

CHAPTER 15

CIVIL MOTION PRACTICE

Xin Xu
Xin Xu Law Group

Chapter 15
CIVIL MOTION PRACTICE
TABLE OF CONTENTS

	<u>Page #</u>
I. INTRODUCTION TO STATE COURT CIVIL MOTIONS.....	15-1
A. Applicable Rates.....	15-1
B. Available Resources	15-2
C. Practice Tips	15-3
II. ORCP 21 MOTIONS AGAINST PLEADINGS.....	15-3
A. Motions to Dismiss.....	15-3
B. Other ORCP 21 Motions	15-4
III. ORCP 23 MOTION TO AMEND AND RELATION BACK	15-5
A. ORCP 23 A Amendment	15-5
B. ORCP 23 B Amendment	15-5
C. ORCP 23 C Relation Back.....	15-5
IV. DISCOVERY MOTIONS	15-6
A. Motions to Compel – ORCP 46	15-6
B. Discovery Sanctions.....	15-7
C. Motion for a Protective Order-ORCP 36 C	15-7
D. Practice Tip	15-7
V. SUMMARY JUDGMENT MOTIONS	15-7
A. Summary Judgment Standard	15-7
B. Responding to Summary Judgment Motions.....	15-8
C. Type of Evidence Allowed in Summary Judgment.....	15-8
D. Motion to Strike	15-9
E. Expert Declarations	15-9
F. Considerations When Moving for Summary Judgment.....	15-10

I. Introduction to Oregon State Court Civil Motions

There are dozens of different types of civil motions. This CLE focuses on the four most common motions you will likely come across in state court: ORCP 21 Motions, ORCP 23 Motion to Amend, Discovery Motions, and ORCP 47 Summary Judgment Motion.

A. Applicable Rules

- i. Review and be familiar with Oregon Rules of Civil Procedure (ORCP), Uniform Trial Court Rules (UTCRC), and Supplemental Local Rules (SLR) for the county of filing.
- ii. Review UTCRC 5.010 for when conferral is required prior to filing a motion, and the certificate of compliance.
 - Conferral is **required** for motions under ORCP 21A(1)-(7), 23, and 36-46. UTCRC 5.010. *See Anderson v. State Farm Mutual Auto Ins. Co.*, 217 Or App 592, 595-96, 177 P3d 31 (2008) (court held defendant's violation of conferral request in UTCRC 5.010 compelled denial of its motion to dismiss; futility in conferral was no excuse).
 - Certificate of compliance must state either that the parties conferred or contain facts showing good cause for not conferring.
- iii. Be familiar with ORCP 10 for computing time periods.
- iv. Make sure you pay the correct filing fee, if any, or risk the filing being rejected. The 2020 circuit court fee schedule is located at: https://www.courts.oregon.gov/Documents/2020_CircuitFeeSchedule_public_eff-2020-01-01.pdf
- v. Review UTCRC 5.100 for submission of proposed order on motions.
- vi. Make sure your motion complies with UTCRC 5.050 by stating whether oral argument is requested, estimated time for oral argument, and whether official court reporting services are requested. If you are requesting telecommunication, make sure you comply with UTCRC 5.050(2).

B. Available Resources

- i. Oregon State Bar Barbooks, e.g., Oregon Civil Pleading and Litigation (2020 ed.).
- ii. Multnomah County:
 - [Multnomah County Attorney Reference Manual](#)

The Attorney Reference Manual is updated regularly and provides an extremely valuable resource on practices and procedures in Multnomah County. It also provides sample motions and forms to be used in Multnomah County.

<https://www.courts.oregon.gov/courts/multnomah/go/Documents/ARM.pdf>

- The Civil Motion Panel Statement of Consensus Multnomah County judges have compiled an explanation of rulings on a variety of issues that arise in the civil cases that come before them. The statement of consensus is a good reference point for motions and responses under consideration.
<https://mbabar.org/assets/documents/multnomah%20county%20motion%20panel%20consensus%20statement%20august%202018.pdf>

iii. Clackamas County:

- Clackamas Court Survival Guide - The Survival Guide is similar to Multnomah County's Attorney Reference manual and provides valuable resource on practices and procedures in Clackamas County Circuit Court.
https://www.courts.oregon.gov/courts/clackamas/resources/Documents/2019_Survival_Guide_Final.pdf

iv. Court Clerks and Judicial Assistants: If you cannot find the answer in the rules, the court clerks and judicial assistants (if your matter is assigned to a judge) are very helpful.

