memorandum. Micek v. LeMaster, 71 Or App 361, 363-365, 692 P2d 652 (1984). The court said that the rule that a party cannot lead a court into error and then claim reversible error did not apply. That rule presupposes that the court was induced to act erroneously in a situation where it had authority to act. A trial court has absolutely no authority to rule on a motion for judgment notwithstanding the verdict more than 55 days after entry of judgment.

RULE 64--NEW TRIALS

Generally

An order granting a new trial is an appealable order under ORS 19.010(2)(d). If an order is entered under ORCP 64, setting aside a judgment and granting a new trial, the party in whose favor the judgment was originally entered must appeal immediately from the new trial order. The party deprived of the judgment cannot wait until the case is retried and then assign entry of the order for new trial as error in an appeal from the subsequent final judgment. E.A. Mock & Sons, Inc. v. Mehdizadehkashi, 91 Or App 453, 455-458, 755 P2d 739 (1988). The court of appeals has said that a denial of a motion for new trial is not an appealable order and appeal should be from the final judgment. Am. Fed. Sav. and Loan Ass'n v. Rice, 76 Or App 635, 642, 711 P2d 150 (1985). Denial of a motion for new trial based upon jury misconduct or newly discovered evidence, however, is apparently an appealable order under ORS 19.010(2)(c). It would be an order effecting a substantial right made after judgment. In State of Oregon v. Montgomery, 294 Or 417, 422 n 1, 657 P2d 668 (1983), the supreme court said that, although there was a line of cases suggesting that denial of a motion for new trial based upon juror misconduct or newly discovered evidence could be reviewed upon an appeal from the judgment, the better practice would be to file a separate notice of appeal from the judgment and the motion for new trial.

A trial court cannot vacate an order denying a motion for new trial, after time for appeal has expired, solely for the purpose of extending the time for appeal. Simpson v. Simpson, 73 Or App 1, 5, 697 P2d 570, rev'd on other grounds, 299 Or 578, 704 P2d 509 (1985). The court of appeals also noted in the Simpson case that, although ORCP 63 E requires that the clerk mail the parties a notice of the date when an order on a motion for judgment notwithstanding the verdict is entered, no analogous notice rule is provided in ORCP 64 with respect to rulings on motions for a new trial. The court found this a bit puzzling. 73 Or App at 4 n 4.

Since the ORCP eliminated procedural distinctions between law an equity, a motion for new trial under ORCP 64 is now available in cases seeking equitable remedies. The "motion for reconsideration", which formerly served the function of a motion for new trial in equity cases should no longer be used. Schmidling v. Dove, 65 Or App 1, 3-7, 670 P2d 166 (1983).

In Schmidling, the court of appeals said that it would treat motions for reconsideration as if they were motions for new trial. It also said that the limitations in Rule 64, including the requirement that the grounds for motion be plainly specified, and the time limits in ORCP 64 F, applied to a motion to

set aside

reconsider. In Carter v. U.S. Nat'l Bank, 304 Or 538, 540-546, 747 P2d 980 (1987), the supreme court treated a motion to ~~reconsider~~ an order granting a summary judgment as the equivalent of a motion for new trial and held the time for appeal ran from the ruling on that motion. See also Scheid v. Harvey, 73 Or App 481, 483-486, 698 P2d 991 (1985).

In Multistate Tax Comm'n v. Dow Chemical Co., 295 Or 831, 836-837, 671 P2d 108 (1983), the supreme court decided that a motion for reconsideration in the tax court was not equivalent to a motion for new trial, because ORCP 64 did not apply to the tax court. The time for appeal was not, therefore, extended by filing the motion. In Alt v. City of Salem, 306 Or 80, 82-90, 756 P2d 637 (1988), the court decided, in a 4-3 decision, that a motion for new trial could not be filed in a writ of review proceeding in circuit court. The court said that, although the ORCP applied generally to writ of review proceedings, a motion for new trial would serve no function in those proceedings. A new trial involves reexamination of an issue of fact in the same court after judgement. Writs of review, while not appeals, have some appellate features. Facts are never decided and there would be no issues of fact to reexamine. The court held that filing the motion for new trial in the writ of review proceeding did not extend the time for filing the appeal and upheld the court of appeal's dismissal of the appeal.

The treatment of a motion to reconsider as the equivalent of a motion for new trial created so many problems that Chief Justice Peterson, concurring in Carter, suggested that lawyers considering filing such a motion, might better denominate it as "a motion asking for trouble".

After Carter, the court of appeals changed its mind and held prospectively that in future cases "any document not clearly labeled as a motion for new trial or judgment notwithstanding the verdict will not extend the 30-day period for filing a notice of appeal under ORS 19.026." Alternative Realty v. Michaels, 90 Or App 280, 285, 753 P2d 419 (1988). In the Alternative Realty case, however, the court of appeals held that a motion to reconsider filed in the case was the equivalent of a motion for new trial. Since the notice of appeal had been filed in the case before the trial court ruled on the motion and before the 55 day limit had run, the trial court lost jurisdiction of the case before the time to rule ran out. The court of appeals remanded the case, stating that the 30 days for appeal in the case would begin to run when the trial court did rule or the balance of the 55 day period ran out. See also Renfroe v. State of Oregon, 90 Or App 446, 448, 752 P2d 1245 (1988).

