NOTICE
PUBLIC MEETING
COUNCIL ON COURT PROCEDURES
Saturday, September 11, 2004
9:30 a.m.
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

AGENDA

1. Call to order (Ms. Clarke)

2. Approval of 6-12-04 minutes

3. Reports and recommendations (Ms. Clarke):

   3a. ORCP 32 - proposed amendments regarding class actions (see Attachment A to this agenda) (Mr. Sugerman)

   3b. ORCP 44 A - proposed amendments regarding court-ordered physical or mental examinations (Attachment B to follow) (Justice Durham for the Committee)

   3c. ORCP 67 - notice to defendant of judgment in excess of amount claimed in original complaint (see Attachment C to this agenda) (Judge Barron)

4. Old business

5. New business:

   5a. ORCP 54 E: Proposal to amend submitted by Procedure and Practice Committee of Oregon State Bar) (see Attachment D to this agenda) (representative of Procedure & Practice Committee)

6. Adjournment (Ms. Clarke)

# # # # #

Note

The Council at its 4-10-04 meeting voted to adopt in principle the amendments to ORCP 59 H.

ORCP 59 H in its present form shown below is deleted:

[H. Necessity of noting exception on error in statement of issues or instruction; all other exceptions automatic. No statement of issues submitted to the jury pursuant to subsection C(2) of this rule and no instruction given to a jury shall be subject to review upon appeal unless its error, if any, was pointed out to the judge who gave it and unless a notation of an exception is made immediately after the court instructs the jury. Any point of exception shall be particularly stated and taken down by the reporter or delivered in writing to the judge. It shall be unnecessary to note an exception in court to any other ruling made. All adverse rulings, including failure to give a requested instruction or a requested statement of issues, except those contained in instructions nd statements of issues given, shall import an exception in favor of the party against whom the ruling was made.]

Proposed new 59 H:

H. Necessity of noting exception on error in statement of issues or instructions given or refused

H(1) Statement of issues or instructions given or refused. A party may not obtain review on appeal of an asserted error by a trial court in submitting or refusing to submit a statement of issues to a jury pursuant to subsection C(2) of this rule or in giving or refusing to give an instruction to a jury unless the party who seeks to appeal identified the asserted error to the trial court and made a notation of exception immediately after the court instructed the jury.

H(2) Exceptions must be specific and on the record. A party shall state with particularity any point of exception to the trial judge. A party shall make a notation of exception either orally on the record or in a writing filed with the court.

* * * *

The Council at its 5-8-04 meeting voted to delete 83 A(9) (referring to notice of a bulk transfer) and 83 D (Effect of notice of bulk transfer) as shown below.

Rule 83 Provisional Process

A. Requirements for issuance. To obtain an order for issuance of provisional process

the plaintiff shall cause to be filed with the clerk of the court from which such process is sought a sworn petition and any necessary supplementary affidavits requesting specific provisional process and showing, to the best knowledge, information, and belief of the plaintiff or affiant, that the action is one in which provisional process may issue, and:

* * *

[(9) If provisional process is based on notice of a bulk transfer, a copy of the notice;]

Renumber present A(10) through A(13) to read A(9) through A(12)

* * *

[D. Effect of notice of bulk transfer. Subject to section B of this rule, if the court finds that with respect to property of the defendant notice of bulk transfer has been given and that the time for possession by the transferee has not passed, the court shall order issuance of provisional process.]

Present Sections **E** through **I** relettered as Sections **D** through **H**.

* * * *.

The Council at its 6-12-04 meeting voted to amend ORCP 46 A(2) as follows:

A(2) **Motion.** If a party fails to furnish a report under Rule 44 B or C, or if a deponent failed to answer a question propounded or submitted under Rules 39 or 40, or if a corporation or other entity fails to make a designation under Rule 39 C(6) or Rule 40 A, or if a party fails to respond to a request for a copy of an insurance agreement or policy under Rule 36 B(2), or if a party in response to a request for inspection submitted under Rule 43 fails to permit inspection as requested, the discovering party may move for an order compelling discovery in accordance with the request. **Any motion made under this subsection shall set out at the beginning of the motion the items that the moving party seeks to discover.** When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 36 C.

* * * *

The Council at its 6-12-04 meeting voted to adopt the following amendment to ORCP 9 F (new language underlined in bold):

F. Service by telephonic facsimile communication device. Whenever under these rules service is required or permitted to be made upon a party, and that party is represented by an attorney, the service may be made upon the attorney by means of a telephone facsimile communication device if the attorney maintains such a device at the attorney's office and the device is operating at the time service is made. **Service in this manner shall be equivalent to service by mail for purposes of Rule 10 C.**

* * * *

The Council at its 6-12-04 meeting voted to tentatively adopt the proposed amendments shown on the attachment to the 6-12-04 agenda but to do additional outreach and to be prepared to demonstrate a greater consensus and support in the community and to come back with the rule possibly amended capturing that additional support.

COUNCIL ON COURT PROCEDURES

Minutes of Meeting of June 12, 2004
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

Present:	Richard L. Barron	Robert D. Durham
	Eric J. Bloch	Martin E. Hansen
	Benjamin M. Bloom	Nicolette D. Johnston
	Bruce J. Brothers	Alexander D. Libmann
	Eugene H. Buckle	David F. Sugerman
	Ted Carp	John L. Svoboda
	Kathryn H. Clarke	Ronald D. Thom
	Don Corson	

Allan H. Coon attended by speaker telephone.

Excused:	Lisa A. Amato
	Daniel L. Harris
	Nely L. Johnson
	Connie Elkins McKelvey
	Shelley D. Russell
	David Schuman
	Russell B. West

The following guests were in attendance: Dr. Larry Friedman, Portland; Attorney Phil Goldsmith, Portland; Mr. Tom Perrick, representative from Oregon Bankers' Association, Portland; Attorney Ken Sherman, Jr., Salem; Attorney Billy Sime, representative for OADC, Salem; Attorney Scott O. Pratt, representative, Procedure & Practice Committee, Portland.

Also present were Maury Holland, Executive Director, and Gilma J. Henthorne, Executive Assistant

Agenda Item 1: Call to order. The meeting was called to order by the Chair, Ms. Clarke, at 9:35 a.m.

Agenda Item 2: Approval of 5-8-04 minutes. With the following corrections the minutes of the May 8, 2004 meeting of the Council were approved as previously distributed: 1. In section 3b, p. 4, "service by tax" should read "service by fax"; 2. The last word in the final paragraph of section 3b, p. 4, should be "correct"; 3. In section 5e, "Steven H. Pratt" is corrected to "Steven O. Pratt;" and 4. Mr. Don Corson should be shown as participating in the meeting by speaker phone.

