CIVIL MOTION PANEL STATEMENT OF CONSENSUS

Current As of November 2, 2004
(Authorities Updated 02/2007)

The Civil Motions Panel of the Circuit Court is a voluntary group of judges who agree to take on the work of hearing and deciding pretrial motions in civil actions that are not assigned specially to a judge. Periodically, the motion panel judges discuss their prior rulings and the differences and similarities in their decisions. When it appears all of the panel members have ruled similarly over time on any particular question, it is announced to the bar as a "consensus" of the members.

The current consensus of the Panel's members are set out below. The statements do not have the force of law or court rule; the statements are not binding on any judge. A consensus statement is not a pre-determination of any question presented on the merits to a judge in an action. In every proceeding before a judge of this court, the judge will exercise independent judicial discretion in deciding the questions presented by the parties.

1. ARBITRATION

A. Motions - Once a case has been transferred to arbitration, all matters are to be heard by the arbitrator. UTCR 13.040(3). A party may show cause (by application to the Presiding Court) why a motion should not be decided by the arbitrator.

B. Punitive Damages - Where the actual damages alleged are less than $50,000, the pleading of a punitive damages claim which may be in excess of the arbitration amount does not exempt a case from mandatory arbitration.

2. DISCOVERY

A. Medical Examinations (ORCP 44)

1. Vocational Rehabilitation Exams - Vocational rehabilitation exams have been authorized when the exam is performed as part of an ORCP 44 examination by a physician or a psychologist.

2. Recording Exams and Presence of Third Persons - Audio recordings have been allowed absent a particularized showing that such recording will interfere with the exam. Videotaping or the presence of a third person has been denied absent a showing of special need (e.g., an especially young plaintiff).

3. We have ordered the pretrial disclosure of the percentage of an examiner's income received from forensic work and amount of the examiner's charges. We have ordered that the information be provided for the most recent three years. We have permitted the information to be provided by an affidavit from the examiner, instead of the underlying documentation. We have not conditioned the examination itself on the disclosure of the information.

B. Depositions

1. Attendance of Experts - Attendance of an expert at a deposition has generally been allowed, but has been reviewed on a case-by-case basis upon motion of a party.

2. Attendance of Others - Persons other than the parties and their lawyers have been allowed to attend a deposition, but a party may apply to the court for the exclusion of witnesses.

3. Out-of-State Parties - A non-resident plaintiff is normally required to appear at plaintiff's expense in Oregon for deposition. Upon a showing of undue burden or expense, the court has ordered, among other things, that plaintiff's deposition occur by telephone with a follow-up personal appearance deposition in Oregon before trial.

Non-resident defendants normally have not been required to appear in Oregon for deposition at their own expense. The deposition of non-resident corporate defendants, through their agents or officers, normally occurs in the forum of the corporation's principal place of business. However, the court has ordered that a defendant travel to Oregon at either party's expense, to avoid undue burden and expense and depending upon such circumstances as whether the alleged conduct of the defendant occurred in Oregon, whether defendant was an Oregon resident at the time the claim arose, and whether defendant voluntarily left Oregon after the claim arose.

4. Videotaping - Videotaping of discovery depositions has been allowed with the requisite notice. The notice must designate the form of the official record. There is no prohibition against the use of BOTH a stenographer and a video, so long as the above requirements are met.

5. Speaking Objections - The motion panel has recommended that the Multnomah County Deposition Guidelines be amended to state that "attorneys should not state anything more than the legal grounds for the objections to preserve the record, and objection should be made without comment".

C. Experts

Discovery under ORCP 36B(1) generally has not been extended to the identity of non-medical experts.

D. Insurance Claims Files

An insurance claim file "prepared in anticipation of litigation" have been held to be protected by the work product doctrine regardless of whether a party has retained counsel. Upon a showing of hardship and need pursuant to ORCP 36B(3) by a moving party, the court has ordered inspection of the file in camera and allowed discovery only to the extent necessary to offset the hardship (i.e., not for production of entire file).

E. Medical Chart Notes

1. Current Injury - Medical records, including chart notes and reports, have been generally discoverable in personal injury actions. These are in addition to reports from a treating physician under ORCP 44. The party who requests an ORCP 44 report has been be required to pay the reasonable charges of the practitioner for preparing the report.

2. Other/Prior Injuries - ORCP 44C authorizes discovery of prior medical records "of any examinations relating to injuries for which recovery is sought." Generally, records relating to the "same body part or area" have been discoverable, when the court was satisfied that the records sought actually relate to the presently claimed injuries.

F. Photographs

Photographs generally have been discoverable.

G. Privileges

Psychotherapist - Patient - ORCP 44C authorizes discovery of prior medical records of any examinations relating to injuries for which recovery is sought. Generally, records relating to the same or related body part or area have been discoverable. In claims for emotional distress, past treatment for mental conditions has been discoverable. See OEC 504(4)(b)(A).

H. Tax Returns

In a case involving a wage loss claim, discovery of those portions of tax returns showing an earning history, i.e., W-2 forms, has been held appropriate, but not those parts of the return showing investment data or non-wage information.

