*** NOTICE ***

PUBLIC MEETING

COUNCIL ON COURT PROCEDURES
Saturday, January 13, 1996, 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 December 9, 1995 minutes (copy attached)

3. Proposal from committee to draft rules regarding Legislative Advisory Committee ("LAC") (see Attachment A to this agenda) (Mr. Alexander)

4. Recommendation re Williams proposal concerning ORCP 39 I(4) (see Attachment B to this agenda) (Mr. Alexander)

5. Status report of committee to study and review ORCP 7 (see Attachment A to 12-9-95 agenda) (Judge Brewer)

6. Status report of committee to consider Justice Peterson's suggested amendments to ORCP 21 (see Attachment C to this agenda) (Mr. Lachenmeier)

7. Continuation of 1995 session legislative review (see Attachment B to 12-9-95 agenda) (Mr. Gaylord)

8. Old business

9. New business

10. Adjournment

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COUNCIL ON COURT PROCEDURES
Minutes of Meeting of December 9, 1995
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

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

Bob Oleson, Director of Public Affairs, Oregon State Bar, and Attorneys Jeff Carter and Keith Tichenor were present for part of the meeting. Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

Agenda Item 1: The Chairperson, Mr. Gaylord, called the meeting to order at 9:37 a.m.

Agenda Item 2: The minutes of the Council's October 14, 1995 meeting were, without objection or amendment, approved as previously distributed.

Agenda Item 3: Mr. Alexander distributed to members present a memo he had prepared, dated 12-7-95, proposing three rules for the Council's consideration regarding the functions of the Legislative Advisory Committee (LAC) and regulating its authority to act or speak on behalf of the full Council. It was agreed, and Mr. Gaylord so directed, that copies of this memo should be distributed to all members with a view to their further discussion and consideration at the 1-13-96 meeting. (See Attachment A to 1-13-96 agenda.)

Mr. Hamlin stated that the Council has Rules of Procedure, adopted early in its history, which few members are probably aware of and which might no longer accurately reflect how the Council functions. He also stated that adoption of these rules did not comply with Oregon's statutory requirements for administrative rule-making. He suggested that copies of these Rules of Procedure be distributed with the agenda of the 1-13-96 meeting, and that Prof. Holland be asked to determine whether

their adoption, or any amendments that might now or later be adopted, are subject to the requirements for administrative rule-making. It was also suggested that Prof. Holland check these requirements to determine whether they might apply to any rules adopted by the Council regarding the LAC. This was generally agreed to, and was so directed by Mr. Gaylord.

Agenda Item 4: Judge Marcus stated that he had received, and responded to, a memo from Justice Peterson regarding the latter's suggested amendments to ORCP 21 by which the defenses of lack of personal jurisdiction, insufficiency of service, and insufficiency of summons would be waived unless raised by pre-answer motion. He added that he had also received a memo from Prof. Holland with some comments. In light of the fact that none of these documents had been distributed to members prior to this meeting, any further discussion of this matter should be deferred until the next meeting. Prof. Holland said that these documents would be distributed with the agenda of the 1-13-96 meeting. (See Attachment C to 1-13-96 agenda.)

Agenda Item 5: There was general discussion as to whether, as suggested in the 9-15-94 letter of Mr. Patrick N. Rothwell and attached memo (see Attachment A to agenda of 12-9-95 meeting), the Council should undertake a study and review of ORCP 7 regarding service of summons. Prof. Holland reported that Mr. Rasmussen had asked him to inform the members at this meeting that he has in mind some possible amendments which he believes would be useful, especially relating to so-called "DMV service" pursuant to ORCP 7 D(4). Several members expressed the opinion that some confusion about one or another aspect of service of summons might have been engendered by some recent appellate opinions. There was general agreement that Mr. Gaylord should appoint an ad hoc committee to look into the question whether any significant confusion or difficulties exist with respect to ORCP 7.

At the suggestion of members present, Mr. Gaylord appointed Judge Brewer, as chair, and Justice Graber, Mr. Lachenmeir, Mr. Paradis, and Mr. Rasmussen as members of this committee. Judge Brewer and Mr. Paradis expressed their willingness to serve on this committee. Mr. Gaylord directed Prof. Holland to write a letter to Justice Graber, Mr. Lachenmeier, and Mr. Rasmussen, informing them that they are appointed to this committee, subject to their willingness to serve.

Agenda Item 6: Mr. Gaylord stated that he was open to suggestions on how best to proceed with a review of 1995 legislation amending the ORCP or effecting changes in civil practice that might have some impact upon them. Mr. Hamlin suggested that there were two distinct levels at which the

Council might conduct its review of the '95 legislation. The first would consist of looking at the ORCP amendments to see if they might contain any flaws in drafting and at other legislative provisions affecting civil practice to see if any of them might create potential problems relating to how they can be accommodated by the ORCP as amended. The second possible level of review, he said, might be to examine the '95 legislation affecting civil practice to determine whether, in the Council's view, the changes it embodied are consistent or inconsistent with sound, fair, and efficient civil procedure.

Mr. Hamlin added that the Council might decide to hold one or more public hearings focusing upon how the changes made by the '95 legislation are working out in practice. Judge Pope suggested that the Council would better proceed reactively, rather than proactively, by waiting to see whether any problems are actually encountered and reported, and not initiating a search for problems that might not exist. Judge Brockley, among others, expressed agreement with Judge Pope's thought. Several members expressed doubts about conducting a review that would range beyond the '95 legislation that amended the ORCP, or, at most, beyond any such legislation that might create problems by way of being accommodated by the ORCP.

After further discussion, there was general agreement that Mr. Gaylord, as Chair of the Council, should contact such customary bar groups as the OTLA, OADC, the OSB Procedure and Practice Committee, the chairs of the interim judiciary committees, and the presidents of the judges' associations, and invite them to bring to the Council's attention any problems they become aware of arising from the 1995 legislative amendments to the ORCP or other 1995 legislation affecting civil procedure. Mr. Gaylord said that he would promptly send letters, on Council letterhead, to each of the groups mentioned, copies of which would be furnished to Council members. It was further agreed that an appropriate notice should be published in *For the Record*. Mr. Gaylord directed that this legislative review be continued as an agenda item for the 1-13-96 meeting, so that members would have more opportunity to study the material distributed with the agenda of this meeting.

Agenda Item 7: Mr. Alexander referred to his memo dated 12-7-95, with attached letter of Mr. Michael L. Williams dated 11-23-93, which he distributed to members at the outset of the meeting (Attachment B to the 1-13-96 agenda). He called particular attention to the suggested amendment to ORCP 39 I(4), on page 2 of his memo, the purpose of which would be to remove any uncertainty as to whether trial judges have authority to permit perpetuation depositions after a trial has commenced. Judge Brewer, among others, expressed doubt whether any such

amendment was needed, and stated he believed that such discretionary authority is already provided in the existing language of this subsection. Mr. Alexander recalled that Mr. Williams' letter was considered by the Council during the 1993-95 biennium, at which time it was agreed that his other suggestion, concerning admissibility in evidence of perpetuation deposition testimony in jury trials, would almost certainly require an amendment of ORS 45.400, and would therefore be beyond the scope of the Council's authority. At the suggestion of Judge Pope, this matter was directed by Mr. Gaylord to be included as an agenda item for the 1-13-96 meeting.

Agenda Item 8: No item of new business was raised.

Agenda Item 9: Mr. Gaylord, on motion carried without objection, declared the meeting adjourned at 11:37 a.m.

Respectfully submitted,

Maury Holland
Executive Director

BURT, SWANSON, LATHEN, ALEXANDER, McCANN & SMITH, P.C.

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December 7, 1995

MEMO TO: Members of Council on Court Procedures

FROM: J. Michael Alexander

RE: House Bill 2228 - The Legislative Advisory Committee (LAC)

As you recall, we had extensive discussion at our last meeting concerning the effects of the LAC, and possible conflict with the general deliberative functions of the Council. It was suggested that internal rules should be drafted to provide direction to the members of the Council who are chosen to serve on the LAC. Attached to this memo is a copy of HB 2228 for your convenience.