Agenda Item 3: Reports and recommendations (Ms. Clarke):*

Item 3c: ORCP 32--proposed amendments regarding class actions (see Attachment C to agenda of this meeting) (Mr. Sugerman). Mr. Sugerman explained that the proposed amendments would make the use of claim forms discretionary with the court, rather than mandatory in every class action as now required by subsections 32 F(1) and (2). He further explained that claim forms serve little purpose in cases where defendants already possess full information about the amount of damages, where they constitute nothing more than expensive make-work. He also stated that section 32 F's mandatory claim form provision is nearly unique to Oregon, and is not found in the federal rule or the rules of most other states. He emphasized that, in cases where use of claim forms might be appropriate, nothing in the proposed amendments would prevent the court from ordering that it be done. Prof. Holland mentioned that claim forms serve little or no useful purpose in cases where the measure of recovery is restitution of defendant's unjust enrichment, as is frequently the case with class actions.

Ms. Clarke then recognized guests present to comment on this matter. Attorney Ken Sherman, Jr. of Sherman, Sherman, Johnnie & Hoyt, stated that he had been counsel to the Oregon Bankers Association since 1977 and that, while he was not a class action litigator, he had spoken to several lawyers in Portland who had expressed very serious concerns about a procedural change such as this because of the potentially serious consequences it might have, among which he said was depriving courts of essential information regarding the extent of damages and the likelihood of driving up the amount of recoveries beyond any damages members of plaintiff classes might have actually sustained. Mr. Corson asked Mr. Sherman what the latter thought should happen in a case where, for example, the evidence shows damages in the aggregate amount of $9,000,000 for the class, but claim forms are submitted totaling a significantly lower amount. Mr. Sherman responded that he was not then in a position to give a response to that hypothetical case. He also stated that he did not think adequate notice of this proposal had been given, with the result that few people were aware of it.

Attorney Phil Goldsmith was then recognized. After noting that he was the principal advocate of somewhat similar amendments to ORCP 32 which the Council

*For the convenience of visitors, and without objection, items were taken up in the order shown in these minutes rather than as shown on the agenda of this meeting.

considered in 1992, Mr. Goldsmith stated that, pursuant to the present rule, any excess in the aggregate class damages established by way of restitution of unjust enrichment or otherwise over the total amounts claimed in claim forms is returned to the defendant. By this he explained that what is generally known in class action practice as "fluid recoveries" are effectively precluded by subsections 32 F(1) and (2). He added that, while there is general agreement that the primary purpose of class actions is to help ensure that the typically large number of class members who have usually been damaged in modest amounts recover compensatory damages, there exists a philosophical difference of opinion as to whether an additional useful purpose is to ensure that defendants whose unlawful conduct has resulted in their being unjustly enriched are made to disgorge such enrichment. He further stated that, when a class action monetary recovery cannot be wholly paid over to class members who have not submitted claim forms, the unpaid amount would probably be treated by the State of Oregon as abandoned property payable to it, usually after some delay for further efforts to notify class members.

Mr. Brothers commented that this proposal seemed to him to involve questions more of substantive policy than of a purely procedural nature, and that, as had happened in the past, the legislature might think the Council exceeded its authority by promulgating these amendments. Mr. Svoboda noted that he was inclined to agree with this comment. Mr. Buckle asked what efforts Mr. Goldsmith had made to confer about this proposal with such obviously interested groups as the Oregon Bankers Association.

Mr. Goldsmith replied that there had no formal consultations with that or any other group, but that he had been in touch with Mr. Dave Barrows, who in the past had been a leading spokesperson for groups inclined to oppose Rule 32 amendments along the lines presently proposed, to be sure he was fully aware of what the Council had under consideration.

Judge Bloch commented that he had had no experience with claim forms, either as a practitioner or as a judge, but that the questions raised by the current proposal seemed to him to be significantly substantive in their implications, which he believed would need to be thoroughly debated before these amendments were promulgated. Judge Carp remarked that the question then before the Council was not whether to promulgate these amendments, but whether tentatively to adopt them for the limited purpose of publication for comment.

Discussion of this item concluded by Mr. Sugerman, seconded by Ms. Clarke, offering a motion tentatively to adopt the amendments set forth in Attachment C. This motion carried by a vote of fifteen in favor, one opposed, and one abstention.

Item 3b: ORCP 9 F and ORCP 10--effective date of fax service (see Attachment B to agenda of this meeting) (Mr. Bruce C. Hamlin). Mr. Hamlin recalled that this matter had been brought to his attention by his firm's docket clerk, who had concluded that ORCP 9 F and ORCP 10 left unclear whether fax service is subject to the same three-day delay in effective date as mail service or is effective on the date of transmission. He added that use of fax in serving documents was here to stay, was being widely used, and had proved generally reliable. He further stated that, while he preferred the version of the amendments shown on p. B-1 of Attachment B, whereby fax service

would be equated with service by hand delivery, he thought the most important thing was that these provisions be clarified one way or the other.

Several members expressed various reservations about an amendment that would equate fax with personal service for purposes of its effective date. Mr. Svoboda asked whether fax numbers as shown in the Bar Directory would be treated as conclusively correct.

Mr. Brothers offered a motion, duly seconded, to place version B-2 on the agenda of the September 11, 2004 meeting. This motion was agreed to by a vote of fifteen in favor, one opposed, and one abstention. Mr. Bloom, seconded by Judge Carp, then offered a motion to place version B-1 of the amendments on the agenda of the September 11, 2004 meeting. This motion failed of agreement by a vote of three in favor and fifteen opposed.

Item 3d: ORCP 44 A--proposed amendments regarding court-ordered physical or mental examinations (see Attachment D to agenda of this meeting) (Justice Durham for the committee). Justice Durham began by thanking the other members of this committee, Mr. Buckle, Mr. Corson, and Judge Johnson, for the effort they had put forth in helping to formulate these proposed amendments. He briefly recalled the history of similar proposed amendments to section 44 A in 2000, which required parties to comply with any agreed conditions relating to examinations and entitled examinees to have a representative present during examinations. He also recalled that those amendments failed to obtain a supermajority by one vote.

Justice Durham continued by noting that, as was well known, there existed a sharp division of views been the plaintiffs and defense bars as to whether ORCP 44 A stood in need of amendment and, if so, how it should be amended. He observed that some believed the current provision is faulty in failing sufficiently to set rules, and leaving too much latitude to negotiation between parties and the discretion of individual judges, in not requiring that some sort of record be made of examinations, and in not entitling examinees to have a representative present during examinations. He also stated that the present rule does not reflect current practice in all respects.