64 A. new trial defined

A motion to set aside a summary judgment is the equivalent

of a motion for new trial. It must be filed within the time limits that apply to motions for new trial and the time for appeal runs from disposition of the motion. Carter v. U.S. Nat'l Bank, 304 Or 538, 540-546, 747 P2d 980 (1987). The supreme court overruled the court of appeals, which had distinguished a line of pre-ORCP cases to this effect, because the adoption of ORCP 64 A changed the definition of new trial. The supreme court said ORCP 64 A was taken verbatim from ORS 17.605 (repealed 1979) and there was no indication of any intent to make any substantive change when the language was put in ORCP 64 A. The court held that although the trial court did not decide contested fact issues in ruling on a summary judgment, the court does examine issues of fact. Therefore, the ORCP 62 A definition of new trial fit the motion to reconsider the summary judgment. The supreme court had in fact already held that a motion to set aside a summary judgment would be treated as a motion for new trial in a case tried after the effective date of ORCP 64. Employee Benefits Ins. Co. v. Grill, 300 Or 587, 589, 715 P2d 491 (1986). But see Alt v. City of Salem, 306 Or 80, 82-90, 756 P2d 637 (1988), where the court held that new trials did not apply in writ of review proceedings because no factual decisions were involved.

64 B. Jury Trial; Ground For New Trial

A motion for new trial under ORCP 64 B may only be granted when there is a substantial chance of prejudice to the moving party from the asserted error during trial. When the chance of prejudice is quite unlikely, a new trial should not be granted. Wegener v. Walter Kidde & Co., Inc., 73 Or App 22, 24-25, 697 P2d 981 (1985); Wohlers v. Ruegger, 58 Or App 537, 539, 649 P2d 602, 1982). The appellate court will usually defer to the discretion of the trial judge in the decision whether an error was prejudicial. The trial judge is generally in a better position to evaluate the circumstances of the case. Owens v. Haug, 61 Or App 513, 519, 658 P2d 523 (1983). In Canton v. Huage, 72 Or App 548, 550-553, 696 P2d 1126 (1985), the court of appeals said, although the trial judge had discretion to decide the existence of prejudice, the question of the existence of error was subject to review. The court reversed a trial court ruling granting a new trial based on party misconduct in closing argument. See also Brewer v. Erwin, 61 Or App 642, 645, 658 P2d 1180 (1983).

Where a party sought a new trial on the grounds that the jurors agreed to a verdict but misinterpreted the means of expressing that verdict and signed the wrong verdict form, at most they were claiming irregularity of proceedings of the jury under ORCP 64 B(1). They were not claiming misconduct of the jury nor was there any claim that the court or the adverse party had acted improperly. D.C. Thompson and Co. v. Hauge, 300 Or 651, 653-660, 717 P2d 1169 (1986). The supreme court held that juror testimony as to the mistake was not admissible to impeach

the verdict because it did not relate to overt acts, conducts or events that occurred, but only to the mental processes of the jury. Since the jurors could not testify as to their mental processes, the new trial should not have been granted. The court never decided whether, if it could be proved by means other than juror testimony, a mistake of this nature would qualify as irregularity in the proceedings of the jury under ORCP 64 B.

The information about the mistake came to light when two jurors talked to defense counsel who took them to the judge. Six days later the judge called all the jurors in and took unsworn statements from them. Justice Jones, concurring, pointed out that, because of ethical and local court rule limitations on ex parte post trial contact with jurors by counsel, when there is probable cause that jury misconduct or irregularity occurred, the court should call all lawyers, parties, and jurors back into open court. It should then allow the parties to question the jurors under oath relating to the problem, at least to the extent the jurors are allowed to testify about matters that do not involve their mental processes. 300 Or App at 661-662.

In order for newly discovered evidence to justify a new trial under ORCP 64 B(4), it: (1) must be such as will probably change the result if a new trial is granted; (2) must have been discovered since the trial; (3) must be such as could not have been discovered before the trial by the exercise of due diligence; (4) must be material to the issue; (5) must not be merely cumulative of former evidence; and, (6) must not be merely impeaching or contradicting of former evidence. State of Oregon v. Baker, 87 Or App 285, 290-291, 742 P2d 633 (1987). The court of appeals decided that the newly discovered evidence would not have changed the result in the case. See also State v. Disorbo, 54 Or App 877, 882, 636 P2d 986 (1981) and State v. Mendenhall, 53 Or App 174, 177-178, 631 P2d 791 (1981), where the court said that motions for new trial based on newly discovered evidence are not favored and are viewed with distrust.

When a motion is made for new trial under ORCP 64 B(5) based upon insufficiency of the evidence, the jury verdict must stand unless the trial court can affirmatively say that there is no evidence to support it. Or Const Art VII (amended) sec 3. Fischer v. Kombol, 90 Or App 398, 400, 752 P2d 349 (1988). The evidence, including inferences, should be viewed in the light most favorable to the party against whom the motion is made. The court of appeals has said the same thing in a case under ORCP 64 B(5) involving a claim that the evidence was insufficient to support the amount of damages awarded. Roberti's House of Wines v. Somerset Wine Co., 74 Or App 338, 340-341, 703 P2d 976 (1985).