Based upon my own recollection, part of our discussions, and my own thoughts on the matter, I would propose the following internal rules:

1. House Bill 2228 requires the LAC to provide analysis and advice within 10 days after the request from the chairperson of the Legislative Committee. The statute also requires the LAC to consult with the full Council to the extent possible. I would suggest that we adopt the following rule:

> **When the LAC is called upon to provide technical analysis and advice to a Legislative Committee, it must not present such advice as being representative of the full Council unless the Committee has presented any proposal to the full Council, and the full Council has voted, through a super majority, in support of the specific analysis and advice to be rendered to the Committee. Without vote of the full Council by a super majority, any analysis and advice given a Legislative Committee shall be given with the specific disclaimer that the advice**

does not represent the opinion of the Council on Court Procedures, but only represents an opinion of the majority of the individuals comprising the LAC.

2. The statute also provides that the LAC may vote to take a position on behalf of the Council on Court Procedures on proposed Legislation. The statute goes on to say that if the LAC has voted to take a position on behalf of the Council, the Committee shall so indicate to the Legislative Committee. I believe that our internal rules **should disallow** the LAC to ever represent that it takes a position on behalf of the full Council unless the full Council has in fact approved the position through an appropriate vote of a super majority. Therefore, I suggest that we adopt the following rule:

LAC shall not exercise its statutory discretion to take a position on behalf of the Council on Court Procedures on proposed legislation unless such position has been submitted to the full Council and specifically approved by a vote of a super majority.

3. Subsection 5 of House Bill 2228 allows members of the LAC to appear before Legislative Committees for the purpose of testifying on legislation that proposes changes to the Oregon Rules of Civil Procedure. If a member of the LAC chooses to so testify, then it would seem inappropriate, as discussed above, for that individual to represent that he speaks for the Council unless the full Council has approved the position taken. I suggest that we adopt the following rule:

Any member of the LAC who chooses to appear and offer testimony before a Legislative Committee, and has not obtained the approval of the full Council concerning the content of his testimony, shall not represent to the Legislative Committee that such member speaks for the full Council, but shall only identify himself as a member of the

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Council, a member of the LAC, and also indicate that he is expressly not authorized to speak on behalf of the full Council.

Sincerely,

BURT, SWANSON, LATHEN, ALEXANDER, McCANN, & SMITH, P.C.

/s/ J. Michael Alexander

J. Michael Alexander

JMA/jb
Encls.

Pass 5/30/95

B-Engrossed
House Bill 2228

Ordered by the Senate May 26
Including House Amendments dated May 5 and Senate Amendments dated May 26

Ordered printed by the Speaker pursuant to House Rule 12.00A (5). Presession filed (at the request of Judicial Department)

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 that proceedings removed from small claims department of district court by reason of request for jury trial be referred directly to arbitration in any court that has established mandatory arbitration program. Provides exception. Prohibits representation by attorneys in referred proceedings.

Requires that decision and award in arbitration proceeding requiring payment of money be in form prescribed for money judgments. Directs that Council on Court Procedures elect from its membership legislative advisory committee.

SECTION 8. (1) The Council on Court Procedures shall elect five persons from among its members to serve as a legislative advisory committee. Two members of the committee shall be judges. Two members shall be members of the Oregon State Bar who are not judges. One member shall be the public member designated under ORS 1.730 (1)(f). The committee shall elect one of its members to serve as chairperson of the committee.

(2) Upon the request of the chairperson of a legislative committee considering legislation that proposes changes to the Oregon Rules of Civil Procedure, the legislative advisory committee established under this section shall provide technical analysis and advice to the legislative committee. Analysis and advice shall be by a majority vote of the legislative advisory committee. The committee shall consult with and consider comments from the full Council on Court Procedures to the extent possible. Analysis and advice under this subsection must be provided within 10 days after the request from the chairperson of a legislative committee.

(3) The legislative advisory committee established under this section may vote to take a position on behalf of the Council on Court Procedures on proposed legislation. If the legislative advisory committee has voted to take a position on behalf of the council, the committee shall so indicate to the legislative committee.

(4) Members of the legislative advisory committee established under this section may meet by telephone and may vote by telephone. Meetings of the committee are not subject to ORS 192.610 to 192.690.

(5) Members of the legislative advisory committee established under this section may

ATTACHMENT A-4

appear before legislative committees for the purpose of testifying on legislation that proposes changes to the Oregon Rules of Civil Procedure.

COUNCIL ON COURT PROCEDURES

RULES OF PROCEDURE

The following are suggested Rules of Procedure to be adopted pursuant to Section 2(1)(b), House Bill 2316. The rules do not cover Council membership, terms, notices, public meeting requirements, voting, or expense reimbursement to the extent that these subjects are directly covered in the statute.

I. MEETINGS

Meetings of the Council shall be held regularly at such time and place fixed by the Council or the Executive Committee. Special meetings of the Council may be called at any time by the Chairman or the Executive Committee. Notice of special meetings of the Council stating the time, place and purpose of such meeting shall be given personally by telephone or by mail to each Council member not less than twenty-four hours prior to the holding of the meeting. Notice of the meetings may be waived in writing by any Council member at any time. Attendance of any Council member at any meeting shall constitute a waiver of notice of such meeting except where a Council member attends the meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called.

All meetings shall be conducted in accordance with parliamentary procedure.

II. OFFICERS, EXECUTIVE COMMITTEE, SUBCOMMITTEES

A. Officers. The Council shall choose the following officers from among its membership: a Chairman, Vice Chairman, and Treasurer. These officers shall be elected for a period of two years at the first meeting of the Council following the adjournment of a regular session of the legislature. The powers and duties of the officers shall be as follows:

1. Chairman. The Chairman shall preside at meetings of the Council, shall set the time and place for meetings of the Council, shall direct the activities of the Executive Director, may issue public statements relating to the Council, and shall have such other powers and perform such other duties as may be assigned to the Chairman by the Council.

2. Vice Chairman. The Vice Chairman shall preside at meetings of the Council in the absence of the Chairman and shall have such other powers and perform such other duties as may be assigned to the Vice Chairman by the Council.

3. Treasurer. The Treasurer shall preside at all meetings of the Council in the absence of the Chairman and Vice Chairman and shall have general responsibility for reporting to the Council on disbursement of funds and preparation of a budget for the Council and shall have such other powers and perform such other duties as may be assigned to the Treasurer by the Council.

B. Executive Committee. The above officers shall constitute an Executive Committee of the Council. The Executive Committee shall have the authority to employ or contract with staff and may authorize disbursement of funds of the Council or may delegate authority to disburse funds to the Executive Director and perform such other duties as may be assigned to them by the Council. The Executive Committee shall set the agenda for each Council meeting prior to such meeting and provide reasonable notice to Council members of such agenda.

C. Subcommittees. The Executive Committee may appoint such subcommittees from Council membership as it shall deem necessary to carry out the

business and purposes of the Council. Such subcommittee shall report to and recommend action to the Council.

III. EXECUTIVE DIRECTOR, STAFF, ADMINISTRATIVE OFFICE, CONTROL OF FUNDS

A. Executive Director. The Council shall select and appoint an Executive Director on such terms and conditions as the Council shall specify.

Under direction of the President, Treasurer and Executive Committee, the Executive Director shall be responsible for the employment and supervision of other Council staff, maintenance of records of the Council, presentation and submission of minutes of the meetings of the Council, provision of required notice of meetings of the Council, preparation and disbursement of Council agenda and receipt and preparation of suggestions for modification of rules of pleading, practice and procedure, and shall have such other powers and perform such other duties as may be assigned to the Executive Director by the Council or the Executive Committee.

B. Staff. The Council shall employ or contract with, under terms and conditions specified by the council or the Executive Committee, such other staff members as may be required to carry out the purposes of the Council.

C. Control and Disbursement of Funds. Funds of the Council shall be retained by the State Court Administrator's office and shall be paid out only by the State Court Administrator as directed by the Council, the Executive Committee, or the Executive Director as authorized by the Executive Committee.

D. Administrative Office. Council shall designate a location for an administrative office for the Council. All Council records shall be kept

in such office under the supervision of the Executive Director.