C. Practice Tips

- i. Create a Motions bank for different types of motions.
 - Ask others in your office or your mentors for samples of good motions, responses, and replies.
 - Check OECI (state court) or Pacer (federal court) in your free time to add to your motions bank.
- ii. Make sure you are relying on the most up-to-date rules and resources. There have been many recent changes to the rules, especially with e-Court.
- iii. Just because you can file a motion does not mean you should. Some types of motions are particularly frowned upon by the court and should only be brought when absolutely necessary.

II. ORCP 21 Motions Against Pleadings

A. Motions to Dismiss – ORCP 21 A

- i. Motions to dismiss are used by defendants to eliminate claims for relief or an entire action, or, by plaintiffs to eliminate affirmative defenses. ORCP 21 A specifies the following grounds for dismissal:
 1. Lack of jurisdiction over the subject matter;
 2. Lack of jurisdiction over the person;
 3. There is another action pending between the same parties for the same cause;
 4. Plaintiff does not have legal capacity to sue;
 5. Insufficiency of summons or process, or insufficiency of service;
 6. The party asserting the claim is not the real party in interest;
 7. Failure to join a party under ORCP 29;
 8. Failure to state ultimate facts sufficient to constitute a claim; and
 9. The pleading shows that the action has not been commenced within the applicable statute of limitation.
- ii. Unlike the other ORCP 21A motions, motions to dismiss brought under ORCP A(8)(Failure to state a claim) and A(9) (statute of limitations) are limited to the face of the complaint. In other words, these motions cannot be supported by matters outside the pleading, including affidavits, declarations, and other evidence. *See Deep Photonics Corp. v. LaChapelle*, 282 Or App 533, 548, 385 P2d 1126 (2016), *rev den* 361 Or 425 (2017); *Kastle v. Salem Hospital*, 284 Or App 342, 344, 392 P3d 374 (2017).
- iii. Defenses Waived if Not Raised-Certain defenses are waived if not raised by motion before pleading, or in the first responsive pleading.
 - ORCP 21 G(1) – Lack of jurisdiction over the person, insufficiency of summons or process, insufficiency of service, another action pending between the same parties on the same cause. These defenses are **waived** if not raised in the party’s first appearance.
 - ORCP 21 G(2) – Plaintiff lacks capacity to sue, not real party in interest, and statute of limitations. These defenses are waived if it is neither made by motion nor included in a responsive pleading or, in limited circumstances, amendment thereof.
- iv. **Practice Tip:** Consider whether the ORCP 21 A motion to dismiss will result in dismissal with or without prejudice if granted. If you want the court to dismiss the claim or action with prejudice, make sure you so state in your motion and order. If the order is silent as to whether the dismissal is with or without prejudice, then the dismissal shall be treated as without prejudice.

B. Other ORCP 21 Motions

- i. **ORCP 21 B** provides for a motion for judgment on the pleadings after the pleadings are closed and in advance of trial. See *Simpkins v. Connor*, 210 Or App 224, 228, 150 P3d 417 (2006); *Beason v. Harcleroad*, 105 Or App 376, 379-80, 805 P2d 700 (1991). The court may enter judgment on the pleadings if the allegations show the nonmoving party cannot prevail as a matter of law. ORCP 21 B; *Rowlett v. Fagan*, 358 Or 639, 649, 369 P3d 1132 (2016); *Lehman v. Bielenberg*, 257 Or App 501, 508, 307 P3d 478 (2013); *Pendergrass v. Fagen*, 218 Or App 533, 537, 180 P3d 110 (2008), *rev den*, 344 Or 670 (2008) (court did not err in granting plaintiff’s motion for judgment on the pleadings in FED action).
- ii. **ORCP 21 D Motion to Make More definite and certain:** Use ORCP 21 D to “require the pleading to be made definite and certain by amendment when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge, defense, or reply is not apparent.” See *Stewart v. Kids Incorporated of Dallas, Or.*, 245 Or App 267, 272, 286, 261 P3d 1272 (2011), *rev dismissed*, 353 Or 104 (2012) (affirmed dismissal where complaint failed to allege facts to show why defendants were on reasonable notice of unreasonable risk of harm).
- iii. **ORCP 21 E Motion to Strike:** Use ORCP 21 E(1) to strike any sham, frivolous, or irrelevant pleading or defense or any pleading containing more than one claim or defense not separately stated. Use ORCP 21 E(2) to strike redundant matter from the complaint.
 - A “sham” allegation appears false on the face of the pleading and may be stricken. *Rowlett v. Fagan*, 262 Or App 667, 682, 327 P3d 1 (2014), *aff’d in part, rev’d in part*, 358 Or 639 (2016); *Kashmir Corp. v. Nelson*, 37 Or App 887, 891, 588 P2d 133 (1978); *Warm Springs Forest Products Ind. v. EBI Co.*, 300 Or 617, 619 n 1, 716 P2d 740 (1986) (“Good in form but false in fact; * * * a pretense because it is not pleaded in good faith.”).
 - A “frivolous” pleading under ORCP 21 B “is one which, although true in its allegations, is totally insufficient in substance.” See *Kashmir Corp. v. Nelson*, 37 Or App 887, 892, 588 P2d 133 (1978)
 - An “irrelevant” pleading pertains to matters that “are not logically or legally germane to the substance of the parties’ dispute.” *Ross and Ross*, 240 Or App 435, 440-41, 246 P3d 1179 (2011). A pleading may be stricken as either frivolous or irrelevant if it is legally insufficient. *Id* at 440.