Although ORCP 64 B(5) does not explicitly require a motion for directed verdict as a condition precedent to a motion for new trial based upon the sufficiency of the evidence, no issue can be

raised on motion for new trial that was not in some fashion raised during trial. A party who did not move for a directed verdict, cannot seek a new trial based upon insufficiency of the evidence to justify the verdict. Arena v. Gingrich, 84 Or App 25, 32, 733 P2d 75, aff'd 305 Or 1, 748 P2d 547 (1987); Barrett v. Warrington, 60 Or App 406, 407, 653 P2d 1020 (1982).

In order to assert a ground for new trial, the moving party must have preserved error by making an appropriate objection or motion during trial. Even though a court may have made improper comments during trial, if a party fails to make timely objection or move for a mistrial, the party cannot assert the comments as a ground for new trial. State ex rel. Delisser v. Hardy, 89 Or App 508, 511, 749 P2d 1211 (1988). A party cannot move for a new trial on the ground that the verdict form was improper, when it did not clearly object to the submission of the form to the jury. Wegener v. Walter Kidde & Co., Inc., 73 Or App 22, 25, 697 P2d 981 (1985). See also Brewer v. Erwin, 61 Or App 642, 645, 658 P2d 1180 (1983).

64 D. Specification of Grounds of Motion: When Motion Must be on Affidavits

In D.C. Thompson and Co. v. Hauge, 300 Or 651, 657 n 4, 717 P2d 1169 (1986), the supreme court was faced with a motion for new trial based upon irregular conduct by jurors. The moving party submitted affidavits of counsel, but none of the jurors, as to what had occurred in the jury room. The court held testimony of the jury was not admissible in any event, but suggested the affidavits supporting motions for new trial must be from someone who can set forth the facts that occurred.

64 F. Time of Motion; Counteraffidavits; Hearing and Determination

In Schmidling v. Dove, 65 Or App 1, 3-7, 670 P2d 166 (1983), the court of appeals held that a motion for reconsideration, filed more than 10 days after entry of the judgment, was not proper and could not extend the period for appeal. In United Adjustors, Inc. v. Shaylor, 77 Or App 510, 511, 713 P2d 687 (1986), the court held that a motion to reconsider a summary judgment was treated as a motion for a new trial. A granting of the motion more than 55 days after entry of judgment was held improper under ORCP 64 F. The appellate court treatment of motions to reconsider as a motion for new trial has now been changed by Alternative Realty Co. v. Michaels, 90 Or App 280, 282-287, 753 P2d 419 (1988).

64 G. New Trial on the Court's Own Initiative

Although a party may not move for a new trial on a ground not preserved by a previous motion or objection to the trial

court, a trial judge may grant a new trial on its own motion without regard to prior action by the parties to preserve error. Jackson v. Multnomah County, 76 Or App 540, 543-545, 709 P2d 1153 (1985). The court of appeals also said that the trial court still must consider whether an error committed was prejudicial and can only grant a new trial under ORCP 64 G when it finds prejudicial error.

M E M O R A N D U M

September 15, 1988

TO: **MEMBERS, COUNCIL ON COURT PROCEDURES**

FROM: Fred Merrill, Executive Director

RE: Supplement to Memorandum of September 9, 1988 (ORCP 7 D(4))

1. **ORCP 7 D(4).** For some reason, I lost track of one issue before the Council in my previous memorandum relating to issues for the September 17 meeting. This memorandum addresses ORCP 7 D(4), and we will add it to the agenda.

I had submitted an amendment to ORCP 7 D(4)(a)(i) relating to mailing to the insurance company. I was asked to submit a further possible amendment to 7 D(4)(a)(ii) that would require the supplementary mailing to be certified and registered mail. Since our last meeting, the Court of Appeals decided Willis v. Edwards, 92 Or App 35, 37-38, 756 P2d 1273 (1988). The court said that supplemental mailing under ORCP 7 D(2)(b) was not the same as service by mail, and the supplemental mailing could be by ordinary mail. Arguably, the same would hold true for supplemental mailing for office service under ORCP 7 D(2)(c) and motor vehicle service under ORCP 7 D(4).

The question is: Does the council want more formal mailing for sending copies of the summons and complaint to the defendant and the insurance company in motor vehicle cases? If it does, should not the other forms of supplemental mailing be changed? If it does not, should mailing to the insurance company differ from other forms of supplemental mailing? Perhaps it is possible to distinguish motor vehicle service on the ground that the mailing is the only real form of service to both the defendant and the insurance company but, with office and abode service, summons is left with someone likely to give it to defendant. Certainly ORCP 7 D(4)(c) governing default is written assuming that more formal mailing is being used.

If the Council does wish to change ORCP 7 D(4)(a)(i) and (ii), I suggest the amendments attached.

Note that, as pointed out at the meeting, ORCP 7 D(4)(c), governing default, does seem to assume that the mailings to the insurance company and the defendant were accomplished by registered and certified mail (return receipt requested). If the Council wants to have ordinary mail used, we need to change ORCP 7 D(4)(c) to reflect that.

