

AMENDMENTS

TO ORCP 47

promulgated by

COUNCIL ON COURT PROCEDURES

1980 to 2024

RULE 47

SUMMARY JUDGMENT

A. For claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move, with or without supporting affidavits, for a summary judgment in that party's favor upon all or any part thereof.

B. For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move, with or without supporting affidavits, for a summary judgment in that party's favor as to all or any part thereof.

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

D. Form of affidavits; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or further affidavits. When a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of that party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue as to any material fact for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party.

E. When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that such party cannot, for reasons stated, present by affidavit facts essential to justify the opposition of that party, the court may refuse the application for judgment, or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had, or may make such other order as is just.

F. Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.

G. Multiple parties or claims; final judgment. In any action involving multiple parties or multiple claims, a summary judgment which is not entered in compliance with ORS 18.125 shall not constitute a final judgment.

COMMENT

This is based on ORS 18.105.

RULE 48 (RESERVED)

RULE 49 (RESERVED)

SUMMARY JUDGMENT

RULE 47

A. For claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move, with or without supporting affidavits, for a summary judgment in that party's favor upon all or any part thereof.

B. For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move, with or without supporting affidavits, for a summary judgment in that party's favor as to all or any part thereof.

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

issue of liability alone although there is a genuine issue as to the amount of damages.

D. Form of affidavits; defense required. [*Supporting*] Except as provided by section E. of this rule, supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or further affidavits. When a motion for summary judgment is made and supported as provided in this rule an adverse party may not rest upon the mere allegations or denials of that party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue as to any material fact for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party.

E. Affidavit of attorney when expert opinion required. Motions under this rule are not designed to be used as discovery devices to obtain the names of potential expert witnesses or to obtain their facts or opinions.

If a party, in opposing a motion for summary judgment, is required to provide the opinion of an expert to establish a genuine issue of material fact, an affidavit of the party's attorney stating that an unnamed qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact, will be deemed sufficient to controvert the allegations of the moving party and an adequate basis for the court to deny the motion. The affidavit shall be made in good faith based on admissible facts or opinions obtained from a qualified expert who has actually been retained by the attorney who is available and willing to testify and who has actually rendered an opinion or provided facts which, if revealed by affidavit, would be a sufficient basis for denying the motion for summary judgment.

[E] F. When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that such party cannot, for reasons stated, present by affidavit facts essential to justify the opposition of that party, the court may refuse the application for judgment, or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had, or may make such other order as is just.

[F] G. Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the

court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.

[G] H. Multiple parties or claims; final judgment.

In any action involving multiple parties or multiple claims, a summary judgment which is not entered in compliance with Rule 67 B. shall not constitute a final judgment.

COMMENT

When, in opposing a motion for summary judgment, it would be necessary to provide the opinion of an expert to raise a material issue of fact, an affidavit of counsel that a qualified expert is willing to testify to facts and opinions which raise a material issue of fact will be an adequate basis for the court to deny the motion.

SUMMARY JUDGMENT

RULE 47

C. Motion and proceedings thereon. The motion and all supporting documents shall be served and filed at least [10] 45 days before the [time fixed] date set for [the hearing] trial. The adverse party[, prior to the day of the hearing, may serve opposing affidavits] shall have 20 days in which to serve and file opposing affidavits and supporting documents. The moving party shall have five days to reply. The court shall have discretion to modify these stated times. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

COMMENT

Rule 47 C. is amended to standardize time limitations applied to motions for summary judgment. Unless modified by the court, motions must be filed at least 45 days before trial. Twenty days from the date of filing the motion are allowed for response; five days are then allowed for reply. In cases where summary judgment may be appropriate, although it would be impossible to meet the established deadlines, the court may modify the times allowed.