iv. Practice Tips

- Conferral is required for all ORCP 21 motions except for motions brought under ORCP 21 A(8)(failure to state a claim) and ORCP 21 A(9)(statute of limitations).
- If you are filing an ORCP 21 D motion to make more definite or certain or ORCP 21 E motion to strike, make sure you comply with UTCR 5.020(2).

III. ORCP 23 Motion to Amend and Relation Back

A. ORCP 23A Amendment

ORCP 23A provides that a “pleading may be amended by a party once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, the party may so amend it at any time within 20 days after it is served”. Otherwise, a party may amend a pleading only with written consent of the adverse party or court approval. The court shall freely grant leave to amend “when justice so requires.”

B. ORCP 23 B Amendment

When issues not raised by the pleadings are nonetheless tried with the express or implied consent of the parties, the pleadings may be amended to conform to the proof. ORCP 23 B; *see Agrons v. Strong*, 250 Or App 641, 282 P3d 925(2012). If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to show prejudice.

C. ORCP 23 C Relation Back

When the need for amendment becomes apparent after the statute of limitations has run, consider the application of ORCP 23 C which provides:

Relation back of amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment, such party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining any defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party brought in by amendment.

New allegations or claims: An amendment adding a new claim or defense against the same party or parties will relate back to the date of original filing when it arises “out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading.” ORCP 23 C; *See Concienne v. Asante*, 273 Or App 331, 359 P3d 407 (2015) (permitting relation back where predicate facts, injury and damages are the same and defendant had adequate notice of claim)

New parties: An amendment adding or substituting a party will be allowed to relate back to the date of original filing when the party to be added received actual notice of the action within the statute of limitations and knew or should have known, but for the mistake, it would have been named as a party to the action. ORCP 23 C; *McLain v Maletis Beverage*, 200 Or App 374, 115 P3d 938 (2005); *see also Smith v. American Legion Post 83*, 188 Or App 139, 71 P3d 136, rev den, 336 Or 60 (2003). This means actual notice within the statutory period, not including any extension for service under ORS 12.020. *McLain v. Maletis Beverage*, 200 Or App 374, 377-81, 115 P3d 938 (2005) (Rule 23 C requires notice within the statutory period, not service); *Richlick v. Relco Equipment, Inc.*, 120 Or App 81, 852 P2d 240, rev den, 317 Or 605 (1993) (court held the amendment did not relate back when party had no notice of the action within the period of limitations).

Practice Tip: A common issue arises when plaintiff realizes there was an error in naming the defendant and files an amended complaint to correct the error after the statute of limitations had expired. Whether the amendment constitutes a “change in party” and therefore requires the defendant to receive notice within the statute of limitations depends on if the error is a “misnomer” or “misidentification.” A misnomer occurs when there is an “error in stating what the Defendant is called.” *Worthington v. Estate of Davis*, 250 Or App 755, 760 (2012). A misidentification occurs when plaintiff makes “a mistake in choosing which person or entity to sue.” *Id.* at 760. A misnomer triggers just the first sentence of ORCP 23 C and does not trigger the notice requirement. On the other hand, a misidentification constitutes a change in party and triggers the additional notice requirements for relation back as imposed in the second part of ORCP 23 C. *Id.* at 759.