IV. PREPARATION AND SUBMISSION OF RULES OF PLEADING, PRACTICE AND PROCEDURE

The Council shall consider and propose such rules of pleading, practice and procedure as it deems appropriate at its meetings. Two weeks prior to the regularly scheduled meeting in October, or any meeting in October specified by the Council or the Executive Committee, of a year prior to a regular session of the legislature, the Executive Director shall prepare and cause to be published to all members of the Bar and to the public a notice of such meeting, which shall include the time and place of such meeting and a description of the substance of the rules and amendments which have been proposed, and notice that copies of any specific rules and amendments proposed may be secured upon request from the Administrative Office of the Council. At such meeting, the Council shall receive any comments from the members of the Bar and the public relating to proposed amendments and rules of procedure.

Thereafter, the Executive Director shall distribute to the members of the Council a draft of the tentative final action to be taken to amend or adopt rules of pleading, practice and procedure as directed by the Council, together with a list of statutory sections superseded thereby, and appropriate explanatory comments, in such form as the Council shall direct, and the Council shall take final action to modify, repeal or adopt rules of pleading, practice and procedure and direct submission of such amendments and rules and any list of statutory sections affected thereby, together with explanatory comment, to the legislature before the beginning of the regular session of the legislature.

{For Distribution at Council's 1-13-96 meeting as p. A-9 of Attachment A to agenda thereof.}

To: Chair and Members, Council on Court Procedures

From: Maury Holland, Executive Director M.J.H.

Re: Legal Opinion

1. Question: Do the formal rule-making requirements of the Oregon Administrative Procedure Act ("OAPA," currently ORS 183.310 - 183.400) apply to actions of the Council, in particular adoption or amendment of internal rules of procedure?

2. Answer: No.

3. Discussion: In contrast to many questions of law, the answer to this one can be brief and free from any "ifs, ands or buts." The rule-making procedures mandated by the OAPA are not applicable to any actions by the Council, including internal rule-making on its part, because the Council is not an "agency" for purposes of such procedures. The pertinent definition is set forth in ORS 183.310(1) as follows:

> As used in ORS 183.310 to 183.550 [183.310 - 183.400 being the provisions applicable to rule-making]: (1) "Agency" means any state board, commission, department, or division thereof, or officer authorized by law to make rules or to issue orders, except those in the legislative and judicial branches. [Emphasis supplied.]

While it is perhaps arguable whether the Council is "in" the legislative or judicial branch of state government, it is certainly not "in" the executive or administrative branch or department. Since the rule-making procedures of the OAPA are not applicable to the Council, the latter's procedures are therefore governed by its own organic statute, ORS 1.725 - 1.750. Regarding rule-making by the Council, ORS 1.730(2)(b) provides that "the council shall adopt rules of procedure . . . ," and ORS 1.730(2)(a) provides that "[a]n affirmative vote by a majority of the council is required for action by the council on all matters other than promulgation of rules under ORS 1.735." Thus all that is required for amendment of the existing Rules of Procedure, or for adoption of new rules regulating the functioning and authority of the Legislative Advisory Committee (LAC), is a majority vote of the members at a meeting where a quorum is present.

BURT, SWANSON, LATHEN, ALEXANDER, McCANN & SMITH, P.C.

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December 7, 1995

MEMO TO: Members of Council on Court Procedures

FROM: J. Michael Alexander

RE: Mike Williams' letter of November, 1993
Perpetuation Depositions

This matter has been pending for quite some time. As you may remember, Mike Williams wrote the Council indicating that he had encountered a situation in which the trial court had felt unauthorized to allow a perpetuation deposition during the midst of trial. Mr. Williams' expert had testified in his case in chief, and then had to return to Baltimore. After the Defendant's case, Mr. Williams wanted to recall the physician in rebuttal. The physician was unavailable and Mr. Williams sought to either allow him to testify by phone, or to take a perpetuation deposition. The court allowed the deposition to be taken, although never ruled on whether it would be admissible. The case settled, and the issue was never resolved. Mr. Williams wrote asking if some rule in the ORCP could address this situation by granting the trial court the discretion to allow such procedure. I am enclosing a copy of Mr. Williams' original letter, and a copy of the brief motion that he submitted to the court.

I examined the case of Pope v. Benefit Trust Life Insurance Co., 261 Or 397, 494 P2d 420 (1972). I am attaching a copy of this case. Quite frankly, I am at a bit of a loss to understand how that case would be necessarily controlling. Mr. Williams also referenced ORCP 39 and the 1993 statute relating to telephone depositions, ORS 45.400. (A copy of is attached) ORCP 39(i)(4) requires that "Any perpetuation deposition shall be taken not less than 7 days before the trial or hearing, on not less than 14 days notice, unless the court in which the action is pending allows a shorter period upon a showing of good cause." ORS 45.400 similarly speaks in terms of pretrial motions, and also applies only to trials to the court. Both the statute and the rule seem to contemplate that perpetuation depositions, or telephonic testimony, is only available **if appropriate pretrial motions are made.** The procedural issue thus seems to be whether there should be a method

by which the trial court could entertain a motion for telephone testimony, or a perpetuation deposition, after trial has commenced. Without getting into any substantive issues of the right to jury trial, the right of the jury to view the demeanor of a witness during the course of his testimony, or any other substantive evidentiary questions, it would seem that a procedure at least allowing the court the opportunity to permit a perpetuation deposition is not unreasonable, and could be provided under the rules. I would suggest that a simple amendment to ORCP 39(i)(4) would accomplish this goal. I would suggest the following change:

> **"Any perpetuation deposition shall be taken not less than 7 days before the trial or hearing, on not less than 14 days notice. However, the court in which the action is pending may allow a shorter period for a pretrial deposition, or may allow a perpetuation deposition during trial, upon a showing of good cause."**

We might even add that in determining good cause, the court may consider the factors contained in ORS 45.400(3-6).

Allowing telephonic testimony in a jury trial would appear to involve amended ORS 45.400, which is beyond our scope. I'm not sure if another portion of the rules could cover this situation.

Sincerely,

BURT, SWANSON, LATHEN, ALEXANDER, McCANN, & SMITH, P.C.

/s/ J. Michael Alexander

J. Michael Alexander

JMA/jb
Encls.

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November 24, 1993

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Re: Telephone Testimony of Witnesses During Trial

Dear John, Bill and Mic:

Perhaps more than any other members of the Council, the three of you will appreciate the importance of the issue raised by this letter. Bob Keating and I recently tried a medical malpractice case against each other in Judge Steve Tiktin's courtroom in Bend. The case settled after five days of trial, just before the judge was to rule on the issue I raise in this letter. I know that Judge Tiktin would be willing to give you his views, if the Council decides to pursue this matter.

The, issue was this: I on behalf of the plaintiff, and Bob Keating, on behalf of the defendant doctor, each presented one of the two leading experts in the world on the disease at issue, primary pulmonary hypertension. My expert, Dr. Lewis Rubin from the University of Maryland, flew to Bend from Baltimore on Wednesday, November 3, traveling approximately eight hours with a brief stopover in Indianapolis, change of planes in San

Francisco, and a late arrival without his garment bag in Bend. Then he had to hang around all day on Thursday while we picked the jury and made opening statements. He finally got to testify live before the jury for approximately two hours beginning at 3:30 p.m. He was, I think Bob will admit, extremely impressive and knowledgeable. Immediately after his testimony, we raced him to the Redmond airport so that he could catch a plane back to Portland, where stayed overnight in a hotel, because he had to fly out early the next morning for Atlanta where he was presenting three papers at the annual meeting of the American Heart Association.

On the fourth day of trial, on Wednesday, November 10, Bob Keating called his counter-expert, the co-author with Dr. Rubin of the main reference work on primary pulmonary hypertension, another very impressive and knowledgeable expert doctor from the University of Illinois, Dr. Stuart Rich. Although he and Dr. Rubin agreed on most points, Dr. Rich raised two points which were not covered in Dr. Rubin's testimony, either on direct or cross, and to which I felt I had to have Dr. Rubin respond to in order get a fair result in the case.

To give you the import of the matter, my client, who was sitting beside me, was expected to die within 3 - 12 months by all the experts who testified, unless she had a lung transplant. The main issue of causation was whether or not she would have responded to drug therapy if the defendant doctor had read an x-ray report seven years earlier that diagnosed her disease. Her disease went undiagnosed for seven years, during which time she worsened considerably. She was an extremely attractive plaintiff from a long-time and well respected family in the Bend area, going up against a local doctor who was also very well respected. It was clearly an important case.