2. **ORCP 71 A and B.** We have received the attached letter from Jim Nass, Legal Counsel, setting out the response of the Supreme Court and Court of Appeals to the proposal to allow the trial court to decide ORCP 71 motions during the pendency of an appeal. As you can see, the appellate courts favor the idea, but prefer Larry Thorp's suggestion of simply giving the trial court the authority to decide the case during the appeal. Notice would be given to the appellate court of the filing of the motion and disposition of the motion. The appellate court could stay the appeal if it wished and modify the appeal to reflect any change in the judgment. The only thing that is not clear is how the file gets back to the trial court, but that is not something that would be covered in the ORCP. After consultation with Larry Thorp, we suggest that Nass's suggested redraft of ORCP 71 be modified in the form attached and that a bill to amend ORS 19.033, by addition of the attached section (6), be recommended by the Council.

3. **ORCP 69 B.** We have received the attached proposal to revise ORCP 69 B relating to notice of default from the Oregon State Bar Procedure and Practice Committee.

Enclosures

SUGGESTED AMENDMENTS TO ORCP 7

D. Manner of service.

* * *

D(2)d) **Service by mail.** Service by mail, when required or allowed by this rule, shall be mailed by mailing a true copy of the summons and a true copy of the complaint to the defendant by certified or registered mail, return receipt requested. For the purpose of computing any period of time prescribed or allowed by these rules, service by mail shall be complete three days after such mailing if the address to which it was mailed is within this state and seven days after mailing if the address to which it is mailed is outside this state.

* * *

D. Particular actions involving motor vehicles.

D(4)(a)i) In any action arising out of any accident, collision, or liability in which a motor vehicle may be involved while being operated upon the roads, highways, and streets of this state, any defendant who operated such motor vehicle, or caused such motor vehicle to be operated on the defendant's behalf, except a defendant which is a foreign corporation maintaining a registered agent within this state, may be served with summons by personal service upon the Motor Vehicles Division and mailing**, in accordance with paragraph 7 D(2)(d) of this rule,** a copy of the summons and complaint to the defendant's insurance carrier if known.

D(4)(a)(ii) Summons may be served by leaving one copy of the summons and complaint with a fee of $12.50 in the hands of the Administrator of the Motor Vehicles Division or in the Administrator's office or at any office the Administrator authorizes to accept summons. The plaintiff, as soon as reasonably possible, shall cause to be mailed**, in accordance with paragraph 7 D(2)(d) of this rule,** a true copy of the summons and complaint to the defendant at the address given by the defendant at the time of the accident or collision that is the subject of the action, the most recent address as shown by the Motor Vehicles Division's driver records, and any other address of the defendant known to the plaintiff, which might result in actual notice and the defendant's insurance carrier if known. For purposes of computing any period of time prescribed or allowed by these rules, service under this paragraph shall be complete upon such mailing.

SUPREME COURT COURT of APPEALS

R. WILLIAM LINDEN, JR.
State Court Administrator

SUPREME COURT BUILDING
SALEM, OREGON 97310

503-378-6005

September 13, 1988

Dean Frederic Merrill
Executive Director
Council on Court Procedures
University of Oregon School of Law
Eugene, OR 97403-1221

Re: Relationship between appeal and ORCP 71

Dear Dean Merrill,

Enclosed are my proposed amendments to ORCP 71. Also enclosed are proposed amendments to ORAP 2.07 that compliment the proposed amendments to ORCP 71. Although I had originally drafted an amendment to ORS 19.033(4) that was similar to Mr. Thorp's, if the Council accepts our proposed amendments to ORCP 71, it will not be necessary to amend that statute.

Chief Judge Joseph and Chief Justice Peterson agree that the trial courts ought to have the authority to rule on motions filed under both ORCP 71A. and 71B. You and Mr. Thorp have proposed that leave or direction of the appellate court be required before a motion could be filed in the trial court for relief under ORCP 71A. or 71B. For two reasons, we would propose that leave or direction of the appellate court not be required.

First, a motion under ORCP 71B must be filed within one year after entry of judgment. What if an appellate court, erroneously, denies leave to file a motion under ORCP 71B so that the party was prevented from filing the motion within one year of entry of judgment? What remedy, if any, would the party have? Second, regardless of the appellate court's decision on a motion seeking leave under either ORCP 71A or 71B, may a party who disagrees with the ruling either assign the denial as error or immediately petition the Supreme Court for review of that decision? By giving the parties the absolute right to file a motion under ORCP 71A or 71B, we would avoid the problems. In addition, trial courts are as able as the appellate courts to determine whether relief should be granted under those rules; no useful purpose is served by interposing another decision and another decision-maker in the process.

However, the appellate court needs to know that a motion seeking relief under ORCP 71A or 71B has been filed and, after the motion has been acted on, the outcome of the motion. Therefore, we propose that new ORCP 71A(3) require service of a copy of the motion on the appellate court together with an original notice thereof. We recommend the filing of a separate original notice, because the appellate courts receive copies of a number of post-judgment papers filed in the trial court, many of which do not require the appellate court to take any action. The filing of an original notice will alert the appellate court that some action needs to considered. At that point, the appellate court may stay or go forward with the appeal, as the circumstances in the case warrant.

