COUNCIL ON COURT PROCEDURES

Saturday, September 26, 1992, Meeting
9:00 a.m.

Seaside Civic & Convention Center (Seaside A and B)
415 First Avenue
Seaside, Oregon

A G E N D A

1. Approval of minutes of meeting held August 1, 1992

2. Old business (Chair)

3. Amendment to Rule 60 (see attached letter from Lee Johnson) (Lee Johnson)

4. Amendment to Rule 69 (see attached proposed amendment) (Maury Holland)

5. Class actions (Janice Stewart)

6. Appointment of Executive Director (Chair)

7. **NEW BUSINESS**

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CIRCUIT COURT OF OREGON
FOURTH JUDICIAL DISTRICT
MULTNOMAH COUNTY COURTHOUSE
1021 S.W. 4TH AVENUE
PORTLAND, OREGON 97204

LEE JOHNSON
JUDGE
DEPARTMENT NO. 10

COURTROOM 528
(503) 248-3165

August 20, 1992

Henry Kantor, Chair
Council on Court Procedures
1100 Standard Plaza
1100 S.W. Sixth Avenue
Portland, OR 97204

Dear Henry:

This letter is to propose the following amendment to ORCP 60:

> "**Motion for a Directed Verdict.** Any party may move for a directed verdict [at the close of the evidence offered by an opponent or at the close of all the evidence] <u>at any time during the trial after the opponent has been fully heard</u>. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury. If a motion for directed verdict is made by the party against whom the claim is asserted, the court may, at its discretion, give a judgment of dismissal without prejudice under Rule 54 rather than direct a verdict.

(The above material in brackets is to be deleted; the underlined material is new.)

This would conform ORCP 60 to Federal Rule 50(a)(1) and enable a trial judge to dispose of issues at any time during the

trial when it becomes apparent that there is no issue of fact and as a matter of law one side is entitled to prevail. This often occurs after opening statement. The trial judge should have means to dispose of these issues without having to continue the trial until close of the evidence.

To illustrate, I tried a case wherein Plaintiff advanced a multitude of legal theories, some legal and others equitable. I concluded in pretrial conference, that the gravamen of Plaintiff's claim was recision for mutual mistake and tried that claim. As to the other theories, I asked Plaintiff's counsel to make an offer of proof by summarizing the evidence he intended to offer and pointing up the inferences he wished me to draw. Based upon that presentation, and viewing the evidence most favorably to Plaintiff, I dismissed the other claims. The Court of Appeals affirmed the judgment on the recision claim; but, without reaching the merits, remanded the other claims for trial on the ground that they were "not in the posture for judgment." Harbert v. Riverplace Associates, Slip Opinion July 8, 1992.

Frankly, I have difficulty understanding the Court of Appeals decision. Plaintiff had opportunity to present her evidence in the most favorable light possible. The Court of Appeals may have been technically correct that summary judgment was inappropriate because ORCP 47 contemplates a written motion made 45 days prior to trial. However, ORCP 47 also gives the

trial court discretion to modify the time limits. Federal Courts have allowed summary judgment under identical conditions as in Harbert. FDIC v. Cover, 714 F. Supp. 455 (D. Kan. 1988) cited with favor in Moore, Federal Practice, Para. 50.03.

In any event, Plaintiff had presented his evidence by offer of proof and thus closed his case. A more liberal interpretation of ORCP 60 would permit a directed verdict under such circumstances. Finally, one must ask why did the Court of Appeals not treat the matter as harmless error and decide the issue on the merits.

The Court of Appeals, apparently, is preoccupied with the notion that the only time that it is appropriate to dispose of an issue is by judgment on the pleadings, summary judgment or after a full blown trial. See Harbert supra at p.3.
In Industrial Underwriters v. JKS Inc., 90 Or App 189 (1988), I allowed an oral motion for summary judgment at the conclusion of Plaintiff's opening statement. The case was again remanded without reaching the merits on the ground that summary judgment was improper at that stage of the proceedings. The Court of Appeals refused to treat the decision as a directed verdict. On remand, the case was assigned to another judge who, at the close of Plaintiff's case, allowed a directed verdict. I predict the same result will occur in Harbert.

Prior to 1991, Federal Rule 50(a)(2) was identical to ORCP 60 that a party could move for a "directed verdict at the

close of the evidence offered by an opponent. . .". Nonetheless, according to Moore, it was traditional to grant motions for directed verdict "(1) after the opening statement of adverse counsel, if by such statement it is clear that no question for the jury exists; (2) at the close of the evidence offered by an opponent; or (3) at the close of all the evidence. " According to Moore, the 1991 amendment was intended to make it clear that a directed verdict could be granted "at any time during the trial, as soon as it is apparent that either party is unable to carry a burden of proof that is essential to the party's case. " Advisory Committee Note to the 1991 Amendments quoted in Moore, Federal Practice (1991).

The situation in which the proposed rule is most needed is the complex case where there are multitude of contentions by both sides. The proposed rule gives the trial judge a tool to sort out what are the valid contentions and present the case in some coherent form to the finder of fact.

Sincerely,

Lee Johnson

LJ/jim;ths
cc: Maury Holland
Acting Executive Director

RULE 69
DEFAULT ORDERS AND JUDGMENTS

A. Entry of order of default. When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, the party seeking affirmative relief may apply for an order of default. If the party against whom an order of default is sought has filed an appearance in the action, or has provided written notice of intent to file an appearance to the party seeking an order of default, then the party against whom an order of default is sought shall be served with written notice of the application for [an] **such** order [of default] at least 10 days, unless shortened by the court, prior to entry [of the order of default] **thereof[.], except that no prior notice is required for entry of an order of default against a party who, having proper notice thereof, fails to defend at trial.**

B. Entry of default judgment.

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

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B.(1)(c) The party against whom judgment is sought has been defaulted for failure to [appear] **plead or otherwise defend**;

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