IV. Discovery Motions

A. Motions to Compel – ORCP 46

If the opposing party or a nonparty fails to respond to discovery requests or if the response is inadequate, the requesting party may file a motion to compel discovery pursuant to ORCP 46 A. The moving party must establish that the material sought is discoverable, e.g., that the material is not privileged or subject to an exception to the privilege claimed. *Kahn v. Pony Express Courier Corp.*, 173 Or App 127, 133

(2001). The court may award reasonable expenses, including attorney fees, to the party that prevailed on bringing or opposing the motion. ORCP 46 A(4).

B. Discovery Sanctions- ORCP 46 B

The trial court may impose a variety of sanctions for a party's failure to obey an order to permit or provide discovery. ORCP 46 B(1)-(3), C, D. Sanctions for the failure must be just, but may include striking pleadings, limiting proof at trial, and dismissal. ORCP 46 B(2), 46 D. *See Burdette v. Miller*, 243 Or App 423, 431-32, 259 P3d 976 (2011) (Court of Appeals held no abuse of discretion in striking defenses of defendant who failed repeatedly to appear for deposition or for sanction hearing). The party compelling compliance is also entitled to reasonable expenses, including attorney fees, unless the court finds that the opposing party's failure to obey the order was substantially justified "or that other circumstances make an award of expenses unjust." ORCP 46 D.

C. Motion for Protective Order-ORCP 36 C

A party opposing a request for discovery may (1) object to the discovery request or (2) move for a protective order under ORCP 36 C—an order "that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

D. Practice Tip

The parties must confer before filing any motions under ORCP 36-46. These motions are disfavored by the court. The moving party should make every attempt to resolve the issues and document in writing all of the efforts to resolve the dispute before filing the motion.

V. Summary Judgment Motions

A. Summary Judgment Standard

A summary judgment motion is a dispositive motion designed to eliminate the opponent's case or portions of the case without a trial. The motion is not designed to resolve factual disputes, but to determine whether there is any genuine issue of material fact to justify a trial. ORCP 47 C; *Bonnett v. Division of State Lands*, 151 Or App 143, 145-46 n 1, 949 P2d 735 (1997).

The court reviews the facts and draws all reasonable inferences in favor of the nonmoving party. ORCP 47 C; *Chapman v. Mayfield*, 263 Or App 528, 530, 329 P3d 12 (2014); see *Perry v. Rein*, 215 Or App 113, 168 P3d 1163 (2007) (record permitted competing inferences); *West v. Allied Signal, Inc.*, 200 Or App 182, 113 P3d 983 (2005). "Summary judgment is proper if the 'pleadings, depositions, affidavits, declarations and admissions on file show that there is not genuine issue as to any material fact.' ORCP 47 C." *Greer v. Ace Hardware Corp.*, 256 Or App 132, 134, 300 P3d 202 (2013); *Hagler v. Coastal Farm Holdings, Inc.*, 354 Or 132, 140, 309 P3d 1073 (2013).

When the moving party does not have the burden of proof at trial, it may move for summary judgment without coming forward with evidence in support of its motion. Rather, the adverse party must produce admissible evidence on every issue raised in the motion as to which the adverse party would have the burden of persuasion at trial. ORCP 47 C. Failure to do so entitles the moving party to summary judgment.

A plaintiff seeking to recover on a claim, counterclaim, or cross-claim, or to obtain a declaratory judgment, may obtain summary judgment if it is established that “there is no genuine issue as to any material fact” necessary to prove a claim, that none of the affirmative defenses asserted by defendant raise a genuine issue of material fact, and that judgment should be entered in plaintiff’s favor under applicable law. ORCP 47 A; ORCP 47 C; *see William C. Cornitius, Inc. v. Wheeler*, 276 Or 747, 757, 556 P2d 666 (1976) (summary judgment was appropriate when, *inter alia*, “none of the affirmative defenses raised any triable issue”).

A defendant may obtain summary judgment on a showing that “there is no genuine issue as to any material fact” necessary for the plaintiff’s claim and that defendant is entitled to a judgment based on the applicable law, or when one or more affirmative defenses are established in the same manner. ORCP 47 B; ORCP 47 C; *King v. Warner Pac. Coll.*, 296 Or App 155, 172, 437 P3d 1172 (2019).