The trial was going to conclude on Friday morning. Thursday, November 11 was a court holiday. I phoned Dr. Rubin, and learned there was no way I could get him to come back out live to testify on Friday. He had patients flying in from all over the world to Baltimore, and other commitments, and so forth. He was willing and able to testify either live by telephone over a speaker in the courtroom on Friday morning (the courtroom was so equipped), or by perpetuation deposition on Thursday. Bob Keating objected to either approach, and Judge Tiktin initially ruled that he had no discretion to permit live testimony during trial over such an objection, under the case of Pope v. Benefit Trust Life, 494 P2d 420 (1972)(enclosed) and under the 1993 statute allowing telephone testimony in trials by the court without a jury.

I argued that that case did not apply to this situation, that we should be able to at least take a perpetuation deposition for rebuttal under ORCP 39I, and that Keating had waived his objection to such testimony by telephone in rebuttal because I had mentioned it off the record in front of the judge a couple of days earlier and Keating had not objected.

The judge did order Bob to attend a telephone deposition of the proffered rebuttal testimony on Thursday morning, which was done. The case settled that afternoon, so the judge never got to rule as to whether I could read the testimony to the jury, or play the audiotape.

We prepared a short brief on this issue, which we were going to submit to the judge on Friday morning, a copy of which is also enclosed.

During the perpetuation telephone deposition, I elicited testimony from Dr. Rubin about the difficulty, in fact, impossibility, of getting him to come back out for live rebuttal testimony. A copy of the rebuttal deposition is also enclosed.

I think in this situation a party should have the absolute right to have the witness testify either live by telephone in the courtroom, or by telephonic deposition. The jury has already seen the demeanor of the witness and sized him up. The expense and time involved in getting such an important expert witness to return for 20 minutes of testimony to a remote part of the country is outrageously high, and in many cases, such as in my own, a worthy claimant simply cannot do it.

The broader issue of when telephonic testimony should be allowed other than in rebuttal situations where the witness has already appeared, is more complex, but I think in the case of an expert witness who has already appeared live before the jury, such rebuttal testimony by telephone should be permitted as a matter of right.

I am certain that any federal judge would have permitted such testimony, and Judge Tiktin would have permitted it if he believed he had authority to do so.

Don't you agree that this is something that Council on Court Procedures should take up?

Yours truly,

WILLIAMS & TROUTWINE, P.C.

Michael L. Williams

MLW/co
\occ\lr\otla\cocp.c02
Enclosures

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF DESCHUTES

CHERI NICHOLS, Plaintiff, vs. WILLIAM R. LEE, M.D., Defendant.	Case No. 93CV0147ST PLAINTIFF'S MOTIONS

MOTIONS

Plaintiff moves the court for an order permitting the reading of the perpetuation deposition of Dr. Rubin in rebuttal to Dr. Rich. In the alternative, plaintiff moves to strike the testimony that was beyond the scope of cross examination and to instruct the jury to ignore the testimony.

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POINTS AND AUTHORITIES

1. Facts.

Dr. Rich testified about plaintiff's vomiting after being given very high doses of nifedipine in 1992. He gave this testimony on redirect over the objection that it was beyond the scope of cross examination. The jury might infer from this discussion of vomiting that plaintiff could not have tolerated the drug in 1985. This testimony could decide the case, and needs to be rebutted. The entire effort of plaintiff in this litigation, and her future turns on the decision on whether to allow plaintiff an opportunity to rebut Dr. Rich's improper and misleading testimony.

2. **Primary goal: just, speedy and inexpensive determination of every action.**

The rules of civil procedure "shall be construed to secure the just, speedy and inexpensive determination of every action." ORCP 1B (Emphasis added)

The role of the court is further defined on OEC 611 which states, in part:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to make the interrogation and presentation effective for the ascertainment of truth, avoid needless consumption of time and protect the witnesses from undue embarrassment.

The comment continues:

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> . . . The ultimate responsibility for the effective working of the adversary system rests with the trial judge. . . .

Emphasis added.

3. The court has discretion to allow Dr. Rubin to testify (again) perpetuation deposition.

ORCP 39I authorizes perpetuation depositions. When the depositions may be taken as a matter of right is set forth in 39I (4), which states:

> Any perpetuation deposition shall be taken not less than seven days before the trial or hearing on not less than 14 days' notice, unless the court in which the action is pending allows a shorter period upon a showing of good cause.

The court fully understands that good cause exists in this case. The issue raised by the defense is whether it is proper to allow a perpetuation deposition after the trial has commenced.

The plain language of the rule permits a deposition at a time other than more than "seven days before the trial."

We found no Oregon case law amplifying the plain language, but the prime directive in ORCP 1 requires the court to construe the rule in a manner to effect a "just, speedy and inexpensive determination" of the action.

Other jurisdictions have recognized that a court has discretion to permit depositions during trial.

In Knox v. Anderson, 21 FRD 97 (D. Hawaii, 1957), a party sought a perpetuation deposition during a lengthy trial recess.

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The court held:

> . . . I am satisfied that a deposition may be taken during a trial not as of right but within the discretion of the Court.

21 FRD at 99.

In Wieneke v. Chalmers, 73 NM 8, 385 P2d 65 (1963) the court allowed a discovery deposition after the commencement of trial. On appeal, the New Mexico Supreme Court found "no merit" in the argument that the court abused its discretion in interrupting the trial so as to permit appellee to take appellant's deposition. It stated:

> [The Rule] in no way limits the taking of depositions to any period prior to commencement of trial. The rule should be construed so as "to secure the just, speedy and inexpensive determination of every action," and if in the sound discretion of the trial judge a trial should be continued so as to permit additional discovery. . .

385 P2d at 68.

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4. Conclusion

Pursuant to ORCP 31 and ORCP 1, the court should permit the rebuttal testimony of Dr. Rubin to be offered through a perpetuation deposition.[1]

Date: November 23, 1993

WILLIAMS & TROUTWINE, P.C.

Jeffrey S. Merrick OSB # 84298
Attorneys for Plaintiff

NICHOLS\TRMM

[1] By making this motion, plaintiff does not waive her right to appeal in the court's ruling on 1993 Or Laws ch. 425. That statute gives a right to telephone testimony under certain circumstances in nonjury trials. It does not address the court's authority to make reasonable and appropriate rulings in jury cases.

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Argued January 28, affirmed March 9, 1972

POPE, *Respondent*, *v.* BENEFIT TRUST LIFE INSURANCE COMPANY, *Appellant*.

494 P2d 420

Action under group accident and health policy issued by defendant to railroad for monthly disability benefits for injured employee, wherein defendant contended that amputation of employee's fingers which were frostbitten during period of extreme cold weather was not result of accidental cause within policy. The Circuit Court, Multnomah County, James M. Burns, J., entered judgment for plaintiff and defendant appealed. The Supreme Court, Tongue, J., held that where railroad employee had ordinarily been able to have some heat while clearing switches of ice and snow and foreman ordinarily came by in middle of shift and, if weather was bad enough, took employee to shack where he could get warm, but at time employee's fingers were frostbitten, foreman was on vacation and employee had no way to warm his hands except by putting them next to his body, employee's injuries arose from "accidental cause" within group accident and health policy providing benefits for disability resulting from such.

Affirmed.

O'Connell, C. J., specially concurred in opinion in which Holman, J., concurred.

Insurance—Employe's injuries arose from "accidental cause" within group policy

1. Where railroad employee had ordinarily been able to have some heat while clearing switches of ice and snow and foreman ordinarily came by in middle of shift and, if weather was bad enough, took employee to shack where he could get warm, but at time employee's fingers were frostbitten, requiring amputation, during period of extreme cold weather, foreman was on vacation and employee had no way to warm his hands except by putting them next to his body, employee's injuries arose from "accidental cause" within group accident and health policy providing benefits for disability resulting from such.

Evidence—Deliberate testimony held as judicial admission

2. When a party to action or suit stipulates or testifies deliberately to concrete fact, not as matter of opinion, estimate, appearance, inference, or uncertain memory, but as a considered circumstance of case, his adversary is entitled to hold him to it as a judicial admission.

