***** NOTICE *****

PUBLIC MEETING

COUNCIL ON COURT PROCEDURES
Saturday, December 9, 1995, Meeting
9:30 a.m.

Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

A G E N D A

1. Call to order

2. Approval of October 14, 1995 minutes (copy attached)

3. Status report from committee on LAC rules (Mr. Alexander)

4. Status report from committee to consider Justice Peterson's proposed amendments to ORCP 21 (Mr. Lachenmeier)

5. Possible new project for 1995-97 biennium: Possibly needed amendments to ORCP 7 (Mr. Gaylord) (see Attachment A)

6. Review of 1995 legislation amending ORCP and possibly affecting ORCP (Mr. Gaylord) (see Attachment B)

7. Old business

8. New business

9. Adjournment

# # # # #

COUNCIL ON COURT PROCEDURES
Minutes of Meeting of October 14, 1995
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

Present:	J. Michael Alexander	John E. Hart
	Marianne Bottini	Rudy R. Lachenmeier
	David V. Brewer	Michael H. Marcus
	Patricia Crain	John H. McMillan
	Diane L. Craine	Karsten Rasmussen
	Don A. Dickey	Stephen J.R. Shepard
	Stephen L. Gallagher, Jr.	Nancy S. Tauman
	William A. Gaylord	
Excused:	Sid Brockley	Nely L. Johnson
	Mary J. Deits	David B. Paradis
	Susan P. Graber	Milo Pope
	Rodger J. Isaacson	

Charles S. Tauman, Executive Director, Oregon Trial Lawyers' Association, was in attendance. Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

Agenda Item 1. The Chairperson, John Hart, called the meeting to order at 9:40 a.m.

Agenda Item 2. Mr. Hart asked all members present to introduce themselves, and this was done, along with self-introductions of the Executive Assistant, Ms. Henthorne, and the Executive Director, Prof. Holland. Mr. Hart mentioned that, due to a regrettable oversight, Bruce Hamlin, whom he intended to nominate to be the Council's new Vice Chairperson, had not been reappointed as a Council member by the OSB Board of Governors, but added that this will be rectified and Mr. Hamlin officially reappointed at the Board's November meeting. Mr. Hart wondered whether there would be any objection to his proceeding with Mr. Hamlin's nomination under these circumstances, or whether this nomination should be deferred until he has been officially reappointed. The consensus of the members was that this nomination should proceed, along with those of the other new officers, at the appropriate point during this meeting.

Agenda Item 3. The minutes of the Council's April 22, 1995 meeting were, without objection or amendment, approved as previously distributed.

Agenda Item 4. Mr. Hart announced the following nominations for 1995-97 officers of the Council: Mr. Gaylord to be

Chairperson, Mr. Hamlin to be Vice Chairperson, and Mr. McMillan to be Treasurer. These nominations were seconded by Ms. Crain, and were approved by unanimous voice vote, whereupon Mr. Gaylord assumed the Chair. Mr. Gaylord then presented Mr. Hart with an inscribed gavel and stand as a token of the Council's esteem and appreciation for his leadership as Chairperson during the 1993-95 biennium, for which presentation Mr. Hart expressed his thanks.

Agenda Item 5. Mr. Gaylord first noted that the new Council members might have some interest in reading the write-up about the Council's history and role prepared by Prof. Holland in the form of a letter to Mr. McMillan, and asked that copies of this be distributed with the agenda of the next meeting. He then conducted a general discussion of the current situation of the Council in the wake of the 1995 legislative session, in particular HB 2228, which amended the Council's organic statute to require it to elect a five-member legislative advisory committee (hereinafter "LAC") to work closely with legislators on any proposed legislation that would amend the ORCP during future legislative sessions. He initiated this discussion by observing that HB 2228 seems to require the Council to undertake a function new to it and very different from its traditional deliberative method of carefully considering proposed ORCP amendments over the course of several meetings at which cumulative input would be obtained, not only from Council members, but from interested members of the bench, the bar, and the public in the form of testimony before the Council or written comments submitted to it. Mr. Gaylord added that he, along with what he sensed was a consensus of other Council members, has some concern that the five-member LAC, when called upon to give its position on behalf of the Council on possible ORCP amendments to legislators on very short notice, would be placed in the position of having to respond without benefit of the traditional kind of deliberation by the full Council as has tended to assure the quality of its work in the past. Mr. Gaylord urged the Council to focus in particular on §8 of HB 2228, which authorizes the LAC to act and speak on behalf of the full Council if the former so chooses.

Mr. Alexander stated his agreement with this concern, and urged that the Council formulate some internal rules that would govern the operation and functioning of the LAC, and in particular either prohibit or carefully circumscribe its authority to speak on behalf of the full Council except when expressly authorized by the latter to do so. Mr. Alexander added that he has been impressed with the deliberative processes by which the Council debates and refines ORCP amendments before promulgating them, and would strongly oppose anything being done or said in the Council's name in the absence of those processes.

Judge Marcus noted that, although he shared the concerns of other Council members, at the April 22nd meeting he had expressed some positive reactions to the concept of an active role for the Council during legislative sessions, and that he remained of the view that some good could come of such role as now mandated by HB 2228. As an example he mentioned that the full Council or the LAC could prevent serious damage that might inadvertently be done to the ORCP by amending language formulated by committee staff or others under the pressure of the close of a session.

Mr. Hart commented that the only way of responding promptly to legislative inquiries without compromising the role of the full Council might be to schedule several public meetings during sessions, contrary to past practice. Mr. Lachenmeier suggested that, to facilitate timely consultation and input, key legislators might be contacted in advance of a session and asked to provide the Council with as much specific information as possible regarding possible legislation impacting upon the ORCP.

Mr. McMillan stated that, as the public member, he felt wholly incompetent to serve as a member of the LAC, as HB 2228 requires. He asked whether the participation of Mr. Alexander, Mr. Hart and Prof. Holland in some of the consultations between various bar groups and committee staff had achieved anything by way of improving any language that finally was enacted by the legislature. The general response was that this participation had been reasonably beneficial and that some damaging draftsmanship had been eliminated or made less damaging as a result of this participation. However, Mr. Alexander emphasized how difficult it was for him and others who participated to keep in mind that they were not authorized to speak on behalf of the Council, yet at the same time not permitted to advocate their own personal views or the positions of any group, such as OTLA or OADC, with which they might be affiliated or associated in other settings. The effect of this ambiguous role was, he reported, quite stultifying, since it was difficult to know what one could properly say.

Mr. Gaylord suggested that the discussion might usefully turn to the future, in particular what steps the Council should consider in order to act in compliance with the new legislative mandate while not compromising the role of the Council or the quality of its work product. Mr. Hart noted the inconsistency between the amendment passed by the 1993 legislature, which required that the Council act by vote of a fifteen-member "supermajority," and the 1995 amendment now under discussion, which seems intended to force the Council to act by a five-member committee.

Mr. Alexander stated that he could envision no circumstances where the LAC should properly purport to represent or speak on behalf of the Council, and suggested that some internal rules should be adopted to clarify and limit the role and authority of the LAC in a manner not inconsistent with §8. Judge Marcus expressed the view that, merely because the Council's governing statute requires an affirmative vote of a supermajority of fifteen members in order to promulgate ORCP amendments is not necessarily controlling on whether internal rules of procedure along the lines suggested by Mr. Alexander would require a supermajority, or ordinary majority, vote of the Council to authorize the LAC to speak or act in its name. He added that his understanding is that the Council's organic statute permits it to take any action apart from official and final promulgation of ORCP amendments by vote of a simple majority of members, including adoption of internal rules governing the relationship between the Council and the LAC. Prof. Holland confirmed this understanding.

Mr. McMillan moved that a committee be appointed by the Chair to work on a set of rules regulating the functioning of the LAC, as suggested by Mr. Alexander. On the basis of a broad consensus in favor if this action rather than a formal vote on Mr. McMillan's motion, Mr. Gaylord appointed the following members, who indicated a willingness to serve, to an ad hoc committee to draft a set of rules and present them in due course to the Council for its consideration, possible modification, and adoption: Mr. Alexander, Ms. Bottini, Ms. Craine, Mr. Hart, and Judge Marcus. Mr. Gaylord stated that he saw no reason for this committee to rush its work, but asked that an item for the next Council meeting's agenda be included for the purpose of receiving the committee's preliminary status report.

Mr. McMillan asked what, if any, action was taken by the 1995 Legislative Assembly with reference to the ORCP amendments promulgated by the Council at its December 1994 meeting. Prof. Holland responded that the legislature had done nothing to modify or disapprove any of those amendments, although it did by statute enact several ORCP amendments of its own devising. Mr. Hart suggested that the Council should perhaps devote some time to reviewing the work product of the 1995 legislative session bearing upon the ORCP, to see whether any problems might be anticipated. Prof. Holland invited the members' attention to the fact that his July 15, 1995 memo, "Legislative Summary," on pp. 3-14, set forth all of the ORCP amendments enacted by the 1995 legislature. Mr. Lachenmeier suggested that a full meeting of the Council should be devoted to carefully reviewing the ORCP amendments enacted by the 1995 legislature to see if any of them might have created any drafting or other technical problems. There was general agreement with this suggestion, on the basis of

which Mr. Gaylord indicated that the next following meeting of the Council should be reserved primarily for the purpose of carefully reviewing the legislature's ORCP amendments. He asked all Council members to spend some time prior to that meeting studying those amendments so that the discussion on that occasion could proceed efficiently and productively. He also reminded members to bring to all meetings a copy of the current ORCP for reference. Prof. Holland asked Mr. Gaylord whether, in addition to the ORCP amendments set forth in his 7-15-95 memo, he should prepare and distribute other statutory amendments, apart from those amending the ORCP, that made significant changes in civil practice and procedure and therefore might have some impact upon the ORCP. Mr. Gaylord responded that these additional materials should be distributed with the agenda of the next meeting.

Discussion then turned to when the next Council meeting, and those to follow, should be scheduled. It was agreed that the next following meeting should be on December 9, 1995, and that a room should be reserved at the Bar Center for subsequent Council meetings throughout 1996 for the mornings of the second Saturday of each month, but with the understanding that one or more of such meetings might be canceled or re-scheduled if warranted by the Council's workload.

Agenda Item 6: Status Reports on items continued from the 1993-95 biennium. Mr. Alexander was asked whether he had anything to report concerning item 6 a (see Attachment A to the agenda of this meeting), a proposal that the ORCP be amended in some manner to provide trial courts with discretionary authority to permit live, telephonic testimony in jury-trial cases. He responded that he was not prepared to report anything at this time, but would draft a proposed rule or amendment for presentation to the Council at some future meeting.

Mr. Lachenmeier was then asked whether he had anything to report concerning item 6 b (see Attachment B to the agenda of this meeting), which was a proposal of retired Chief Justice Ed Peterson that ORCP 21 be amended to provide that the defenses of want of subject matter and personal jurisdiction, as well as insufficiency of service or summons, be waived unless raised in a pre-answer motion. Mr. Lachenmeier responded that, in his opinion, this proposal merited some careful consideration, but also suggested that it might present some problems that would have to be resolved. He noted that, in almost all cases, competent defense counsel will have every reason to raise these defenses at the earliest possible time, i.e., by pre-answer motion, at least when only a pure question of law was presented. But he also noted that there are some situations where these defenses will require adjudication of factual issues and, therefore, where at least a limited amount of discovery will

often be necessary. To accommodate such cases the present option provided in ORCP 21 G(1)(b) to raise the defenses of want of personal jurisdiction, and insufficiency of summons or service, in the answer unless omitted from a pre-answer motion, might be regarded as useful or even essential. Mr. Lachenmeier also noted that, as applied to want of subject matter jurisdiction, waiver by omission in either responsive pleadings or motions would represent a major departure from long-established practice as exemplified by ORCP 21 G(4). Mr. McMillan mentioned that he would soon be meeting with Justice Peterson for lunch, and asked whether it would be useful for him to discuss this proposal with the latter. In response, it was suggested to Mr. McMillan that he might tell Justice Peterson that the Council is genuinely interested in this proposal, that it is under active consideration, and that any views he might have about the perceived occasional need for factual development by discovery in connection with these defenses following filing of the answer would be most welcome.

Agenda Item 7. Proposed amendments to ORCP 7 and 15 (see Attachment C to agenda of this meeting). Prof. Holland was asked briefly to explain each of these two proposed amendments. There was general agreement that his proposed amendment to ORCP 7 B, which would provide that a summons may be subscribed by any active member of the Oregon State Bar rather than by "a resident attorney of this state," seemed clearly to be a sound one, and that it should be placed on the agenda of some future meeting when the time is ripe for the Council's full consideration of it. Regarding his proposed amendment to ORCP 15 A, however, there was less agreement that it was either necessary or sound. On the basis of this reaction Mr. Gaylord stated that some further thought seemed needed as to whether it would be useful to place this proposal on the agenda of some subsequent meeting for full dress consideration.

Agenda Item 8. Open discussion: Suggested priorities for 1995-97 biennium. Mr. Gaylord invited suggestions or comments from all members as to specific things the Council should consider or undertake in the course of the 1995-97 biennium. Prof. Holland stated that, as one small step toward meeting the perennial criticism that the Council activities and functions are not made well enough known to the bench and bar, he would be forwarding for publication by *For the Record* a roster of the Council's current officers and members, together with a schedule of its projected meetings and an invitation for submission of proposed ORCP amendments.

Mr. Lachenmeier said that he thought the Council should perhaps give some attention to ORCP 7 D(4)(c) having to do with the prerequisite showing for taking defaults in cases where DMV

service has been used, as well as the showing required for service by publication pursuant to ORCP 7 D(6)(a). Mr. Rasmussen agreed that these, and perhaps other provisions of ORCP 7, might stand in need of some clarification.

Mr. Gaylord concluded this discussion by suggesting that if members have specific ideas about possible ORCP amendments the Council should consider during this biennium, it would be helpful if they were put in written form and forwarded to Prof. Holland for distribution so that all members could give them some considered thought between meetings, as this would conserve meeting time.

Agenda Item 11: Adjournment. There being no items of old or new business (Agenda Items 9 and 10), the meeting was adjourned at 11:32 a.m.

Respectfully submitted,

Maury Holland
Executive Director

Attachment A

HOFFMAN, HART & WAGNER

Attorneys at Law

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September 20, 1994

Maurice J. Holland
Executive Director
Council on Court Procedures
University of Oregon
School of Law
Eugene, OR 97403-1221

Dear Maury:

Bernie and I received the enclosed very positive suggestion from attorney Pat Rothwell at Hallmark, Keating which is worthy of the Council's consideration; perhaps we could place this on the agenda for our next available meeting. In checking our schedule, however, I note that we did not schedule a meeting in November which means our next meeting will be the December 10th meeting at which all of our proposals need substantial consideration. In short, I suspect that Mr. Rothwell's suggestion will represent the first order of new business in 1995.

Best personal regards,

John

John E. Hart

JEH:ikw
Enclosure
cc: Bernard Jolles

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September 15, 1994

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Mr. John Hart
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1000 Southwest Broadway
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Dear Gentlemen:

In June, Barbara Fishleder of the PLF called me to request that I provide to you an analysis of service cases in Oregon to provide background a possible suggestions for changes to ORCP 7. Enclosed with this cover letter is the historic analysis of the law on service. This is taken from an article I wrote for the PLF in Brief Newsletter, February, 1993 as well as part of summary of the more recent Atterburry v. Wells, by Robert Schnack of the Bullivant, Houser firm.

I have also included an analysis of possible changes to the rule at the end of this enclosed article.

Please call me if you would like to discuss this further. I would be glad to be of any assistance I can.

Very truly yours,

Patrick N. Rothwell

PNR/em
cc: Barbara Fishleder

SERVICE OF PROCESS

Reasonably Calculated to Apprise Defendant

Seven years ago the Oregon Supreme Court decided Lake Oswego Review v. Steinkamp, 298 Or 607, 695 P2d 565 (1985). The plaintiff in Steinkamp, mailed the summons and complaint to defendant with a certified, return-receipt requested letter. The mail carrier, by chance, happened to know defendant and delivered the letter containing the summons and complaint to the defendant at a different address. The defendant signed for the letter. The Supreme Court held the service on defendant was valid.

Some attorneys may have understood, after reading Steinkamp, that service was "liberalized" and as long as service was in some way reasonable and the defendant received notice, service was not an issue. A year later, in 1986, the Oregon Supreme Court decided Jordan v. Wiser, 302 Or 50, 726 P2d 365 (1986) and eliminated that understanding. In Jordan, the plaintiffs attorney had information from the Oregon DMV that one of the defendants resided with his mother. The attorney instructed the process server to serve that defendant at his mother's address. The process server attempted substitute service by leaving a certified copy of the summons and complaint at the mother's address. It turned out, however, the defendant lived in Washington at the time of the attempted substitute service.

About a week or two later, the defendant's mother drove to Washington and attempted to hand-deliver the summons and complaint to her son but he refused to accept. The defendant had also previously been informed by his insurance carrier a complaint had been filed.

The court in Jordan distinguished Steinkamp by noting the mother's attempt to serve the summons and complaint on her son was not authorized by the plaintiff. The Jordan court stated the person who makes or attempts to make personal service on a defendant must intend to serve the summons and must be authorized to do so by plaintiff or plaintiff's attorney. Here, in the court's words, the defendant's mother was a "self-starter" and could not be considered an agent for purposes of service. The Jordan court also noted that actual notice by defendant is not enough to satisfy service despite the language of ORCP 7D(1) and ORCP 7G.

Follow-up Mailing in Substituted Service

In 1990, the Supreme Court decided two service cases. In Hoyt v. Paulos, 310 Or 196, 796 P2d 355 (1990), the plaintiff personally served the Oregon DMV and mailed a copy of the summons and complaint by certified mail to the defendant. The plaintiff also mailed a copy of the summons and complaint to defendants

insurer but it was by regular mail. The issue concerned whether the follow-up mailing to the insurer must be by registered mail and whether that mailing was necessary for an action to be deemed "commenced" for statute of limitations purposes. The Paulos court held the mailing of the complaint to the insurer by regular mail did not deprive the court of jurisdiction and therefore the action was timely commenced.[1]

Two-Prong Test of Baker

The Supreme Court then decided Baker v. Foy, 310 Or 221, 797 P2d 349 (1990). In Baker, two days before the applicable statute of limitations ran, the plaintiff filed a complaint. The Oregon DMV records showed the defendant resided at his mother's address. The defendant also told the investigating officers at the scene of the motor vehicle accident that he resided at his mother's address. The plaintiff's attorney gave the complaint to the process server who served it by substituted service at the mother's address. The plaintiff's attorney sent a follow-up mailing to the mothers address. In fact, the defendant had not lived at his mother's address for over two years. The defendant nonetheless had actual notice of the complaint. The Baker court held the service invalid.

The Baker court pronounced a two-prong test for determining the adequacy of service under ORCP 7. The first question is whether the method of service was specifically permitted under ORCP 7 and accomplished in accordance with ORCP 7. If the answer is yes, service is presumptively adequate. If the answer is no, the next question is whether the method of service satisfies the "reasonable notice" standard under ORCP 7D(1).

This two-prong Baker test is not helpful in practice since obviously if service satisfies the first prong there is generally no issue. Further, the Baker case does not provide guidance on the second question of what method, not expressly authorized under ORCP 7, is nonetheless "reasonably calculated to apprise defendant of the existence and pendency of the action".

Recent change in DMV Service Rule

More recently, ORCP 7D(4) was amended. Now, in a motor vehicle accident case, DMV service is authorized on a defendant "who cannot be served with summons by any method specified in subsection 7D(3)". This language suggests a plaintiff's attorney

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[1] See also Korgan v. Gantenbein, 74 Or App 154, 702 P2d 427 (1985). Follow-up mailing after substituted service does not effect when an action is deemed "commenced" for statute of limitations purposes and is only a requirement of the Oregon Rules of Civil Procedure, not ORS 12.110.

can no longer initially turn to the Oregon DMV for service in an automobile accident case but must make some attempts at personal service. The extent of these attempts is unclear. Must the plaintiffs attorney try to personally serve the defendant twice, four times, six times, before using DMV service? No Oregon case has decided this issue.

Atterbury Case

Atterbury v. Wells, 125 Or App 592, 866 P2d 484 (1994), is the most recent in an evolution of cases which demonstrate the difficulty of fulfilling the ORCP standard of "reasonably calculated to apprise the defendant of the existence and pendency of the action". In Atterbury, shortly before the statute of limitations expired, the plaintiff's attorney sent a copy of the complaint to the defendant's insurer by regular mail and gave the summons and complaint to the local sheriff for service. The sheriff was unsuccessful at serving the defendant because the defendant was on vacation. When the defendant's adult daughter learned the sheriff was looking for the defendant, she went to the sheriff's office, informed the deputy that the defendant was out of town, and stated that she would see to it that the defendant received the papers. The deputy gave the papers to the adult daughter. Plaintiff's attorney then sent a copy of the summons and complaint by regular mail to the defendant at his home address.

The court of appeals first noted that mailing a copy of the complaint to the insurance company did not purport to accomplish service, as the complaint was not accompanied by a summons and did not contain notice of service on the defendant. With respect to delivery of the complaint and summons to the defendant's adult daughter, the court of appeals stated that what the process server knew at the time of delivery is relevant for the purpose of evaluating whether service was reasonably calculated to give notice of the lawsuit. The court held that because the deputy sheriff knew very little about the daughter's contacts with the defendant, it was not reasonable for the plaintiff to expect that the handing of the papers to the daughter would result in the defendant receiving notice of the action. The deputy had failed to inquire as to the defendant's whereabouts, the frequency of regularity of the daughter's contacts with him, or when the daughter might deliver the papers to the defendant.