Justice Durham then distributed copies of the committee's draft amendments for discussion, a copy of which is attached to these minutes. Mr. Buckle stated that he questioned whether there was anything wrong with the current section 44 A. Regarding the committee's draft he expressed concern that it would authorize encroachment on the domain of the medical profession, and questioned whether an examinee's representative, who might be an expert or the examinee's attorney, would be subject to discovery. Justice Durham responded that the present rule was based on the rule in federal courts and fostered excessive divergence in rulings among individual trial court judges. He added that the committee's draft amendments provided some default rules, such as audio recording of examinations, while also leaving room for negotiated changes agreed to by the parties and judicial discretion to deal with unusual situations, and additionally prohibited obstruction of examinations by representatives or any one else.

Mr. Brothers stated that there appeared to be no disagreement about the appropriateness of audio recording of examinations as a routine matter, but that he shared the concerns expressed by others about providing for the presence of a representative as a matter of right. He added that he also thought any reference to obstructing an

examination should be qualified by the word "unreasonably." Mr. Hansen said he was curious about practice in other jurisdictions, in particular whether representatives tended to be relatives or friends of examinees as opposed to adjusters or experts and whether authorizing the presence of representatives has added another layer of complexity to the process. Mr. Sugerman stated that compelled medical examinations is a somewhat unique discovery method where examinees should be afforded some protection against inaccuracies in examiners' reports and questions that might go beyond the proper scope of the examination.

Dr. Larry Friedman, a neuropsychologist, was then recognized. He stated that he recognized that the issue of permitting representatives to be present was a complex one having many facets. He added that, from what he has observed and from the literature he had read, he had concluded that physicians conducting physical examinations usually have no serious problem with the presence of a representative, but that psychologists and psychiatrists often do have an objection to it because the presence of a representative can interfere with establishing rapport between the examiner and the examinee. He further added that psychologists and psychiatrists tend not to see an examination as a legal, but as a medical, procedure. Dr. Friedman stated that he would be strongly opposed to both having a recording of an examination apart from the examiner's notes and report, and to having a representative present at examinations that are psychological or psychiatric, as opposed to purely physical, in nature.

Judge Barron commented that, throughout his twenty-four years on the bench, he had never encountered a situation where the attorneys were unable to reach agreement about fair and reasonable conditions under which the examination would be conducted. He stated that he was therefore opposed to amending this provision because of his sense that it would create more problems than it would solve.

Ms. Clarke observed that general agreement appeared to exist with respect to the following three aspects of this problem: i. All examinations except psychological ones should be routinely audio recorded; ii. the use of simple notice; and iii. the autonomy of practice under rules.

Attorney Billy Sime was then recognized. He said that he saw some problems with the draft amendments, namely, what about examinees who come to their examination and insist upon recording it without having given prior notice, and what about discovery of a representative's observations.

Justice Durham at this point suggested that the time had come to find out how much common ground existed among Council members. With that in mind, Judge Thom, seconded by Judge Coon, moved that no changes be made to the present ORCP 44 A. The motion failed of agreement by a vote of seven in favor and eight opposed.

Ms. Clarke then asked for a straw vote on the distinct question of whether to amend section 44 A to permit audio recording of examinations. Twelve members indicated support for such an amendment and three members indicated opposition to it. Another straw vote was taken concerning the question of amending section 44 A to prohibit obstruction of examinations where a representative is present. Eight members indicated support for such an amendment and six members indicated opposition to it. These straw votes concluded discussion of this item.

Item 3a. ORCP 46 A(1)--Judge Velure's proposed amendment (see Attachment A to agenda of this meeting) (Judge Carp). Judge Carp offered a motion, duly seconded, that this amendment be tentatively adopted. This motion was agreed to by a vote of fourteen in favor, none opposed and one abstention.

Item 3e. ORCP 44 B and C--proposed amendments regarding requests for written reports and existing notations of examinations relating to injuries for which recovery is sought (see Attachment E to agenda of this meeting) (Mr. Bloom). Mr. Brothers stated that he thought that no case had been made for any changes to sections 44 B and C. Judge Barron offered a motion, duly seconded, that no amendments to these sections be promulgated. This motion was agreed to by a vote of fourteen in favor, none opposed and no abstentions.

Agenda Item 4. Old business. No item of old business was raised.

Agenda Item 5. New business (Ms. Clarke):

Item 5a. Proposals by Ms. Kristen David to amend UTCR 5.030 and 5.080 referred to the Council by Mr. Bruce D. Miller (see Attachment F to agenda of this meeting). A motion was duly offered, seconded, and unanimously agreed to that this item be referred back to the UTCR Committee.

Items 5b and 5c. These items were not discussed and no action was taken regarding them.

Ms. Clarke announced that the Justice Department had agreed to advance $4,000 toward members' travel and lodging expenses, an amount that will be forthcoming from the Oregon State Bar on January 1, 2005.

Agenda Item 6: Adjournment. On motion duty offered, seconded, and unanimously agreed to, the meeting was adjourned at 1:25 p.m.

Respectfully submitted,

Maury Holland
Executive Director

RULE 32
CLASS ACTIONS

* * * *

F. Notice and exclusion.

F(1) When ordering that an action be maintained as a class action under this rule, the court shall direct that notice be given to some or all members of the class under subsection E(2) of this rule, shall determine when and how this notice should be given and shall determine whether, when, how, and under what conditions putative members may elect to be excluded from the class. The matters pertinent to these determinations ordinarily include: (a) the nature of the controversy and the relief sought; (b) the extent and nature of any member's injury or liability; (c) the interest of the party opposing the class in securing a final resolution of the matters in controversy; (d) the inefficiency or impracticality of separately maintained actions to resolve the controversy; (e) the cost of notifying the members of the class; and (f) the possible prejudice to members to whom notice is not directed. When appropriate, exclusion may be conditioned on a prohibition against institution or maintenance of a separate action on some or all of the matters in controversy in the class action or a prohibition against use in a separately maintained action of any judgment rendered in favor of the class from which exclusion is sought.

F(2) Prior to the entry of a final judgment against a defendant the court [*shall request*] **may require** members of the class who may be entitled to individual monetary recovery to submit a [*statement in a form*] **claim form** prescribed by the court requesting affirmative relief which may also, where appropriate, require information regarding the nature of the loss, injury, claim, transactional relationship, or damage. **When required,** [T]the [*statement*] **claim form** shall be designed to meet the ends of justice. In determining [*the form of the statement*] **whether to require a claim form and what form it shall take**, the court shall

consider the nature of the acts of the defendant, the amount of knowledge a class member would have about the extent of such member's damages, the nature of the class including the probable degree of sophistication of its members, **the probable cost of administering claim forms, the possible prejudice to the parties and class members of omitting the claim form, the probable size of the class, the probable size of individual class members' claims,** and the availability of relevant information from sources other than the individual class members. **When the court requires a claim form,** [T]the amount of damages assessed against the defendant shall not exceed the total amount of damages determined to be allowable by the court for each individual class member who has filed a statement required by the court, assessable court costs, and an award of attorney fees, if any, as determined by the court.