Evidence—Not barred from recovery by judicial admissions

3. In action on group health and accident policy by plaintiff whose fingers had been amputated as result of being frostbitten

while working, plaintiff was not barred from recovery because of claimed "judicial admissions" made in deposition to effect that conditions at time of frostbite were not different from what he had expected to find and that nothing unusual or unexpected had occurred while he was working, where trial judge could have found that claimant understood that "conditions" referred to weather conditions, not to unexpected absence of axe for cutting ties for fire, warming shack and car with heater.

Evidence—Admission does not preclude recovery of disability benefit

4. Fact that railroad employee seeking monthly disability benefits under defendant's group accident and health policy for amputation of fingers which had been frostbitten admitted that he had had access to telephone and could have called for assistance did not preclude recovery, where it appeared that he may have understood that telephone was only to be used in event of emergency and he may not have realized that his hands were being frozen until too late.

See liability under accident policy for injury from freezing or exposure to cold.
44 Am Jur 2d, Insurance § 1342.
4 ALR3d 1177.
CJS, Insurance § 753.

IN BANC

Appeal from Circuit Court, Multnomah County.

JAMES M. BURNS, Judge.

Frank H. Lagesen, Portland, argued the cause for appellant. With him on the briefs were Maguire, Koster & Cosgrave and Walter J. Cosgrave, Portland.

Keith Burns, Portland, argued the cause for respondent. With him on the brief was Jane Edwards, Portland.

AFFIRMED.

TONGUE, J.

This is an action to recover monthly disability benefits under a group accident and health insurance policy issued by defendant to the Union Pacific Rail-

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road Employees Hospital Association to provide such benefits to Union Pacific employees for disability "as the result of bodily injury arising from accidental cause." Defendant appeals from a judgment awarding such recovery to plaintiff, after a trial before the court, without a jury.

Plaintiff's fingers were frostbitten, requiring amputation, as the result of exposure to cold while employed by the Union Pacific Railroad to keep switches clear of ice and snow during a period of extreme cold weather on December 30 and 31, 1968.

Defendant contends that the words "accidental cause" mean the same as "accidental means" and that this court is committed to the distinction between liability under such insurance policies for injuries by "accidental means" and non-liability for injuries which are the unexpected results "of the doing by the plaintiff of intentional acts in which no mischance, slip or mishap occurred," quoting from *Chalfant v. Arens et al*, 167 Or 649, 656, 120 P2d 219 (1941), and also citing *Finley v. Prudential Ins. Co.*, 236 Or 235, 246, 388 P2d 21 (1963). Thus, defendant contends that plaintiff's "exposure was not due to any mishap, slip, mischance or unexpected or unintended event" and that his injury "developed as a result of his intended and knowing exposure to the extreme cold and not by reason of 'accidental cause'," with the result that there is no right of recovery under the policy.

The distinction between injury by "accidental means" and "accidental results from intended means," although recognized by this court in *Chalfant v. Arens et al, supra*, and in *Finley v. Prudential Ins. Co., supra*, has been the subject of increasing criticism in

recent years.[4] The rationale of those decisions which reject such a distinction is, in essence, that the term "accidental means" must be given the meaning which the ordinary purchaser of a policy of insurance places upon that term when he buys a policy[5] (i.e., the reasonable expectation and purpose of the ordinary purchaser of such a policy),[6] "with the help of the established rule that ambiguities and uncertainties are to be resolved against the company,"[7] and that "the proposed distinction will not survive the application of that test."[8] Such a rationale is not inconsistent with

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[4] According to Richards on Insurance 734, § 216 (5th ed 1952):

"This attempted distinction between 'accidental means' and 'accidental injury or death,' as a rationale for a decision in a given case, has not been followed by a majority of the courts today. Ever since Justice Cardozo's dissent in the Landress case (291 US 491, 78 L ed 934, 54 S Ct 461), bench and bar have demonstrated their distrusts for such logomachy."

At the least, an increasing number of jurisdictions have now rejected or repudiated that distinction. See 10 Couch on Insurance 2d 53, § 41.30 and cases cited therein. See also Vance on Insurance, 949, § 181 (3d ed 1951), and Annot., 166 ALR 469 (1947).

[5] Cf. Finley v. Prudential Ins. Co., 236 Or 235, 245, 388 P2d 21 (1963).

[6] See 166 ALR, *supra* note 1, at 475.

[7] See dissent by Cardozo, J., in Landress v. Phoenix Mut. L. Ins. Co., 291 US 491, 499, 78 L ed 934, 938, 54 S Ct 461, 464 (1934).

[8] Idem. As further stated by Cardozo, J.:

"When a man has died in such a way that his death is spoken of as an accident, he has died because of an accident, and hence by accidental means."

Among other recent cases to the same effect, see Beckman v. Travellers Insurance Company, 424 Pa 107, 225 A2d 532 (1967), and Knight v. Metropolitan Life Insurance Company, 103 Ariz 100, 437 P2d 416 (1968).

It is also contended that if the insurance company wishes that the terms "accident" and "accidental means" shall have different meanings the contract of insurance should give warning of that distinction and should expressly exclude specific types of non-covered risks. See 166 ALR, *supra note 1*, at 476 and 478.

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the approach taken by this court in recent decisions involving the interpretation of insurance policies.[3]

Under the facts of this particular case, however, it is not necessary for this court to re-examine this distinction. This is because we find, after reading the entire record in this case, that there was sufficient evidence to support the decision of the trial court that plaintiff's injury resulted from an "accidental cause" because, under the particular facts of this case, it cannot properly be said that the injury to plaintiff's hands "occurred by reason of the doing by the plaintiff of intentional acts in which no mischance, slip or mishap occurred"—to apply the test contended for by the defendant in this case.[4]

1. Plaintiff was 64 years of age, with an eighth grade education. He had been employed by the Union Pacific for 19 years in "maintenance of way," including the keeping of switches in repair and operation. During previous winters he had also been assigned to keep switches clear of ice and snow.

Ordinarily, however, he would be taken to his work by rail on a "Sunshine motor car," after picking up

[3] Salisbury v. John Hancock Mut. Life, 259 Or 453, 486 P2d 1279 (1971). See also Gowans v. N.W. Pac. Indemnity Co., 93 Adv Sh 730, 731, — Or —, 489 P2d 947 (1971); Hardware Mut. Cas. v. Farmers Ins., 256 Or 599, 609, 474 P2d 316 (1970); Jarrard v. Continental Casualty, 250 Or 119, 126, 440 P2d 858 (1968); and Ramco, Inc. v. Pac. Ins., 249 Or 666, 674, 439 P2d 1002 (1968). In addition see Finley v. Prudential Ins. Co., 236 Or 235, 249, 388 P2d 21 (1963), quoting with seeming approval from N.W. Commercial Travellers Association v. The London Guarantee and Accident Co., 10 Manitoba Reports 537.

[4] Under that test, as stated in Chalfant v. Arens et al, 167 Or 649, 120 P2d 219 (1941), at 657, an injury or death does not result from "accidental means" where "an unusual or unexpected result occurs by reason of the doing by the insured of an intentional act, where no mischance, slip, or mishap occurs in doing the act itself * * *."

tools at "Russell Street." These tools included an axe, among other tools. As a result, he was "ordinarily able to have some heat on the job" during periods of extreme cold weather by "cutting old ties and burning them."

In addition, the practice was that the foreman would come by in the middle of the shift and "if the weather is bad enough, they take you to the shack [nearly two miles away] where you can get warm."

There was also evidence that on some occasions the men would drive directly to the job site, rather than to "Russell Street," and that on such occasions "the first man" picked up the tools and "carried them down in his car." There was also evidence that on such occasions more than one employee would be assigned to such work and that one of them would bring his car to the area where the men might sit to eat lunch, with a car heater to get warm.

On December 30, 1968, however, none of these things occurred. Plaintiff was on vacation at that time and was called by his foreman to go to work. The foreman told him to dress warmly and he knew from the radio that "the temperature was going to be down to six above zero." Accordingly, he put on "lots of clothes," including rubber gloves with an inner lining. He had "worked that junction" (St. Johns junction) many times before. On this occasion, however, he was told by his foreman to go directly to St. Johns junction, rather than to go to "Russell Street" to pick up tools (including an axe) and to be transported to the junction on the "Sunshine motor car." Plaintiff intended to take his car (which he could have used to eat his lunch and get warm), but when he tried to get it "out" he was unable to do so, so arranged with a friend to drive him to work.