The court of appeals also concluded that mailing of summons and complaint by regular mail to the defendant was not sufficient to satisfy the "reasonable notice" standard of ORCP 7D(1). The court noted that service on an individual by mail, although not presumed adequate under ORCP 7D(2), may be considered as a factor under the "reasonable notice" standard of ORCP 7D(1), if the requirements for service by mail contained in ORCP 7D(2)(d) are satisfied, including certified, return receipt.

Finally, the court of appeals in Atterbury rejected the plaintiff's contention that each of the three methods of service, taken together, accomplished service reasonably calculated to give the defendant notice of the action.

Proposed Changes

The real issues here seems to be what service is valid where the defendant receives actual notice? If such notice is enough, then the language of ORCP 7G could be changed slightly. The current ORCP 7G states that failure to comply with the provisions of this rule relating to the "form of service issuance of summons and the person who may serve summons" shall not effect the validity of service. Perhaps this rule could be changed to state "Failure to comply with the provisions of this rule relating to the manner of service shall not effect the validity of service of summons or the existence of jurisdiction or if the court determines that the defendant received actual notice of the dependency of the action." The rule could then continue, as it does now, with the language concerning no material prejudice to the substance rights of the party.

If the desire is to require something more than actual notice, than the first sentence of current ORCP 7G should be eliminated since it is confusing to have that rule but yet require something more than notice under the case law.

ORCP 7D(1) is confusing because it starts off by indicating that service may be made "in any manner reasonably calculated" to apprise defendant of the action but then goes on to state that service may be made by the following methods. If service can be made by "any manner" reasonably calculated, it seems there should be a sentence added to the end of ORCP 7D(1) that states "service by some other method not mentioned above may be valid if it is made in a manner reasonably calculated under all the circumstances to apprise the defendant of the existence and pendency of the action and the method or manner of service does not materially prejudice the of rights of the defendant."

ORCP 7D(4), involving DMV service, is confusing bacause of the provision that DMV service can be used on a defendant "who cannot be served under 7D(3)." The problem here, as discussed above, is that there is no guidance as to what the plaintiff has to do to attempt personnal service under 7D(3) before turning to DMV service. Perhaps some language could be added that DMV service can be used on a defendant "who cannot be served with summoned by any method specified under subsection 7D(3) after reasonable attempts to satisfy any of those methods have been exhausted." There should be some guidance on what a plaintiff must do to make a reasonable attempt to serve through ORCP 7D(3). As the rule is currently written, it could be interrupted to mean that if there is some way the defendant could have been served through ORCP 7D(3), then DMV service is invalid. If the plaintiff needs to show the plaintiff made a "reasonable attempt" to comply with one of those service

methods, that ought to be enough. The focus should be on the reasonableness of the plaintiff's attempt to serve rather than whether the defendant could have, in fact, been served under one of those methods.

I also think ORCP 7D(7) could be changed. As it is currently worded, it does not seem to make sense. It states a defendant cannot be served by any method if the plaintiff attempted all methods and was unable to complete service. This does not make any sense. I would eliminate ORCP 7D(7) entirely as I do not think it helps in any analysis of service.

Attachment B

Currently Effective ORCP Amendments By 1995 Legislative Assembly

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Other 1995 Legislation Affecting Civil Practice*

{*Note: The consensus at the Oct. 14 meeting was that the Council might wish to review, in addition to 1995 legislation amending the ORCP, other legislation affecting civil practice that might have an impact on the ORCP or create difficulties under them. As most, if not all, of you know, the entirety of the 1995 legislation that changes various aspects of civil practice would amount to several hundred pages in bill, or any other, format. Given the limited amount of meeting time available, I have used my best judgment to select and provide those enactments, or sections thereof, which seemed to me most important for the specific purpose of the Council's review; i.e., most likely to create difficulties under the ORCP as effective 1-1-96. I probably missed some important stuff, and could reasonably be second-guessed by every member.

What follows is in bill format, which is not easy reading. The Westlaw method of indicating added and deleted language makes the reading even more arduous. <<+ +>> = language added; <<- ->> = language deleted.}

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Ch 79

Senate Bill 851

Sponsored by COMMITTEE ON JUDICIARY

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure as introduced.

Makes technical changes in Oregon Statutes. Adjusts grammar, syntax and punctuation. De obsolete provisions. Conforms language to existing statutes. Inserts omitted provisions. Adjusts series references.

A BILL FOR AN ACT

Relating to correction of erroneous material in Oregon Law; creating new provisions; amending C 2.150, 3.041, 7.211, 18.360, 18.480, 19.038, 20.085, 29.145, 29.147, 29.411, 34.040, 52.130, 52.1 62.415, 62.720, 63.034, 63.160, 68.120, 72.2010, 72A.1010, 72A.5230, 73.0102, 74.1020, 74.21: 77.6040, 79.2030, 79.3020, 79.3120, 83.820, 92.060, 92.140, 105.430, 107.718, 108.660, 109.070, 109.1: 109.425, 109.430, 109.440, 109.450, 109.503, 109.990, 110.162, 126.137, 128.320, 133.245, 137.635, 161.685, 163.206, 163.575, 166.165, 166.725, 171.825, 174.535, 181.640, 182.360, 182.375, 182.395, 183.335, 183.360, 183.413, 183.464, 184.730, 184.733, 185.530, 185.540, 190.210, 192.502, 192.530, 195.210, 197.295, 198.190, 215.203, 215.273, 215.402, 215.710, 221.770, 222.130, 222.250, 222.620, 222.650, 240.610, 244.020, 244.045, 244.050, 248.370, 260.725, 261.355, 266.380, 275.120, 276.612, 285.035, 285.153, 285.800, 285.860, 285.905, 286.605, 287.056, 294.035, 294.485, 294.555, 305.005, 305.230, 305.275, 305.520, 305.583, 305.585, 305.620, 305.747, 305.749, 305.753, 307.115, 307.162, 307.518, 307.527, 308.005, 308.025, 308.365, 308.372, 308.396, 308.411, 308.479, 308.558, 308.880, 309.100, 310.310, 310.315, 310.390, 310.396, 311.010, 311.105, 311.140, 311.205, 311.385, 311.605, 311.668, 311.691, 311.812, 312.214, 314.021, 314.407, 314.625, 314.650, 314.670, 314.680, 314.682, 314.686, 314.688, 315.204, 316.002, 316.027, 317.152, 317.259, 318.031, 320.012, 321.353, 321.357, 321.415, 321.760, 321.805, 323.110, 326.111, 336.088, 336.187, 341.085, 341.290, 341.331, 343.465, 345.400, 346.680, 351.050, 351.077, 351.085, 351.545, 352.360, 352.400, 357.246, 357.525, 358.171, 358.831, 359.025, 366.155, 373.020, 390.805, 401.839, 409.620, 414.730, 416.010, 417.815, 418.030, 418.312, 419A.200, 419C.367, 420.074, 423.525, 430.630, 432.420, 435.080, 446.322, 450.280, 450.885, 450.900, 451.545, 454.225, 455.447, 455.770, 456.005, 456.065, 456.120, 456.515, 456.530, 456.535, 456.539, 456.543, 456.547, 456.550, 456.555, 456.559, 456.574, 456.578, 456.593, 456.615, 456.620, 456.625, 456.627, 456.630, 456.640, 456.645, 456.650, 456.661, 456.665, 456.670, 456.675, 456.680, 456.685, 456.695, 456.700, 456.705, 456.720, 457.170, 458.310, 458.415, 458.610, 459.298, 459.335, 459A.025, 468.220, 468.423, 468.429, 468.431, 468.433, 468.440, 468A.615, 469.370, 469.681, 478.225, 480.350, 480.436, 480.450, 508.718, 508.808, 517.800, 517.950, 527.260, 527.710, 536.125, 537.515, 537.800, 541.755, 545.234, 545.254, 554.110, 561.140, 561.240, 571.515, 576.215, 577.210, 577.320, 577.710, 578.030, 579.030, 586.550, 586.561, 586.720, 603.010, 632.745, 633.006, 633.511, 634.022, 634.042, 634.122, 646.204, 646.605, 657.095, 657.471, 657.513, 657A.400, 658.715, 659.037, 659.430, 670.306, 672.020, 675.595, 678.113, 678.140, 678.820, 683.510, 684.092, 686.210, 688.040, 689.832, 691.555, 700.260, 705.165, 708.520, 716.645, 731.028, 731.036, 731.434, 732.523, 733.600, 735.610,

NOTE: Matter in boldfaced type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in boldfaced type.

737.346, 742.460, 743.652, 743.722, 750.705, 801.285, 802.110, 809.410, 810.180, 811.220, 811.615, 811.625, 815.075, 818.100, 818.430, 819.150, 819.160, 819.440, 820.150, 822.050, 830.185 and 835.045 and section 7, chapter 290, Oregon Laws 1987, sections 2, 10, 11b and 15, chapter 791, Oregon Laws 1989, section 10, chapter 948, Oregon Laws 1989, section 15, chapter 920, Oregon Laws 1991, section 11, chapter 676, Oregon Laws 1993, section 5, chapter 729, Oregon Laws 1993, and section 2, chapter 811, Oregon Laws 1993, and ORCP 4 J, 7 D, 27 B, 55 D, 63 E, 69 B and 82 C; and repealing ORS 171.645, 307.127, 308.660, 316.485, 316.495, 318.100, 323.086, 323.087, 323.089, 323.091, 401.733, 419A.295, 430.700, 468.685, 468A.425, 468A.430, 468A.435, 468A.440, 468A.445, 468A.450, 469.157, 653.770 and 835.050 and sections 1, 2, 4, 5, 6, 7, 8, 9 and 10, chapter 679, Oregon Laws 1985, sections 60 and 66, chapter 863, Oregon Laws 1991, section 50, chapter 344, Oregon Laws 1993, and sections 1, 2, 3, 4 and 8, chapter 814, Oregon Laws 1993.

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

SECTION 1. ORS 174.535 is amended to read:

174.535. It is the policy of the Legislative Assembly to revise sections from Oregon Revised Statutes and Oregon law periodically in order to maintain accuracy. However, nothing in chapter 740, Oregon Laws 1983, chapter 565, Oregon Laws 1985, chapter 158, Oregon Laws 1987, chapter 171, Oregon Laws 1989, chapters 67 and 927, Oregon Laws 1991, [*and*] chapters 18 and 469, Oregon Laws 1993, **and this 1995 Act** is intended to alter the legislative intent or purpose of statutory sections affected by chapter 740, Oregon Laws 1983, chapter 565, Oregon Laws 1985, chapter 158, Oregon Laws 1987, chapter 171, Oregon Laws 1989, chapters 67 and 927, Oregon Laws 1991, [*and*] chapters 18 and 469, Oregon Laws 1993, **and this 1995 Act** except insofar as the amendments thereto, or repeals thereof, specifically require.

NOTE: Reviser's Bill policy statement.

SECTION 2. ORS 2.150 is amended to read:

2.150. (1) The Supreme Court shall arrange for the publication and distribution of bound volumes of reports of decisions of the Supreme Court and Court of Appeals, of bound volumes of reports of decisions of the Oregon Tax Court determined to be of general public interest under ORS 305.450, of unbound copies of those decisions to be used as advance sheets and press summaries, rules and other official judicial department publications. The bound volumes of reports or advance sheets shall contain additional material as the Supreme Court may direct.

(2) The bound volumes of reports or advance sheets or both may be printed and bound, as the Supreme Court shall determine, by:

(a) The Oregon Department of Administrative Services in the same manner as other state printing; or

(b) A private printer pursuant to a contract entered into by the Supreme Court with the printer and not subject to ORS 282.020.

(3) The bound volumes of reports or advance sheets or both may be distributed, as the Supreme Court shall determine, by:

(a) The State Court Administrator; or

(b) A private distributor pursuant to a contract entered into by the Supreme Court with the distributor.

(4) The bound volumes of reports and advance sheets shall be distributed without charge as determined by the Supreme Court or sold by the distributor. Except as otherwise provided in a contract entered into under subsection [*(3)(c)*] **(3)(b)** of this section, the State Court Administrator shall determine sale prices and all moneys collected or received from sales shall be paid into the

(h) [*If House Bill 5061 becomes law,*] Funds available under [*House Bill 5061*] **chapter 637, Oregon Laws 1993,** may be used to provide training for persons providing services under this subsection.

(6) On or before July 1, 1995, all federal funds administered by the Department of Human Resources through the Children's Services Division shall be transferred and made available to the State Office for Services to Children and Families.

NOTE: Supplies missing words; deletes obsolete words; adds punctuation.

SECTION 398. Section 5, chapter 729, Oregon Laws 1993, is amended to read:

Sec. 5. [*Sections 6 and 7 of this Act are*] **Section 6, chapter 729, Oregon Laws 1993, is** added to and made a part of ORS 183.310 to 183.410.

NOTE: Corrects inadvertent addition of inappropriate provision to portion of Administrative Procedures Act.

SECTION 399. Section 2, chapter 811, Oregon Laws 1993, is amended to read:

Sec. 2. As used in **ORS chapter 251 and** sections 1 to 13 and 17 and 18, [*of this Act*] **chapter 811, Oregon Laws 1993:**

(1) "Candidate" means an individual whose name is or is expected to be printed on the official ballot.

(2) "County clerk" means the county clerk or the county official in charge of elections.

(3) "Elector" means an individual qualified to vote under section 2, Article II of the Oregon Constitution.

(4) "Measure" includes any of the following submitted to the people for their approval or rejection at an election:

(a) A proposed law.

(b) An Act or part of an Act of the Legislative Assembly.

(c) A revision of or amendment to the Oregon Constitution.

(d) Local, special or municipal legislation.

(e) A proposition or question.

NOTE: Clarifies application of definitions.

SECTION 400. **Sections 1, 2, 3, 4 and 8, chapter 814, Oregon Laws 1993, are repealed.**

NOTE: Deletes redundant provisions.

SECTION 401. ORCP 4 J is amended to read:

J. Securities. In any action arising under the Oregon Securities Law, including an action brought by the [*Corporation Commissioner*] **Director of the Department of Consumer and Business Services** against:

J(1) An applicant for registration or registrant, and any person who offers or sells a security in this state, directly or indirectly, unless the security or the sale is exempt from ORS 59.055; or

J(2) Any person, a resident or nonresident of this state, who has engaged in conduct prohibited or made actionable under the Oregon Securities Law.

NOTE: Updates reference to state agency personnel.

SECTION 402. ORCP 7 D is amended to read:

D. Manner of service.

D(1) Notice required. Summons shall be served, either within or without this state, in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend. Summons may be served in a manner specified in this rule or by any other rule or statute on the defendant

or upon an agent authorized by appointment or law to accept service of summons for the defendant. Service may be made, subject to the restrictions and requirements of this rule, by the following methods: personal service of summons upon defendant or an agent of defendant authorized to receive process; substituted service by leaving a copy of summons and complaint at a person's dwelling house or usual place of abode; office service by leaving with a person who is apparently in charge of an office; service by mail; or, service by publication.

D(2) Service methods.

D(2)(a) Personal service. Personal service may be made by delivery of a true copy of the summons and a true copy of the complaint to the person to be served.

D(2)(b) Substituted service. Substituted service may be made by delivering a true copy of the summons and complaint at the dwelling house or usual place of abode of the person to be served, to any person over 14 years of age residing in the dwelling house or usual place of abode of the person to be served. Where substituted service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed a true copy of the summons and complaint to the defendant at defendant's dwelling house or usual place of abode, together with a statement of the date, time, and place at which substituted service was made. For the purpose of computing any period of time prescribed or allowed by these rules, substituted service shall be complete upon such mailing.

D(2)(c) Office service. If the person to be served maintains an office for the conduct of business, office service may be made by leaving a true copy of the summons and complaint at such office during normal working hours with the person who is apparently in charge. Where office service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed a true copy of the summons and complaint to the defendant at the defendant's dwelling house or usual place of abode or defendant's place of business or such other place under the circumstances that is most reasonably calculated to apprise the defendant of the existence and pendency of the action, together with a statement of the date, time, and place at which office service was made. For the purpose of computing any period of time prescribed or allowed by these rules, office service shall be complete upon such mailing.

D(2)(d) Service by mail. Service by mail, when required or allowed by this rule, shall be made 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(3) Particular defendants. Service may be made upon specified defendants as follows:

D(3)(a) Individuals.

D(3)(a)(i) Generally. Upon an individual defendant, by personal service upon such defendant or an agent authorized by appointment or law to receive service of summons or, if defendant personally cannot be found at defendant's dwelling house or usual place of abode, then by substituted service or by office service upon such defendant or an agent authorized by appointment or law to receive service of summons.

D(3)(a)(ii) Minors. Upon a minor under the age of 14 years, by service in the manner specified in subparagraph (i) of this paragraph upon such minor, and also upon such minor's father, mother, conservator of the minor's estate, or guardian, or, if there be none, then upon any person having the care or control of the minor or with whom such minor resides, or in whose service such minor is employed, or upon a guardian ad litem appointed pursuant to Rule 27 A(2).

D(3)(a)(iii) Incapacitated persons. Upon an incapacitated person as defined by ORS 126.003 [(2)], by service in the manner specified in subparagraph (i) of this paragraph upon such person, and also upon the conservator of such person's estate or guardian, or, if there be none, upon a guardian ad litem appointed pursuant to Rule 27 B(2).

D(3)(b) Corporations and limited partnerships. Upon a domestic or foreign corporation or limited partnership:

D(3)(b)(i) Primary service method. By personal service or office service upon a registered agent, officer, director, general partner, or managing agent of the corporation or limited partnership, or by personal service upon any clerk on duty in the office of a registered agent.

D(3)(b)(ii) Alternatives. If a registered agent, officer, director, general partner, or managing agent cannot be found in the county where the action is filed, the summons may be served: by substituted service upon such registered agent, officer, director, general partner, or managing agent; or by personal service on any clerk or agent of the corporation or limited partnership who may be found in the county where the action is filed; or by mailing a copy of the summons and complaint to the office of the registered agent or to the last registered office of the corporation or limited partnership, if any, as shown by the records on file in the office of the [*Corporation Commissioner*] [**Secretary of State**] or, if the corporation or limited partnership is not authorized to transact business in this state at the time of the transaction, event, or occurrence upon which the action is based occurred, to the principal office or place of business of the corporation or limited partnership, and in any case to any address the use of which the plaintiff knows or, on the basis of reasonable inquiry, has reason to believe is most likely to result in actual notice.

D(3)(c) State. Upon the state, by personal service upon the Attorney General or by leaving a copy of the summons and complaint at the Attorney General's office with a deputy, assistant, or clerk.

D(3)(d) Public bodies. Upon any county, incorporated city, school district, or other public corporation, commission, board or agency, by personal service or office service upon an officer, director, managing agent, or attorney thereof.

D(3)(e) General partnerships. Upon any general partnerships by personal service upon a partner or any agent authorized by appointment or law to receive service of summons for the partnership.

D(3)(f) Other unincorporated association subject to suit under a common name. Upon any other unincorporated association subject to suit under a common name by personal service upon an officer, managing agent, or agent authorized by appointment or law to receive service of summons for the unincorporated association.

D(3)(g) Vessel owners and charterers. Upon any foreign steamship owner or steamship charterer by personal service upon a vessel master in such owner's or charterer's employment or any agent authorized by such owner or charterer to provide services to a vessel calling at a port in the State of Oregon, or a port in the State of Washington on that portion of the Columbia River forming a common boundary with Oregon.

D(4) Particular actions involving motor vehicles.

D(4)(a) Actions arising out of use of roads, highways, and streets; service by mail.

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 who cannot be served with summons by any method specified in subsection [7] D(3) of this rule, may be served with summons 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*] **with the Department of Transportation or at any office the** [*Administrator*] **department** authorizes to accept summons or by mailing such summons and complaint with a fee of $12.50 to the [*office of the Administrator of the Motor Vehicles Division*] **Department of Transportation** by registered or certified mail, return receipt requested. The plaintiff shall cause to be mailed by registered or certified mail, return receipt requested, 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, and at the most recent address as shown by the [*Motor Vehicles Division's*] **Department of Transportation's** driver records, and at any other address of the defendant known to the plaintiff, which might result in actual notice to the defendant. For purposes of computing any period of time prescribed or allowed by these rules, service under this paragraph shall be complete upon the date of the first mailing to the defendant.

D(4)(a)(ii) The fee of $12.50 paid by the plaintiff to the [*Administrator of the Motor Vehicles Division*] **Department of Transportation** shall be taxed as part of the costs if plaintiff prevails in the action. The [*Administrator of the Motor Vehicles Division*] **Department of Transportation** shall keep a record of all such summonses which shall show the day of service.

D(4)(b) Notification of change of address. Every motorist or user of the roads, highways, and streets of this state who, while operating a motor vehicle upon the roads, highways, or streets of this state, is involved in any accident, collision, or liability, shall forthwith notify the [*Administrator of the Motor Vehicles Division*] **Department of Transportation** of any change of such defendant's address within three years after such accident or collision.

D(4)(c) Default. No default shall be entered against any defendant served under this subsection unless the plaintiff submits an affidavit showing:

(i) that summons was served as provided in subparagraph D(4)(a)(i) of this rule and all mailings to defendant required by subparagraph D(4)(a)(i) of this rule have been made; and

(ii) either, if the identity of the defendant's insurance carrier is known to the plaintiff or could be determined from any records of the [*Motor Vehicles Division*] **Department of Transportation** accessible to plaintiff, that the plaintiff not less than 14 days prior to the application for default caused a copy of the summons and complaint to be mailed to such insurance carrier by registered or certified mail, return receipt requested, or that the defendant's insurance carrier is unknown; and

(iii) that service of summons could not be had by any method specified in subsection [7] D(3) of this rule.