We also propose that the language of ORS 19.033(1) be incorporated in new ORCP 71A(3) to the effect that 'any necessary modification of the appeal shall be pursuant to rule of the appellate court.' The proposed amendments to ORAP 2.07 would address concerns about how parties would obtain appellate review of a trial court decision and would follow a procedure presently in use for post-judgment decisions relating to costs and attorney fees.

I am also enclosing a copy of my memorandum dated June 13, 1988, to Chief Justice Peterson regarding this subject, because it raises one additional concern of mine. You and Mr. Thorp propose that ORS 19.033 be amended. ORS 19.033 carries a great deal of baggage already, and the proposed amendments would add some more. At some point, ORS 19.033 needs to be "unpacked" and its several component concepts separated out in a more logical format. Because of other legislative priorities, the Judicial Department will not be proposing this session that ORS 19.033 be reorganized, at least not by a separate bill. If a bill is introduced that proposes to amend to ORS 19.033, it would be worth considering whether to propose such additional amendments as may be necessary to unpack that statute.

Sincerely,

James W. Nass
Legal Counsel

c: Chief Justice Peterson
Chief Judge Joseph

(DRAFT - **proposed new material in bold print**; [bracketed material to be deleted].)

RELIEF FROM JUDGMENT OR ORDER

RULE 71

A. Clerical and other mistakes, inadvertence, excusable neglect, newly discovered evidence, etc.; availability of relief when appeal pending.

A.**(1)** Clerical Mistakes. Clerical mistakes in judgments, orders**[**,**]** or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own motion or on the motion of any party and after such notice to all parties who have appeared, if any, as the court orders. **[**During the pendency of an appeal, a judgment may be corrected under this section only with leave of the appellate court.**]**

[B.**]** **A.(2)** Mistakes; inadvertence; excusable neglect; newly discovered evidence, etc.

[B.(1) By motion.**]** On motion and upon such terms as are just, the court may relieve a party or such party's legal representative from a judgment for the following reasons * * *.

[B.(2)**]** **A.(3)** When appeal pending. **[**With leave of the appellate court, and subject to the time limitations of subsection (1) of this section,**]** A motion under **[**this section**]** **sections A. and B.** may be filed with the trial court during the time an appeal from a judgment

is pending before an appellate court[, but no relief may be granted by the trial court during the pendency of an appeal]. **When the motion is filed in the trial court, the party shall serve a copy of the motion on the appellate court, accompanied by a notice of motion filed under this rule.** [Leave to file the motion need not be obtained from any appellate court, except during such time as an appeal from the judgment is actually pending before such court] **The trial court shall have jurisdiction notwithstanding the pendency of an appeal to grant relief. After the trial court has ruled on the motion, a copy of the trial court's order shall be filed within seven days in the appellate court by the party filing the motion. If the party filing the motion does not file a copy of the order with the appellate court, any other party may do so. Any necessary modification of the appeal shall be pursuant to rule of the appellate court.**

[C.] **B.** Relief from judgment by other means. * * *

[D.] **C.** Writs and bills abolished. * * *

PROPOSED AMENDMENT TO ORS 19.033

(6) Notwithstanding the filing of a notice of appeal, the trial court shall have jurisdiction to decide motions under ORCP 71.

September 8, 1988

The Hon. Robert E. Jones
The Supreme Court
Supreme Court Building
Salem, OR 97310

Dear Justice Jones:

I have put your letter of July 11, 1988 on the agenda for the Council meeting on September 17 in Eugene and will furnish copies to the members of the Council.

I disagree with the conclusion of your "floater" clerk. I think making the ORCP inapplicable to writs or any other type of special civil proceeding would be an undesirable deviation from the concept of uniformity of procedure for all civil proceedings.

It is true that the Alt case holds that a writ of review proceeding does not involve a "trial" and therefore ORCP 60 relating to new trials has no application to such a proceeding. That merely recognizes that, while the ORCP generally apply to all civil proceedings, for many types of proceedings some, or even many, of the ORCP simply have no function. That does not change the fact that, even in a writ of review proceeding, it is necessary to get the case filed in a circuit court, serve summons, present the controversy, etc. In doing so, the writ of review proceeding should conform to the same requirements that apply to other civil cases. Setting up separate procedures creates undesirable confusion.

A good example appears in the recent decision of your Court in Gage v Maass, 306 Or. 196, 198-303 (1988), which holds that there are special procedures specified in ORS Chapter 34 which override the normal motion practice in habeas corpus proceedings. Since the petition for the writ drops out of the case when the

writ is issued, the plaintiff's claim is actually asserted in the replication, and a Rule 21 motion to dismiss the petition is not proper. Apparently, there is a motion to strike the replication provided in ORS Chapter 34. I think it would be more desirable to eliminate the special provisions in Chapter 34, except for the formal issuance of a writ, and have the case handled under the standard pleading and motion practice in the ORCP.

Very truly yours,

Fredric R. Merrill
Executive Director, COUNCIL ON
COURT PROCEDURES

FRM:gh

THE SUPREME COURT
ROBERT E. JONES
JUSTICE

SALEM, OREGON 97310

July 11, 1988

Fred Merrill
University of Oregon School of Law
Eugene, OR 97403

Re: Council on Court Procedures

Dear Fred:

Enclosed is a memo from our "floater" clerk concerning writs of review. I don't have any specific recommendations, but could you put this on our agenda for discussion.