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When he arrived at the junction on December 30, 1968, however, there was no axe on the job and the only tools there were a broom and a shovel. In addition, the only other man on the job then left, with his car. As a result, plaintiff was left to work alone.

Plaintiff's duties on that day were to keep four switches in a "two-block area" clear of snow and ice and he worked eight hours in doing so, from 4 o'clock p.m. until midnight. During that period "the wind was howling and it continued snowing." The temperature was between eight and 14 degrees above zero. The wind averaged 23 miles per hour, with gusts up to 30 miles per hour, and it snowed five inches that day.

There were some "old ties" available for the purpose of building a fire to keep warm, but he was unable to build such a fire because he had no axe with which to cut the ties to start such a fire, although he had expected to find an axe among the tools when he arrived. Plaintiff tried to start a fire with some fusees given to him by the crew of a passing train, but was unable to do so.

That night the foreman did not come by and take him to the "shack" at the Albina yard to get warm, as he usually did when "the weather was bad enough," as it was that night. As previously stated, since plaintiff had been unable to start his car and was working alone, he had no car to get into to get warm with a car heater.

Having no fire and no "shack" or car to get into, plaintiff also had no place to eat his lunch, for such warmth and energy as it might provide. As a result, he was exposed to the wind, snow and cold for the entire eight hours, working with a broom and shovel to keep the switches clear of ice and snow. During that

time, his hands became cold and he had no way to warm them except by putting them next to his body.

When plaintiff arrived home at 12:30 a.m. his hands were cold and he felt a "kind of sting a little bit on the ends." He put them into cold water and rubbed them until they "seemed to act normal" and he went to bed "around two o'clock." His hands were still cold, however, and he "couldn't get [them] warm."

At 5:15 a.m. plaintiff got up to go back to work. At 7:30 a.m. on December 31, 1968, his friend drove him back to work. Two other men were also assigned to work with him for most of that day. They also had axes that day and were able to start small fires, which gave "not very much" heat and kept going out. They had their cars, however, so that they were able to eat their lunches in the cars.

As a result, plaintiff was able to warm his hands with the car heater. During that day, however, his hands began "to sting on the ends" again. They also "swelled up" several times and "turned kind of grayish-like."

He did not work the next day. The following day he went to a doctor, who sent him to a hospital, where his fingers were amputated.

Based upon this evidence the trial court concluded that plaintiff's injuries "arose from accidental cause within the meaning of his contract of insurance with defendant." We agree.

This is not a case of an unexpected result which "occurred by reason of the doing by the plaintiff of intentional acts in which no mischance, slip or mishap occurred," as in *Chalfant v. Arens et al, supra.* On the contrary, the absence of the expected axe with which a warming fire could have been made, the

failure of the foreman to take plaintiff to a warming shack as was usually done in bad weather, and the absence of a car with a heater for lunch were all unexpected "mischances" or "slips," if not "mishaps." They were also "unexpected" and "unintended events" which contributed as concurring causes to the freezing of plaintiff's hands.

As a result, it is our opinion that under the facts of this case the trial court was correct in holding that plaintiff's injury was a "bodily injury arising from accidental cause."⊙ After all, in *Finley v. Prudential Ins. Co., supra,* in which this court recognized the distinction between "accidental means" and "accidental results from intended means," we nevertheless held (at p 245) that:

> "• • • It is our duty to place upon the word 'accident' its common meaning—the meaning which a purchaser of a policy of accident insurance places upon that word when he buys a policy."

Defendant also contends that plaintiff is barred from recovery because of what are claimed to be "judicial admissions" made on deposition, as follows:

> "Q. Were the conditions out there in any way different from what you expected to find?
> "A. No.
>
> "Q. While you were working, did anything unusual or unexpected occur out there?
> "A. No."

This is not a case such as *Morey, Administrator v. Redifer et al,* 204 Or 194, 264 P2d 418, 282 P2d 1062 (1955), as relied upon by defendant.

⊙ For somewhat similar cases involving liability under accident insurance policies for exposure to cold, see Annot., 4 ALR3d 1178 (1965).

2. The rule as stated in that case (at p 214) is as follows:

> "• • • When a party to an action or suit stipulates or testifies deliberately to a concrete fact, not as a matter of opinion, estimate, appearance, inference, or uncertain memory, but as a considered circumstance of the case, his adversary is entitled to hold him to it as a judicial admission. If no mistake is claimed or shown, the party so stipulating or testifying to a concrete fact cannot have the benefit of other evidence tending to falsify it."

In this case, the trial judge could have properly found that plaintiff, who was 64 years of age, with an eighth grade education, understood from the question that the reference to "conditions" had reference to weather conditions, not to the unexpected absence of the axe, warming "shack" and car with heater. This is supported by the fact that when first asked if *"conditions"* were different from what he expected to find, plaintiff answered, "I thought maybe it would cease."

Similarly, the trial judge could have reasonably found that when asked: "Did anything unusual or unexpected *occur* out there?" plaintiff understood the question to refer to *affirmative occurrences,* rather than to the unexpected *absence* of the axe, warming "shack" or car with heater, which were not "occurrences" in that sense.

3. Accordingly, the trial judge could have properly found that these answers by plaintiff to these questions on deposition did not constitute "deliberate testimony to a concrete fact" as a "considered circumstance of the case," and without mistake or misunderstanding, within the meaning of *Morey, Administrator v. Redifer, supra.* Indeed, the record on appeal does

not reveal whether or not at the time of trial defendant claimed these answers to be binding as judicial admissions, so as to call upon plaintiff to claim mistake or misunderstanding at that time.

4. Finally, defendant contends that plaintiff admitted that he had access to a telephone and could have called for assistance. From his testimony, however, the trial judge could have properly found that it was plaintiff's understanding that the telephone was only to be used in the event of an emergency and, in addition, that he did not realize that his hands were being frozen until too late.

For all of these reasons, we affirm the judgment of the trial court.

O'CONNELL, C. J., Specially Concurring.

I reach the same result as the majority but by different reasoning.

The majority opinion, following the previously adopted distinction between accidental means (cause) and accidental result (effect), finds that the means producing the injury were accidental.

Assuming that the distinction provides a workable basis for classifying those injuries which are covered under accident insurance policies and those that are not, I do not think that we have any basis for deciding whether the events leading up to the injury in this case were "accidental."

The majority arrives at its conclusion by first defining "accidental" in terms of the unexpectedness of the occurrence producing the injury. This does not advance the analysis of the problem because it attempts to define the word "accidental" by reference to another word (unexpectedness) which is at the

same level of abstraction. I doubt that all unexpected occurrences from which an injury flows would be commonly understood as "accidental." I cannot prove that this is so because there is no empirical data indicating how the term "accidental" is used and understood in common parlance.

The adjudicated cases demonstrate that the courts, at least, do not agree on what is embraced within the "accidental" category. The confusion springs in large part from the differences in opinion as to what constitutes an "unexpected" event or occurrence. Whether an event leading up to an injury is to be regarded as unexpected or expected will depend upon the frequency with which events of that kind commonly occur in similar situations. If the event is reasonably foreseeable, it is not an accidental event that the injury ensuing is not an injury by accidental means, adopting the formula allowing recovery only if the cause is accidental.

In the present case the unexpected events relied upon by the majority are the absence of the axe, the failure of the foreman to take plaintiff to a warming shack, and the absence of a car with a heater during lunchtime. All these, it may be conceded, were unexpected events, but the question is whether they are the type of unexpected events which would characterize them as accidental according to the common understanding of that term. Personally, I do not know what that understanding might be. It does not strike me as unusual that the axe and the car with a heater were not at the work site, or that plaintiff's transportation was delayed. It would seem that if these events were "accidental means," then almost any circumstance can be transformed into an accident within the meaning of an accident insurance policy.

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Thus, I would assume that the court would hold that if the insured suffered a frostbite injury because the temperature dropped below that which he anticipated, or if he failed to dress warmly enough, or was exposed to the cold for a longer period than anticipated the injury would result from accidental means.

I do not say that the injury suffered by plaintiff was not accidental; I simply say that I do not know and I do not think that the majority of the court stands in any better position.

I concur in the result on the ground that when an insurance contract contains an ambiguous term which we have no way of resolving, the insurance contract is to be construed against the insurer.