D(5) Service in foreign country. When service is to be effected upon a party in a foreign country, it is also sufficient if service of summons is made in the manner prescribed by the law of the foreign country for service in that country in its courts of general jurisdiction, or as directed by the foreign authority in response to letters rogatory, or as directed by order of the court. However, in all cases such service shall be reasonably calculated to give actual notice.

D(6) Court order for service; service by publication.

D(6)(a) Court order for service by other method. On motion upon a showing by affidavit that service cannot be made by any method otherwise specified in these rules or other rule or statute, the court, at its discretion, may order service by any method or combination of methods which under the circumstances is most reasonably calculated to apprise the defendant of the existence and pendency of the action, including but not limited to: publication of summons; mailing without publication to a specified post office address of defendant, return receipt requested, deliver to addressee only; or posting at specified locations. If service is ordered by any manner other than publication,

the court may order a time for response.

D(6)(b) Contents of published summons. In addition to the contents of a summons as described in section C of this rule, a published summons shall also contain a summary statement of the object of the complaint and the demand for relief, and the notice required in subsection C(3) shall state: "The 'motion' or 'answer' (or 'reply') must be given to the court clerk or administrator within 30 days of the date of first publication specified herein along with the required filing fee." The published summons shall also contain the date of the first publication of the summons.

D(6)(c) Where published. In order for publication shall direct publication to be made in a newspaper of general circulation in the county where the action is commenced or, if there is no such newspaper, then in a newspaper to be designated as most likely to give notice to the person to be served. Such publication shall be four times in successive calendar weeks.

D(6)(d) Mailing summons and complaint. If service by publication is ordered and defendant's post office address is known or can with reasonable diligence be ascertained, the plaintiff shall mail a copy of the summons and complaint to the defendant. When the address of any defendant is not known or cannot be ascertained upon diligent inquiry, a copy of the summons and complaint shall be mailed to the defendant at defendant's last known address. If plaintiff does not know and cannot ascertain, upon diligent inquiry, the present or last known address of the defendant, mailing a copy of the summons and complaint is not required.

D(6)(e) Unknown heirs or persons. If service cannot be made by another method described in this section because defendants are unknown heirs or persons as described in sections I and J of Rule 20, the action shall proceed against the unknown heirs or persons in the same manner as against named defendants served by publication and with like effect; and any such unknown heirs or persons who have or claim any right, estate, lien, or interest in the property in controversy, at the time of the commencement of the action, and served by publication, shall be bound and concluded by the judgment in the action, if the same is in favor of the plaintiff, as effectively as if the action was brought against such defendants by name.

D(6)(f) Defending before or after judgment. A defendant against whom publication is ordered or such defendant's representatives, on application and sufficient cause shown, at any time before judgment, shall be allowed to defend the action. A defendant against whom publication is ordered or such defendant's representatives may, upon good cause shown and upon such terms as may be proper, be allowed to defend after judgment and within one year after entry of judgment. If the defense is successful, and the judgment or any part thereof has been collected or otherwise enforced, restitution may be ordered by the court, but the title to property sold upon execution issued on such judgment, to a purchaser in good faith, shall not be affected thereby.

D(7) Defendant who cannot be served. A defendant cannot be served with summons by any method specified in subsection [7] D(3) of this rule if the plaintiff attempted service of summons by all of the methods specified in subsection [7] D(3) and was unable to complete service, or if the plaintiff knew that service by such methods could not be accomplished. *

NOTE: Deletes erroneous subsection references; standardizes internal reference language; updates references to state agency personnel.

SECTION 403. ORCP 27 B is amended to read:

B. Appearance of incapacitated person by conservator or guardian. When an incapacitated person as defined by ORS 126.003 [(4)], who has a conservator of such person's estate or a guardian, is a party to any action, the incapacitated person shall appear by the conservator or guardian as may be appropriate or, if the court so orders, by a guardian ad litem appointed by the court in which *

the action is brought. If the incapacitated person does not have a conservator of such person's estate or a guardian, the incapacitated person shall appear by a guardian ad litem appointed by the court. The court shall appoint some suitable person to act as guardian ad litem:

B(1) When the incapacitated person is plaintiff, upon application of a relative or friend of the incapacitated person.

B(2) When the incapacitated person is defendant, upon application of a relative or friend of the incapacitated person filed within the period of time specified by these rules or other rule or statute for appearance and answer after service of summons, or if the application is not so filed, upon application of any party other than the incapacitated person.

NOTE: Deletes erroneous subsection reference.

SECTION 404. ORCP 55 D is amended to read:

D. Service; service on law enforcement agency; service by mail; proof of service.

D(1) Service. Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other person 18 years of age or older. The service shall be made by delivering a copy to the witness personally and giving or offering to the witness at the same time the fees to which the witness is entitled for travel to and from the place designated and for one day's attendance. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. A subpoena for taking of a deposition, served upon an organization as provided in Rule 39 C(6), shall be served in the same manner as provided for service of summons in Rule 7 D(3)(b)(i), D(3)(d), D(3)(e), or D(3)(f). Copies of each subpoena commanding production of books, papers, documents or tangible things and inspection thereof before trial, not accompanied by command to appear at trial or hearing or at deposition, shall be served on each party at least seven days before the subpoena is served on the person required to produce and permit inspection, unless the court orders a shorter period. In addition, a subpoena shall not require production less than 14 days from the date of service upon the person required to produce and permit inspection, unless the court orders a shorter period.

D(2) Service on law enforcement agency.

D(2)(a) Every law enforcement agency shall designate individual or individuals upon whom service of subpoena may be made. At least one of the designated individuals shall be available during normal business hours. In the absence of the designated individuals, service of subpoena pursuant to paragraph (b) of this subsection may be made upon the officer in charge of the law enforcement agency.

D(2)(b) If a peace officer's attendance at trial is required as a result of employment as a peace officer, a subpoena may be served on such officer by delivering a copy personally to the officer or to one of the individuals designated by the agency which employs the officer not later than 10 days prior to the date attendance is sought. A subpoena may be served in this manner only if the officer is currently employed as a peace officer and is present within the state at the time of service.

D(2)(c) When a subpoena has been served as provided in paragraph (b) of this subsection, the law enforcement agency shall make a good faith effort to give actual notice to the officer whose attendance is sought of the date, time, and location of the court appearance. If the officer cannot be notified, the law enforcement agency shall promptly notify the court and a postponement or continuance may be granted to allow the officer to be personally served.

D(2)(d) As used in this subsection, "law enforcement agency" means the Oregon State Police, a county sheriff's department, or a municipal police department.

D(3) Service by mail.

Under the following circumstances, service of a subpoena to a witness by mail shall be of the same legal force and effect as personal service otherwise authorized by this section:

D(3)(a) The attorney certifies in connection with or upon the return of service that the attorney, or the attorney's agent, has had personal or telephone contact with the witness, and the witness indicated a willingness to appear at trial if subpoenaed;

D(3)(b) The attorney, or the attorney's agent, made arrangements for payment to the witness of fees and mileage satisfactory to the witness; and

D(3)(c) The subpoena was mailed to the witness more than 10 days before trial by certified mail or some other designation of mail that provides a receipt for the mail signed by the recipient, and the attorney received a return receipt signed by the witness more than three days prior to trial.

[D(3)(d)] D4 Service by mail; exception. Service of subpoena by mail may not be used for a subpoena commanding production of books, papers, documents, or tangible things, not accompanied by a command to appear at trial or hearing or at deposition.

[D(4)] D5 Proof of service. Proof of service of a subpoena is made in the same manner as proof of service of a summons.

NOTE: Clarifies structure.

SECTION 405. ORCP 63 E is amended to read:

E. Duties of the clerk. The clerk shall, on the date an order made pursuant to this rule is entered or on the date a motion is deemed denied pursuant to section D of this rule, whichever is earlier, mail a notice of the date of entry of the order or denial of the motion to the attorney of record, if any, of each party who is not in default for failure to appear. If a party who is not in default for failure to appear does not have an attorney of record, such *[noticer]* **notice** shall be mailed to the party. The clerk also shall make a note in the docket of the mailing.

NOTE: Corrects word choice.

SECTION 406. ORCP 69 B is amended to read:

B. Entry of default judgment.

B(1) By the court or the clerk. The court or the clerk upon written application of the party seeking judgment shall enter judgment when:

B(1)(a) The action arises upon contract;

B(1)(b) The claim of a party seeking judgment is for the recovery of a sum certain or for a sum which can by computation be made certain;

B(1)(c) The party against whom judgment is sought has been defaulted for failure to appear;

B(1)(d) The party against whom judgment is sought is not a minor or an incapacitated person as defined by ORS 126.003 *[(4)]* and such fact is shown by affidavit;

B(1)(e) The party seeking judgment submits an affidavit of the amount due;

B(1)(f) An affidavit pursuant to subsection B(3) of this rule has been submitted; and

B(1)(g) Summons was personally served within the State of Oregon upon the party, or an agent, officer, director, or partner of a party, against whom judgment is sought pursuant to Rule 7 D(3)(a)(i), 7 D(3)(b)(i), 7 D(3)(e) or 7 D(3)(f).

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 as defined by ORS 126.003 *[(4)]* unless the minor or incapacitated person has a general guardian or is 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.

B(3) Amount of judgment. The judgment entered shall be for the amount due as shown by the affidavit, and may include costs and disbursements and attorney fees entered pursuant to Rule 68.

B(4) Non-military affidavit required. No judgment by default shall be entered until the filing of an affidavit on behalf of the plaintiff, showing that affiant reasonably believes that the defendant is not a person in military service as defined in Article 1 of the "Soldiers' and Sailors' Civil Relief Act of 1940," as amended, except upon order of the court in accordance with that Act.

NOTE: Deletes erroneous subsection references.

SECTION 407. ORCP 82 G is amended to read:

G(1) Request for hearing. Notice of objections to an issuer or a surety as provided in section F of this rule shall be filed in the form of a motion for hearing on objections to the irrevocable letter of credit or bond. Upon demand of the objecting party, each issuer or surety shall appear at the hearing of such motion and be subject to examination as to such issuer's or surety's pecuniary responsibility or the validity of the execution of the letter of credit or bond. Upon hearing of such motion, the court may approve or reject the letter of credit or bond as filed or require such amended, substitute, or additional letter of credit or bond as the circumstances will warrant.

G(2) Information to be furnished. Sureties on any bond or undertaking and any irrevocable letter of credit issuers shall furnish such information as may be required by the judge approving the same.

G(3) Surety insurers. It shall be sufficient justification for a surety insurer when examined as to its qualifications to exhibit the certificate of authority issued to it by the [*Insurance Commissioner*] **Director of the Department of Consumer and Business Services** or a certified copy thereof.

NOTE: Updates reference to state agency personnel.

SECTION 408. For the purpose of harmonizing and clarifying statute sections published in Oregon Revised Statutes, the Legislative Counsel may substitute for words designating the board of higher education, wherever they occur in Oregon Revised Statutes, other words designating the State Board of Higher Education.

SECTION 409. For the purpose of harmonizing and clarifying statute sections published in Oregon Revised Statutes, the Legislative Counsel may substitute for words designating the Executive Department Economic Development Fund, wherever they occur in Oregon Revised Statutes, other words designating the Administrative Services Economic Development Fund.

SECTION 410. For the purpose of harmonizing and clarifying statute sections published in Oregon Revised Statutes, the Legislative Counsel may substitute for words designating justice's court, justices' court or justice of the peace court, wherever they occur in Oregon Revised Statutes, other words designating justice court.

SECTION 411. For the purpose of harmonizing and clarifying statute sections published in Oregon Revised Statutes, the Legislative Counsel may substitute for words designating chairman, chairmen, chairman's or chairmen's, wherever they occur in chapters 246 to 260 of Oregon Revised Statutes, other words designating chairperson, chairpersons, chairperson's or chairpersons'.

SECTION 412. For the purpose of harmonizing and clarifying statute sections published in Oregon Revised Statutes, the Legislative Counsel may substitute for words designating an election officer, chief election officer, district election officer or chief city election officer,

delivered to the party or attorney requesting it, who shall fill it in before service.

D Service; service on law enforcement agency; service by mail; proof of service.

D(1) **Service.** Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other person 18 years of age or older. The service shall be made by delivering a copy to the witness personally and giving or offering to the witness at the same time the fees to which the witness is entitled for travel to and from the place designated and, whether or not personal attendance is required, one day's attendance fees. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. A subpoena for taking of a deposition, served upon an organization as provided in Rule 39 C(6), shall be served in the same manner as provided for service of summons in Rule 7 D(3)(b)(i), D(3)(d), D(3)(e), or D(3)(f). Copies of each subpoena commanding production of books, papers, documents or tangible things and inspection thereof before trial, not accompanied by command to appear at trial or hearing or at deposition, whether the subpoena is served personally or by mail, shall be served on each party at least seven days before the subpoena is served on the person required to produce and permit inspection, unless the court orders a shorter period. In addition, a subpoena shall not require production less than 14 days from the date of service upon the person required to produce and permit inspection, unless the court orders a shorter period.

D(2) **Service on law enforcement agency.**

D(2)(a) Every law enforcement agency shall designate individual or individuals upon whom service of subpoena may be made. At least one of the designated individuals shall be available during normal business hours. In the absence of the designated individuals, service of subpoena pursuant to paragraph (b) of this subsection may be made upon the officer in charge of the law enforcement agency.

D(2)(b) If a peace officer's attendance at trial is required as a result of employment as a peace officer, a subpoena may be served on such officer by delivering a copy personally to the officer or to one of the individuals designated by the agency which employs the officer not later than 10 days prior to the date attendance is sought. A subpoena may be served in this manner only if the officer is currently employed as a peace officer and is present within the state at the time of service.

D(2)(c) When a subpoena has been served as provided in paragraph (b) of this subsection, the law enforcement agency shall make a good faith effort to give actual notice to the officer whose attendance is sought of the date, time, and location of the court appearance. If the officer cannot be notified, the law enforcement agency shall promptly notify the court and a postponement or continuance may be granted to allow the officer to be personally served.

D(2)(d) As used in this subsection, "law enforcement agency" means the Oregon State Police, a county sheriff's department, or a municipal police department.

D(3) **Service by mail.**

Under the following circumstances, service of a subpoena to a witness by mail shall be of the same legal force and effect as personal service otherwise authorized by this section:

D(3)(a) The attorney certifies in connection with or upon the return of service that the attorney, or the attorney's agent, has had personal or telephone contact with the witness, and the witness indicated a willingness to appear at trial if subpoenaed;

D(3)(b) The attorney, or the attorney's agent, made arrangements for payment to the witness of fees and mileage satisfactory to the witness; and

D(3)(c) The subpoena was mailed to the witness more than 10 days before trial by certified mail or some other designation of mail that provides a receipt for the mail signed by the recipient, and the attorney received a return receipt signed by the witness more than three days prior to trial.

D(4) **Service by mail; exception.** Service of subpoena by mail may be used for a subpoena commanding production of books, papers, documents, or tangible things, not accompanied by a command to appear at trial or hearing or at deposition.

D(5) **Proof of service.** Proof of service of a subpoena is made in the same manner as proof of service of a summons.

E Subpoena for hearing or trial; prisoners. If the witness is confined in a prison or jail in this state, a subpoena may be served on such person only upon leave of court, and attendance of the witness may be compelled only upon such terms as the court prescribes. The court may order temporary removal and production of the prisoner for the purpose of giving testimony or may order that testimony only be taken upon deposition at the place of confinement. The subpoena and court order shall be served upon the custodian of the prisoner.

Effective Date of Act

Chapt. 53

A-Engrossed
Senate Bill 869

Ordered by the Senate April 27
Including Senate Amendments dated April 27

Sponsored by COMMITTEE ON JUDICIARY

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Establishes procedure for objecting to exercise of peremptory challenge when party believes that peremptory challenge is being exercised on basis of juror's sex, race or ethnicity. **Requires that party making objection establish prima facie case that adverse party challenged juror on basis of sex, race or ethnicity.**

A BILL FOR AN ACT

Relating to jurors; creating new provisions; and amending ORS 136.230 and ORCP 57 D.

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

SECTION 1. ORCP 57 D is amended to read:

D. Challenges.

D(1) Challenges for cause; grounds. Challenges for cause may be taken on any one or more of the following grounds:

D(1)(a) The want of any qualifications prescribed by ORS 10.030 for a person eligible to act as a juror.

D(1)(b) The existence of a mental or physical defect which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the challenging party.

D(1)(c) Consanguinity or affinity within the fourth degree to any party.

D(1)(d) Standing in the relation of guardian and ward, physician and patient, master and servant, landlord and tenant, or debtor and creditor, to the adverse party; or being a member of the family of, or a partner in business with, or in the employment for wages of, or being an attorney for or a client of, the adverse party; or being surety in the action called for trial, or otherwise, for the adverse party.

D(1)(e) Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, upon substantially the same facts or transaction.

D(1)(f) Interest on the part of the juror in the outcome of the action, or the principal question involved therein.

D(1)(g) Actual bias, which is the existence of a state of mind on the part of the juror, in reference to the action, or to either party, which satisfies the court, in the exercise of a sound discretion, that the juror cannot try the issue impartially and without prejudice to the substantial rights of the party challenging. A challenge for actual bias may be taken for the cause mentioned in this para-

NOTE: Matter in boldfaced type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in boldfaced type.

graph, but on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the cause from what the juror may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.

D(2) Peremptory challenges; number. A peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court shall exclude such juror. Either party shall be entitled to three peremptory challenges, and no more. Where there are multiple parties plaintiff or defendant in the case or where cases have been consolidated for trial, the parties plaintiff or defendant must join in the challenge and are limited to a total of three peremptory challenges, except the court, in its discretion and in the interest of justice, may allow any of the parties, single or multiple, additional peremptory challenges and permit them to be exercised separately or jointly.

D(3) Conduct of peremptory challenges. After the full number of jurors have been passed for cause, peremptory challenges shall be conducted **by written ballot or outside the presence of the jury** as follows: the plaintiff may challenge one and then the defendant may challenge one, and so alternating until the peremptory challenges shall be exhausted. After each challenge, the panel shall be filled and the additional juror passed for cause before another peremptory challenge shall be exercised, and neither party is required to exercise a peremptory challenge unless the full number of jurors are in the jury box at the time. The refusal to challenge by either party in the order of alternation shall not defeat the adverse party of such adverse party's full number of challenges, and such refusal by a party to exercise a challenge in proper turn shall conclude that party as to the jurors once accepted by that party, and if that party's right of peremptory challenge be not exhausted, that party's further challenges shall be confined, in that party's proper turn, to such additional jurors as may be called. The court may, for good cause shown, permit a challenge to be taken to any juror before the jury is completed and sworn, notwithstanding the juror challenged may have been theretofore accepted, but nothing in this subsection shall be construed to increase the number of peremptory challenges allowed.

D(4) Challenge of peremptory challenge exercised on basis of race, ethnicity or sex.

D(4)(a) A party may not exercise a peremptory challenge on the basis of race, ethnicity or sex. Courts shall presume that a peremptory challenge does not violate this paragraph, but the presumption may be rebutted in the manner provided by this section.

D(4)(b) If a party believes that the adverse party is exercising a peremptory challenge on a basis prohibited under paragraph (a) of this subsection, the party may object to the exercise of the challenge. The objection must be made before the court excuses the juror. The objection must be made outside of the presence of potential jurors. The party making the objection has the burden of establishing a prima facie case that the adverse party challenged the potential juror on the basis of race, ethnicity or sex.

D(4)(c) If the court finds that the party making the objection has established a prima facie case that the adverse party challenged a prospective juror on the basis of race, ethnicity or sex, the burden shifts to the adverse party to show that the peremptory challenge was not exercised on the basis of race, ethnicity or sex. If the adverse party fails to meet the burden of justification as to the questioned challenge, the presumption that the challenge does not violate paragraph (a) of this subsection is rebutted.

D(4)(d) If the court finds that the adverse party challenged a prospective juror on the basis of race, ethnicity or sex, the court shall disallow the peremptory challenge.

ch 608

B-Engrossed
Senate Bill 213

Ordered by the House May 24
Including Senate Amendments dated March 21 and House Amendments dated May 24

Printed pursuant to Senate Interim Rule 213.28 by order of the President of the Senate in conformance with presession filing rules, indicating neither advocacy nor opposition on the part of the President (at the request of Department of Justice)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Modifies provisions relating to enforcement of support by implementing Uniform Interstate Family Support Act. Makes related changes. **Establishes conditions under which party may apply to have issue of paternity reopened.**

A BILL FOR AN ACT

Relating to support enforcement; creating new provisions; amending ORS 3.408, 18.400, 23.170, 23.175, 23.185, 23.242, 25.010, 25.011, 25.020, 25.080, 25.085, 25.100, 25.130, 25.240, 25.255, 25.280, 25.287, 25.311, 25.367, 25.720, 107.105, 107.835, 109.015, 109.175, 109.251, 110.324, 110.399, 237.201, 239.261, 416.427, 416.429, 416.440, 417.210 and ORCP 4 K and 78 C; and repealing ORS 25.410, 25.420, 25.430, 25.440, 25.450, 25.460, 25.470, 25.480, 25.490, 25.500, 25.510, 25.520, 25.530, 110.005, 110.006, 110.011, 110.022, 110.031, 110.041, 110.045, 110.052, 110.062, 110.071, 110.082, 110.092, 110.102, 110.121, 110.132, 110.142, 110.152, 110.162, 110.165, 110.172, 110.176, 110.182, 110.185, 110.201, 110.212, 110.222, 110.226, 110.232, 110.242, 110.251, 110.272, 110.275, 110.277, 110.281 and 110.291.