F(3) **When a claim form is required,** [F]failure of a class member to file a statement required by the court will be grounds for entry of judgment dismissing such class member's claim for individual monetary recovery without prejudice to the right to maintain an individual, but not a class, action for such claim.

F(4) Plaintiffs shall bear costs of any notice ordered prior to a determination of liability. The court may, however, order that defendant bear all or a specified part of the costs of any notice included with a regular mailing by defendant to its current customers or employees. The court may hold a hearing to determine how the costs of such notice shall be apportioned.

F(5) No duty of compliance with due process notice requirements is imposed on a defendant by reason of the defendant including notice with a regular mailing by the defendant to current customers or employes of the defendant under this section.

F(6) As used in this section, "customer" includes a person, including but not limited to a student, who has purchased services or goods from a defendant.

FAX COVER SHEET

Oregon Supreme Court
Supreme Court Building
1163 State Street
Salem, OR 97310
FAX: (503) 986-5730

DATE: March 2, 2005

Number of Pages *following* this Cover Sheet: **8**

TO: **Gilma Hinthorne**

FAX Number: **(541) 346-1564**

FROM: Linda Kinney, Judicial Assistant

Phone Number: (503) 986-5725

REMARKS:

Gilma: I'm sorry I didn't respond sooner. I've just returned from vacation and am catching up. Here is the revised draft that was handed out for the December meeting.

Revised Draft - September 10, 2004

Rule 44. Physical and Mental Examination of Persons; Reports of Examinations

A. ~~Order~~ Notice for Examination.

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

~~B.~~, and the name and address of the examiner. The following

conditions shall apply to an examination under this rule:

(1) The parties, the examinee, and their representatives shall comply with any conditions for the examination to which they agree in writing.

(2) No person shall obstruct the examination. Acting pursuant to ORCP 17 D, the court may impose sanctions against a party or person who obstructs an examination and may order any relief that the court deems necessary to remedy an obstruction.

(3) Any party, the examinee, and the examining physician or psychologist may record the examination by audiotape in an unobtrusive manner. However, the court may limit or prohibit the audiotaping of an examination to prevent infringement of a right protected by the law of copyright regarding any psychological test, or to prevent a violation of an ethical rule that applies to the medical professional who conducts the examination. A person who records an examination by audiotape shall retain the original recording without alteration until final disposition of the proceeding unless the court orders otherwise. Upon request, and upon payment of the reasonable charges for copying, the person who records the examination shall make and furnish a copy of the original audiotape recording to any party, the examinee, or their representatives.

(4) All objections to questions asked and the procedures followed during the examination are reserved for trial or other

disposition by the court. The examinee may refuse to disclose information or a communication that is protected from disclosure by the law of privilege.

(5) The court by order may alter any of the foregoing conditions or require that the examination occur under different or additional conditions.

B. Report of Examining Physician or Psychologist.

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

C.— Reports of Examinations; Claims for Damages for Injuries.

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

D.— Report; Effect of Failure to Comply.

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

D(2) Failure to Comply or Make Report or Request Report. If a party fails to comply with sections B and C of this rule, or if a physician or psychologist fails or refuses to make a detailed report within a reasonable time, or if a party fails to request that the examining physician or psychologist prepare a written

report within a reasonable time, the court may require the physician or psychologist to appear for a deposition or may exclude the physician's or psychologist's testimony if offered at the trial.

———E.— Access to individually identifiable health information.—

Any party against whom a civil action is filed for compensation or damages for injuries may obtain copies of individually identifiable health information as defined in Rule 55 H within the scope of discovery under Rule 36 B. Individually identifiable health information may be obtained by written patient authorization, by an order of the court, or by subpoena in accordance with Rule 55 H.

Add emphasized material to ORCP 46 B(2)(e):

Rule 46. Failure to Make Discovery; Sanctions

B(2)(e) Such orders as are listed in paragraphs (a), (b), and (c) of this subsection, where a party has failed to comply with a notice for examination under Rule 44 A requiring the party to produce another for examination, unless the party failing to comply shows inability to produce such person for examination.

"Don Corson"
<dcorson@jclc.com>

06/11/2004 04:27 PM

To <jslawman@aol.com>, <KathrynHC@aol.com>, <LAmato@bittner-hahs.com>, <ebuckle@cvk-law.com>, <shelley@employmentlaw-nw.com>,

cc

bcc

Subject ORCP 44; Council on Court Procedures

Dear Council members:

In comparing Oregon's rule on compelled medical exams to the rules in many other states, and in considering the problems encountered in practice, I believe that our rule is in need of improvement in several respects.

However, the rule on compelled medical exams is unlike the other discovery rules. Other discovery rules are basically bilateral (used by both plaintiffs and defendants). This unique rule, in practice, is essentially unilateral. As a consequence, discussions about law improvement tend to be polarized. It has occurred to me that if the rule on compelled medical exams were bilateral, this might reduce the polarization, as both sides would have more similar interests in fair and workable procedures. Accordingly, I offer for consideration the attached proposed form of ORCP 44 (both in RTF and Word Perfect formats).

Thank you.

Sincerely,

Don Corson
Johnson, Clifton, Larson & Corson, P.C.
975 Oak Street, Suite 1050
Eugene, OR 97401

B-7

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

(Proposed new language in **bold**; proposed deletions in [brackets])

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

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

C. Reports of Examinations[; Claims for Damages for Injuries**].** In a civil action where **an examination could be ordered pursuant to section A of this rule, [**claim is made for damages for injuries to the party or to a person in the custody or under the legal control of a party,] upon the request of **a** [the] party [against whom the claim is pending,] the **responding party** [claimant] shall deliver to the requesting party a copy of all written reports and existing notations of any examinations relating to **the physical or mental condition(s) alleged in the claim(s) or defense(s)** [injuries for which recovery is sought] unless the **responding party** [claimant] shows inability to comply.

D. Report; Effect of Failure to Comply.

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

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

E. Access to individually identifiable health information. In any civil action where an examination could be ordered pursuant to section A of this rule, any party [against whom a civil action is filed for compensation or damages for injuries] may obtain copies of individually identifiable health information as defined in Rule 55 H within the scope of discovery under [Rule 36 B] **section C of this rule**. Individually identifiable health information may be obtained by written patient authorization, by an order of the court, or by subpoena in accordance with Rule 55 H.