Best regards,

Robert E. Jones

Enc.

MEMORANDUM 3906M

TO: Jones, J.

FROM: Gary Firestone

RE: Writ of Review Procedure

DATE: May 23, 1988

The case of Alt v. City of Salem, currently before this court, illustrates the difficulty of attempting to apply the rules of civil procedure to writ proceedings, specifically writ of review proceedings. ORCP 1 provides that the rules apply to special proceedings "except where a different rule is specified by statute or rule." It is also accepted that the rules apply only when applicable. However, it can sometimes be difficult to determine if the rules are applicable and when the statutes governing specific writs preempt the rules. I recommend that ORCP 1 be amended so that the rules are no longer generally applicable to writ proceedings because the rules are, for the most part, irrelevant to writ proceedings.

There are at least two alternatives available to provide rules for writ proceedings. First, certain of the rules of civil procedure could be made applicable to writ proceedings. This could be done either by a provision in the rules of civil procedure or, preferably, by a provision in ORS chapter 34. The following rules could be made applicable to

writ proceedings: ORCP 8, 9, 10, 12, 14, 15, 16, 17, 18, 19, 23, 25, 53, 54, 67, 68, and 70. Additionally, in habeas corpus proceedings, the following rules could be made applicable: ORCP 36, 37, 39, 40, 41, 44, 45, 46, 55, 58, 62 and 66. This list was compiled on a quick perusal of the rules and could be added to or subtracted from as seems appropriate. I would recommend that the number of rules applicable be kept to a minimum.

A second possibility would be to create a "Rules of Writ Procedure" which would govern all three types of trial court writ proceedings. I think only 20-25 rules would be needed, and certain existing statutory provisions could be eliminated as a result. The rules could either preserve writ procedure as currently provided for or could further simplify the procedure by simplifying the pleadings. A variation on this alternative would be to expand the statutes on each writ so that the statutes provide all the rules necessary for each writ.

A more radical alternative would be to abolish the three remaining writs and replace them with some form of civil action providing the same ultimate relief. This could lead to greater uniformity of procedure, but could eliminate some of the advantages of writ procedure, such as speed and simplicity.

Another alternative would be to abolish the writ of review only and to make the case proceed as under APA rules for contested case appeals, but in the circuit court rather than in the Court of Appeals.

While the various alternatives all have some merit, I recommend the establishment of a "Rules of Writ Procedure." The rules should make it clear that pleadings and motions are to be limited and every effort should be made to not complicate the procedure.

DIANA E. GODWIN
ATTORNEY AT LAW
THE SPALDING BUILDING
319 S. W. WASHINGTON, SUITE 520
PORTLAND, OREGON 97204
(503) 222-2600

DONNA R. MEYER

June 21, 1988

Fred Merrill
Executive Director
Council on Court Procedures
University of Oregon School of Law
Eugene, Or 97403

Re: Proposed Amendment to ORCP 44

Dear Fred:

As I mentioned in our telephone conversation of Thursday, June 16th, it has come to my attention that the language of ORCP 44, which allows a court to order a party "to submit to a physical or mental examination by a physician", has been interpreted and applied literally by some court in Oregon to preclude licensed psychologists from conducting mental examinations. Unfortunately, 15 out of 36 counties in this state have no resident psychiatrist, which raises the question of whether a "mental examination by a physician" can be conducted in those counties.

In order to correct this problem, my client, the Oregon Psychological Association, respectfully requests that the Council on Court Procedures amend ORCP 44 to allow either a physician or a psychologist to conduct a mental examination of a party. I have attached an amended version of ORCP 44 for consideration by the Council at its meeting in Bend on June 25th. The suggested new language is underlined and deletions are shown in brackets.

Thank you for your help and please call me if the Council needs additional information or assistance from me.

Very truly yours,

Diana E. Godwin

DEG/smc
#6Merrill.617

Enclosure
cc: Elliott Weiner, Ph.D.
Robert Henry, Ph.D.
Lorah Sebastian, Ph.D.

PHYSICAL AND MENTAL EXAMINATION OF PERSONS;

REPORTS OF EXAMINATIONS

RULE 44

A. **Order for examination.** When the mental or physical condition or the blood relationship of a party, or of an agent, employee or person in the custody or under the legal control of a party (including the spouse of a party in an action to recover for injury to the spouse), is in controversy, the court may order the party to submit to a physical or mental examination by a physician or a mental examination by a psychologist or to produce for examination the person in such party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

B. **Report of examining physician.** If requested by the party against whom an order is made under section A. of this rule or the person examined, the party causing the examination to be made shall deliver to the requesting person or party a copy of a detailed report of the examining physician or psychologist setting out such physician's or psychologist's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows inability to obtain it. This section applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise.