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

SECTION 1. ORS 25.010 is amended to read:

25.010. As used in ORS chapters 23, 107, 108, 109, 293, 416 and 418 and ORS 25.010 to 25.240 and [*110.005 to 110.291*] **110.300 to 110.441** and any other statutes providing for support payments or support enforcement procedures, unless the context requires otherwise:

(1) "Administrator" means either the administrator of the Support Enforcement Division of the Department of Justice or a district attorney, or the administrator's or a district attorney's authorized representative.

(2) "Department" means the Department of Human Resources.

(3) "Disposable income" means that part of the income of an individual remaining after the deduction from the income of any amounts required to be withheld by law except laws enforcing spousal or child support and any amounts withheld to pay medical or dental insurance premiums.

(4) "Employer" means any entity or individual who engages an individual to perform work or services for which compensation is given in periodic payments or otherwise.

(5) "Income" is any monetary obligation in the possession of a third party owed to an obligor and includes but is not limited to:

NOTE: Matter in boldfaced type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in boldfaced type.

417.210. (1) Financial responsibility for any child placed pursuant to the provisions of the Interstate Compact on the Placement of Children shall be determined in accordance with the provisions of Article V thereof in the first instance. However, in the event of partial or complete default of performance thereunder, the provisions of ORS *[110.005 to 110.291]* **110.300 to 110.441** and 416.010 to 416.260 and any other applicable laws also may be invoked.

(2) The "appropriate public authorities" as used in Article III of the Interstate Compact on the Placement of Children shall, with reference to this state, mean the Children's Services Division of the Department of Human Resources and the division shall receive and act with reference to notices required by Article III thereof.

(3) As used in paragraph (a) of Article V of the Interstate Compact on the Placement of Children, the phrase "appropriate authority in the receiving state" with reference to this state shall mean the Children's Services Division of the Department of Human Resources.

SECTION 40. ORCP 4 K is amended to read:

K. Certain marital and domestic relations actions.

K(1) In any action to determine a question of status instituted under ORS chapter 106 or 107 when the plaintiff is a resident of or domiciled in this state.

K(2) In any action to enforce personal obligations arising under ORS chapter 106 or 107, if the parties to a marriage have concurrently maintained the same or separate residences or domiciles within this state for a period of six months, notwithstanding departure from this state and acquisition of a residence or domicile in another state or country before filing of such action; but if an action to enforce personal obligations arising under ORS chapter 106 or 107 is not commenced within one year following the date upon which the party who left the state acquired a residence or domicile in another state or country, no jurisdiction is conferred by this subsection in any such action.

K(3) In any proceeding to establish paternity under ORS chapter 109 or ORS *[110.005 to 110.291]* **110.300 to 110.441**, or any action for declaration of paternity where the primary purpose of the action is to establish responsibility for child support, when the act of sexual intercourse which resulted in the birth of the child is alleged to have taken place in this state.

SECTION 41. ORCP 78 C is amended to read:

C. Application. Section B of this rule does not apply to an order or judgment for the payment of money, except orders and judgments for the payment of sums ordered pursuant to ORS 107.095 and 107.105 (1)(i), and money for support, maintenance, nurture, education, or attorney fees, in:

C(1) Actions for dissolution or annulment of marriage or separation from bed and board.

C(2) Proceedings upon support orders entered under ORS chapter 108 or 109 or ORS *[110.005 to 110.291]* **110.300 to 110.441**, 416.400 to 416.470, ~~419B.400~~ or 419C.590.

SECTION 42. Section 43 of this Act is added to and made a part of ORS 416.400 to 416.470.

SECTION 43. (1) No later than one year after an order establishing paternity is docketed under ORS 416.440 and if no genetic parentage test has been completed, a party may apply to the Support Enforcement Division or a district attorney to have the issue of paternity reopened. Upon receipt of a timely application, the Support Enforcement Division or the district attorney shall order:

(a) The mother and the male party to submit to parentage tests; and

(b) The person having physical custody of the child to submit the child to a parentage test.

(2) If a party refuses to comply with an order under subsection (1) of this section, the

(To Resolve Conflicts)

ch 618

C-Engrossed
Senate Bill 385

Ordered by the House June 6
Including Senate Amendments dated April 20 and May 19
and House Amendments dated June 6 to resolve conflicts

Sponsored by COMMITTEE ON JUDICIARY

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Allows court to require plaintiff who previously dismissed action with prejudice and who refiles action to pay reasonable attorney fees incurred by defendants in dismissed action. Establishes factors that court must consider in determining whether to award attorney fees in case in which attorney fees are authorized by statute. Establishes additional prevailing party fee. Requires mandatory arbitration in all courts. Modifies procedural requirements relating to arbitration. Allows settlement conference at any time.

Requires award of attorney fees for certain misconduct, including causing mistrial. Requires sanctions for certain false certifications in pleadings, motions, papers and arguments to court. Modifies grounds for granting of motion for summary judgment.

Authorizes award of attorney fees against defendant when defendant removes action from small claims department.

Amends statutes allowing or requiring award of attorney fees to prevailing plaintiff to allow or require award of attorney fees to prevailing party.

Makes related technical changes.

A BILL FOR AN ACT

Relating to civil procedure; creating new provisions; amending ORS 20.080, 20.094, 20.105, 20.107, 20.125, 20.190, 30.020, 30.075, 30.184, 30.190, 30.680, 30.820, 30.822, 30.825, 30.860, 30.862, 30.864, 30.960, 36.400, 36.405, 36.410, 36.415, 36.425, 46.465, 46.475, 46.485, 59.115, 59.127, 59.255, 59.670, 59.890, 59.925, 62.335, 62.440, 65.207, 65.224, 65.781, 70.415, 74A.3050, 74A.4040, 79.5070, 83.650, 86.260, 86.720, 86.742, 90.710, 92.018, 96.030, 97.760, 105.831, 133.739, 166.725, 192.590, 223.615, 279.365, 307.525, 311.673, 311.679, 311.711, 311.771, 346.630, 346.687, 346.690, 431.905, 455.440, 460.165, 462.110, 469.421, 474.085, 478.965, 479.265, 480.600, 527.665, 540.120, 540.250, 545.104, 545.502, 548.620, 548.660, 553.560, 554.140, 583.126, 583.146, 585.150, 618.516, 621.246, 645.225, 646.140, 646.240, 646.359, 646.632, 646.638, 646.641, 646.642, 646.760, 646.770, 646.775, 646.780, 646.876, 648.135, 650.020, 650.065, 650.250, 652.230, 653.055, 653.285, 656.052, 658.220, 658.415, 659.160, 659.165, 661.280, 671.578, 671.705, 692.180, 697.762, 697.792, 701.067, 722.116, 722.118, 731.314, 731.737, 746.300, 746.350, 746.680, 756.185, 759.720, 759.900, 760.540, 774.210, 815.410 and 815.415 and ORCP 17, 47 C and 54 and sections 2 and 6, chapter _____, Oregon Laws 1995 (Enrolled House Bill 2228); and repealing section 2, chapter _____, Oregon Laws 1995 (Enrolled Senate Bill 22), and section 47, chapter _____, Oregon Laws 1995 (Enrolled House Bill 2805).

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

NOTE: Matter in boldfaced type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in boldfaced type.

LC 1892

B-16

OFFERS OF COMPROMISE, SETTLEMENT AND PREVIOUSLY DISMISSED ACTIONS

SECTION 1. ORCP 54 is amended to read:

A. Voluntary dismissal; effect thereof.

A(1) By plaintiff; by stipulation. Subject to the provisions of Rule 32 D and of any statute of this state, an action may be dismissed by the plaintiff without order of court (a) by filing a notice of dismissal with the court and serving such notice on the defendant not less than five days prior to the day of trial if no counterclaim has been pleaded, or (b) by filing a stipulation of dismissal signed by all adverse parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action against the same parties on or including the same claim unless the court directs that the dismissal shall be without prejudice. Upon notice of dismissal or stipulation under this subsection, the court shall enter a judgment of dismissal.

A(2) By order of court. Except as provided in subsection (1) of this section, an action shall not be dismissed at the plaintiff's instance save upon judgment of dismissal ordered by the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the defendant may proceed with the counterclaim. Unless otherwise specified in the judgment of dismissal, a dismissal under this subsection is without prejudice.

A(3) Costs and disbursements. When an action is dismissed under this section, the judgment may include any costs and disbursements, including attorney fees, provided by rule or statute. Unless the circumstances indicate otherwise, the dismissed party shall be considered the prevailing party.

B. Involuntary dismissal.

B(1) Failure to comply with rule or order. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for a judgment of dismissal of an action or of any claim against such defendant.

B(2) Insufficiency of evidence. After the plaintiff in an action tried by the court without a jury has completed the presentation of plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a judgment of dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment of dismissal against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment of dismissal with prejudice against the plaintiff, the court shall make findings as provided in Rule 62.

B(3) Dismissal for want of prosecution; notice. Not less than 60 days prior to the first regular motion day in each calendar year, unless the court has sent an earlier notice on its own initiative, the clerk of the court shall mail notice to the attorneys of record in each pending case in which no action has been taken for one year immediately prior to the mailing of such notice, that a judgment of dismissal will be entered in each such case by the court for want of prosecution, unless on or before such first regular motion day, application, either oral or written, is made to the court and good cause shown why it should be continued as a pending case. If such application is not made or good cause shown, the court shall enter a judgment of dismissal in each such case. Nothing contained in this subsection shall prevent the dismissal by the court at any time, for want of prosecution of any action upon motion of any party thereto.

B(4) Effect of judgment of dismissal. Unless the court in its judgment of dismissal otherwise specifies, a dismissal under this section operates as an adjudication without prejudice.

C. Dismissal of counterclaim, cross-claim, or third party claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third party claim.

D. Costs of previously dismissed action.

D(1) If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of any unpaid judgment for costs and disbursements against plaintiff in the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

D(2) If a party who previously asserted a claim, counterclaim, cross-claim or third party claim that was dismissed with prejudice subsequently makes the same claim, counterclaim, cross-claim or third party claim against the same party, the court shall enter a judgment dismissing the claim, counterclaim, cross-claim or third party claim and may enter a judgment requiring the payment of reasonable attorney fees incurred by the party in obtaining the dismissal.

E. Compromise; effect of acceptance or rejection. Except as provided in ORS 17.065 through 17.085, the party against whom a claim is asserted may, at any time up to 10 days prior to trial, serve upon the party asserting the claim an offer to allow judgment to be given against the party making the offer for the sum, or the property, or to the effect therein specified. If the party asserting the claim accepts the offer, the party asserting the claim or such party's attorney shall endorse such acceptance thereon, and file the same with the clerk before trial, and within three days from the time it was served upon such party asserting the claim; and thereupon judgment shall be given accordingly, as a stipulated judgment. Unless agreed upon otherwise by the parties, costs, disbursements, and attorney fees shall be entered in addition as part of such judgment as provided in Rule 68. If the offer is not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence on the trial; and if the party asserting the claim fails to obtain a more favorable judgment, the party asserting the claim shall not recover costs, **prevailing party fees,** disbursements, *[and]* **or** attorney fees incurred after the date of the offer, but the party against whom the claim was asserted shall recover of the party asserting the claim costs and disbursements **not including prevailing party fees,** from the time of the service of the offer.

F. Settlement conferences. A settlement conference may be ordered by the court at any time at the request of any party or upon the court's own motion. Unless otherwise stipulated to by the parties, a judge other than the judge who will preside at trial shall conduct the settlement conference.

AWARD OF ATTORNEY FEES AS SANCTION FOR FALSE OR FRIVOLOUS PLEADINGS AND OTHER MISCONDUCT

SECTION 2. ORS 20.105 is amended to read:

20.105. (1) In any civil action, suit or other proceeding in a district court, a circuit court or the Oregon Tax Court, or in any civil appeal to or review by the Court of Appeals or Supreme Court, the court [*may, in its discretion,*] **shall** award reasonable attorney fees [*appropriate in the circumstances*] to a party against whom a claim, defense or ground for appeal or review is asserted, if that party is a prevailing party in the proceeding and to be paid by the party asserting the claim, defense

or ground, upon a finding by the court that the party willfully disobeyed a court order or [*acted in bad faith, wantonly or solely for oppressive reasons*] **that there was no objectively reasonable basis for asserting the claim, defense or ground for appeal.**

(2) All attorney fees paid to any agency of the state under this section shall be deposited to the credit of the agency's appropriation or cash account from which the costs and expenses of the proceeding were paid or incurred. If the agency obtained an Emergency Board allocation to pay costs and expenses of the proceeding, to that extent the attorney fees shall be deposited in the General Fund available for general governmental expenses.

SECTION 3. ORS 20.125 is amended to read:

20.125. In the case of a mistrial in a civil or criminal action, if the court determines that the mistrial was caused by the deliberate misconduct of an attorney, the court, upon motion by the opposing party or upon motion of the court, [*may*] **shall assess against the attorney causing the mistrial** costs and disbursements, as defined in ORCP 68, [*of*] **and reasonable attorney fees incurred by** the opposing party [*against the attorney causing the mistrial*] **as a result of the misconduct.** [*Those costs and disbursements may be assessed against the attorney for the trial that ended in the mistrial.*]

SECTION 4. ORCP 17 is amended to read:

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

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

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

C. Certifications to court.

C(1) An attorney or party who signs, files or otherwise submits an argument in support of a pleading, motion or other paper makes the certifications to the court identified in subsections (2) to (5) of this section, and further certifies that the certifications are based on the person's reasonable knowledge, information and belief, formed after the making of such inquiry as is reasonable under the circumstances.

C(2) A party or attorney certifies that the pleading, motion or other paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

C(3) An attorney certifies that the claims, defenses, and other legal positions taken in

NEW

the pleading, motion or other paper are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law.

C(4) A party or attorney certifies that the allegations and other factual assertions in the pleading, motion or other paper are supported by evidence. Any allegation or other factual assertion that the party or attorney does not wish to certify to be supported by evidence must be specifically identified. The attorney or party certifies that the attorney or party reasonably believes that an allegation or other factual assertion so identified will be supported by evidence after further investigation and discovery.

C(5) The party or attorney certifies that any denials of factual assertion are supported by evidence. Any denial of factual assertion that the party or attorney does not wish to certify to be supported by evidence must be specifically identified. The attorney or party certifies that the attorney or party believes that a denial of a factual assertion so identified is reasonably based on a lack of information or belief.

D. Sanctions.

D(1) The court may impose sanctions against a person or party who is found to have made a false certification under section C of this rule, or who is found to be responsible for a false certification under section C of this rule. A sanction may be imposed under this section only after notice and an opportunity to be heard are provided to the party or attorney. A law firm is jointly liable for any sanction imposed against a partner, associate or employee of the firm, unless the court determines that joint liability would be unjust under the circumstances.

D(2) Sanctions may be imposed under this section upon motion of a party or upon the court's own motion. If the court seeks to impose sanctions on its own motion, the court shall direct the party or attorney to appear before the court and show cause why the sanctions should not be imposed. The court may not issue an order to appear and show cause under this subsection at any time after the filing of a voluntary dismissal, compromise or settlement of the action with respect to the party or attorney against whom sanctions are sought to be imposed.

D(3) A motion by a party to the proceeding for imposition of sanctions under this section must be made separately from other motions and pleadings, and must describe with specificity the alleged false certification. A motion for imposition of sanctions based on a false certification under subsection C(4) of this rule may not be filed until 120 days after the filing of a complaint if the alleged false certification is an allegation or other factual assertion in a complaint filed within 60 days of the running of the statute of limitations for a claim made in the complaint. Sanctions may not be imposed against a party until at least 21 days after the party is served with the motion in the manner provided by Rule 9. Notwithstanding any other provision of this section, the court may not impose sanctions against a party if, within 21 days after the motion is served on the party, the party amends or otherwise withdraws the pleading, motion, paper or argument in a manner that corrects the false certification specified in the motion. If the party does not amend or otherwise withdraw the pleading, motion, paper or argument but thereafter prevails on the motion, the court may order the moving party to pay to the prevailing party reasonable attorney fees incurred by the prevailing party by reason of the motion for sanctions.

D(4) Sanctions under this section must be limited to amounts sufficient to reimburse the

moving party for attorney fees and other expenses incurred by reason of the false certification, including reasonable attorney fees and expenses incurred by reason of the motion for sanctions, and amounts sufficient to deter future false certification by the party or attorney and by other parties and attorneys. The sanction may include monetary penalties payable to the court. The sanction must include an order requiring payment of reasonable attorney fees and expenses incurred by the moving party by reason of the false certification.

D(5) An order imposing sanctions under this section must specifically describe the false certification and the grounds for determining that the certification was false. The order must explain the grounds for the imposition of the specific sanction that is ordered.

E. Rule not applicable to discovery. This rule does not apply to any motion, pleading or conduct that is subject to sanction under Rule 46.

NEW

SUMMARY JUDGMENT

SECTION 5. ORCP 47 C is amended to read:

C. Motion and proceedings thereon. The motion and all supporting documents shall be served and filed at least 45 days before the date set for trial. The adverse party shall have 20 days in which to serve and file opposing affidavits and supporting documents. The moving party shall have five days to reply. The court shall have discretion to modify these stated times. 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. **No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment.** 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.

NEW

ATTORNEY FEE AWARDS

SECTION 6. (1) A court shall consider the following factors in determining whether to award attorney fees in any case in which attorney fees are authorized by statute and in which the court has discretion to decide whether to award attorney fees:

(a) The conduct of the parties in the transactions or occurrences that gave rise to the litigation, including any conduct of a party that was reckless, willful, malicious, in bad faith or illegal.

(b) The objective reasonableness of the claims and defenses asserted by the parties.

(c) The extent to which an award of an attorney fee in the case would deter others from asserting good faith claims or defenses in similar cases.

(d) The extent to which an award of an attorney fee in the case would deter others from asserting meritless claims and defenses.

(e) The objective reasonableness of the parties and the diligence of the parties and their attorneys during the proceedings.

(f) The objective reasonableness of the parties and the diligence of the parties in pursuing settlement of the dispute.

Ch 664

B-Engrossed
Senate Bill 61

Ordered by the House May 24
Including Senate Amendments dated April 10 and House Amendments dated May 24

Printed pursuant to Senate Interim Rule 213.28 by order of the President of the Senate in conformance with pre-session filing rules, indicating neither advocacy nor opposition on the part of the President (at the request of Senate Interim Judiciary Committee)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Revises laws relating to guardianships, conservatorships and other protective proceedings. Prescribes effective date.

A BILL FOR AN ACT

Relating to protective proceedings; creating new provisions; amending ORS 3.408, 7.240, 21.110, 21.270, 21.275, 21.310, 22.020, 23.242, 25.720, 30.297, 36.170, 46.064, 46.221, 105.772, 109.316, 109.335, 112.385, 114.155, 126.925, 126.945, 127.700, 179.610, 179.653, 411.795, 412.600, 413.200, 419B.379, 419C.561, 426.390, 427.290 and 436.225 and ORCP 7 D, 27 B and 69 B; repealing ORS 126.003, 126.007, 126.013, 126.017, 126.035, 126.040, 126.045, 126.050, 126.055, 126.060, 126.065, 126.070, 126.075, 126.080, 126.085, 126.090, 126.095, 126.098, 126.100, 126.103, 126.107, 126.113, 126.114, 126.117, 126.123, 126.127, 126.133, 126.137, 126.143, 126.157, 126.163, 126.167, 126.173, 126.177, 126.183, 126.187, 126.193, 126.197, 126.203, 126.207, 126.213, 126.217, 126.223, 126.227, 126.229, 126.233, 126.237, 126.243, 126.247, 126.253, 126.257, 126.263, 126.267, 126.273, 126.277, 126.283, 126.287, 126.293, 126.297, 126.303, 126.307, 126.313, 126.317, 126.323, 126.327, 126.333, 126.337, 126.343, 126.347, 126.353, 126.357, 126.363, 126.367, 126.373, 126.377, 126.383, 126.387, 126.393, 126.397 and 126.403 and section 46, chapter 79, Oregon Laws 1995 (Enrolled Senate Bill 851); and prescribing an effective date.

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

GENERAL PROVISIONS

SECTION 1. Definitions. As used in sections 1 to 66 of this Act:

(1) "Conservator" means a person appointed as a conservator under the provisions of sections 1 to 66 of this Act.

(2) "Fiduciary" means a guardian or conservator appointed under the provisions of sections 1 to 66 of this Act or any other person appointed by a court to assume duties with respect to a protected person under the provisions of sections 1 to 66 of this Act.

(3) "Financially incapable" means a condition in which a person is unable to manage financial resources of the person effectively for reasons including, but not limited to, mental

NOTE: Matter in boldfaced type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in boldfaced type.

and custody of the relative, friend or legal guardian. The order may be revoked and the mentally retarded person committed to the division for the balance of the year whenever, in the opinion of the court, it is in the best interest of the mentally retarded person.

(3) If in the opinion of the court voluntary treatment and training or conditional release is not in the best interest of the mentally retarded person, the court may order the commitment of the person to the division for care, treatment or training. The commitment shall be for a period not to exceed one year with provisions for continuing commitment pursuant to ORS 427.020.

(4) If in the opinion of the court the mentally retarded person may be incapacitated, the court may appoint a legal guardian or conservator pursuant to [*ORS 126.103 or 126.157*] **sections 1 to 66 of this 1995 Act**. The appointment of a guardian or conservator shall be a separate order from the order of commitment.