I would add that I do not think that the distinction between accidental means and accidental results is workable and, therefore, I feel that we should abolish it. See the dissent by Cardozo, J., in *Landress v. Phoenix Mut. L. Ins. Co.*, 291 US 491, 54 S Ct 461, 464, 78 L Ed 934, 938 (1934); Note, Insurance-Accidental Means v. Accidental Death, or Tweedledum v. Tweedledee, 46 N C L Rev 178 (1967); Note, 36 Ind L J 376 (1961). I recognize that even though the distinction is abolished the problem of drawing the line between injuries that are accidental and those that are not still remains. But unless insurers word their policies more clearly they will have to bear the burdens arising from their own ambiguities. Ultimately, of course, these burdens will be shifted to the purchasers of insurance in the form of higher premiums.

HOLMAN, J., concurs in this opinion.

November 3, 1995
{Revised Dec. 12, 1995}

To: Judge Marcus
Justice Peterson ✓

From: Maury Holland M.J.H.

Re: Justice Peterson's Suggestions of Amendments to ORCP 21

Thanks to both of you for copying me on your correspondence regarding this matter. Allow me to horn in on your early exchange of views with some thoughts of my own.

1. In his October 17 memo clarifying his proposal, Justice Peterson seems to limit his suggested amendment to waiver of the defenses of insufficiency of summons or service unless raised by pre-answer motion, but with no such waiver attaching to the defenses of lack of personal or subject matter jurisdiction. I agree with his dropping any idea about waiving objection to subject matter jurisdiction, since the tradition that such objection is non-waivable is so strongly entrenched and probably makes continuing good sense.

What puzzles me, however, is his proposed amendment to ORCP 21 G(1) [§ 6 of his memo], which seems to assume that the defenses of insufficiency of summons or service could be waived, while preserving the defense of lack of personal jurisdiction provided it is raised in the answer. The difficulty is that sufficient summons and service are tied to personal jurisdiction by ORCP 4 ["A court of this state having jurisdiction of the subject matter has jurisdiction over a party served in an action pursuant to Rule 7 under any of the following circumstances."} To accomplish Justice Peterson's purpose, there would probably have to be an additional clarifying amendment to the effect that, unless objection to sufficiency of summons or service is raised by pre-answer motion, lack of personal jurisdiction could not thereafter be shown by showing insufficiency of summons or service. This would allow lack of personal jurisdiction to be shown, if raised in the answer, on grounds not implicating insufficiency of summons or service, such as absence of "minimum contacts." Were the Council to conclude that insofar as Justice Peterson's suggestion relating to insufficiency of summons or service has enough merit to warrant an appropriate amendment, it would also have to decide whether an additional amendment along the lines I suggest would be worth the risk of possible confusion, etc.

2. Justice Peterson raises a concern about the damage to the law if defendants were to hold back the defenses of lack of personal jurisdiction, or insufficiency of summons or service, by by-passing a pre-answer motion, merely tucking those defenses into their answers, waiting until the limitations period has expired, and then springing them as late as trial. However, it appears

to me that ORS 12.220[1] would provide an adequate safeguard against this stratagem, whether employed deliberately or otherwise.

This badly worded statute seems on its face to provide that a plaintiff can lose a lawsuit and then bring it again within one year of the dismissal in the trial court or reversal on appeal. Literally, this is of course true, but the new action would presumably be subject to the additional defense of res judicata; i.e., claim preclusion. Without having read all the cases interpreting this provision, it is pretty clear that its intended application is to cases where an action, commenced within the limitations period, is dismissed, or reversed on appeal, for lack of subject matter or personal jurisdiction, or presumably any other basis not going to the merits, such as insufficiency of summons or service.

Statutes similar to ORS 12.000 are nearly universal among other states, and all derive from the medieval English statute of "jeo faile," an Anglo-Norman word derived from chess. If I am reading 12.220 correctly, this particular concern of Justice Peterson appears misplaced, although that certainly does not mean that some or all of what he proposes is necessarily not worthwhile

3. The concern Justice Peterson raises about the danger of factual issues relating to personal jurisdiction, or insufficiency of summons or service, possibly going to juries has caught my attention in the course of working on a book he and I are co-authoring, which will of course put all procedural problems in this state to rest. There are some old cases, which I am having a research assistant run down, which seem to suggest, while not squarely holding, that in cases tried to juries, "genuine issues of material fact" relating to sufficiency of summons or service, venue, or personal jurisdiction, must be decided by the jury unless jury trial has been waived. This is nutty, and I believe is at odds with how the scope of the civil jury's fact-finding authority is understood in federal courts, under the seventh amendment, and how it is understood in other states having the constitutional right of trial by jury in civil cases. Elsewhere, I think it is universally understood that the province of civil juries is limited to deciding facts relating to the merits of substantive claims and defenses when these are contested, and does not extend to facts

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[1]"Commencement of new action within one year after dismissal or reversal. Except as otherwise provided in ORS 72.7250 [relating to contracts of sale under UCC], if an action is commenced within the time prescribed therefor and the action is dismissed upon the trial thereof, or upon appeal, after the time limited for bringing a new action, the plaintiff, . . . may commence a new action upon such cause of action within one year after the dismissal or reversal on appeal; however, all defenses that would have been available against the action , if brought within the time limited for the bringing of the action, shall be available against the new action when brought under this section."

relevant to what used to be called "pleas in abatement."

I have asked my research assistant to track down these old cases, and also to examine the debates at the Oregon constitutional convention, to determine whether it was ever seriously intended that, in this state, civil juries should determine contested facts relating to jurisdiction, service of summons, or venue. I hope she finds that it was not. The reason the issue doesn't seem to surface in recent times is that, as far as published appellate decisions reveal, the facts relating to these "pleas in abatement" are sufficiently uncontroverted as to be determined by the trial court judge by way of OCRP 47 summary judgment. One cannot, however, safely assume that the facts relevant to jurisdiction, sufficiency of summons or service, etc., will alway be uncontested. Justice Peterson gives one example, where there might be conflicting evidence on whether the person on whom substituted service is made was a "resident" of defendant's place of abode. Other examples, relevant to personal jurisdiction, are whether an out-of-state defendant had sufficient minimum contacts with Oregon as to be amenable to jurisdiction, or whether a collision between an Oregonian and an Idaho motorist occurred on one side of a state boundary or the other. Can you imagine a trial judge having to define "minimum contacts" for a jury, and instructing them to return a verdict for defendant if it finds they were not present? At the least this would require a special verdict in order to know whether a defendant's verdict was on the merits or on a finding of lack of jurisdiction. The idea of doing this seems preposterous.

If this confused assumption about the scope of a civil jury's fact-finding authority does exist, it might explain another foible of Oregon practice which I hope to persuade Justice Peterson should be pointed out in our book in the hope that someday the Oregon Supreme Court will tidy it up. That is the apparently invariable practice of Oregon trial judges, when granting a judgment of dismissal for lack of personal jurisdiction, or insufficiency of summons or service, to characterize such disposition as "summary judgment." This might not do much, if any, practical harm, because everyone seems to understand that, despite the judgment granting dismissal being called "summary judgment," it is not on the merits and hence is without prejudice. I believe federal practice and usage are more precise and better, because FRCP 56 makes reasonably clear that the term "summary judgment" refers to a judgment determining one or more substantive claims or defenses on the basis of there being no "genuine issue of material fact" regarding them. In other words, when a judge grants what is properly called summary judgment, he or she is deciding issues of law and issues of fact that would otherwise go to the jury if there were a genuine issue as to them. Thus, a grant of summary judgment, properly so called, should be understood to be a merits disposition, with prejudice. If a judge grants a motion to dismiss for lack of jurisdiction, or insufficiency of service or summons, that is obviously not a merits judgment, and should be characterized simply as a judgment of dismissal for lack of jurisdiction, or whatever, and thus without prejudice.

As mentioned, this confusion, if it exists, probably does no practical harm as long as any subsequent litigation involving one of these spurious "summary judgments" occurs in Oregon.

However, I have seen cases from other states where the preclusive effect of a judgment by a court of the state of rendition (but not Oregon in any that I have found) has engendered doubt and confusion when that judgment is invoked, usually by way of claim preclusion, in another state. If a judge in some other state were confronted with one of these spurious "summary judgments" by an Oregon court, he or she might be in doubt whether to accord it claim preclusion effect, especially if the Oregon judgment did not specify whether it was with or without prejudice. If my analysis is correct, this is again nothing the Council can do anything about, but possibly the Oregon Supreme Court will be persuaded to clarify this issue when the occasion is ripe.