C. **Reports of examinations; claims for damages for injuries.** In a civil action where a claim is made for damages for injuries to the party or to a person in the custody or under the legal control of a party, upon the request of the party against whom the claim is pending, the claimant shall deliver to the requesting party a copy of al written reports or existing notations of any examinations relating to injuries for which recovery is sought unless the claimant shows inability to comp

D. **Report; effect of failure to comply.**

D.(1) **Preparation of written report.** If an obligation to furnish a report arises under sections B. or C. of this rule and the examining physician or psychologist has not made a written report, the party who is obliged to furnish the report shall request that the examining physic or psychologist prepare a written report of the examination, and the party requesting such report shall pay the reasonable costs and expenses including the [examining physician's] examiner's fee, necessary to prepare such a report.

D.(2) Failure to comply or make report or request report. If a party fails to comply with sections B. and C. of this rule, or if a physician or psychologist fails or refuses to make a detailed report within a reasonable time, or if a party fails to request that the examining physician or psychologist prepare a written report within a reasonable time, the court may require the physician or psychologist to appear for a deposition or may exclude the physician's or psychologist's testimony if offered at the trial.

E. Access to hospital records. Any party against whom a civil action is filed for compensation or damages for injuries may examine and make copies of all records of any hospital in reference to and connected with any hospitalization or provision of medical treatment by the hospital of the injured person within the scope of discovery under Rule 36B. Any party seeking access to hospital records under this section shall give written notice of any proposed action to seek access to hospital records, at a reasonable time prior to such action, to the injured person's attorney or, if the injured person does not have an attorney, to the injured person.

#6Rule44

AMENDMENTS TENTATIVELY ACCEPTED BY COUNCIL AT PRIOR MEETINGS

9/17/88

TIME
RULE 10

A. Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any court, by order of court or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday or a legal holiday, including Sunday, in which event the period runs until the end of the next day which is not a Saturday or a legal holiday. **If the period so computed relates to serving a public officer or filing a document at a public office, and if the last day falls on a day when that particular office is closed before the end of or for all of the normal work day, the last day shall be excluded in computing the period of time within which service is to be made or the document is to be filed, in which event the period runs until the close of office hours on the next day the office is open for business.** When the period of time prescribed or allowed **(without regard to section C of this rule)** is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" means legal holiday as defined in ORS 187.010 and 187.020.

COMMENT

The new third sentence of ORCP 10 A was added by the Council as a result of a suggestion by the Oregon State Bar Procedure and Practice Committee. The concern expressed was inability to file documents within specified time periods due to closure of the courthouse or clerk's office because of weather conditions or other unusual circumstances. The language used was taken directly from ORS 174.125. While that statute apparently would extend a time period, if a public office was closed during regular working hours, the Council felt it would be better to have all rules for computing time explicitly set out in Rule 10. The statute is also somewhat difficult to find and, on first reading, seems to relate only to serving documents on public officials rather than filing documents in civil cases.

The parenthetical material in the fourth sentence of ORCP 10 A has been added to make it clear that the time period referred to is the time period originally prescribed and not the original time period with three days added because mail service is involved.

INSTRUCTIONS TO JURY
AND DELIBERATION
RULE 59

C. Deliberation.

* * * *

C.(6) **Separation during deliberation.** The court in its discretion may allow the jury to separate [for the evening] during its deliberation <u>for any noon or evening recess</u> when the court is of the opinion that the deliberation process will not be adversely affected. In such cases the court will give the jury appropriate cautionary instructions.

COMMENT

When the ORCP were originally promulgated, trial judges had no authority to allow a jury to separate after they had retired to begin their deliberation. The 1981 Legislature added 59 C(6) which allowed the trial judge to permit the jury to separate for the evening after deliberation had begun. The Council has now added authority for the trial judge to permit separation for the noon recess. The authority to permit separation is still limited to noon and evening recesses only and then only if the trial court can affirmatively find that separation will not adversely affect the deliberation process. The Council was concerned that the discretion to allow separation for the noon recess be exercised cautiously since separation for the noon recess may present the risk of unavoidable and undesirable contact between jurors and other trial participants.

ALLOWANCE AND TAXATION OF ATTORNEY FEES AND COSTS AND DISBURSEMENTS RULE 68

(C)(2) **Asserting claim for attorney fees.** A party seeking attorney fees shall assert the right to recover such fees by alleging the facts, statute, or rule which provides a basis for the award of such fees in a pleading filed by that party. A party shall not be required to allege a right to a specific amount of attorney fees; an allegation that a party is entitled to "reasonable attorney fees" is sufficient. If a party does not file a pleading and seeks judgment or dismissal by motion, a right to attorney fees shall be asserted by a demand for attorney fees in such motion, in substantially similar form to the allegations required by this subsection. Such allegation shall be taken as [substantially] denied and no responsive pleading shall be necessary. **The opposing party may make a motion to strike the allegation or to make the allegation more definite and certain. Any objections to the form or specificity of allegation of the facts, statute, or rule which provides a basis for the award of fees shall be waived if not asserted prior to trial.** Attorney fees may be sought before the substantive right to recover such fees accrues. No attorney fees shall be awarded unless a right to recover such fees is asserted as provided in this subsection.