SECTION 98. ORS 436.225 is amended to read:

436.225. (1) In obtaining informed consent for sterilization a physician must offer to answer any questions the individual to be sterilized may have concerning the proposed procedure, and must provide orally all of the following information or advice to the individual to be sterilized:

(a) Advice that the individual is free to withhold or withdraw consent to the procedure at any time before the sterilization without affecting the right to future care or treatment;

(b) A description of available alternative methods of family planning and birth control;

(c) Advice that the sterilization procedure is considered to be irreversible;

(d) A thorough explanation of the specific sterilization procedure to be performed;

(e) A full description of the discomforts and risks that may accompany or follow the performing of the procedure, including an explanation of the type and possible effects of any anesthetic to be used; and

(f) A full description of the benefits or advantages that may be expected as a result of the sterilization.

(2) A natural parent, or a legal guardian or conservator of a minor child or [*incapacitated*] **protected** person appointed under [*ORS chapter 126*] **sections 1 to 66 of this 1995 Act**, may not give substitute consent for sterilization.

(3) Whenever any physician has reason to believe an individual 15 years of age or older is unable to give informed consent, no sterilization shall be performed until it is determined by a circuit court that the individual involved is able to and has given informed consent. Whenever the court determines, under the provisions of this chapter, that a person lacks the ability to give informed consent, the court shall permit sterilization only if the person is 18 years of age or older and only upon showing that such operation, treatment or procedure is in the best interest of the individual.

(4) Informed consent may not be obtained while the individual to be sterilized is:

(a) In labor or childbirth;

(b) Seeking to obtain or obtaining an abortion; or

(c) Under the influence of alcohol or other substances that affect the individual's state of awareness.

SECTION 99. ORCP 7 D is amended to read:

D. Manner of service.

D(1) Notice required. Summons shall be served, either within or without this state, in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend. Summons may be served in a manner specified in this rule or by any other rule or statute on the defendant

or upon an agent authorized by appointment or law to accept service of summons for the defendant. Service may be made, subject to the restrictions and requirements of this rule, by the following methods: personal service of summons upon defendant or an agent of defendant authorized to receive process; substituted service by leaving a copy of summons and complaint at a person's dwelling house or usual place of abode; office service by leaving with a person who is apparently in charge of an office; service by mail; or, service by publication.

D(2) Service methods.

D(2)(a) Personal service. Personal service may be made by delivery of a true copy of the summons and a true copy of the complaint to the person to be served.

D(2)(b) Substituted service. Substituted service may be made by delivering a true copy of the summons and complaint at the dwelling house or usual place of abode of the person to be served, to any person over 14 years of age residing in the dwelling house or usual place of abode of the person to be served. Where substituted service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed a true copy of the summons and complaint to the defendant at defendant's dwelling house or usual place of abode, together with a statement of the date, time, and place at which substituted service was made. For the purpose of computing any period of time prescribed or allowed by these rules, substituted service shall be complete upon such mailing.

D(2)(c) Office service. If the person to be served maintains an office for the conduct of business, office service may be made by leaving a true copy of the summons and complaint at such office during normal working hours with the person who is apparently in charge. Where office service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed a true copy of the summons and complaint to the defendant at the defendant's dwelling house or usual place of abode or defendant's place of business or such other place under the circumstances that is most reasonably calculated to apprise the defendant of the existence and pendency of the action, together with a statement of the date, time, and place at which office service was made. For the purpose of computing any period of time prescribed or allowed by these rules, office service shall be complete upon such mailing.

D(2)(d) Service by mail. Service by mail, when required or allowed by this rule, shall be made 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(3) Particular defendants. Service may be made upon specified defendants as follows:

D(3)(a) Individuals.

D(3)(a)(i) Generally. Upon an individual defendant, by personal service upon such defendant or an agent authorized by appointment or law to receive service of summons or, if defendant personally cannot be found at defendant's dwelling house or usual place of abode, then by substituted service or by office service upon such defendant or an agent authorized by appointment or law to receive service of summons.

D(3)(a)(ii) Minors. Upon a minor under the age of 14 years, by service in the manner specified in subparagraph (i) of this paragraph upon such minor, and also upon such minor's father, mother, conservator of the minor's estate, or guardian, or, if there be none, then upon any person having the care or control of the minor or with whom such minor resides, or in whose service such minor is employed, or upon a guardian ad litem appointed pursuant to Rule 27 A(2).

D(3)(a)(iii) Incapacitated persons. Upon [*an*] a person who is incapacitated or financially incapable, [*person*] as defined by [*ORS 126.003 (4)*] section 1 of this 1995 Act, by service in the manner specified in subparagraph (i) of this paragraph upon such person, and also upon the conservator of such person's estate or guardian, or, if there be none, upon a guardian ad litem appointed pursuant to Rule 27 B(2).

D(3)(b) Corporations and limited partnerships. Upon a domestic or foreign corporation or limited partnership:

D(3)(b)(i) Primary service method. By personal service or office service upon a registered agent, officer, director, general partner, or managing agent of the corporation or limited partnership, or by personal service upon any clerk on duty in the office of a registered agent.

D(3)(b)(ii) Alternatives. If a registered agent, officer, director, general partner, or managing agent cannot be found in the county where the action is filed, the summons may be served: by substituted service upon such registered agent, officer, director, general partner, or managing agent; or by personal service on any clerk or agent of the corporation or limited partnership who may be found in the county where the action is filed; or by mailing a copy of the summons and complaint to the office of the registered agent or to the last registered office of the corporation or limited partnership, if any, as shown by the records on file in the office of the Corporation Commissioner [Secretary of State] or, if the corporation or limited partnership is not authorized to transact business in this state at the time of the transaction, event, or occurrence upon which the action is based occurred, to the principal office or place of business of the corporation or limited partnership, and in any case to any address the use of which the plaintiff knows or, on the basis of reasonable inquiry, has reason to believe is most likely to result in actual notice.

D(3)(c) State. Upon the state, by personal service upon the Attorney General or by leaving a copy of the summons and complaint at the Attorney General's office with a deputy, assistant, or clerk.

D(3)(d) Public bodies. Upon any county, incorporated city, school district, or other public corporation, commission, board or agency, by personal service or office service upon an officer, director, managing agent, or attorney thereof.

D(3)(e) General partnerships. Upon any general partnerships by personal service upon a partner or any agent authorized by appointment or law to receive service of summons for the partnership.

D(3)(f) Other unincorporated association subject to suit under a common name. Upon any other unincorporated association subject to suit under a common name by personal service upon an officer, managing agent, or agent authorized by appointment or law to receive service of summons for the unincorporated association.

D(3)(g) Vessel owners and charterers. Upon any foreign steamship owner or steamship charterer by personal service upon a vessel master in such owner's or charterer's employment or any agent authorized by such owner or charterer to provide services to a vessel calling at a port in the State of Oregon, or a port in the State of Washington on that portion of the Columbia River forming a common boundary with Oregon.

D(4) Particular actions involving motor vehicles.

D(4)(a) Actions arising out of use of roads, highways, and streets; service by mail.

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 who cannot be served with summons by any method specified in subsection 7 D(3)

of this rule, may be served with summons 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 [Department of Transportation] or in the Administrator's office or at any office the Administrator authorizes to accept summons or by mailing such summons and complaint with a fee of $12.50 to the office of the Administrator of the Motor Vehicles Division [Department of Transportation] by registered or certified mail, return receipt requested. The plaintiff shall cause to be mailed by registered or certified mail, return receipt requested, 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, and at the most recent address as shown by the Motor Vehicles Division's [Department of Transportation's] driver records, and at any other address of the defendant known to the plaintiff, which might result in actual notice to the defendant. For purposes of computing any period of time prescribed or allowed by these rules, service under this paragraph shall be complete upon the date of the first mailing to the defendant.

D(4)(a)(ii) The fee of $12.50 paid by the plaintiff to the Administrator of the Motor Vehicles Division [Department of Transportation] shall be taxed as part of the costs if plaintiff prevails in the action. The Administrator of the Motor Vehicles Division [Department of Transportation] shall keep a record of all such summonses which shall show the day of service.

D(4)(b) Notification of change of address. Every motorist or user of the roads, highways, and streets of this state who, while operating a motor vehicle upon the roads, highways, or streets of this state, is involved in any accident, collision, or liability, shall forthwith notify the Administrator of the Motor Vehicles Division [Department of Transportation] of any change of such defendant's address within three years after such accident or collision.

D(4)(c) Default. No default shall be entered against any defendant served under this subsection unless the plaintiff submits an affidavit showing:

(i) that summons was served as provided in subparagraph D(4)(a)(i) of this rule and all mailings to defendant required by subparagraph D(4)(a)(i) of this rule have been made; and

(ii) either, if the identity of the defendant's insurance carrier is known to the plaintiff or could be determined from any records of the Motor Vehicles Division [Department of Transportation] accessible to plaintiff, that the plaintiff not less than 14 days prior to the application for default caused a copy of the summons and complaint to be mailed to such insurance carrier by registered or certified mail, return receipt requested, or that the defendant's insurance carrier is unknown; and

(iii) that service of summons could not be had by any method specified in subsection 7 D(3) of this rule.

D(5) Service in foreign country. When service is to be effected upon a party in a foreign country, it is also sufficient if service of summons is made in the manner prescribed by the law of the foreign country for service in that country in its courts of general jurisdiction, or as directed by the foreign authority in response to letters rogatory, or as directed by order of the court. However, in all cases such service shall be reasonably calculated to give actual notice.

D(6) Court order for service; service by publication.

D(6)(a) Court order for service by other method. On motion upon a showing by affidavit that service cannot be made by any method otherwise specified in these rules or other rule or statute, the court, at its discretion, may order service by any method or combination of methods which under the circumstances is most reasonably calculated to apprise the defendant of the existence and pendency of the action, including but not limited to: publication of summons; mailing without publication to a specified post office address of defendant, return receipt requested, deliver to addressee

only; or posting at specified locations. If service is ordered by any manner other than publication, the court may order a time for response.

D(6)(b) Contents of published summons. In addition to the contents of a summons as described in section C of this rule, a published summons shall also contain a summary statement of the object of the complaint and the demand for relief, and the notice required in subsection C(3) shall state: "The 'motion' or 'answer' (or 'reply') must be given to the court clerk or administrator within 30 days of the date of first publication specified herein along with the required filing fee." The published summons shall also contain the date of the first publication of the summons.

D(6)(c) Where published. In order for publication shall direct publication to be made in a newspaper of general circulation in the county where the action is commenced or, if there is no such newspaper, then in a newspaper to be designated as most likely to give notice to the person to be served. Such publication shall be four times in successive calendar weeks.

D(6)(d) Mailing summons and complaint. If service by publication is ordered and defendant's post office address is known or can with reasonable diligence be ascertained, the plaintiff shall mail a copy of the summons and complaint to the defendant. When the address of any defendant is not known or cannot be ascertained upon diligent inquiry, a copy of the summons and complaint shall be mailed to the defendant at defendant's last known address. If plaintiff does not know and cannot ascertain, upon diligent inquiry, the present or last known address of the defendant, mailing a copy of the summons and complaint is not required.

D(6)(e) Unknown heirs or persons. If service cannot be made by another method described in this section because defendants are unknown heirs or persons as described in sections I and J of Rule 20, the action shall proceed against the unknown heirs or persons in the same manner as against named defendants served by publication and with like effect; and any such unknown heirs or persons who have or claim any right, estate, lien, or interest in the property in controversy, at the time of the commencement of the action, and served by publication, shall be bound and concluded by the judgment in the action, if the same is in favor of the plaintiff, as effectively as if the action was brought against such defendants by name.

D(6)(f) Defending before or after judgment. A defendant against whom publication is ordered or such defendant's representatives, on application and sufficient cause shown, at any time before judgment, shall be allowed to defend the action. A defendant against whom publication is ordered or such defendant's representatives may, upon good cause shown and upon such terms as may be proper, be allowed to defend after judgment and within one year after entry of judgment. If the defense is successful, and the judgment or any part thereof has been collected or otherwise enforced, restitution may be ordered by the court, but the title to property sold upon execution issued on such judgment, to a purchaser in good faith, shall not be affected thereby.

D(7) Defendant who cannot be served. A defendant cannot be served with summons by any method specified in subsection 7 D(3) of this rule if the plaintiff attempted service of summons by all of the methods specified in subsection 7 D(3) and was unable to complete service, or if the plaintiff knew that service by such methods could not be accomplished.

SECTION 100. ORCP 27 B is amended to read:

B. Appearance of incapacitated person by conservator or guardian. When [*an incapacitated person as defined by ORS 126.003 (4),*] **a person who is incapacitated or financially incapable, as defined in section 1 of this 1995 Act,** who has a conservator of such person's estate or a guardian, is a party to any action, the [*incapacitated*] person shall appear by the conservator or guardian as may be appropriate or, if the court so orders, by a guardian ad litem appointed by the court in which

the action is brought. If the [*incapacitated*] person does not have a conservator of such person's estate or a guardian, the [*incapacitated*] person shall appear by a guardian ad litem appointed by the court. The court shall appoint some suitable person to act as guardian ad litem:

B(1) When the [*incapacitated*] person **who is incapacitated or financially incapable, as defined in section 1 of this 1995 Act,** is plaintiff, upon application of a relative or friend of the [*incapacitated*] person.

B(2) When the [*incapacitated*] person is defendant, upon application of a relative or friend of the [*incapacitated*] person filed within the period of time specified by these rules or other rule or statute for appearance and answer after service of summons, or if the application is not so filed, upon application of any party other than the [*incapacitated*] person.

SECTION 101. ORCP 69 B is amended to read:

B. Entry of default judgment.

B(1) By the court or the clerk. The court or the clerk upon written application of the party seeking judgment shall enter judgment when:

B(1)(a) The action arises upon contract;

B(1)(b) The claim of a party seeking judgment is for the recovery of a sum certain or for a sum which can by computation be made certain;

B(1)(c) The party against whom judgment is sought has been defaulted for failure to appear;

B(1)(d) The party against whom judgment is sought is not a minor or [*an incapacitated person as defined by ORS 126.003 (4)*] **a person who is incapacitated or financially incapable, as defined by section 1 of this 1995 Act,** and such fact is shown by affidavit;

B(1)(e) The party seeking judgment submits an affidavit of the amount due;

B(1)(f) An affidavit pursuant to subsection B(3) of this rule has been submitted; and

B(1)(g) Summons was personally served within the State of Oregon upon the party, or an agent, officer, director, or partner of a party, against whom judgment is sought pursuant to Rule 7 D(3)(a)(i), 7 D(3)(b)(i), 7 D(3)(e) or 7 D(3)(f).

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 as defined by ORS 126.003 (4)*] **a person who is incapacitated or financially incapable, as defined by section 1 of this 1995 Act,** unless the minor or [*incapacitated*] person has a general guardian or is 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.

B(3) Amount of judgment. The judgment entered shall be for the amount due as shown by the affidavit, and may include costs and disbursements and attorney fees entered pursuant to Rule 68.

B(4) Non-military affidavit required. No judgment by default shall be entered until the filing of an affidavit on behalf of the plaintiff, showing that affiant reasonably believes that the defendant is not a person in military service as defined in Article 1 of the "Soldiers' and Sailors' Civil Relief Act of 1940," as amended, except upon order of the court in accordance with that Act.

SECTION 102. ORS 126.030 is added to and made a part of ORS chapter 109.

SECTION 103. The unit and section captions used in this Act are provided only for convenience in locating provisions of this Act and do not become part of the statutory law of

Ch 6646

B-Engrossed
Senate Bill 493

Ordered by the House June 5
Including Senate Amendments dated April 5 and House Amendments dated June 5

Sponsored by Senator BRYANT

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Creates Elder Abuse Prevention Act. Allows removal of petitioner or respondent and issuance of restraining order for abuse of elderly person. Specifies persons who may testify to establish "showing" of abuse. Prescribes court forms.

[*Excludes caregiver of elderly person from Residential Landlord and Tenant Act.*] Provides immunity from civil liability for financial institution for release of certain information.

A BILL FOR AN ACT

Relating to elder abuse; creating new provisions; and amending ORS 14.070, 21.361, 36.170, 36.185, 107.445, 107.485, 107.500, 107.710, 107.718, 107.755, 107.795, 133.055, 133.310, 133.381, 135.703 and 192.575 and ORCP 79 E and section 10, chapter _____, Oregon Laws 1995 (Enrolled Senate Bill 192).

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

SECTION 1. Sections 2 to 9 of this Act are added to and made a part of ORS chapter 107.

SECTION 2. Sections 2 to 9 of this 1995 Act shall be known and may be cited as the "Elder Abuse Prevention Act."

SECTION 3. As used in sections 2 to 9 of this 1995 Act:

(1) "Abuse" means one or more of the following:

(a) Any physical injury caused by other than accidental means, or that appears to be at variance with the explanation given of the injury.

(b) Neglect that leads to physical harm through withholding of services necessary to maintain health and well-being.

(c) Abandonment, including desertion or willful forsaking of an elderly person or the withdrawal or neglect of duties and obligations owed an elderly person by a caregiver or other person.

(d) Willful infliction of physical pain or injury.

(e) Use of derogatory or inappropriate names, phrases or profanity, ridicule, harassment, coercion, threats, cursing, intimidation or inappropriate sexual comments of such a nature as to threaten significant physical or emotional harm to the elderly person.

(2) "Elderly person" means any person 65 years of age or older who is not subject to the provisions of ORS 441.640 to 441.665.

SECTION 3a. If Senate Bill 1053 becomes law, section 3 of this Act is amended to read:

Sec. 3. As used in sections 2 to 9 of this 1995 Act:

NOTE: Matter in boldfaced type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in boldfaced type.

(b) Assault in the third degree under ORS 163.165;

(c) Menacing under ORS 163.190;

(d) Recklessly endangering another person under ORS 163.195; or

(e) Harassment under ORS 166.065.

SECTION 27. ORCP 79 E is amended to read:

E. Scope of rule.

E(1) This rule does not apply to a temporary restraining order issued by authority of ORS 107.700 to 107.730 **or sections 2 to 9 of this 1995 Act**.

E(2) This rule does not apply to temporary restraining orders or preliminary injunctions granted pursuant to ORCP 83 except for the application of section D of this rule.

E(3) These rules do not modify any statute or rule of this state relating to temporary restraining orders or preliminary injunctions in actions affecting employer and employee.

SECTION 28. ORS 192.575 is amended to read:

192.575. (1) Nothing in ORS 192.550 to 192.595 shall require a financial institution to inquire or determine that those seeking disclosure have duly complied with the requirements set forth in ORS 192.550 to 192.595, provided only that the customer authorization, summons, subpoena or search warrant served upon or delivered to a financial institution pursuant to ORS 192.560, 192.565 or 192.570 shows compliance on its face.

(2) A financial institution which in good faith reliance refuses to disclose financial records of a customer upon the prohibitions of ORS 192.550 to 192.595, shall not be liable to its customer, to a state or local agency, or to any person for any loss or damage caused in whole or in part by such refusal.

(3) Financial institutions shall not be required to notify their customers concerning the receipt by them of [*request*] **requests** from state or local agencies for disclosures of financial records of such customers. However, except as otherwise provided in ORS 192.550 to 192.595, nothing in ORS 192.550 to 192.595 shall preclude financial institutions from giving such notice to customers. A court may order a financial institution to withhold notification to a customer of the receipt of a summons, subpoena or search warrant when the court finds that notice to the customer would impede the investigation being conducted by the state or local agency.

(4) Financial institutions that participate in a trust account overdraft notification program established under ORS 9.132 are not liable to a lawyer or law firm on the attorney trust account, to a beneficiary of the trust account or to the Oregon State Bar for loss or damage caused in whole or in part by that participation or arising in any way out of that participation.

(5) A financial institution shall not be liable to any person for any loss, damage or injury arising out of or in any way pertaining to the release of information pursuant to ORS 192.555 (2)(a).

 Ch 694

A-Engrossed
Senate Bill 597

Ordered by the Senate May 5
Including Senate Amendments dated May 5

Sponsored by COMMITTEE ON JUDICIARY (at the request of Oregon Medical Association)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Requires copy of subpoena for medical records be served on patient, [*or*] other health care recipient **or attorney** before being served on custodian or other keeper of medical records. Describes medical records subject to requirement.

A BILL FOR AN ACT

Relating to subpoenas; creating new provisions; and amending ORCP 55.

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

SECTION 1. ORCP 55, as amended by the Council on Court Procedures by promulgation dated December 10, 1994, is further amended by adding a new section I to read:

I. Medical records.

I(1) Service on patient or health care recipient required. Except as provided in subsection (3) of this section, a subpoena duces tecum for medical records served on a custodian or other keeper of medical records is not valid unless proof of service of a copy of the subpoena on the patient or health care recipient, or upon the attorney for the patient or health care recipient, made in the same manner as proof of service of a summons, is attached to the subpoena served on the custodian or other keeper of medical records.

I(2) Manner of service. If a patient or health care recipient is represented by an attorney, a true copy of a subpoena duces tecum for medical records of a patient or health care recipient must be served on the attorney for the patient or health care recipient at least 24 hours before the subpoena is served on a custodian or other keeper of medical records. Service on the attorney for a patient or health care recipient under this section may be made in the manner provided by ORCP 9 B. If the patient or health care recipient is not represented by an attorney, service of a true copy of the subpoena must be made on the patient or health care recipient at least 24 hours before the subpoena is served on the custodian or other keeper of medical records. Service on a patient or health care recipient under this section must be made in the manner specified by ORCP 7 D(3)(a) for service on individuals.