~~party that subsequently discovers any document or thing that the request identifies shall produce or allow inspection of the item, or object in the manner described in this paragraph, within a reasonable time after discovering the item. The party submitting the request may move for an order under Rule 46 A with respect to any objection to or other failure to respond to the request or any part thereof or any failure to permit inspection as requested.~~

SUMMARY JUDGMENT  
RULE 47

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C Motion and proceedings thereon. The motion and all supporting documents shall be served and filed at least [45] 60 days before the date set for trial. The adverse party shall have 20 days in which to serve and file opposing affidavits and supporting documents. The moving party shall have five days to reply. The court shall have discretion to modify these stated times. The court shall enter judgment for the moving party if the pleadings, depositions, affidavits and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of

the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at trial. The adverse party may satisfy the burden of producing evidence with an affidavit under section E of this rule. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

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~~PHYSICAL AND MENTAL  
EXAMINATION OF PERSONS;  
REPORTS OF EXAMINATION  
RULE 44~~

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~~E Access to [hospital records] individually identifiable health information. Any party against whom a civil action is filed for compensation or damages for injuries may obtain copies of [all records of any hospital in reference to and connected with any hospitalization or provision of medical treatment by the hospital of the injured person] individually identifiable health information as defined in Rule 55 H within the scope of discovery under Rule 36 B. [Hospital records] Individually identifiable health information [shall] may be obtained by written patient authorization, by an order of the court, or by subpoena in accordance with Rule 55 H.~~



1 issue of liability alone although there is a genuine issue as to the amount of damages.

2         **D Form of affidavits and declarations; defense required.** Except as provided by section  
3 E of this rule, supporting and opposing affidavits and declarations [*shall*] **must** be made on  
4 personal knowledge, [*shall*] **must** set forth such facts as would be admissible in evidence, and  
5 [*shall*] **must** show affirmatively that the affiant or declarant is competent to testify to the  
6 matters stated therein. Sworn or certified copies of all [*papers*] **documents** or parts thereof  
7 referred to in an affidavit or a declaration [*shall*] **must** be attached thereto or served therewith.  
8 The court may permit affidavits or declarations to be supplemented or opposed by depositions  
9 or further affidavits or declarations. When a motion for summary judgment is made and  
10 supported as provided in this rule, an adverse party may not rest [*upon*] **on** the mere  
11 allegations or denials of that party's pleading[, *but*]; **rather**, the adverse party's response, by  
12 affidavits, declarations, or as otherwise provided in this section, must set forth specific facts  
13 showing that there is a genuine issue as to any material fact for trial. If the adverse party does  
14 not so respond, the court shall grant the motion, if appropriate.

15         **E Affidavit or declaration of attorney when expert opinion required.** Motions under  
16 this rule are not designed to be used as discovery devices to obtain the names of potential  
17 expert witnesses or to obtain their facts or opinions. If a party, in opposing a motion for  
18 summary judgment, is required to provide the opinion of an expert to establish a genuine issue  
19 of material fact, an affidavit or a declaration of the party's attorney stating that an unnamed,  
20 qualified expert has been retained who is available and willing to testify to admissible facts or  
21 opinions creating a question of fact[,] will be deemed sufficient to controvert the allegations of  
22 the moving party and an adequate basis for the court to deny the motion. The affidavit or  
23 declaration [*shall*] **must** be made in good faith based on admissible facts or opinions obtained  
24 from a qualified expert who has actually been retained by the attorney, who is available and  
25 willing to testify, and who has actually rendered an opinion or provided facts [*which*] **that**, if  
26 revealed by affidavit or declaration, would be a sufficient basis for denying the motion for

1 summary judgment.

2 **F When affidavits or declarations are unavailable.** Should it appear from the affidavits  
3 or declarations of a party opposing the motion that *[such]* **the** party cannot, for reasons stated,  
4 present by affidavit or declaration facts essential to justify the opposition of that party, the  
5 court may deny the motion or may order a continuance to permit affidavits or declarations to  
6 be obtained or depositions to be taken or discovery to be had, or may make *[such]* **any** other  
7 order as is just.