[Note: ORCP 44 would read as follows if the proposed amendments outlined above were adopted]:

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

A. Order for Examination. When the mental or physical condition or the blood relationship of a party, or of an agent, employee, or person in the custody or under the legal control of a party (including the spouse of a party in an action to recover for injury to the spouse), is put in controversy by a claim or defense in the pleadings, the parties may stipulate to an order or the court may order the party to

submit to a physical or mental examination by a physician or a mental examination by a psychologist or to produce for examination the person if in such party's custody or legal control. Unless the parties stipulate otherwise, the order may be made only on motion and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

B. Report of Examining Physician or Psychologist. If requested by the party against whom an order is made under section A of this rule or the person examined, the party causing the examination to be made shall deliver to the requesting person or party a copy of a detailed report of the examining physician or psychologist setting out such physician's or psychologist's findings, including results of all tests made, diagnoses and conclusions.

C. Reports of Examinations. In a civil action where an examination could be ordered pursuant to section A of this rule, upon the request of a party, the responding party shall deliver to the requesting party a copy of all written reports and existing notations of any examinations relating to the physical or mental condition(s) alleged in the claim(s) or defense(s) unless the responding party shows inability to comply.

D. Report; Effect of Failure to Comply.

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

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

E. Access to individually identifiable health information. In any civil action where an examination could be ordered pursuant to section A of this rule, any party may obtain copies of individually identifiable health information as

defined in Rule 55 H within the scope of discovery under section C of this rule. Individually identifiable health information may be obtained by written patient authorization, by an order of the court, or by subpoena in accordance with Rule 55 H.

March 15, 2004

To: Council on Court Procedures

From: Rick Barron

Re: ORCP 67C(1); Montoya v. Housing Authority of Portland, _Or App_(March 10, 2004)

I have attached a suggested amendment to ORCP 67C(1) based on my reading of the above case. The case involved a default judgment for money damages. The court entered a judgment for an amount that exceeded the prayer. On appeal, the Court of Appeals allowed the judgment to remain, minus the excess amount. The reason for deleting the excess amount was that entering a greater amount violated due process. In effect, the court had no jurisdiction to enter a judgment for an amount greater than prayed for.

As I understand the majority opinion, it holds that relief not demanded in a pleading cannot be the basis for a judgment without reasonable notice to the party against whom the judgment is be entered. This is because due process prevents such judgments. The concurring opinion agrees as to equitable claims because they are specifically referred to as an exception in ORCP 67C(1). Chief Judge Deits does not agree with the majority that legal claims can exceed the demand in a pleading even with reasonable notice because ORCP 67C(1) does not so provide.

The change I am suggesting combines all sections in ORCP 67 into one section and allows a judgment for relief not demanded in a pleading as long as there is reasonable notice and opportunity to be heard by the adverse party. The suggested change is not limited to default judgments. ORCP 67 as a whole is not limited to default judgments although ORCP 67C(1) is.

Under the suggested change, a party can file a claim, legal or equitable, move for a default if the other party fails to appear and obtain a judgment in accordance with the party's pleadings. If a party after defaulting the adverse party decided he/she/it wanted different or greater relief, the party would have to provide reasonable notice and opportunity to the adverse party. In most cases, an amended complaint would have to be filed and served. ORCP 9A already requires this.

Similarly, if the party went to trial on its pleading, the party would be entitled to only that relief requested in its pleading. If before trial or during trial, the party wanted relief different or greater than requested in its pleading, the party would have to move to amend or move to conform the party's pleading to the evidence. In either case, the adverse party would be given notice and opportunity. It would be up to the court to determine whether such notice and opportunity was reasonable. Such a change would be

consistent with ORCP 2 and with due process and also consistent with the present practice of deciding whether to allow an amended pleading before trial or an amended pleading to conform to the evidence.

I just thought this might be a way to shorten a rule without really changing its substance. On the other hand, the Council may wish to just leave the rule as is. The decision just came down from the Court of Appeals and there was not total agreement on the meaning of ORCP 67C(1). There may also be distinctions between equitable and legal claims that the Council may not want to change.

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Matter in brackets deleted and matter underlined added.

C. DEMAND FOR JUDGMENT

Every judgment shall grant the relief to which the party in whose favor it is rendered is entitled[.]. A judgment for relief different in kind from or exceeding the amount prayed for in the pleadings may not be rendered unless reasonable notice and opportunity to be heard are given to any party against whom the judgment is to be entered. [even if such relief has not been demanded in the pleadings, except:

C.(1) Default. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. However, a default judgment granting equitable remedies may differ in kind from or exceed in amount that prayed for in the demand for judgment, provided that reasonable notice and opportunity to be heard are given to any party against whom the judgment is to be entered.

C.(2) Demand for money damages. Where a demand for judgment is for a stated amount of money as damages, any judgment for money damages shall not exceed that amount.]

ATTACHMENT C TO AGENDA OF 4-10-04 COUNCIL MEETING, CONTINUED PAGES C-4 TO C-11

Montoya v. Housing Authority of Portland, __Or App__ (March 10, 2004)

Before EDMONDS, Presiding Judge, and DEITS, Chief Judge, and WOLLHEIM, Judge.

EDMONDS, P.J.

Defendant Quantum Residential, Inc. (Quantum) appeals from the trial court's denial of its motion to set aside a default judgment entered against it. ORCP 71 B(1). Quantum first asserts that the judgment is void for lack of jurisdiction because the judgment's face amount exceeds the amount pleaded, contrary to ORCP 67 C(1). Alternatively, Quantum asserts that the trial court erred in determining that it had not established that its failure to defend was the product of "excusable neglect" pursuant to ORCP 71 B(1)(a). We agree with Quantum's first argument and hold that the judgment is void to the extent that its amount exceeds the amount sought in plaintiff's complaint. Otherwise, we agree with the trial court's ruling.

On July 28, 2000, plaintiff filed an action for personal injuries against Quantum and the Housing Authority of Portland (HAP), alleging injuries as a result of a fall by plaintiff on premises owned by HAP and managed by Quantum. Plaintiff alleged, among other things, a failure to maintain, inspect, and repair the premises. The original complaint alleged: "[P]laintiff prays for judgment against defendants and each of them jointly and severally, in the sum of $40,000.00 in non-economic damages, to be proven more accurately at trial, with economic damages for $25,800.00, and for her costs, disbursements and attorney fees incurred herein." Plaintiff filed an amended complaint on August 30, 2000, containing similar language:

"Plaintiff suffered non-economic damages for $40,000.00.

"As a further result of defendants' negligence, plaintiff incurred approximately $9,000.00 in health care and medical expenses and approximately $16,800.00 in lost wages and benefits, said wage loss continuing and to be proven more accurately at trial."