Come to think of it, mischaracterizing dismissals for lack of jurisdiction and the like as "summary judgments" could also breed confusion of a different sort. For example, if a trial court grants a motion to dismiss for lack of jurisdiction, insufficiency of summons or service, etc., and in the course of doing so, must determine issues of fact, the appellate court should not review such findings of fact as it would a grant of summary judgment properly so called. As you know, the standard of review where summary judgment has been granted is whether there was any "genuine issue of material fact." Only if that stringent standard was met may a grant of summary judgment be affirmed. However, when a trial judge acts as a fact-finder in connection with motions to dismiss for lack of jurisdiction, insufficiency of summons or service, or other matters not going to the merits, the judge is entitled and obligated to find facts even if the evidence is contested in the sense of supporting a finding either way. When that is the case, the standard of appellate review of the trial judge's finding of facts should be governed by ORCP 62 F; i.e., the same as the standard of review applied to special findings in bench trials. A possible complication here, however, is that ORCP 62 seems to apply only to bench trials, where a jury is waived. This means that, in cases where jury trial has not been waived, but where the trial court judge functions as trier of fact respecting controverted facts relevant only to lack of personal jurisdiction, insuffiency of summons, or insufficiency of service, the judge would be under no obligation to make special findings even if requested. I don't know whether this would present any sort of practical problem. As far as I know, U. S. District Court judges are not required to make special findings in comparable situations. We know from our experience last biennium regarding attorney fee awards how much resistance there would likely be to any amendment of the ORCP that would expand the obligation of trial judges to make special findings, even upon request.

cc: Chair and Members, Council on Court Procedures

Hon. Edwin J. Peterson
School of Law
245 Winter Street SE
Salem OR 97301

October 27, 1995

Re: ORCP 21A and G

Dear Justice Peterson:

I regret that I've not been able to respond to your memorandum sooner. And, if I am responding to an inconvenient address, please let me know. Unfortunately, the envelope was separated from the memo by the time it reached me, so I had no return address to use.

There was some discussion of your November 5, 1995, at the Council's October 14, 1995, meeting. After the discussion, which I will summarize below, John McMillan volunteered that he was planning to see you soon and that he would be willing to convey the substance of our discussion to you then. After the meeting, John mentioned to me that he might suggest that you and I talk since he wasn't confident that he understood the discussion completely as a non-attorney. I think I said something about John being too modest, and I am happy to be your contact on this issue, but the Council did not delegate any role to me in any formal sense.

My sense of the discussion was that those who spoke on your suggestion agreed:

1. Yes, jurisdictional questions should almost always be resolved at the earliest feasible opportunity; but
2. The problem of improperly delayed resolutions of jurisdictional disputes is extremely rare, and in any event not frequent enough to justify a rule change;
3. Requiring the defense to be raised by motion will probably generate frivolous motions because defense counsel sometimes need substantial discovery to determine a fact essential to the jurisdictional issue and, if deprived of the simple device of including a short affirmative defense in an answer, would have to file the motion to preserve the issue even when discovery and informal measures would otherwise soon resolve the issue.

4. If counsel cannot resolve the jurisdictional issue informally, existing motions under ORCP 21A (supplemented, if necessary by "affidavits and other evidence") or ORCP 47 are adequate to resolve those jurisdictional questions which should be resolved prior to trial. My sense was that those who spoke were not particularly offended by the burden of proof problems you described.
5. New sanctions available under SB 385 should enable counsel to minimize the harm done by frivolous jurisdictional disputes.

My sense is also that the Council certainly did not reject your suggestion, but that the issues just mentioned need to be addressed before anything approaching a supermajority would favor changes such as those you suggest. Plaintiffs' members did not seem to disagree with these points, and spoke in favor of some of them.

I would be happy to discuss this further, and I will keep the Council posted by sending copies to our Executive Director. The council decided to schedule meetings on the second Saturday of each month starting December 9, and you may wish to discuss a more formal presentation with Maury.

Sincerely,

Michael H. Marcus

Edwin Peterson
School
245 Winter St SE
Salem 97301

To: Michael Marcus
From: Edwin J Peterson
Re: Suggested changes to ORCP 21A and G
Date: October 17, 195

I understand that you have been delegated by the Council to talk to me concerning my suggested changes to ORCP 21A and G. I thought that one way to proceed would be to write you a clearer memo [than my memo of Nov 5, 1994, to Maury] and then we can talk about it.

Here's the analysis:

1. Currently, ORCP 21A expressly permits the defenses of "insufficiency of summons or process or insufficiency of service of summons or process" to be made either "in the responsive pleading" [generally the answer], or "by motion to dismiss."

2. Under this procedure, a defendant who asserts that the summons or service of the summons is insufficient is not required to raise this defense by a motion to dismiss. The defendant can raise it by answer, usually in an affirmative defense along these lines:

FOURTH AFFIRMATIVE DEFENSE

> For its fourth affirmative defense, defendant alleges that the summons is legally insufficient because ..... [or]that the service of summons is insufficient because.....

Assume such a case. Defendant raises these defenses in the answer and the case comes to trial. How is the defense handled? Does defendant present evidence and does the jury decide the issue? Rarely. But I can envision a situation in which a defendant claims that he, she or it is entitled to have a jury decide the issue whether, for example, the person who received the papers resided in the dwelling house or usual place of abode of the person being served, ORCP 7D(2)(b), or the issue of whether the building at which service occurred was "the dwelling house or usual place of abode of the person to be served." ORCP 7D(2)(b).

3. I submit that objections relating to the sufficiency of summons or service of summons should be required to be made as soon as possible, and that the decision on such objections should be made as soon as possible. After all, if the court lacks jurisdiction because the summons or service was insufficient, isn't it best to have that decided early?

I further submit that questions such as these are not the type of questions that trial juries should be required to decide. [I prefer not getting into a dispute whether such questions <u>might</u> be jury questions. Normally these objections are made early on, and the issues are decided by the trial court, early on, usually on a motion to dismiss. The changes I suggest do not address whether a

party might be entitled to a jury decision on the issue. The changes I suggest only relate to the time at which such objections must be raised.] I also suggest that the practice now usually followed is for such objections to be made by motion to dismiss. My suggested amendments are consistent with the current practice.

4. I therefore suggest that objections based upon insufficiency of summons or insufficiency of service of summons should be required to be made early in the case, preferably by motion to dismiss.

5. Currently, ORCP 21G(1) provides:

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

6. I suggest amending ORCP 21G(1) to read as follows (new matter is underlined; deleted matter is in brackets):

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

7. A parallel amendment would need to be made to ORCP 21A. These words should be added to the very beginning of ORCP 21A:

> "Except as specified in Section 21G(1), every defense, etc..."

8 Note that ORCP 21F permits motions

> "to dismiss for lack of jurisdiction over the person or insufficiency of summons or process or insufficiency of service of summons or process without consolidation of defenses [otherwise] required by this section."

This suggests that motions directed to the sufficiency of summons

or service of summons should be made early on. I do not suggest any amendment to ORCP 21F; I only raise this to the extent it supports my claim that the law should require such objections to made early on.

9. As a defendant's attorney (which I usually was when I practiced law), my client's interests were well served by a practice that permitted me to raise the defense of insufficiency of summons or service of summons in an answer, and let the matter sit until the statute of limitations had run. (Some plaintiff's attorneys might be inclined to think that such a defense was merely a boilerplate defense, and pay no attention to it.) Then, after the statute of limitations runs, the defendant runs the defense up the flagpole in earnest, either by motion for summary judgment or at trial. If the service is bad, plaintiff is remediless. Although my client's interests were well served by such a practice, the law is not well served.

I won a lot of cases as a young lawyer simply by carefully checking the service of summons. (Citations furnished upon request. Several went up on appeal.) But at that time, a defendant could not raise such defenses by answer. The usual approach was to make a special appearance and move to quash the summons or service thereof. Today special appearances no longer are required.

It may be that this will end up being a plaintiff/defendant issue. It should not be. The law is well served if it requires that objections based upon insufficiency of summons or service be made promptly, so that a prompt decision can be made.