B. Responding to Summary Judgment Motions

After the moving party has pointed out the lack of any genuine issue of material fact and that it is entitled to judgment as a matter of law, the adverse party must produce admissible evidence sufficient to meet a burden of production on any issue on which that party would bear the ultimate burden of persuasion at trial. ORCP 47 C.

C. Type of Evidence Allowed in Summary Judgment

Both the moving party and adverse party may only rely on admissible materials for purposes of summary judgment. *See* ORCP 47 D; *Deberry v. Summers*, 255 OR App 152, 166 n6 (2013). Affidavits, declarations, depositions, responses to requests for admissions are typical materials used in summary judgment proceedings.

An affidavit or declaration must be based on personal knowledge and must “set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant or declarant is competent to testify to the matters stated therein.” ORCP 47 D; *Spectra Novae, Ltd. v. Waker Associates, Inc.*, 140 Or App 54, 58, 914 P2d 693 (1996). The declarant satisfies the requirement for personal knowledge when the affidavit is read as a whole, and an objectively reasonable person would understand that the statements are made from the affiant's

personal knowledge and with competence. *West v. AlliedSignal, Inc.*, 200 Or App 182, 113 P3d 983 (2005).

If evidence presented in support or oppose summary judgment is inadmissible, the other party should seek to strike the evidence. When evidentiary challenges are raised, the court will assess the admissibility of particular evidence. *See Perman v. CH. Murphy/Clark-Ullman, Inc.*, 220 Or App 132, 138, 185 P3d 519 (2008) (analyzing admissibility of lay opinion under OEC 701).

D. Motion to Strike

A party must make evidentiary objections before the motion for summary judgment is decided. Otherwise, the evidence may be considered. *Aylett v. Universal Frozen Foods Co.*, 124 Or App 146, 154, 861 P2d 375 (1993). Examples of objections include:

Hearsay – Hearsay statements not falling within any exception to the hearsay rule are inadmissible and should not be considered.

Opinions – “Opinions as to liability are legal conclusions and are not the proper subject of a witness’s testimony.” *Olson v. Coats*, 78 Or App 368, 717 P2d 176 (1986).

Legal conclusions – An affidavit that merely states legal conclusions is not sufficient to create a question of fact. *Spectra Novae Ltd.*, 140 Or App 54, 59, 914 P2d 693 (1996).

Irrelevant averments – Affidavit statements that are irrelevant should play no part in the court’s consideration.

E. Expert Declarations

Expert testimony may be required on specific claims, such as claims for medical or other professional negligence. *See e.g. Getchell v. Mansfield*, 260 Or 174, 179, 489 P2d 953 (1971) (expert testimony required to establish the standard of care in the community).

When a party opposing summary judgment is required to provide the opinion of an expert to establish a genuine issue of material fact, ORCP 47 E permits the party’s attorney to submit an affidavit or declaration “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[.]” ORCP 47 E is designed to protect the expert’s identity and opinions from disclosure before trial. *Stotler v. MTD Products, Inc.*, 149 Or App 405, 408, 943 P2d 220 (1997); *Moore v. Kaiser Permanente*, 91 Or App 262, 265, 754 P2d 615, rev den, 306 Or 661 (1988).

An ORCP 47 E affidavit or declaration must be made in good faith and be based on admissible facts or opinions of a qualified expert. *Two Two v. Fujitec Am., Inc.*, 355 Or 319, 328-29, 325 P3d 707 (2014) (if ORCP 47 E affidavit is filed in bad faith, offending party pays reasonable expenses incurred by other party as a result and may be subject to sanctions).

The submission of an ORCP 47 E affidavit or declaration does not automatically create an issue of fact. *VFS Financing, Inc., v. Shilo Management Corp.*, 277 Or App 698, 706, 372 P3d 582 (2016), *rev den* 360 Or 401 (2016). It will create an issue of fact only when the expert testimony is “‘required’ to establish a genuine issue of material fact” and not otherwise. *Id.*

F. Considerations When Moving for Summary Judgment

Motions for summary judgment can be time consuming and expensive. Additional considerations before filing include:

- The stage of discovery
- Factual records
- Strength of legal position and likelihood of success
- Educating opponent
- Targeting all or part of the case and impact on the balance
- Timing