Both defendants were served with civil process. On October 5, 2000, an order of default was entered against Quantum. On October 19, 2000, pursuant to plaintiff's request, the court dismissed the claims against HAP with prejudice. On December 7, 2000, the trial court awarded a default judgment against Quantum in the amount of $79,766, which included $40,000 in noneconomic damages and $39,766 in economic damages. The award exceeded the specific amount prayed for in the original and amended complaints by $13,966. The record includes a copy of the notice of entry of judgment in the trial court file that lists Quantum's name but not its address. Quantum asserts that it did not receive notice that a judgment had been entered against it until plaintiff made a post-judgment demand for payment on February 9, 2002. On March 8, 2002, Quantum filed a motion to set aside the default judgment on the basis of excusable neglect pursuant to ORCP 71 B(1)(a).

In support of its motion to set aside the default judgment, Quantum submitted an affidavit

from its president, Gary O'Connell. O'Connell averred that he learned of the lawsuit in August 2000 but that, based on HAP's previous practices and based on a conversation with HAP's Director of Asset Management, John Meyer, he believed that HAP's insurer, Housing Authority Risk Retention Pool (HARRP), would undertake the defense of Quantum. O'Connell asserted: "When an action is filed against a HAP building and the property manager, occasionally the property manager will defend the case. However, most often HAP--as owner of the building--will take on the defense of the case through HARRP."

O'Connell also said in his affidavit that, at the time of the filing of the lawsuit, Meyer had "informed [him] that HAP would take over defense of this case." Meyer, on the other hand, testified that he did not recall whether O'Connell asked him if HAP or HARRP would defend Quantum. He did, however, note that, although it was not his understanding that HAP or HARRP "would necessarily represent [Quantum]," it was his understanding "that HAR[R]P and [HAP's] counsel should have been working with the property--with Quantum's counsel to coordinate a defense on" the claim. (Emphasis added.) Meyer noted that his usual practice is to "make sure the property manager would forward [information regarding a lawsuit] on to HAR[R]P," or that the asset manager working for him would coordinate that.

Additionally, portions of a "Property Management Services Agreement" between HAP and Quantum were submitted to the court by the parties with regard to Quantum's motion to set aside the default judgment. The agreement contains two relevant indemnification provisions on which the parties relied below in support of their respective excusable neglect arguments. Article 5(A)(1) of the agreement states: "Indemnification for Third Party Injuries to Person and Property: Irrespective of whether [Quantum] is negligent [Quantum] shall indemnify, defend and save [HAP] harmless from any and all claims, or liability relating to the management of the premises. This obligation shall include all costs and expenses (including, but not limited to, fines, penalties and reasonable attorney fees), for injuries or damages to persons, including any employee of [HAP], or property of others. This obligation does not extend to claims arising against [HAP] which solely allege wrongdoing by [HAP], its officers or employees. [Quantum's] obligation to indemnify [HAP] shall not exceed five million ($5,000,000) for any single claim or in the aggregate for each year during which this Agreement is in effect. This limitation shall not apply to claims based upon allegations of the sole wrongdoing of [Quantum]."[1]

Article 5(A)(2), of the agreement provides: "Indemnification for Violation of Law: [HAP] shall indemnify, defend and save [Quantum] from any and all claims, or liabilities, as well as all costs and expenses thereof (including, but not limited to, fines, penalties and reasonable attorney's fees) involving alleged or actual violation by [HAP] of a criminal statute, rule or regulation pertaining to the premises, property, the management or operation of the Property, except to the extent that such a claim, proceeding or liability resulted from the intentional wrongdoing of [Quantum] or the failure of [Quantum] to notify [HAP] of the issue after having gained actual knowledge thereof."

The agreement further states that, "except in any claim which is clearly against only [HAP], [Quantum] shall be responsible for conducting the joint defense and protecting the common interest."

The trial court denied Quantum's motion, ruling that it failed to establish sufficiently that

[1]The agreement refers to Owner (HAP) and Agent (Quantum).

it was entitled to relief based on its claim of excusable neglect. The trial court specifically referred to the provision of the agreement that required Quantum to conduct a joint defense and to protect the common interest of HAP and itself. The trial court also said that it "was not persuaded that Quantum [had] shown that the HAP agreed to defend Quantum" and that "Quantum and Gary O'Connell did not have reason to believe that the HAP was going to defend Quantum in this lawsuit."

We turn to Quantum's first assignment of error. Quantum asserts: "Quantum did not argue below that the trial court lacked jurisdiction; that the default judgment is void; or that the default judgment should be set aside under ORCP 71 B(1)(d). However, '[a] void judgment is subject to collateral attack at any time.' * * * Also, a question concerning the trial court's jurisdiction is not waivable. Finally, as explained infra, this court can and should treat the trial court's denial of the motion to set aside that judgment as plain error. ORAP 5.45(4)(b). For any of these reasons, this otherwise unpreserved error is reviewable." (Citations omitted.)

In light of the above arguments, we determine first whether the trial court had jurisdiction to enter a default judgment for approximately $14,000 more than requested by plaintiff's pleading. First, there is no indication in the record that the trial court lacked personal jurisdiction over the parties at the commencement of the action. Rather, the record reflects that Quantum was properly served at the outset of the lawsuit. Second, under the Oregon Constitution, trial courts "have subject matter jurisdiction over all actions unless a statute or rule of law divests them of jurisdiction." Greeninger v. Cromwell, 127 Or.App. 435, 438, 873 P.2d 377 (1994) (citation omitted). "The fact that a court acts in violation of a statute does not mean that the resulting judgment is void." Geranghadr v. Entagh, 189 Or.App. 567, 572, 77 P.3d 323 (2003) (citation omitted).

Quantum, however, relies on our opinion in Cooley v. Fredinburg, 144 Or.App. 410, 927 P.2d 124 (1996), modified on other grounds, 146 Or.App. 436, 934 P.2d 505 (1997), to support its assertion that the lack of notice and opportunity to be heard underlying the award in the default judgment renders it void. In that case, we said: "The fact that a court has initial jurisdiction over the parties and the subject matter does not authorize it to act without appropriate notice to the parties. If the proposed order would grant relief different from that contemplated by the original proceeding and would affect a party's personal rights, due process requires that there be reasonable notice and an opportunity to be heard. Scarth v. Scarth, 211 Or. 121, 126, 315 P.2d 141 (1957). If the notice of the proposed relief is so defective or lacking that it does not satisfy the requirements of due process, the court is deprived of jurisdiction to enter an order arising out of such a defective proceeding. Hood River County v. Dabney, 246 Or. 14, 21, 423 P.2d 954 (1967). Such an order, entered without jurisdiction, must be considered a nullity. State ex rel. v. Hall, 153 Or. 127, 129, 55 P.2d 1102 (1936)." Cooley, 144 Or.App. at 418, 927 P.2d 124 (footnote omitted).