I(3) Affidavit of attorney. If a true copy of a subpoena duces tecum for medical records of a patient or health care recipient cannot be served on the patient or health care recipient in the manner required by subsection (2) of this section, and the patient or health care recipient is not represented by counsel, a subpoena duces tecum for medical records served on a custodian or other keeper of medical records is valid if the attorney for the person serving the subpoena attaches to the subpoena the affidavit of the attorney attesting to the

NEW

NOTE: Matter in boldfaced type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in boldfaced type.

following: (a) That reasonable efforts were made to serve the copy of the subpoena on the patient or health care recipient, but that the patient or health care recipient could not be served; (b) That the party subpoenaing the records is unaware of any attorney who is representing the patient or health care recipient; and (c) That to the best knowledge of the party subpoenaing the records, the patient or health care recipient does not know that the records are being subpoenaed.

I(4) Application. The requirements of this section apply only to subpoenas duces tecum for patient care and health care records kept by a licensed, registered or certified health practitioner as described in ORS 18.550, a health care service contractor as defined in ORS 750.005, a home health agency licensed under ORS chapter 443 or a hospice program licensed, certified or accredited under ORS chapter 443.

SECTION 2. The amendments to ORCP 55 by section 1 of this Act apply only to subpoenas served on or after the effective date of this Act.

Effective Date of the Act

Ch. 707

A-Engrossed
Senate Bill 868

Ordered by the Senate April 27
Including Senate Amendments dated April 27

Sponsored by COMMITTEE ON JUDICIARY

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Allows challenge to juror for cause [*in certain circumstances if juror makes statement that shows prejudice against racial or ethnic group*] **based on actual bias on part of juror in reference to action, party to action, sex of party or racial group.**

A BILL FOR AN ACT

Relating to jurors; creating new provisions; and amending ORCP 57 D.

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

SECTION 1. ORCP 57 D is amended to read:

D. Challenges.

D(1) Challenges for cause; grounds. Challenges for cause may be taken on any one or more of the following grounds:

D(1)(a) The want of any qualifications prescribed by ORS 10.030 for a person eligible to act as a juror.

D(1)(b) The existence of a mental or physical defect which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the challenging party.

D(1)(c) Consanguinity or affinity within the fourth degree to any party.

D(1)(d) Standing in the relation of guardian and ward, physician and patient, master and servant, landlord and tenant, or debtor and creditor, to the adverse party; or being a member of the family of, or a partner in business with, or in the employment for wages of, or being an attorney for or a client of, the adverse party; or being surety in the action called for trial, or otherwise, for the adverse party.

D(1)(e) Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, upon substantially the same facts or transaction.

D(1)(f) Interest on the part of the juror in the outcome of the action, or the principal question involved therein.

D(1)(g) [*Actual bias, which is the existence of a state of mind on the part of the juror, in reference to the action, or to either party, which satisfies the court, in the exercise of a sound discretion, that the juror cannot try the issue impartially and without prejudice to the substantial rights of the party challenging.*] **Actual bias on the part of a juror. Actual bias is the existence of a state of mind on the part of a juror that satisfies the court, in the exercise of sound discretion, that the**

NEW

NOTE: Matter in boldfaced type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in boldfaced type.

juror cannot try the issue impartially and without prejudice to the substantial rights of the party challenging the juror. Actual bias may be in reference to: (i) the action; (ii) either party to the action; (iii) the sex of the party, the party's attorney, a victim or a witness; or (iv) a racial or ethnic group that the party, the party's attorney, a victim or a witness is a member of, or is perceived to be a member of. A challenge for actual bias may be taken for the cause mentioned in this paragraph, but on the trial of such challenge although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the cause from what the juror may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.

D(2) Peremptory challenges; number. A peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court shall exclude such juror. Either party shall be entitled to three peremptory challenges, and no more. Where there are multiple parties plaintiff or defendant in the case or where cases have been consolidated for trial, the parties plaintiff or defendant must join in the challenge and are limited to a total of three peremptory challenges, except the court, in its discretion and in the interest of justice, may allow any of the parties, single or multiple, additional peremptory challenges and permit them to be exercised separately or jointly.

D(3) Conduct of peremptory challenges. After the full number of jurors have been passed for cause, peremptory challenges shall be conducted as follows: the plaintiff may challenge one and then the defendant may challenge one, and so alternating until the peremptory challenges shall be exhausted. After each challenge, the panel shall be filled and the additional juror passed for cause before another peremptory challenge shall be exercised, and neither party is required to exercise a peremptory challenge unless the full number of jurors are in the jury box at the time. The refusal to challenge by either party in the order of alternation shall not defeat the adverse party of such adverse party's full number of challenges, and such refusal by a party to exercise a challenge in proper turn shall conclude that party as to the jurors once accepted by that party, and if that party's right of peremptory challenge be not exhausted, that party's further challenges shall be confined, in that party's proper turn, to such additional jurors as may be called. The court may, for good cause shown, permit a challenge to be taken to any juror before the jury is completed and sworn, notwithstanding the juror challenged may have been theretofore accepted, but nothing in this subsection shall be construed to increase the number of peremptory challenges allowed.

SECTION 2. The amendments to ORCP 57 D by section 1 of this Act apply only to jurors sworn on or after the effective date of this Act.

---------- Excerpt from page 4955 follows ----------

Note: The following sections of Ch. 658, which phases out the district courts, amend ORCP 1, 21 G, 56 and 81 A effective 1-15-98.

'ECTION 117. ORCP 1 A is amended to read:

<< OR ST RCP Rule 1 >>

A Scope. These rules govern procedure and practice in all circuit <<-and district->> courts of this state, except in the small claims department of <<-district->> <<+circuit+>> courts, for all civil actions and special proceedings whether cognizable as cases at law, in equity, or of statutory origin except where a different procedure is specified by statute or rule. These rules shall also govern practice and procedure in all civil actions and special proceedings, whether cognizable as cases at law, in equity, or of statutory origin, for the small claims department of <<-district->> <<+circuit+>> courts and for all other courts of this state to the extent they are made applicable to such courts by rule or statute. Reference in these rules to actions shall include all civil actions and special proceedings whether cognizable as cases at law, in equity or of statutory origin.

SECTION 118. ORCP 21 G is amended to read:

<< OR ST RCP Rule 21 >>

G Waiver or preservation of certain defenses.

---------- Page 4956 follows ----------

G(1) A defense of lack of jurisdiction over the person, that there is another action pending between the same parties for the same cause, insufficiency of summons or process, or insufficiency of service of summons or process, is waived ~~either~~ either of the following circumstances: (a) if the defense is omitted from a motion in the circumstances described in section F of this rule, or (b) if the defense is neither made by motion under this rule nor included in a responsive pleading. The defenses referred to in this subsection shall not be raised by amendment.

G(2) A defense that a plaintiff has not the legal capacity to sue, that the party asserting the claim is not the real party in interest, or that the action has not been commenced within the time limited by statute, is waived if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof. Leave of court to amend a pleading to assert the defenses referred to in this subsection shall only be granted upon a showing by the party seeking to amend that such party did not know and reasonably could not have known of the existence of the defense or that other circumstances make denial of leave to amend unjust.

G(3) A defense of failure to state ultimate facts constituting a claim, a defense of failure to join a party indispensable under Rule 29, and an objection of failure to state a legal defense to a claim or insufficiency of new matter in a reply to avoid a defense, may be made in any pleading permitted or ordered under Rule 13B or by motion for judgment on the pleadings, or at the trial on the merits. The objection or defense, if made at trial, shall be disposed of as provided in Rule 23B in light of any evidence that may have been received.

G(4) <<-Except as provided in ORS 3.227 and 46.064,->> If it appears by motion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court shall dismiss the action.

SECTION 119. ORCP 56 is amended to read:

<< OR ST RCP Rule 56 >>

Trial by jury defined.

---------- Excerpt from page 4956 follows ----------

.<+A Twelve-person juries.+>> A trial jury in the circuit court is a body of 12 persons drawn as provided in Rule 57. The parties may stipulate that a jury shall consist of any number less than 12 or that a verdict or finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

---------- Page 4957 follows ----------

<<+B Six-person juries. Notwithstanding section A of this rule, a jury in circuit court shall consist of six persons if the amount in controversy is less than $10,000.+>>

SECTION 120. ORCP 81 A is amended to read:

<< OR ST RCP Rule 81 >>

A Definitions. As used in Rules 81 through 85, unless the context otherwise requires:

A(1) Attachment. 'Attachment' is the procedure by which an unsecured plaintiff obtains a judicial lien on defendant's property prior to judgment.

A(2) Bank. 'Bank' includes commercial and savings banks, trust companies, savings and loan associations, and credit unions.

A(3) Clerk. 'Clerk' means clerk of the court or any person performing the duties of that office.

A(4) Consumer goods. 'Consumer goods' means consumer goods as defined in ORS 79.1090.

A(5) Consumer transaction. 'Consumer transaction' means a transaction in ch the defendant becomes obligated to pay for goods sold or leased, services rendered, or monies loaned, primarily for purposes of the defendant's personal, family, or household use.

A(6) Issuing officer. 'Issuing officer' means any person who on behalf of the court is authorized to issue provisional process.

A(7) Levy. 'Levy' means to create a lien upon property prior to judgment by any of the procedures provided by Rules 81 through 85 that create a lien.

A(8) Plaintiff and defendant. 'Plaintiff' includes any party asserting a claim for relief whether by way of claim, third party claim, cross-claim, or counterclaim, and 'defendant' includes any person against whom such claim is asserted.

A(9) Provisional process. 'Provisional process' means attachment under Rule 84, claim and delivery under Rule 85, temporary restraining orders under Rule 83, preliminary injunctions under Rule 83, or any other legal or equitable judicial process or remedy which before final judgment enables a plaintiff, or the court on behalf of the plaintiff, to take possession or control of, or to restrain use or disposition of, or fix a lien on property in which the defendant claims an interest, except an order appointing a provisional receiver under Rule 80 or granting a temporary restraining order or preliminary injunction under Rule 79.

A(10) Security interest. 'Security interest' means a lien created by agreement, as opposed to a judicial or statutory lien.

---------- Page 4958 follows ----------

A(11) Sheriff. 'Sheriff' includes a constable of a <<-district or->> justice rt.

A(12) Writ. A 'writ' is an order by a court to a sheriff or other official to aid a creditor in attachment.

---------- Excerpt from page 4366 follows ----------

SECTION 2. ORS 20.105 is amended to read:

<< OR ST Sec. 20.105 >>

20.105. (1) In any civil action, suit or other proceeding in a district court, a circuit court or the Oregon Tax Court, or in any civil appeal to or review by the Court of Appeals or Supreme Court, the court <<-may, in its discretion,->> <<+shall+>> award reasonable attorney fees <<-appropriate in the circumstances->> to a party against whom a claim, defense or ground for appeal or review is asserted, if that party is a prevailing party in the proceeding and to be paid by the party asserting the claim, defense or ground, upon a finding by the court that the party willfully disobeyed a court order or <<-acted in bad faith, wantonly or solely for oppressive reasons->> <<+that there was no objectively reasonable basis for asserting the claim, defense or ground for appeal+>>.

(2) All attorney fees paid to any agency of the state under this section shall be deposited to the credit of the agency's appropriation or cash account from which the costs and expenses of the proceeding were paid or incurred. If the agency obtained an Emergency Board allocation to pay costs and expenses of the proceeding, to that extent the attorney fees shall be deposited in the General Fund available for general governmental expenses.

SECTION 3. ORS 20.125 is amended to read:

<< OR ST Sec. 20.125 >>

20.125. In the case of a mistrial in a civil or criminal action, if the court determines that the mistrial was caused by the deliberate misconduct of an attorney, the court, upon motion by the opposing party or upon motion of the court, <<-may->> <<+shall+>> assess <<+against the attorney causing the mistrial+>> costs and disbursements, as defined in ORCP 68, <<-of->> <<+and reasonable attorney fees incurred by+>> the opposing party <<-against the attorney causing the mistrial->> <<+as a result of the misconduct+>>. <<-Those costs and disbursements may be assessed against the attorney for the trial that ended in the mistrial.->>

---------- Excerpt from page 4370 follows ----------

SECTION 6. <<+(1) A court shall consider the following factors in determining whether to award attorney fees in any case in which attorney fees are authorized by statute and in which the court has discretion to decide whether to award attorney fees:+>>

<<+(a) The conduct of the parties in the transactions or occurrences that gave rise to the litigation, including any conduct of a party that was reckless, willful, malicious, in bad faith or illegal.+>>

<<+(b) The objective reasonableness of the claims and defenses asserted by the parties.+>>

<<+(c) The extent to which an award of an attorney fee in the case would deter others from asserting good faith claims or defenses in similar cases.+>>

<<+(d) The extent to which an award of an attorney fee in the case would deter others from asserting meritless claims and defenses.+>>

<<+(e) The objective reasonableness of the parties and the diligence of the parties and their attorneys during the proceedings.+>>

---------- Page 4371 follows ----------

<<+(f) The objective reasonableness of the parties and the diligence of the parties in pursuing settlement of the dispute.+>>

<<+(g) The amount that the court has awarded as a prevailing party fee under ORS 20.190.+>>

<<+(h) Such other factors as the court may consider appropriate under the circumstances of the case.+>>

<<+(2) A court shall consider the factors specified in subsection (1) of this section in determining the amount of an award of attorney fees in any case in which attorney fees are authorized by statute and in which the court has discretion to decide whether to award attorney fees. In addition, the court shall consider the following factors in determining the amount of an award of attorney fees in those cases:+>>

<<+(a) The time and labor required in the proceeding, the novelty and difficulty of the questions involved in the proceeding and the skill needed to properly perform the legal services.+>>

<<+(b) The likelihood, if apparent to the client, that the acceptance of the particular employment by the attorney would preclude the attorney from taking other cases.+>>

<<+(c) The fee customarily charged in the locality for similar legal services.+>>

<<+(d) The amount involved in the controversy and the results obtained.+>>

<<+(e) The time limitations imposed by the client or the circumstances of the case.+>>

<<+(f) The nature and length of the attorney's professional relationship with the client.+>>

<<+(g) The experience, reputation and ability of the attorney performing the services.+>>

<<+(h) Whether the fee of the attorney is fixed or contingent.+>>

<<+(3) In any appeal from the award or denial of an attorney fee subject to this section, the court reviewing the award may not modify the decision of the court in making or denying an award, or the decision of the court as to the amount of the award, except upon a finding of an abuse of discretion.+>>

<<+(4) Nothing in this section authorizes the award of an attorney fee in excess of a reasonable attorney fee.+>>

---------- Page 4372 follows ----------

<<+PREVAILING PARTY FEES+>>

---------- Excerpt from page 4372 follows ----------

SECTION 7. ORS 20.190 is amended to read:

<< OR ST Sec. 20.190 >>

20.190. <<+(1) Except as provided in subsections (2) to (5) of this section,+>> a prevailing party in a civil action or proceeding who has a right to recover costs and disbursements in the following cases also has a right to recover, as a part of the costs and disbursements, the following additional amounts:

<<-(1)->><<+(a)+>> In the Supreme Court or Court of Appeals, on an appeal, $100.

<<-(2)->><<+(b)+>> In a circuit court or district court:

<<-(a)->><<+(A)+>> When judgment is given without trial of an issue of law or fact or on an appeal, $50; or

<<-(b)->><<+(B)+>> When judgment is given after trial of an issue of law or fact, $75.

<<-(3)->><<+(c)+>> In a small claims department, a county court or justice's court, one-half of the amount provided for in <<-subsection (2) of this section->> <<+paragraph (b) of this subsection.+>>

<<+(2) In lieu of the prevailing party fee provided for in subsection (1) of this section, in any civil action or proceeding in which recovery of money or damages is sought, a prevailing party who has a right to recover costs and disbursements also has a right to recover, as a part of the costs and disbursements, the following additional amounts:+>>

<<+(a) In a circuit court:+>>

<<+(A) When judgment is given without trial of an issue of law or fact, $250; or+>>

<<+(B) When judgment is given after trial of an issue of law or fact, $500.+>>

<<+(b) In a district court:+>>

<<+(A) When judgment is given without trial of an issue of law or fact, $125; or+>>

<<+(B) When judgment is given after trial of an issue of law or fact, $250.+>>

<<+(c) In a small claims department, a county court or justice's court:+>>

---------- Page 4373 follows ----------

<<+(A) When judgment is given without trial of an issue of law or fact, $50; or+>>

<<+(B) When judgment is given after trial of an issue of law or fact, $75.+>>

<<+(3) In addition to the amounts provided for in subsection (2) of this section, in any civil action or proceeding in a district or circuit court in which recovery of money or damages is sought, a circuit court may award to the prevailing party up to an additional $5,000 as a prevailing party fee, and a district court may award up to an additional $2,500 as a prevailing party fee. The court shall consider the following factors in making an award under the provisions of this subsection:+>>

<<+(a) The conduct of the parties in the transactions or occurrences that gave rise to the litigation, including any conduct of a party that was reckless, willful, malicious, in bad faith or illegal.+>>

<<+(b) The objective reasonableness of the claims and defenses asserted by the parties.+>>

<<+(c) The extent to which an award of a larger prevailing party fee in the case would deter others from asserting good faith claims or defenses in similar

---------- Excerpt from page 4373 follows ----------

cases.+>>

<<+(d) The extent to which an award of a larger prevailing party fee in the case would deter others from asserting meritless claims and defenses.+>>

<<+(e) The objective reasonableness of the parties and the diligence of the parties and their attorneys during the proceedings.+>>

<<+(f) The objective reasonableness of the parties and the diligence of the parties in pursuing settlement of the dispute.+>>

<<+(g) Any award of attorney fees made to the prevailing party as part of the judgment.+>>

<<+(h) Such other factors as the court may consider appropriate under the circumstances of the case.+>>

<<+(4) Nonprevailing parties are jointly liable for the prevailing party fees provided for in this section. A court may not award more than one prevailing party fee to a prevailing party under this section, or more than one prevailing party fee against a nonprevailing party regardless of the number of parties in the action, and, upon being paid the amount of the award, the prevailing party may not seek recovery of any additional amounts under the provisions of this section from any other nonprevailing party.+>>

---------- Page 4374 follows ----------

<<+(5) In any appeal from the award or denial of a prevailing party fee under subsection (2) of this section, the court reviewing the award may not modify the decision of the court in making or denying an award, or the decision of the court as to the amount of the award, except upon a finding of an abuse of discretion.+>>

<<+(6) The prevailing party fees provided for in this section may not be awarded in the following proceedings:+>>

<<+(a) A class action proceeding under ORCP 32.+>>

<<+(b) A condemnation proceeding.+>>

<<+(c) Proceedings under the provisions of ORS chapters 25, 107, 108 and 109 and ORS 110.005 to 110.291.+>>

<<+(7) Mandatory arbitration under ORS 36.400 to 36.425 does not constitute a trial of an issue of law or fact for the purposes of this section.+>>

<<+SECTION 8.+>> ORS 46.475 is amended to read:

<< OR ST Sec. 46.475 >>

46.475. (1) Upon written request, the court may extend to the parties additional time within which to make formal appearances required in the small claims department.

(2) If the defendant fails to pay the claim, demand a hearing, or demand a jury trial, upon written request from the plaintiff the clerk shall enter a judgment against the defendant for the relief claimed plus the amount of the small claims filing fees and service expenses paid by the plaintiff and the prevailing party fee provided by ORS 20.190<<-(3)->><<+(1)(c)+>>.

(3) If the plaintiff fails within the time provided to file a formal complaint pursuant to ORS 46.465(3), the clerk shall:

(a) Dismiss the case without prejudice; and

(b) If the defendant applies therefor in writing to the clerk not later than days after the expiration of the time provided for the plaintiff to file a formal complaint, refund to the defendant the amount of the jury trial fee paid by the defendant under ORS 46.455(2)(c).

(4) If the defendant appears at the time set for hearing but no appearance is made by the plaintiff, the claim shall be dismissed with prejudice. If neither

party appears, the claim shall be dismissed without prejudice.

---------- Excerpt from page 4374 follows ----------

(5) Upon good cause shown within 60 days, the court may set aside a default judgment or dismissal and reset the claim for hearing.

---------- Page 4375 follows ----------

<< OR ST Sec. 46.475 >>

SECTION 8a. <<+If House Bill 2228 becomes law, (FN1) section 6, chapter ___, Oregon Laws 1995, (Enrolled House Bill 2228) (amending ORS 46.475), is repealed and ORS 46.475, as amended by section 8 of this Act, is further amended to read:+>>

<< OR ST Sec. 46.475 >>

46.475. (1) Upon written request, the court may extend to the parties additional time within which to make formal appearances required in the small claims department.

(2) If the defendant fails to pay the claim, demand a hearing, or demand a jury trial <<+and comply with section 2(2), chapter ___, Oregon Laws 1995 (Enrolled House Bill 2228)+>>, upon written request from the plaintiff the clerk shall enter a judgment against the defendant for the relief claimed plus the amount of the small claims filing fees and service expenses paid by the plaintiff and the prevailing party fee provided by ORS 20.190(1)(c).

<<+(3) If the plaintiff fails to comply with section 2(2), chapter ___, Oregon Laws 1995 (Enrolled House Bill 2228), the clerk shall:+>>

<<+(a) Dismiss the case without prejudice; and+>>

<<+(b) If the defendant applies therefor in writing to the clerk not later than 30 days after the expiration of the time provided for the payment of those fees, refund to the defendant the amount of the fees paid by the defendant under section 2(2), chapter ___, Oregon Laws 1995 (Enrolled House Bill 2228).+>>

<<-(3)->><<+(4)+>> If the plaintiff fails within the time provided to file a formal complaint pursuant to <<-ORS 46.465(3)->> <<+section 2(4), chapter ___, Oregon Laws 1995 (Enrolled House Bill 2228)+>>, the clerk shall:

(a) Dismiss the case without prejudice; and

(b) If the defendant applies therefor in writing to the clerk not later than 30 days after the expiration of the time provided for the plaintiff to file a formal complaint, refund to the defendant the amount of the jury trial fee paid by the defendant under ORS 46.455(2)(c).

