A few years ago my firm defended a personal injury case in which our client believed a prior release disposed of the plaintiff’s claims. We pled “release” as an affirmative defense, and after discovery, moved for summary judgment. Plaintiff’s attorney filed a cross-motion for summary judgment against the affirmative defense. Our opponent was a seasoned plaintiff’s lawyer, and we assumed his motion was just an aggressive procedural move. But, at the time, we did not think to challenge the procedural propriety of the motion. Ultimately, the court found issues of fact and denied both motions.

Fast forward a few years, and we are now seeing construction defect plaintiffs file motions for summary judgment against affirmative defenses almost as a matter of course. Plaintiffs often file these motions as cases approach trial, long after they receive service of the answer. As we are defending these motions more often, we have now begun defending these motions by challenging the procedure.

Unfortunately, there is a dearth of Oregon appellate authority on the procedural propriety of motions for summary judgment against affirmative defenses. One case discusses the issue, but the opinion is only suggestive of an answer favorable to defendants. In Williams v. Haverfield, the plaintiff sought summary judgment on her own claim and partial summary judgment against certain affirmative defenses pled in the defendant’s answer. The Court of Appeals opinion reveals the trial court's struggle with the issue of using a motion for summary judgment to attack affirmative defenses:

This motion has been difficult to decide as it seems plaintiff has not moved for a partial summary order on 'all or any part' of her claim under ORCP 47(a). Instead it appears that she has asked the court to rule on Haverfield's right to rely on certain defenses, agency, estoppel, waiver. I am not sure that is within the scope of a partial summary judgment order under the Oregon Rules.

The trial court denied the motion, “believing that the court lack[ed] authority under ORCP 47 to grant the relief plaintiff request[ed].” On review, the Court of Appeals did not tackle the procedural question head-on. Rather, the court concluded, pursuant to ORCP 19 B, that the affirmative defenses were actually mislabeled counterclaims and were therefore subject to summary judgment analysis.

Research beyond Oregon’s Court of Appeals reveals a host of cases procedurally similar to my firm’s personal injury case. In those cases, plaintiff’s counsel moves for summary judgment against one or more affirmative defenses. Defense counsel dutifully dons his plaintiff attorney hat, offering declarations and other evidence to establish the existence of issues of material fact. The procedural issues are rarely raised, and the court rules without comment on whether summary judgment motions against affirma-
tive defenses are a round peg, square hole problem.

With closer analysis, however, we see that applying ORCP 47 to affirmative defenses requires inappropriate and unnecessary twisting of the language and purpose of the applicable rules.

The Plain Language of the Rules

The ORCPs do not specifically address whether parties may use a motion for summary judgment to move against affirmative defenses. But, ORCP 47 is clear about what it does apply to: claims. A party “seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment” can move for summary judgment “upon all or any part thereof.” A defense (affirmative or otherwise) is not a claim or part of a claim. The rules do not define “claim for relief” or “defense,” but Black’s Law Dictionary defines “claim” as “the aggregate of operative facts giving rise to a right enforceable by a court.” Black’s defines “defense” as “a defendant’s stated reason why the plaintiff or prosecutor has no valid case.” Defenses become “affirmative” when they raise new facts or arguments that, if true, will defeat the plaintiff’s or prosecutor’s claim, even if all allegations in the complaint are true.3

Because a “defense” is not a “claim,” ORCP 47 does not, by its plain language, apply to defenses. Moreover, as the trial court in Williams noted, a motion for summary judgment against an affirmative defense does not actually seek a judgment or even a partial judgment. The plaintiff’s goal is to preemptively torpedo certain defenses—a goal which seems better suited to another favorite tool of the defense practitioner, the ORCP 21 motion.

As support for their motions against affirmative defenses, plaintiffs cite cases discussing the policy benefits of ORCP 47, for example, judicial economy.4 But ORCP 21 motions also serve that same purpose, and applying ORCP 21 to affirmative defenses does not require torturing the language of ORCP 47 to include “defense” within the meaning of “claim.”

Pursuant to ORCP 21 D, a party can ask the court to require a “pleading” (including an answer with affirmative defenses) to be made more definite and certain. ORCP 21 E specifically authorizes motions to strike “any sham, frivolous, or irrelevant pleading or defense or any pleading containing more than one claim or defense not separately stated ... or any insufficient defense ... “ Thus, it seems that ORCP 47 is actually being inappropriately used as a fallback when plaintiffs fail to move against the sufficiency or propriety of an affirmative defense within the 10 days from service permitted under ORCP 21 D and E.

Helpful Analysis from Across the River

Western District of Washington Judge James Robart examined the issue under the federal rules in an unreported 2007 opinion, Kerzman v. NCH Corp., 2007 WL 765202 * 7 (WD Wash 2007). According to Judge Robart:

The court first addresses whether a motion for partial summary judgment on an affirmative defense is a proper motion. At least some courts have held that the proper method for seeking to strike an affirmative defense is pursuant to Rule 12(f) of the Federal Rules of Civil Procedure ... The court agrees with the former cases; to claim insufficiency of defense should not be considered a request for judgment but more aptly a request to strike it from the pleading. The court therefore construes Plaintiffs’ motion for partial summary judgment as a motion to strike pursuant to Rule 12(f).

[Citations omitted.]

Oregon Circuit Courts Are Split

In 2010, judges in Washington County (the hotbed of construction defect litigation) began granting motions for summary judgment against affirmative defenses in construction defect cases. But in October 2011, one judge changed his mind, and adopted Judge Robart’s and the Williams trial court’s skepticism, concluding that a plaintiff is not “really seeking summary judgment on ‘all or any part thereof’ of their claims.”5 But still, in late 2012, at least one Marion County judge disagreed, granting some plaintiff motions for summary judgment against affirmative defenses.6

Thus, while the issue is unresolved, defense practitioners should see some benefit in not only attacking the substance of a plaintiff’s motion for summary judgment against affirmative defenses, but also challenging the procedural propriety of plaintiff’s motion.

Endnotes

1 82 Or App 553 (1986).
2 Id. at 557.
4 See, e.g., Cochran v. Connell, 53 Or App 933, 39 (1981) (highlighting the function of ORCP 47 to avoid unnecessary trials or a trial of undisputed facts).
6 Spruce Terrace, LP v. Tri-Vest, LLC et al., Marion Co. Case No. 11C12472, Order on Plaintiff’s Motion for Summary Judgment, Hon. Dale W. Penn.