I. Witnesses

1. Identity - the court has required production of documents, including those prepared in anticipation of litigation, reflecting the names, addresses and phone numbers of occurrence witnesses. To avoid having to produce documents which might otherwise be protected, attorneys have been allowed to provide a "list" of occurrence witnesses, including their addresses and phone numbers.

2. Statements - Witness statements, if taken by a claims adjuster or otherwise in anticipation of litigation, have been held to be subject to the work-product doctrine. Generally, witness statements taken within 24 hours of an accident, if there is an inability to obtain a substantially similar statement, have been discoverable.

ORCP 36B(3) specifies that any person, whether a party or not, may obtain his or her previous statement concerning the action or its subject matter.

J. Surveillance Tapes

Surveillance tapes of a plaintiff taken by defendant generally have been protected by the work-product privilege, and not subject to production under a hardship or need argument.

3. VENUE

A. Change of Venue (*forum non conveniens*) - Generally, the court has not allowed a motion to change venue within the tri-county area (from Multnomah to Clackamas or Washington counties) on the grounds of *forum non conveniens*.

B. Change of Venue - FELA - The circuit court generally has followed the federal guidelines regarding choice of venue for FELA cases.

4. MOTION PRACTICE

A. Conferring and Good Faith Efforts to Confer (UTCR 5.010) -

1. **"Conferring."** We have held that "to confer" means to talk in person or on the phone.

2. **Good Faith Efforts to Confer.** Because "confer" means to talk in person or on the phone, a "good faith effort to confer" is action designed to result in such a conversation. In various cases, motion judges have held that a letter to opposing counsel, even one that includes an invitation to call for a discussion, does not constitute a good faith effort to confer unless the moving attorney also makes a follow-up phone call to discuss the matter. We have held that a phone call leaving a message must be specific as to the subject matter before it constitutes a good faith effort to confer. Likewise, a message that says simply: "This is Jane. Please call me about Smith v. Jones," is not enough. Last minute phone messages or FAX transmissions immediately before the filing of a motion have been held not to satisfy the requirements of a good faith effort to confer.

3. **Complying with the Certification Requirement**. UTCR 5.010(3) specifies that the certificate of compliance is sufficient if it states either that the parties conferred, or contains **facts** showing good cause for not conferring. The judges on the Motion Panel have held that the certificate is not sufficient if it simply says "I made a good faith effort to confer." It must either state that the lawyers actually talked or state the facts showing good cause why they did not.

B. Copy of Complaint - The failure to attach a marked copy of the complaint to a Rule 21 motion pursuant to UTCR 5.020(2) has resulted in denial of the motions. UTCR 1.090.

C. Praecipe Requirement - Failure to properly praecipe a motion pursuant to SLR 5.015 has resulted in denial of the motion(s). Mult. Co. SLR 5.015(6), UTCR 1.090.

5. DAMAGES

Non-economic Cap - The court has not struck the pleading of non-economic damages over $500,000 on authority of ORS 31.710 (*former* ORS 18.560) (Note: the Oregon Supreme Court ruled that ORS 18.560(1) violates Article I section 17, Oregon Constitution, to the following extent: ". . . . The legislature may not interfere with the full effect of a jury's assessment of noneconomic damages, at least as to civil cases in which the right to jury trial was customary in 1857, or in cases of like nature." *Lankin v. Senco Products, Inc.,* 329 Or 62, 82 (1999)).

6. REQUESTING PUNITIVE DAMAGES

A. All motions to amend to assert a claim for punitive damages are governed by ORS 31.725, ORCP 23A, UTCR Chapter 5 and Multnomah County SLR Chapter 5. Such motions have been governed by summary judgment procedures in ORCP 47 and related case law except where inconsistent with the statute and rules cited in the first sentence. Enlargements of time are governed by ORS 31.725(4), ORCP 15D and UTCR 1.100.

B. A party may not include a claim for punitive damages in its pleading without court approval. A party may include in its pleading a notice of intent to move to amend to claim punitive damages. While discovery of a party's ability to pay an award of punitive damages is not allowed until a motion to amend is granted per ORS 31.725(5), the court has allowed parties to conduct discovery on other factual issues relating to the claims for punitive damages once the opposing party has been put on written notice of an intent to move to amend to claim punitive damages.

C. All evidence submitted must be admissible per ORS 31.725(3); evidence to which an objection is not made is deemed received. Testimony generally is presented through deposition or affidavit; live testimony has not been permitted at the hearing absent extraordinary circumstances and prior court order.

D. If the motion is denied, the claimant has been permitted to file a subsequent motion based on a different factual record (i.e. additional or different facts) without the second motion being deemed one for reconsideration prohibited by Multnomah County SLR 5.045.

E. For cases in mandatory arbitration, the arbitrator has the authority to decide any motion to amend to claim punitive damages. The arbitrator's decision may be reconsidered by a judge as part of de novo review under UTCR 13.040(3) and 13.100(1).