<<-(4)->><<+(5)+>> If the defendant appears at the time set for hearing but no appearance is made by the plaintiff, the claim shall be dismissed with prejudice. If neither party appears, the claim shall be dismissed without prejudice.

---------- Page 4376 follows ----------

<<-(5)->><<+(6)+>> Upon good cause shown within 60 days, the court may set aside a default judgment or dismissal and reset the claim for hearing.

SECTION 9. ORS 46.485 is amended to read:

<< OR ST Sec. 46.485 >>

46.485. (1) In addition to other award, the prevailing party shall be

entitled to a judgment for the small claims filing fees and service expenses paid by the party and the prevailing party fee provided for in ORS

---------- Excerpt from page 4376 follows ----------

20.190<<-(3)->><<+(1)(c)+>>. The award shall be paid or the property delivered upon such terms and conditions as the judge may prescribe.

(2) The court may allow to the defendant a set-off not to exceed the amount of plaintiff's claim, but in such case the court shall cause to be entered in the record the amount of the set-off allowed.

(3) No attachment shall issue on any cause in the small claims department.

(4) A judgment in the small claims department is conclusive upon the parties and no appeal may be taken from the judgment.

(5) The clerk of the district court shall keep a record of all actions, proceedings and judgments in the small claims department.

(6) A judgment in the small claims department is a judgment of the district court. The clerk shall enter such judgment in the register of the district court. Money judgments shall be subject to ORCP 70A(2) and ORCP 70B. Execution and other process on execution provided by law may issue on judgments in the small claims department as in other cases in the district court.

<<+MANDATORY ARBITRATION+>>

SECTION 10. ORS 36.400 is amended to read:

<< OR ST Sec. 36.400 >>

36.400. (1) A mandatory arbitration program is established in <<-the following courts:->>

<<-(a) In->> the circuit court of <<-any->> <<+each+>> judicial district <<+and in each district court+>> <<-that contains a county with a population of 75,000 or more according to the latest federal decennial census.->>

<<-(b) In the district court for a county or counties if any of the counties served by the district court has a population of 75,000 or more according to the latest federal decennial census.->>

---------- Excerpt from page 4376 follows ----------

SECTION 10. ORS 36.400 is amended to read:

<< OR ST Sec. 36.400 >>

36.400. (1) A mandatory arbitration program is established in <<-the following courts:->>

<<-(a) In->> the circuit court of <<-any->> <<+each+>> judicial district <<+and in each district court+>> <<-that contains a county with a population of 75,000 or more according to the latest federal decennial census.->>

<<-(b) In the district court for a county or counties if any of the counties served by the district court has a population of 75,000 or more according to the latest federal decennial census.->>

---------- Page 4377 follows ----------

<<-(2) If an arbitration program is not required under subsection (1) of this section, an arbitration program under ORS 36.400 to 36.425 for civil actions may be established for:->>

<<-(a) The circuit court in a judicial district by an affirmative vote of a majority of the judges of the court, subject to the approval of the Chief Justice of the Supreme Court, or by an order of the Chief Justice.->>

<<-(b) The district court for a county or counties by an affirmative vote of a majority of the judges of the court, subject to the approval of the Chief Justice of the Supreme Court, or by an order of the Chief Justice.->>

<<-(3)->><<+(2)+>> Rules consistent with ORS 36.400 to 36.425 to govern the operation and procedure of an arbitration program established under this section for a court->> may be made in the same manner as other rules applicable to the court <<-pursuant to ORS 1.002(1), 3.065(3), 3.220, 46.280 or 46.665(3). Rules to govern the operation and procedure of a program made pursuant to ORS 3.065(3), 3.220, 46.280 or 46.665(3)->> <<+and+>> are subject to the approval of the Chief Justice of the Supreme Court.

<<-(4) An arbitration program established under subsection (2) of this section may be suspended or terminated by an order of the Chief Justice of the Supreme Court. A civil action may not be referred to arbitration under a program while the program is suspended or after the program is terminated, but an action referred to arbitration under a program before the program is suspended or terminated and pending on the effective date of the suspension or termination shall continue to be governed by the applicable provisions of ORS 36.400 to 36.425 and rules made under subsection (3) of this section.->>

<<+(3) Each circuit court shall establish whether arbitration under ORS 36.400 to 36.425 is required in matters involving less than $25,000 or in matters involving less than $50,000. The decision shall be made by an affirmative vote of a majority of the judges of the circuit court, subject to the approval of the Chief Justice of the Supreme Court.+>>

<<-(5)->><<+(4)+>> ORS 36.400 to 36.425 do not apply to appeals from a county, justice's or municipal court or actions in the small claims department of a district court.

---------- Page 4378 follows ----------

<< Note: OR ST Sec. 36.400 >>

SECTION 10a. <<+If House Bill 2805 becomes law, (FN2) section 47, chapter ___,

---------- Excerpt from page 4378 follows ----------

(gon Laws 1995 (Enrolled House Bill 2805) (amending ORS 36.400), is repealed.+>>

SECTION 11. ORS 36.405 is amended to read:

<< OR ST Sec. 36.405 >>

36.405. (1) In a civil action in a circuit or district court <<-having an arbitration program established under ORS 36.400,->> where all parties have appeared, the court shall refer the action to arbitration under ORS 36.400 to 36.425 if <<+either of the following applies+>>:

(a) The only relief claimed is recovery of money or damages, and no party asserts a claim for money or general and special damages in an amount exceeding <<-$25,000 in->> <<+the amount established under ORS 36.400(3) for+>> the circuit court, or in an amount exceeding $10,000 in the district court, exclusive of attorney fees, costs and disbursements and interest on judgment.

(b) The action is a domestic relations suit, as defined in ORS 107.510, in which the only contested issue is the division or other disposition of property between the parties.

(2) The presiding judge of the court may <<+do either of the following:+>>

<<+(a)+>> Exempt from arbitration under ORS 36.400 to 36.425 a civil action that otherwise would be referred to arbitration under <<-subsection (1) of->> this section. <<-, or may->>

<<+(b)+>> Remove from further arbitration proceedings a civil action that has been referred to arbitration under <<-subsection (1) of->> this section, when, the opinion of the judge, good cause exists for that exemption or removal.

SECTION 12. ORS 36.410 is amended to read:

<< OR ST Sec. 36.410 >>

36.410. (1) In a civil action in a circuit or district court <<-having an arbitration program established under ORS 36.400,->> where all parties have appeared and agreed to arbitration by stipulation, the court shall refer the action to arbitration under ORS 36.400 to 36.425 if:

(a) The relief claimed is more than or other than recovery of money or damages.

---------- Page 4379 follows ----------

(b) The action is in the circuit court, the only relief claimed is recovery of money or damages and a party asserts a claim for money or general and special damages in an amount exceeding <<-$25,000->> <<+the amount established under ORS 36.400(3),+>> exclusive of attorney fees, costs and disbursements and interest on judgment.

(2) If a civil action is referred to arbitration under <<-subsection (1) of->> this section, the arbitrator may grant any relief that could have been granted if the action were determined by a judge of the court.

SECTION 13. ORS 36.415 is amended to read:

<< OR ST Sec. 36.415 >>

36.415. <<+(1)+>> In a civil action in a circuit court <<-having an bitration program established under ORS 36.400,->> where all parties have appeared, where the only relief claimed is recovery of money or damages, where a party asserts a claim for money or general and special damages in an amount exceeding <<-$25,000->> <<+the amount established under ORS 36.400(3),+>> the

---------- Excerpt from page 4379 follows ----------

court shall refer the action to arbitration under ORS 36.400 to 36.425. A waiver of an amount of a claim under this section shall be for the purpose of arbitration under ORS 36.400 to 36.425 only and shall not restrict assertion of a larger claim in a trial de novo under ORS 36.425.

<<+(2) In a civil action in a circuit court where all parties have appeared, where the only relief claimed is recovery of money or damages and where a party asserts a claim for money or general and special damages in an amount exceeding the amount established under ORS 36.400(3), exclusive of attorney fees, costs and disbursements and interest on judgment, any party against whom the claim is made may file a motion with the court requesting that the matter be referred to arbitration. After hearing upon the motion, the court shall refer the matter to arbitration under ORS 36.400 to 36.425 if the defendant establishes by affidavits and other documentation that no objectively reasonable juror could return a verdict in favor of the claimant in excess of the amount established under ORS 36.400(3), exclusive of attorney fees, costs and disbursements and interest on judgment.+>>

SECTION 14. ORS 36.425 is amended to read:

---------- Page 4380 follows ----------

<< OR ST Sec. 36.425 >>

6.425. (1) At the conclusion of arbitration under ORS 36.400 to 36.425 of a civil action, the arbitrator shall file the decision and award with the clerk of the court that referred the action to arbitration, together with proof of service of a copy of the decision and award upon each party.

(2)(a) Within 20 days after the filing of a decision and award with the clerk of the court under subsection (1) of this section, a party against whom relief is granted by the decision and award or a party whose claim for relief was greater than the relief granted to the party by the decision and award, but no other party, may file with the clerk a written notice of appeal and request for a trial de novo of the action in the court on all issues of law and fact. After the filing of the written notice a trial de novo of the action shall be held. If the action is triable by right to a jury and a jury is demanded by a party having the right of trial by jury, the trial de novo shall include a jury.

(b) If a party files a written notice under paragraph (a) of this subsection, a trial fee or jury trial fee, as applicable, shall be collected as provided in ORS 21.270 or 46.221.

(c) A party filing a written notice under paragraph (a) of this subsection shall deposit with the clerk of the court the sum of $150. If the position under the arbitration decision and award of the party filing the written notice is not improved as a result of a judgment in the action on the trial de novo, the clerk shall dispose of the sum deposited in the same manner as a fee collected by the clerk. If the position of the party is improved as a result of a judgment, the clerk shall return the sum deposited to the party. If the court finds that the party filing the written notice is then unable to pay all or any part of the sum to be deposited, the court may waive in whole or in part, defer whole or in part, or both, the sum. If the sum or any part thereof is so deferred and the position of the party is not improved as a result of a judgment, the deferred amount shall be paid by the party according to the terms of the deferral.

<<-(d) Notwithstanding any other provision of law or the Oregon Rules of Civil

---------- Excerpt from page 4380 follows ----------

subsection whose position under the arbitration decision and award is not improved as a result of a judgment in the action on the trial de novo shall not be entitled to attorney fees or costs and disbursements, and shall be taxed the costs and disbursements of the other parties to the action on the trial de novo, including any expert witness fees and deposition expenses incurred after the arbitration by other parties to the action on the trial de novo.->>

---------- Page 4381 follows ----------

(3) If a written notice is not filed under subsection (2)(a) of this section within the 20 days prescribed, the clerk of the court shall enter the arbitration decision and award as a final judgment of the court, which shall have the same force and effect as a final judgment of the court in the civil action and may not be appealed.

<<+(4) Notwithstanding any other provision of law or the Oregon Rules of Civil Procedure:+>>

<<+(a) If a party requests a trial de novo under the provisions of this section, the action is subject to arbitration under the provisions of ORS 36.405(1)(a), the party is entitled to attorney fees by law or contract, and the position of the party is not improved after judgment on the trial de novo, the party shall not be entitled to an award of attorney fees or costs and disbursements, and shall be taxed the reasonable attorney fees and costs and disbursements of the other parties to the action on the trial de novo, whether incurred by the other parties before or after the commencement of the arbitration.+>>

<<+(b) If a party requests a trial de novo under the provisions of this section, the action is subject to arbitration under ORS 36.405(1)(a), the party is not entitled to attorney fees by law or contract, and the position of the party is not improved after judgment on the trial de novo, the party shall be taxed the reasonable attorney fees and costs and disbursements of the other parties to the action on the trial de novo incurred by the other parties after the filing of the decision and award of the arbitrator.+>>

<<+(c) If a party requests a trial de novo under the provisions of this section, the action is subject to arbitration under ORS 36.405(1)(b), and the position of the party is not improved after judgment on the trial de novo, the party shall not be entitled to an award of attorney fees or costs and disbursements and shall be taxed the costs and disbursements incurred by the other parties after the filing of the decision and award of the arbitrator.+>>

<<+(5) The court shall award reasonable attorney fees not to exceed the following amounts:+>>

<<+(a) Twenty percent of the judgment, if the defendant requests the trial de novo but the position of the defendant is not improved after the trial de novo; or+>>

---------- Page 4382 follows ----------

<<+(b) Ten percent of the amount claimed in the complaint, if the plaintiff requests the trial de novo but the position of the plaintiff is not improved after the trial de novo.+>>

<<+(6) Within seven days after the filing of a decision and award under subsection (1) of this section, a party may file with the court and serve on the other parties to the arbitration written exceptions directed solely to the award or denial of attorney fees or costs. Exceptions under this subsection may be directed to the legal grounds for an award or denial of attorney fees or costs, or to the amount of the award. Any party opposing the exceptions must file a

written response with the court and serve a copy of the response on the party filing the exceptions. Filing and service of the response must be made within

---------- Excerpt from page 4382 follows ----------

seven days after the service of the exceptions on the responding party. A judge of the court shall decide the issue and enter a decision on the award of attorney fees and costs. If the judge fails to enter a decision on the award within 20 days after the filing of the exceptions, the award of attorney fees and costs shall be considered affirmed. The filing of exceptions under this subsection does not constitute an appeal under subsection (2) of this section and does not affect the finality of the award in any way other than as specifically provided in this subsection.+>>

<< OR ST Sec. 36.425 >>

SECTION 14a. If House Bill 2228 becomes law, (FN3) section 14 of this Act (amending ORS 36.425) is repealed and ORS 36.425, as amended by section 3, chapter ___, Oregon Laws 1995 (Enrolled House Bill 2228), is further amended to read:

<< OR ST Sec. 36.425 >>

36.425. (1) At the conclusion of arbitration under ORS 36.400 to 36.425 of a civil action, the arbitrator shall file the decision and award with the clerk of the court that referred the action to arbitration, together with proof of service of a copy of the decision and award upon each party. If the decision and award require the payment of money, including payment of costs or attorney fees, the decision and award must contain all of the information required in a money judgment under ORCP 70A(2)(a) and be substantially in the form prescribed by ORCP 70A(2)(b).

(2)(a) Within 20 days after the filing of a decision and award with the clerk of the court under subsection (1) of this section, a party against whom relief is granted by the decision and award or a party whose claim for relief was greater than the relief granted to the party by the decision and award, but no other party, may file with the clerk a written notice of appeal and request for a trial de novo of the action in the court on all issues of law and fact. A copy of the notice of appeal and request for a trial de novo must be served on all other parties to the proceeding. After the filing of the written notice a trial de novo of the action shall be held. If the action is triable by right to a jury and a jury is demanded by a party having the right of trial by jury, the trial de novo shall include a jury.

---------- Page 4383 follows ----------

(b) If a party files a written notice under paragraph (a) of this subsection, a trial fee or jury trial fee, as applicable, shall be collected as provided in ORS 21.270 or 46.221.

(c) A party filing a written notice under paragraph (a) of this subsection shall deposit with the clerk of the court the sum of $150. If the position under the arbitration decision and award of the party filing the written notice is not improved as a result of a judgment in the action on the trial de novo, the clerk shall dispose of the sum deposited in the same manner as a fee lected by the clerk. If the position of the party is improved as a result of a judgment, the clerk shall return the sum deposited to the party. If the court finds that the party filing the written notice is then unable to pay all or any part of the sum to be deposited, the court may waive in whole or in part, defer in whole or in part, or both, the sum. If the sum or any part thereof is so

deferred and the position of the party is not improved as a result of a judgment, the deferred amount shall be paid by the party according to the terms of the deferral.

---------- Excerpt from page 4383 follows ----------

<<-(d) Notwithstanding any other provision of law or the Oregon Rules of Civil Procedure, a party filing a written notice under paragraph (a) of this subsection whose position under the arbitration decision and award is not improved as a result of a judgment in the action on the trial de novo shall not be entitled to attorney fees or costs and disbursements, and shall be taxed the costs and disbursements of the other parties to the action on the trial de novo, including any expert witness fees and deposition expenses incurred after the arbitration by other parties to the action on the trial de novo, and including reasonable attorney fees if otherwise provided for by contract or statute.->>

(3) If a written notice is not filed under subsection (2)(a) of this section within the 20 days prescribed, the clerk of the court shall enter the arbitration decision and award as a final judgment of the court, which shall have the same force and effect as a final judgment of the court in the civil action and may not be appealed.

<<+(4) Notwithstanding any other provision of law or the Oregon Rules of Civil Procedure:+>>

<<+(a) If a party requests a trial de novo under the provisions of this section, the action is subject to arbitration under the provisions of ORS 36.405(1)(a), the party is entitled to attorney fees by law or contract, and the position of the party is not improved after judgment on the trial de novo, the party shall not be entitled to an award of attorney fees or costs and disbursements, and shall be taxed the reasonable attorney fees and costs and disbursements of the other parties to the action on the trial de novo, whether incurred by the other parties before or after the commencement of the arbitration.+>>

---------- Page 4384 follows ----------

<<+(b) If a party requests a trial de novo under the provisions of this section, the action is subject to arbitration under ORS 36.405(1)(a), the party is not entitled to attorney fees by law or contract, and the position of the party is not improved after judgment on the trial de novo, the party shall be taxed the reasonable attorney fees and costs and disbursements of the other parties to the action on the trial de novo incurred by the other parties after the filing of the decision and award of the arbitrator.+>>

<<+(c) If a party requests a trial de novo under the provisions of this section, the action is subject to arbitration under ORS 36.405(1)(b), and the position of the party is not improved after judgment on the trial de novo, the party shall not be entitled to an award of attorney fees or costs and disbursements and shall be taxed the costs and disbursements incurred by the other parties after the filing of the decision and award of the arbitrator.+>>

<<+(5) The court shall award reasonable attorney fees not to exceed the following amounts:+>>

<<+(a) Twenty percent of the judgment, if the defendant requests the trial de novo but the position of the defendant is not improved after the trial de novo; or+>>

<<+(b) Ten percent of the amount claimed in the complaint, if the plaintiff requests the trial de novo but the position of the plaintiff is not improved after the trial de novo.+>>

<<+(6) Within seven days after the filing of a decision and award under subsection (1) of this section, a party may file with the court and serve on the other parties to the arbitration written exceptions directed solely to the award

or denial of attorney fees or costs. Exceptions under this subsection may be directed to the legal grounds for an award or denial of attorney fees or costs, or to the amount of the award. Any party opposing the exceptions must file a written response with the court and serve a copy of the response on the party

---------- Excerpt from page 4384 follows ----------

filing the exceptions. Filing and service of the response must be made within seven days after the service of the exceptions on the responding party. A judge of the court shall decide the issue and enter a decision on the award of attorney fees and costs. If the judge fails to enter a decision on the award within 20 days after the filing of the exceptions, the award of attorney fees and costs shall be considered affirmed. The filing of exceptions under this subsection does not constitute an appeal under subsection (2) of this section and does not affect the finality of the award in any way other than as specifically provided in this subsection.+>>

---------- Page 4385 follows ----------

<<+SMALL CLAIMS PROCEEDINGS+>>

SECTION 15. ORS 46.465 is amended to read:

<< OR ST Sec. 46.465 >>

46.465. (1) If the defendant demands a hearing in the small claims department, under the direction of the court the clerk shall fix a day and time for the hearing and shall mail to the parties a notice of the hearing time in the form prescribed by the court, instructing them to bring witnesses, documents and other evidence pertinent to the controversy.

(2) If the defendant asserts a counterclaim, the notice of the hearing time shall contain a copy of the counterclaim.

(3) If the defendant claims the right to a jury trial, the clerk shall notify the plaintiff to file a formal complaint within 20 days following the mailing of such notice. The notice shall instruct the plaintiff to serve a summons and copy of the complaint by mail on the defendant at the designated address of the defendant. Proof of service of the summons and complaint copy may be made by certificate of the plaintiff or plaintiff's attorney attached to the complaint prior to its filing. The plaintiff's claim in such formal complaint is not limited to the amount stated in the claim filed in the small claims department but it must involve the same controversy. The defendant shall have 10 days in which to move, plead or otherwise appear following the day on which the summons and copy of the complaint would be delivered to the defendant in due course of mail. Thereafter, the cause shall proceed as other causes in the district court, and costs and disbursements shall be allowed and taxed and fees not previously paid shall be charged and collected as provided in ORS 46.210 and 46.221 for other cases tried in district court, except that the appearance fee for plaintiff shall be an amount equal to the difference between the fee paid by the plaintiff as required by ORS 46.221(1)(f) and the fee required of a plaintiff by ORS 46.221(1)(a).

<<+(4) If the defendant claims the right to a jury trial and does not prevail in the action, the court shall award to the plaintiff reasonable attorney fees incurred by the plaintiff in the action. Unless attorney fees are otherwise provided for in the action by contract or by statutory provision, attorney fees awarded under this subsection may not exceed $1,000.+>>

---------- Page 5301 follows ----------

Oregon Session Laws 1995
REGULAR SESSION OF THE 68TH LEGISLATIVE ASSEMBLY

Additions are indicated by <<+ Text +>>; deletions by <<- Text ->>. Changes in tables are made but not highlighted.

Ch. 688
S.B. No. 482
JUDGMENTS--PUNITIVE DAMAGES

AN ACT relating to punitive damages; creating new provisions; amending ORS 18.540 and 30.925; and repealing ORS 41.315.