8 **G Affidavits or declarations made in bad faith.** Should it appear to the satisfaction of  
9 the court at any time that *[any of the affidavits or declarations]* **an affidavit or declaration**  
10 presented *[pursuant to]* **under** this rule *[are]* **was** presented in bad faith or solely for the  
11 purpose of delay, the court shall *[forthwith]* order the party *[employing them]* **filing the**  
12 **affidavit or declaration** to pay to the other party the amount of the reasonable expenses  
13 *[which]* **that** the filing of the *[affidavits or declarations]* **affidavit or declaration** caused the  
14 other party to incur, including reasonable attorney fees, and any offending party or attorney  
15 may be subject to sanctions for contempt.

16 **H Multiple parties or claims; limited judgment.** If the court grants summary judgment  
17 for *[less]* **fewer** than all parties *[and]* **or fewer than all** claims **or defenses** in an action, a limited  
18 judgment may be entered if the court makes the determination required by Rule 67 B.

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## 2015-2017 BIENNIUM STAFF COMMENT TO RULE 47

*Note: This staff comment is provided as a convenience to those who read the Oregon Rules of Civil Procedure and have a general question as to the impetus for a particular amendment during the 2015-2017 biennium. Language in this comment was circulated to members of the Council on Court Procedures, but was not voted on or approved by the Council. This comment is neither legislative history for purposes of construction, as in statutory construction, to determine the intent of the Council in making any amendment, nor does it establish the meaning of any rule that has been amended. For the purpose of construing the Oregon Rules of Civil Procedure, the only authoritative legislative history is found in the Council's minutes of its deliberations. The Council's minutes can be found at [www.counciloncourtprocedures.org](http://www.counciloncourtprocedures.org). If the Legislative Assembly amended a rule, the legislative history for the Legislature's amendment can be found at [www.oregonlegislature.gov](http://www.oregonlegislature.gov).*

### **Rule 47**

The significant changes in Rule 47 are found in sections A, B, and H. In sections A and B, the existing language did not appear to authorize the use of a motion for summary judgment to challenge an affirmative defense. It was reported that some trial court judges were not allowing a motion for summary judgment to be so utilized. The limitation has not been universally applied. *Hooker Creek v. Central Oregon Land Development*, 279 Or App 117 (2016), discloses without further comment that in the trial court proceedings a party used a Rule 47 motion successfully against an affirmative defense. In section A and section B, the language "claim, counterclaim, or cross-claim" is replaced with "any type of claim," an expansive phrase meant to encompass all of the previously listed claims. Also in section A and section B, the language "all or any part thereof" (of a claim) is expanded and modernized to read "all or any part of any claim or defense." Likewise, in section H, "claims" is expanded to read "claims or defenses." In section A, the second use of "upon" is replaced with "as to" to read consistently with section B.

Section G is rewritten to more clearly state that, if a court finds that an affidavit or declaration supporting or opposing a Rule 47 motion is presented in bad faith or solely for the purpose of delay, the court shall order the party filing that affidavit or declaration to pay the other party's expenses and attorney fees that were caused by the filing of the affidavit or declaration. However, the court is no longer required to enter such an order "forthwith"; the court is required to enter an order for the listed sanctions but may do so with the timing left to the court's discretion.

Other changes include replacing "shall" with "must" once in section C, four times in section D, and once in section E in an attempt to clarify the intended meaning, i.e., a party is required to observe the timing and content requirements specified in the rule if the party chooses to file a motion for summary judgment; no party has a duty to file a motion for summary judgment. Still other changes include replacing "upon" with "on" one time in section A, one time in section C, and one time in section D. An Oxford comma is added in section C and section D;

three additional commas are added in section D; and one comma is deleted and three are added in section E. The word “papers” is replaced with “documents” in section D. In the last sentence in section D, a clause beginning with “but” is replaced with “rather” and the punctuation is changed from a comma to a semi-colon. The word “which” is replaced with “that” in section E and in section G. The word “such” is replaced once with “the” and once with “any” in section F. In section H, the word “less” is replaced with the word “fewer” and, again, it is clarified that a limited judgment can be entered when fewer than all parties or fewer than all claims or defenses are resolved by a motion for summary judgment. The modifications specified in this paragraph are made to improve grammar and clarity and to modernize the language without the intention to effect a change in the rule’s meaning or operation.