Thus, in Cooley, we held that a default judgment entered in violation of ORCP 67 C was

void ab initio because it deprived the defaulted party of due process of law.[2] Plaintiff counters that the facts in this case are different from the facts in Cooley. According to plaintiff, "there is no variance between judgment and pleading so extreme as to raise the due process concerns expressed in Cooley [.]" He adds: "While it may have violated ORCP 67C for the trial court to enter a default judgment for the amounts it did, and while that error might have justified the trial court in vacating the default judgment insofar as it exceeded the amounts specified in the complaint, the inconsistency did not divest the trial court of power to enter a judgment, or make the judgment it did enter a nullity."

This case is like Cooley in one major respect. At the time that the proceeding was pending and the default judgment was entered, the trial court had continuing jurisdiction over the parties and the subject matter. However, in Cooley the issue was whether the trial court could grant relief beyond what the complaint requested when it ordered a party personally to deliver the surplus proceeds from a foreclosure sale without giving that party notice and an opportunity to appear and be heard. We reasoned that, if notice is defective by reason of its failure to satisfy the requirements of due process, then a trial court lacks jurisdiction to enter a particular order, even though it may have continuing personal and subject matter jurisdiction over the parties. Cooley, 144 Or.App. at 418, 927 P.2d 124. Our holding in Cooley is an example of where the trial court, although it had continuing jurisdiction, lacked the additional jurisdiction to order a party personally to perform an act without giving that party notice and an opportunity to be heard. Thus, "the question is not strictly one of jurisdiction, but merely the adequacy of notice to warrant the court in exercising the jurisdiction which it has." Scarth, 211 Or. at 127, 315 P.2d 141.

In Frederick v. Douglas Co. et al., 176 Or. 54, 63-64, 155 P.2d 925 (1945), the court explained the difference between procedural statutes that are directory in nature and procedural statutes that are jurisdictional in nature: "In reaching a conclusion as to what statutory provisions are jurisdictional, a distinction may be made between procedures which are required both by statute and also by the due process clause of the constitution on the one hand, and procedures required by statute alone, over and beyond anything rendered necessary by the constitution, on the other. Those requirements of statute which are essential to due process are, of course, jurisdictional, and we think that statutory requirements over and beyond the bare necessities of due process may also be jurisdictional, but only if it is the legislative intent to make them so." (Citation omitted.)

Here, the first sentence in ORCP 67 C(1) is arguably essential to due process. A party may be content to permit the relief sought in the complaint served on the party to be granted without contest, but if different relief from that requested in the complaint is sought, then the

[2]ORCP 67 C provides: "Every judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if such relief has not been demanded in the pleadings, except: (1) A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. However, a default judgment granting equitable remedies may differ in kind from or exceed in amount that prayed for in the demand for judgment, provided that reasonable notice and opportunity to be heard are given to any party against whom the judgment is to be entered. (2) Where a demand for judgment is for a stated amount of money as damages, any judgment for money damages shall not exceed that amount."

party is entitled to notice and an opportunity to be heard. But even if an increase in economic damages awarded in a judgment from the amount sought in the complaint does not clearly implicate due process, the remainder of the language in ORCP 67 C(1) makes it apparent that the legislature intended the rule to be jurisdictional in nature. The second sentence of ORCP 67 C(1) provides for an exception to the limitation on the court's authority to grant relief different in kind or in amount from that prayed for in the demand for judgment. However, even the exception expressly requires "that reasonable notice and opportunity to be heard are given to any party against whom the judgment is to be entered." In our view, that language when read with the first sentence of ORCP 67 C(1) makes clear that the legislature intended that notice and the opportunity to be heard are jurisdictional essentials before a party can obtain a judgment greater in amount than that sought in the complaint; that is, the court acquires personal jurisdiction over a nonappearing party only to the extent of the relief requested in the complaint served on the party. We conclude therefore that the trial court was without jurisdiction to enter the default judgment to the extent that the amount of the judgment exceeds the amount prayed for and, to that extent, the judgment is void ab initio.[3]

Having ruled that the judgment is void to the extent it exceeded the amount prayed for, we turn to Quantum's second and third assignments of error with regard to the remaining portion of the judgment. In its second and third assignments of error, Quantum challenges the trial court's ruling that it did not demonstrate excusable neglect regarding its default. If Quantum is correct, then it is entitled to have the default judgment set aside in its entirety. If its argument is not correct, then the trial court on remand should enter an amended judgment reflecting the amount prayed for in the complaint.

[3]We note that the rule that we interpret here, ORCP 67, was derived from the Federal Rules of Civil Procedure. See State ex rel Zidell v. Jones, 301 Or. 79, 88-89, 720 P.2d 350 (1986) (noting that legislative history indicates that ORCP 67 was derived from the Federal Rules of Civil Procedure); see also FRCP 54(c) (providing similar language to ORCP 67 C in that "[a] judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment"). The Ninth Circuit has held that a default judgment is void to the extent that it goes beyond the scope of the complaint. Pueblo Trading Co. v. El Camino Irr. Dist., 169 F.2d 312 (9th Cir.1948), cert. den., 335 U.S. 911, 69 S.Ct. 482, 93 L.Ed. 444 (1949); see also Cooper v. Cooper, 275 Or. 627, 552 P.2d 536 (1976). In its analysis of whether the trial court's error was jurisdictional, the Supreme Court indicated the following: "'Clearly, a judgment given by a court that has obtained jurisdiction can be considered a nullity only when that jurisdiction has been lost or exceeded. If the court in rendering the judgment stays within the powers conferred upon it by law and does not transcend the jurisdiction it has acquired in the particular case, its decision, however erroneous, is at most voidable and not for that reason subject to a challenge in an independent proceeding.' " Cooper, 275 Or. at 630, 552 P.2d 536 (quoting A.C. Freeman, 1 Freeman on Judgments § 357, 743-44 (5th ed. 1925)) (emphasis added). In the present case, the trial court exceeded its jurisdiction when it awarded damages in excess of the amount prayed for in violation of ORCP 67 C.