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

SECTION 1. ORS 18.540 is amended to read:

<< OR ST Sec. 18.540 >>

18.540. (1) Upon the entry of a <<-judgment->> <<+verdict+>> including an award of punitive damages, the Department of Justice shall become a judgment creditor as to the punitive damages portion of the award to which the Criminal Injuries Compensation Account is entitled pursuant to paragraph <<-(c)->> <<+(b)+>> of this subsection, and the punitive damage portion of an award shall be allocated as follows:

'a) <<+Forty percent shall be paid to the prevailing party.+>> The attorney f the prevailing party shall be paid <<+out of the amount allocated under this paragraph, in+>> the amount agreed upon between the attorney and the prevailing party. <<+ However, in no event may more than 20 percent of the amount awarded as punitive damages be paid to the attorney for the prevailing party.+>>

<<-(b) One-half of the remainder shall be paid to the prevailing party.->>

<<-(c)->><<+(b)+>> <<-One-half of the remainder->> <<+Sixty percent+>> shall be paid to the Criminal Injuries Compensation Account to be used for the purposes set forth in ORS chapter 147. However, if the prevailing party is a public entity, the amount otherwise payable to the Criminal Injuries Compensation Account shall be paid to the general fund of the public entity.

(2) The party preparing the proposed judgment shall assure that the judgment identifies the judgment creditors specified in subsection (1) of this section.

(3) Upon the entry of a <<-judgment->> <<+verdict+>> including an award of punitive damages, the prevailing party shall provide notice of the judgment to the Department of Justice. <<+ The notice shall be in writing and shall be delivered to the Department of Justice within five days after the entry of the verdict.+>>

---------- Page 5302 follows ----------

(4) Whenever a judgment includes both compensatory and punitive damages, any payment on the judgment by or on behalf of any defendant, whether voluntary or by execution or otherwise, shall be applied first to compensatory damages, costs and court-awarded attorney fees awarded against that defendant and then to punitive damages awarded against that defendant unless all affected parties, including the Department of Justice, expressly agree otherwise, or unless that a lication is contrary to the express terms of the judgment.

(5) Whenever any judgment creditor of a judgment which includes punitive damages governed by this section receives any payment on the judgment by or on

behalf of any defendant, the judgment creditor receiving the payment shall notify the attorney for the other judgment creditors and all sums collected shall be applied as required by subsections (1) and (4) of this section, unless all affected parties, including the Department of Justice, expressly agree otherwise, or unless that application is contrary to the express terms of the judgment.

SECTION 2. <<+(1) Punitive damages are not recoverable in a civil action unless it is proven by clear and convincing evidence that the party against whom punitive damages are sought has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others.+>>

<<+(2) If an award of punitive damages is made by a jury, the court shall review the award to determine whether the award is within the range of damages that a rational juror would be entitled to award based on the record as a whole, viewing the statutory and common-law factors that allow an award of punitive damages for the specific type of claim at issue in the proceeding.+>>

<<+(3) In addition to any reduction that may be made under subsection (2) of this section, upon the motion of a defendant the court may reduce the amount of any judgment requiring the payment of punitive damages entered against the defendant if the defendant establishes that the defendant has taken remedial measures that are reasonable under the circumstances to prevent reoccurrence of the conduct that gave rise to the claim for punitive damages. In reducing awards of punitive damages under the provisions of this subsection, the court shall consider the amount of any previous judgment for punitive damages entered against the same defendant for the same conduct giving rise to a claim for punitive damages.+>>

---------- Page 5303 follows ----------

SECTION 3. <<+(1) A pleading in a civil action may not contain a request for an award of punitive damages except as provided in this section.+>>

<<+(2) At the time of filing a pleading with the court, the pleading may not contain a request for an award of punitive damages. At any time after the pleading is filed, a party may move the court to allow the party to amend the pleading to assert a claim for punitive damages. The party making the motion may submit affidavits and documentation supporting the claim for punitive damages. The party or parties opposing the motion may submit opposing affidavits and documentation.+>>

<<+(3) The court shall deny a motion to amend a pleading made under the provisions of this section if the court determines that the affidavits and supporting documentation submitted by the party seeking punitive damages fail to set forth specific facts supported by admissible evidence adequate to avoid the granting of a motion for a directed verdict to the party opposing the motion on the issue of punitive damages in a trial of the matter.+>>

<<+(4) The court shall conduct a hearing on a motion filed under this section not more than 30 days after the motion is filed and served. The court shall issue a decision within 10 days after the hearing. If no decision is issued within 10 days, the motion shall be considered denied.+>>

<<+(5) Discovery of evidence of a defendant's ability to pay shall not be allowed by a court unless and until the court grants a motion to amend a pleading under this section.+>>

SECTION 4. ORS 30.925 is amended to read:

<< OR ST Sec. 30.925 >>

30.925. (1) In a product liability civil action, punitive damages shall not

be recoverable <<-unless it is proven by clear and convincing evidence that the party against whom punitive damages is sought has shown wanton disregard for the health, safety and welfare of others->> <<+except as provided in section 2 of this 1995 Act.+>>

<<-(2) During the course of trial, evidence of the defendant's ability to pay shall not be admitted unless and until the party entitled to recover establishes a prima facie right to recover under subsection (1) of this section.->>

---------- Page 5304 follows ----------

<<-(3)->><<+(2)+>> Punitive damages, if any, shall be determined and awarded based upon the following criteria:

(a) The likelihood at the time that serious harm would arise from the defendant's misconduct;

(b) The degree of the defendant's awareness of that likelihood;

(c) The profitability of the defendant's misconduct;

(d) The duration of the misconduct and any concealment of it;

(e) The attitude and conduct of the defendant upon discovery of the misconduct;

(f) The financial condition of the defendant; and

(g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected.

SECTION 5. <<+Sections 2 and 3 of this Act, the amendments to ORS 18.540 and 30.925 by sections 1 and 4 of this Act, and the repeal of ORS 41.315 by section 6 of this Act, apply only to actions commenced on or after the effective date of this Act.+>>

<< Repealed: OR ST Sec. 41.315 >>

SECTION 6. <<+ORS 41.315 is repealed.+>>

Approved July 19, 1995

---------- Page 5379 follows ----------

Oregon Session Laws 1995
REGULAR SESSION OF THE 68TH LEGISLATIVE ASSEMBLY

Additions are indicated by <<+ Text +>>; deletions by <<- Text ->>. Changes in tables are made but not highlighted.

Ch. 696
S.B. No. 601
CIVIL LIABILITY--CONTRIBUTORY NEGLIGENCE, DAMAGES, ATTORNEY FEES

AN ACT relating to liability; creating new provisions; and amending ORS 18.450, 18.455, 18.470, 18.480, 18.485, 18.570, 59.115, 59.127, 59.255, 59.890, 59.925, 65.207, 86.720, 133.739, 166.725, 192.590, 223.615, 311.673, 460.165, 469.421, 474.085, 478.965, 480.600, 540.120, 545.104, 548.620, 548.660, 553.560, 585.150, 645.225, 646.140, 646.240, 646.638, 646.639, 646.760, 646.770, 646.775, 646.780, 650.020, 650.065, 650.250, 656.052, 658.220, 692.180, 697.762, 697.792, 756.185, 759.720 and 759.900; and repealing sections 32, 33, 34, 36, 37, 40, 50, 57, 58, 59, 60, 61, 63, 72, 74, 75, 76, 78, 80, 82, 84, 85, 86, 90, 93, 94, 95, 98, 101, 102, 103, 104, 107, 108, 109, 113, 114, 121, 122, 123, 132, 133 and 134, chapter ___, Oregon Laws 1995 (Enrolled Senate Bill 385).

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

SECTION 1. ORS 18.450 is amended to read:

<< OR ST Sec. 18.450 >>

18.450. (1) Whether or not judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced by separate action.

(2) Where a judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced in that action by judgment in favor of one against other judgment defendants by motion upon notice to all parties to the action.

(3) If there is a judgment for the injury or wrongful death against the tortfeasor seeking contribution, any separate action by the tortfeasor to enforce contribution must be commenced within two years after the judgment has become final by lapse of time for appeal or after appellate review.

(4) If there is no judgment for the injury or wrongful death against the tortfeasor seeking contribution, the right of contribution of that tortfeasor is barred unless the tortfeasor has either:

(a) Discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against the tortfeasor and has commenced action for contribution within two years after payment; or

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(b) Agreed while action is pending against the tortfeasor to discharge the common liability and has within two years after the agreement paid the liability and commenced action for contribution.

(5) The running of the statute of limitations applicable to a claimant's right of recovery against a tortfeasor shall not operate to bar recovery of contribution against the tortfeasor <<+or the claimant's right of recovery

against a tortfeasor specified in ORS 18.470(2) who has been made a party by ther tortfeasor+>>.

(6) The recovery of a judgment for an injury or wrongful death against one tortfeasor does not of itself discharge the other tortfeasors from liability for the injury or wrongful death unless the judgment is satisfied. The satisfaction of the judgment does not impair any right of contribution.

(7) The judgment of the court in determining the liability of the several defendants to the claimant for an injury or wrongful death shall be binding as among such defendants in determining their right to contribution.

SECTION 2. ORS 18.455 is amended to read:

<< OR ST Sec. 18.455 >>

18.455. (1) When a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury <<+to person or property+>> or the same wrongful death or claimed to be liable in tort for the same injury or the same wrongful death:

(a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but <<-it reduces the claim against the others to the extent of any amount stipulated by the covenant, or in the amount of the consideration paid for it, whichever is the greater->> <<+the claimant's claim against all other persons specified in ORS 18.470(2) for the injury or wrongful death is reduced by the share of the obligation of the tortfeasor who is given the covenant, as determined under ORS 18.480 and 18.485;+>> and

(b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

2) When a covenant described in subsection (1) of this section is given, the claimant shall give notice of all of the terms of the covenant to all persons against whom the claimant makes claims.

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SECTION 3. ORS 18.470 is amended to read:

<< OR ST Sec. 18.470 >>

18.470. <<+(1)+>> Contributory negligence shall not bar recovery in an action by any person or the legal representative of the person to recover damages for death or injury to person or property if the fault attributable to the <<-person seeking recovery->> <<+claimant+>> was not greater than the combined fault of <<-the person or persons against whom recovery is sought->> <<+all persons specified in subsection (2) of this section+>>, but any damages allowed shall be diminished in the proportion to the percentage of fault attributable to the <<-person recovering->> <<+claimant+>>. This section is not intended to create or abolish any defense.

<<+(2) The trier of fact shall compare the fault of the claimant with the fault of any party against whom recovery is sought, the fault of third party defendants who are liable in tort to the claimant, and the fault of any person with whom the claimant has settled. The failure of a claimant to make a direct claim against a third party defendant does not affect the requirement that the fault of the third party defendant be considered by the trier of fact under this subsection. Except for persons who have settled with the claimant, there shall no comparison of fault with any person:+>>

<<+(a) Who is immune from liability to the claimant;+>>

<<+(b) Who is not subject to the jurisdiction of the court; or+>>

<<+(c) Who is not subject to action because the claim is barred by a statute of limitation or statute of ultimate repose.+>>

<<+(3) A defendant who files a third party complaint against a person alleged to be at fault in the matter, or who alleges that a person who has settled with the claimant is at fault in the matter, has the burden of proof in establishing:+>>

<<+(a) The fault of the third party defendant or the fault of the person who settled with the claimant; and+>>

<<+(b) That the fault of the third party defendant or the person who settled with the claimant was a contributing cause to the injury or death under the law applicable in the matter.+>>

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<<+(4) Any party to an action may seek to establish that the fault of a person should not be considered by the trier of fact by reason that the person does not meet the criteria established by subsection (2) of this section for the consideration of fault by the trier of fact.+>>

<<+(5) This section does not prevent a party from alleging that the party was not at fault in the matter because the injury or death was the sole and exclusive fault of a person who is not a party in the matter.+>>

SECTION 4. ORS 18.480 is amended to read:

<< OR ST Sec. 18.480 >>

18.480. (1) When requested by any party the trier of fact shall answer special questions indicating:

(a) The amount of damages to which a party seeking recovery would be entitled, assuming that party not to be at fault<<+.+>><<-;->>

(b) The degree of <<-each party's->> fault <<+of each person+>> <<-expressed as a percentage of the total fault attributable to all parties represented in the action->> <<+specified in ORS 18.470(2). The degree of each person's fault so determined shall be expressed as a percentage of the total fault attributable to all persons considered by the trier of fact pursuant to ORS 18.470+>>.

(2) A jury shall be informed of the legal effect of its answer to the questions listed in subsection (1) of this section.

<<+(3) The jury shall not be informed of any settlement made by the claimant for damages arising out of the injury or death that is the subject of the action.+>>

<<+(4) For the purposes of subsection (1) of this section, the court may order that two or more persons be considered a single person for the purpose of determining the degree of fault of the persons specified in ORS 18.470(2).+>>

SECTION 5. ORS 18.485 is amended to read:

<< OR ST Sec. 18.485 >>

18.485. <<-(1) As used in this section, 'economic damages' and 'noneconomic damages' have the meaning given those terms in ORS 18.560.->>

<<-(2)->><<+(1) Except as otherwise provided in this section,+>> in any civil action arising out of bodily injury, death or property damage, including claims for emotional injury or distress, loss of care, comfort, companionship and society, and loss of consortium, the liability of each defendant for <<-noneconomic->> damages awarded to plaintiff shall be several only and shall be joint.

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<<-(3) The liability of a defendant who is found to be less than 15 percent at fault for the economic damages awarded the plaintiff shall be several only.->>

<<-(4) The liability of a defendant who is found to be at least 15 percent at fault for the economic damages awarded the plaintiff shall be joint and several, except that a defendant whose percentage of fault is less than that allocated to the plaintiff is liable to the plaintiff only for that percentage of the recoverable economic damages.->>

<<+(2) In any action described in subsection (1) of this section, the court shall determine the award of damages to each claimant in accordance with the percentages of fault determined by the trier of fact under ORS 18.480 and shall enter judgment against each party determined to be liable. The court shall enter a judgment in favor of the plaintiff against any third party defendant who is found to be liable in any degree, even if the plaintiff did not make a direct claim against the third party defendant. The several liability of each defendant and third party defendant shall be set out separately in the judgment, based on the percentages of fault determined by the trier of fact under ORS 18.480. The court shall calculate and state in the judgment a monetary amount reflecting the share of the obligation of each person specified in ORS 18.470(2). Each person's share of the obligation shall be equal to the total amount of the damages found by the trier of fact, with no reduction for amounts paid in settlement of the claim or by way of contribution, multiplied by the percentage of fault determined for the person by the trier of fact under ORS 18.480.+>>

<<+(3) Upon motion made not later than one year after judgment has become final by lapse of time for appeal or after appellate review, the court shall determine whether all or part of a party's share of the obligation determined under subsection (2) of this section is uncollectible. If the court determines that all or part of any party's share of the obligation is uncollectible, the court shall reallocate any uncollectible share among the other parties. The reallocation shall be made on the basis of each party's respective percentage of fault determined by the trier of fact under ORS 18.480. The claimant's share of the reallocation shall be based on any percentage of fault determined to be attributable to the claimant by the trier of fact under ORS 18.480, plus any percentage of fault attributable to a person who has settled with the claimant. Reallocation of obligations under this subsection does not affect any right to contribution from the party whose share of the obligation is determined to be uncollectible. Unless the party has entered into a covenant not to sue or not to enforce a judgment with the claimant, reallocation under this subsection does not affect continuing liability on the judgment to the claimant by the party whose share of the obligation is determined to be uncollectible.+>>

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<<+(4) Notwithstanding subsection (3) of this section, a party's share of the obligation to a claimant may not be increased by reason of reallocation under subsection (3) of this section if:+>>

<<+(a) The percentage of fault of the claimant is equal to or greater than the percentage of fault of the party as determined by the trier of fact under ORS 18.480; or+>>

<<+(b) The percentage of fault of the party is 25 percent or less as determined by the trier of fact under ORS 18.480.+>>

<<+(5) If any party's share of the obligation to a claimant is not increased by reason of the application of subsection (4) of this section, the amount of that party's share of the reallocation shall be considered uncollectible and shall be reallocated among all other parties who are not subject to subsection (4) of this section, including the claimant, in the same manner as otherwise

provided for reallocation under subsection (3) of this section.+>>
<<-(5)->><<+(6)+>> <<-Subsections (1) to (4) of->> This section <<-do->> does+>> not apply to:

(a) A civil action resulting from the violation of a standard established by Oregon or federal statute, rule or regulation for the spill, release or disposal of any hazardous waste, as defined in ORS 466.005, hazardous substance, as defined in ORS 453.005 or radioactive waste, as defined in ORS 469.300.

(b) A civil action resulting from the violation of Oregon or federal standards for air pollution, as defined in ORS 468A.005 or water pollution, as defined in ORS 468B.005.

SECTION 6. ORS 18.570 is amended to read:

<< OR ST Sec. 18.570 >>

18.570. A verdict shall set forth separately economic damages and noneconomic damages, if any, as defined in ORS 18.560. <<- Whenever a judgment includes both economic and noneconomic damages, payment by or on behalf of any defendant shall be applied first to noneconomic damages and then to economic damages.->>

<< Note: OR ST Secs. 18.450, 18.455, 18.470, 18.480, 18.485, 18.570 >>

SECTION 7. <<+The amendments to ORS 18.450, 18.455, 18.470, 18.480, 18.485 and 18.570 by sections 1 to 6 of this Act apply only to causes of action arising on or after the effective date of this Act.+>>

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<< Note: OR ST Secs. 59.115, 59.127, 59.255, 59.890, 59.925, 65.207, 86.720, 133.739, 166.725, 192.590, 223.615, 279.365, 311.673, 460.165, 469.421, 474.085, 478.965, 480.600, 540.120, 545.104, 548.620, 548.660, 553.560, 585.150, 645.225, 646.140, 646.240, 646.638, 646.760, 646.770, 646.775, 646.780, 650.020, 650.065, 650.250, 656.052, 658.220, 692.180, 697.762, 697.792, 756.185, 759.720, 759.900 >>

SECTION 8. <<+Sections 32 (amending ORS 59.115), 33 (amending ORS 59.127), 34 (amending ORS 59.255), 36 (amending ORS 59.890), 37 (amending ORS 59.925), 40 (amending ORS 65.207), 50 (amending ORS 86.720), 57 (amending ORS 133.739), 58 (amending ORS 166.725), 59 (amending ORS 192.590), 60 (amending ORS 223.615), 61 (amending ORS 279.365), 63 (amending ORS 311.673), 72 (amending ORS 460.165), 74 (amending ORS 469.421), 75 (amending ORS 474.085), 76 (amending ORS 478.965), 78 (amending ORS 480.600), 80 (amending ORS 540.120), 82 (amending ORS 545.104), 84 (amending ORS 548.620), 85 (amending ORS 548.660), 86 (amending ORS 553.560), 90 (amending ORS 585.150), 93 (amending ORS 645.225), 94 (amending ORS 646.140), 95 (amending ORS 646.240), 98 (amending ORS 646.638), 101 (amending ORS 646.760), 102 (amending ORS 646.770), 103 (amending ORS 646.775), 104 (amending ORS 646.780), 107 (amending ORS 650.020), 108 (amending ORS 650.065), 109 (amending ORS 650.250), 113 (amending ORS 656.052), 114 (amending ORS 658.220), 121 (amending ORS 692.180), 122 (amending ORS 697.762), 123 (amending ORS 697.792), 132 (amending ORS 756.185), 133 (amending ORS 759.720) and 134 (amending ORS

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REGULAR SESSION OF THE 68TH LEGISLATIVE ASSEMBLY

Additions are indicated by <<+ Text +>>; deletions by <<- Text ->>. Changes in tables are made but not highlighted.

Ch. 485
H.B. No. 3098
EVIDENCE--HEALTH CARE FACILITY DATA--PRIVILEGE

AN ACT relating to evidence; amending ORS 41.675.

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

SECTION 1. ORS 41.675 is amended to read:

<< OR ST Sec. 41.675 >>

41.675. (1) As used in subsection (2) of this section, 'data' means written reports, notes or records of tissue committees, governing bodies or committees <<+including medical staff committees+>> of a health care facility licensed under ORS chapter 441, medical staff committees <<+of the Department of Corrections+>> and similar committees of professional societies<<+, a health care service contractor as defined in ORS 750.005, an emergency medical service provider as defined in ORS 41.685 or any other medical group+>> in connection with <<+bona fide medical research, quality assurance, utilization review, edentialing, education,+>> training, supervision or discipline of physicians <<+or other health care providers+>>, or in connection with the grant, denial, restriction or termination of clinical privileges at a health care facility. The term also includes the written reports, notes or records of utilization review and peer review organizations.

(2) All data shall be privileged and shall not be admissible in evidence in any judicial<<+, administrative, arbitration or mediation+>> proceeding, but this section shall not affect the admissibility in evidence of a party's medical records dealing with a party's hospital care and treatment.

(3) A person serving on or communicating information to any governing body or committee described in subsection (1) of this section shall not be examined as to any communication to that committee or the findings thereof.

(4) A person serving on or communicating information to any governing body or committee described in subsection (1) of this section shall not be subject to an action for civil damages for affirmative actions taken or statements made in good faith.

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(5) Subsection (2) of this section shall not apply to <<-judicial->> proceedings in which a health care practitioner contests the denial, restriction or termination of clinical privileges by a health care facility <<+or the denial, restriction or termination of membership in a professional society or any other health care group+>>. However, any data so disclosed in such proceedings shall not be admissible in any other judicial<<+, administrative, arbitration or mediation+>> proceeding.

proved July 5, 1995