STAFF COMMENT - 1988

The Council believed that in several cases the requirement in ORCP 68 C(2) that a party plead the statutory basis for attorney fees claimed has been too strictly interpreted by the appellate courts. They felt that it was unfair that an opposing party, who was actually aware of the basis for the claimed fees, or who was aware of the failure to plead such basis specifically, could still wait until the cost bill was filed to assert that such fees could not be recovered. The first sentence clarifies the original intent of the Council that all claims for attorney fees be subject to pretrial test for legal sufficiency by motion. This would surely be true under the prior rule for a pleading, but there might be some question whether a motion to strike or make more definite and certain could be used against an allegation of right to attorney fees contained in a motion. The second sentence of the amendment is totally new and would change the result in cases such as Dept. of Human Resources v. Strasser, 83 Or App 363, 732 P2d 38, and AFSD v Fulop, 72 Or App 424, 695 P2d 979, rev'd on other grounds, 300 Or 39, 706 P2d 921 (1985). The waiver in the second sentence is only of objections to the form of allegation of the right to attorney fees. Any objection to the substantive validity of the opponent's claim for attorney fees is not waived by failure to assert such objection prior to the filing of objections to the cost bill.

RULE 69 - DEFAULT ORDERS AND JUDGMENTS

A. Entry of order of default.

When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, the party seeking affirmative relief may apply for an order of default. If the party against whom an order of default is sought has filed an appearance in the action, or has provided written notice of intent to file an appearance to the party seeking an order of default, then the party against whom an order of default is sought (or, if appearing by representative, such party's representative) shall be served with written notice of the application for an order of default at least 10 days, unless shortened by the court, prior to entry of the order of default. These facts, along with the fact that the party against whom the order of default is sought has failed to plead or otherwise defend as provided in these rules, shall be made to appear by affidavit or otherwise, and upon such a showing, the clerk of the court shall enter the order of default.

B. Entry of default judgment.

* * *

B.(2) **By the court.** In all other cases, the party seeking a judgment by default shall apply to the court therefor, but no judgment by default shall be entered against a minor or an incapacitated person unless they have a general guardian or they are represented in the action by another representative as

provided in Rule 27. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing, or make an order of reference, or order that issues be tried by a jury, as it deems necessary and proper. The court may determine the truth of any matter upon affidavits. [In the event that it is necessary to receive evidence prior to entering judgment, and if the party against whom judgment by default is sought has appeared in the action, the party against whom the judgment is sought shall be served with written notice of the application for judgment at least 10 days, unless shortened by the court, prior to the hearing on such application.]

NOTE: UNDERLINED LANGUAGE IS NEW; BRACKETED LANGUAGE IS TO BE DELETED

Procedure and Practice Committee
Explanation and Commentary

The Procedure and Practice Committee respectfully recommends the Council to amend ORCP 69 to require written notice of application for an order of default to be served upon a party who has filed an appearance or provided written notice of intent to file an appearance. The committee further recommends that there should be no requirement for notice after entry of an order of default but prior to an application for a default judgment. The committee believes that it is more appropriate to require

notice prior to application for an order of default rather than after the order of default has been entered and judgment is sought. The committee believes requiring notice to be given at an earlier stage will significantly reduce the numbers of motions to set aside default judgments and therefore promote better utilization of judicial resources.

The proposed amendment would require written notice to be given by a party seeking an order of default to a party who has filed an appearance in an action or has provided written notice of intent to file an appearance. The committee believes that there is a reasonable basis for providing a distinction between defendants who have taken some action in response to service (whether by filing an appearance or providing specific written notice of intent to file an appearance to the plaintiff) versus defendants who have taken no action in response to service. The committee believes that it is reasonable under equal protection standards to require additional notice to the class of defendants who have taken action in response to service prior to an entry of an order of default.

If the proposed amendment to Rule 69 requiring notice prior to entry of an order of default is adopted, the committee urges the Council to delete the requirement that notice be given prior to entering judgment where now required. The committee believes that a second notice would be unnecessary and would lead to unnecessary utilization of judicial resources.

The committee has researched the issue of whether a defaulted party who has appeared in the action has a right to

attend any hearing at which the court takes evidence prior to entry of judgment. The source of a defaulted party's right to attend a prejudgment evidentiary hearing appears tied to earlier statutes allowing either party to demand the benefit of a jury trial on the assessment of unliquidated damages after default. Jones v. Siladic, 52 Or App 807, 813, 629 P2d 875 (1981). The basis of the right to jury trial in such circumstances is statutory, however, not constitutional. Furthermore in Burke v. Rachau, 262 Or 323, 338, 497 P2d 1154 (1972), the Supreme Court held that the original summons provides constitutionally sufficient notice that, unless an appearance is made within the time specified by statute, a judgment will be taken against the defendant. Although that case involved unliquidated damages, the defaulted defendant never made an appearance.

In summary, therefore, the committee concluded that a party in default who has received notice of intent to apply for an order of default, in accordance with the proposed amendment to ORCP 69 B(2), is not entitled to a second notice prior to an application for judgment, even if the party has made an appearance. Accordingly, the committee recommends the deletion of the existing notice requirement from ORCP 69 B(2), provided the Council adopts the new notice requirement proposed above.

DATED this 15th day of September, 1988.

Respectfully submitted,

Kathryn S. Augustson

Kathryn S. Augustson
On behalf of the 1987-88
Procedure and Practice Committee