C 8

First, Quantum assigns as error the trial court's denial of its motion to set aside the default judgment on the ground that Quantum established excusable neglect. ORCP 71 B(1)(a). Next, Quantum assigns as error the trial court's finding that "Quantum and Gary O'Connell did not have reason to believe that the HAP was going to defend Quantum in this lawsuit" and asserts that that finding is not supported by the evidence. Because we understand Quantum's second and third assignments of error to raise essentially the same issue, we discuss them together. We review the denial of a motion to set aside a judgment on the basis of ORCP 71 B(1) for abuse of discretion, accepting the trial court's factual findings if they are supported by the evidence. Wood v. James W. Fowler Co., 168 Or.App. 308, 311-12, 7 P.3d 577 (2000); Adams and Adams, 149 Or.App. 342, 346-48, 942 P.2d 874 (1997).

Before addressing the merits of Quantum's arguments, we first discuss plaintiff's assertion that, because there is no transcript of oral proceedings, the record is inadequate for review with regard to Quantum's second and third assignments of error. We conclude that the assignments are reviewable in light of the record designated by Quantum on appeal. Quantum asserts that all the evidence was presented to the trial court in the form of documents, affidavits, and excerpts of depositions and that that evidence is present in the record before us. Plaintiff argues that "statements of counsel" are necessarily evidentiary in nature, that they are not in the record, and that therefore the record is incomplete without them. However, in State v. Ordonez-Villanueva, 138 Or.App. 236, 244, 908 P.2d 333 (1995), rev. den., 322 Or. 644, 912 P.2d 375 (1996), we held that "a unilateral assertion of counsel is not evidence, because it is not a medium through which a party can present proof of a fact." (Footnote omitted.) That principle applies here. Based on our understanding that no evidence was taken at the hearing on the motion to set aside the default judgment, we conclude that the record before us is adequate for review.

Under ORCP 71 B(1), a default judgment may be set aside if it was the result of "excusable neglect." The motion must be made "within a reasonable time," and "not more than one year after receipt of notice by the moving party of the judgment." Id. (emphasis added). The motion must also be accompanied by a pleading or motion under ORCP 21 A that contains an assertion of a claim or defense. Because we agree with the trial court that Quantum has not demonstrated "excusable neglect," we do not discuss plaintiff's other arguments.

The parties dispute whether HAP indicated to Quantum that it would take over the defense on Quantum's behalf. The trial court resolved that factual dispute against Quantum. We are bound by that finding if there is evidence to support it. Adams, 149 Or.App. at 346-48, 942 P.2d 874. The trial court based its ruling, in part, on the indemnification clause that required Quantum to "defend and save [HAP] harmless from any and all claims, or liability relating to the management of the premises" and on Meyer's testimony that he anticipated at most a "coordinated" defense between HAP and Quantum. The trial court therefore necessarily rejected O'Connell's testimony that HAP said that it would take over its defense of the case. Consequently, there is evidence to support the trial court's findings. In light of its findings, the trial court drew the correct legal conclusion that Quantum did not demonstrate excusable neglect. In other words, Quantum was responsible for its own defense unless it demonstrated an agreement for HAP to take over the defense, an agreement that it failed to prove. Thus, the trial court did not abuse its discretion in denying Quantum's motion to set aside the default judgment.

Order denying motion to set aside judgment reversed; remanded with instructions to enter amended judgment in amount of the prayer of plaintiff's complaint.

DEITS, C.J., concurring. I agree with the majority's disposition of this case and with most of its analysis. The trial court exceeded the extent of its personal jurisdiction over defendant when it entered a default judgment that exceeded the amount of relief sought in the last pleading with which defendant was served. See ORCP 9 A ("No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in [ORCP] 7."). I write separately because I do not agree with the majority's reading of ORCP 67 C. Because, in my view, the result does not depend upon the application of the majority's construction of ORCP 67 C, however, I concur.

The majority concludes that, under ORCP 67 C, notice and an opportunity to be heard are "jurisdictional essentials" that must exist before a party can obtain a default judgment in excess of the amount sought in the complaint. --- Or.App. at ----, --- P.3d at ---- (slip op at 8). I agree with the majority insofar as it concludes that a trial court exceeds its jurisdiction when it enters a default judgment that exceeds in amount the prayer for relief in the operative pleading. I also agree that it is likely that the legislature intended ORCP 67 C(1) to embody jurisdictional requirements imposed by due process principles. I disagree only with how the majority construes ORCP 67 C(1) to reach that result.

According to the majority, we can tell that the legislature intended ORCP 67 C(1) to comport with due process by looking at the second sentence of that subsection, which requires " 'that reasonable notice and opportunity to be heard are given to any party against whom the judgment is to be entered.' " --- Or.App. at ----, --- P.3d at ---- (quoting ORCP 67 C(1)) (slip op at 8). That clause, however, appears in a sentence that governs only those default judgments granting equitable remedies and, accordingly, does not directly apply in this case.

ORCP 67 C provides, in relevant part: "Every judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if such relief has not been demanded in the pleadings, except: C(1) A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. However, a default judgment granting equitable remedies may differ in kind from or exceed in amount that prayed for in the demand for judgment, provided that reasonable notice and opportunity to be heard are given to any party against whom the judgment is to be entered."

The first sentence of ORCP 67 C(1) states that default judgments shall not be different in kind or exceed in amount what was prayed for. The second sentence is an exception: a default judgment granting equitable remedies may be different in kind or exceed in amount what was prayed for if proper notice and an opportunity to be heard are given. The majority reasons that the legislature intended notice and opportunity to be heard to be required whenever a judgment is to exceed the amount prayed for. --- Or.App. at ----, --- P.3d at ---- (slip op at 8). It seems much more likely that the legislature intended that requirement to apply only to cases involving equitable relief; otherwise it would not have phrased ORCP 67 C(1) as a general rule followed by an exception, but rather would have said that any default judgment can differ in kind or exceed in amount what was sought if proper notice and an opportunity to be heard are given.

In my view, the legislature clearly indicated in ORCP 67 C(1) that, consistently with due process, a judgment granting only legal relief may not exceed the amount sought in the prayer.

Consequently, I agree with the majority that the trial court lacked jurisdiction to enter the default judgment to the extent that it exceeded the amount sought in plaintiff's amended complaint. I do not agree that, under the plain language of ORCP 67 C(1), a default judgment granting only legal relief may exceed the amount sought if proper notice and an opportunity to be heard are given. However, that is not a question we need to decide in this case.

For the reasons stated above, I concur.

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PROPOSED AMENDMENTS TO ORCP 54E

Key

Italicized = deleted

Underlined = addition

ORCP 54E Compromise; effect of acceptance or rejection.

E(1) 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. The offer shall state whether the offer is inclusive or exclusive of costs and disbursements or attorney fees.

E(2) 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 states that it is exclusive of costs and disbursements or attorney fees, the party asserting the claim shall submit any claim for costs and disbursements or attorney fees to the court as provided in ORCP 68.

E(3) 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, 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.