Rule 54. Judgments; Costs.

Colorado Court Rules

Colorado Rules of Civil Procedure

Chapter 6. Judgment

As amended through Rule Change 2017(7), effective August 24, 2017

Rule 54. Judgments; Costs

(a) **Definition; Form.** "Judgment" as used in these rules includes a decree and order to or from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) **Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims, or parties and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) **Demand for Judgment.** A judgment by default shall not be different in kind from that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

(d) **Costs.** Except when express provision therefor is made either in a statute of this state or in these rules, reasonable costs shall be allowed as of course to the prevailing party considering any relevant factors which may include the needs and complexity of the case and the amount in controversy. But costs against the state of Colorado, its officers or agencies, shall be imposed only to the extent permitted by law.

(e) **Against Partnership.** Any judgment obtained against a partnership or unincorporated association shall bind only the joint property of the partners or associates, and the separate property of the parties personally served.

(f) **After Death, How Payable.** If a party dies after a verdict or decision upon any issue of

fact, and before judgment, the court may, nevertheless, render judgment thereon. Such judgment shall not be a lien on the real property of the deceased party, but shall be paid as a claim against his estate.

(g) **Against Unknown Defendants.** The judgment in an action in rem shall apply to and conclude the unknown defendants whose interests are described in the complaint.

(h) **Revival of Judgments.** A judgment may be revived against any one or more judgment debtors whether they are jointly or severally liable under the judgment. To revive a judgment a motion shall be filed alleging the date of the judgment and the amount thereof which remains unsatisfied. Thereupon the clerk shall issue a notice requiring the judgment debtor to show cause within 14 days after service thereof why the judgment should not be revived. The notice shall be served on the judgment debtor in conformity with Rule 4. If the judgment debtor answer, any issue so presented shall be tried and determined by the court. A revived judgment must be entered within twenty years after the entry of the judgment which it revives, and may be enforced and made a lien in the same manner and for like period as an original judgment. If a judgment is revived before the expiration of any lien created by the original judgment, the filing of the transcript of the entry of revivor in the register of actions with the clerk and recorder of the appropriate county before the expiration of such lien shall continue that lien for the same period from the entry of the revived judgment as is provided for original judgments. Revived judgments may themselves be revived in the manner herein provided.

Cite as Colo. R. Civ. P. 54

History. Source: (d) and (h) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b). Amendments effective July 1, 2015 for cases filed on or after July 1, 2015.

Note:

Comments

1989

[1] The amendment to C.R.C.P. 54(c) is to eliminate what has been perceived as a possible conflict between that section and the recent change to C.R.C.P. 8(a) which prohibits statement of amount in that ad damnum. The amendment simply strikes the words "or exceed in amount" to make the section consistent with C.R.C.P. 8(a). Relief sought in the prayer is now described rather than stated as an amount. It is, therefore, not necessary to have an amount limitation in C.R.C.P. 54(c).

2015

[2] Rule 54(d) is amended to require that cost awards be "reasonable" by directing courts to consider any relevant

factors, which may include the needs and complexity of the case, and the amount in controversy.

[3] The reasonableness requirement is consistent with § 13-16-122 , C.R.S., which lists matters included in cost awards, because it can hardly have been the intent of the legislature to authorize unreasonable awards.

[4] Cost shifting must be addressed in the Case Management Order required by C.R.C.P. 16.

Case Notes:

Annotation

I. General Consideration.

Law reviews. For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "Judgment: Rules 54-63 ", see 23 Rocky Mt. L. Rev. 581 (1951). For article, "One Year Review of Civil Procedure and Appeals", see 36 Dicta 5 (1959). For article, "One Year Review of Civil Procedure and Appeals", see 39 Dicta 133 (1962). For article, "Certification Under Rule 54(b) : Risky Efficiency", see 13 Colo. Law. 997 (1984). For article, "The Final Judgment Rule And Attorney Fees", see 17 Colo. Law. 2139 (1988).

Where the damages to which plaintiff is entitled can only be estimated at the pleading stage and the defendant is given notice of the various elements of the damages claim, then recovery is not to be limited to the amount listed in the complaint. *DeCicco v. Trinidad Area Health Ass'n*, 40 Colo. App. 63, 573 P.2d 559 (1977).

Rule inapplicable to C.R.C.P. 120 foreclosure sale. Because a statutory public trustee foreclosure does not involve foreclosure through the court, and because there is no appeal from the limited order of a C.R.C.P. 120, court on a motion authorizing the public trustee to conduct a foreclosure sale, this rule is inapplicable to such a foreclosure. *Bakers Park Mining & Milling Co. v. District Court*, 662 P.2d 483 (Colo. 1983).

Rule as basis for jurisdiction. *See Bd. of County Comm'rs v. Anderson*, 34 Colo. App. 37, 525 P.2d 478 (1974), aff'd, 534 P.2d 1201 (1975); *Silverman v. Univ. of Colo.*, 36 Colo. App. 269, 541 P.2d 93 (1975); *United Bank of Denver Nat'l Ass'n v. Shavlik*, 189 Colo. 280, 541 P.2d 317 (1975); *First Com. Corp. v. Geter*, 37 Colo. App. 391, 547 P.2d 1291 (1976); *City of Delta v. Thompson*, 37 Colo. App. 205, 548 P.2d 1292 (1975); *Chavez v. Zanghi*, 42 Colo. App. 417, 598 P.2d 152 (1979); *Styers v. Mara*, 631 P.2d 1138 (Colo. App. 1981); *Fort Collins Nat'l Bank v. Fort Collins Nat'l Bank Bldg.*, 662 P.2d 196 (Colo. App. 1983).

Applied in *Vogt v. Hansen*, 123 Colo. 105, 225 P.2d 1040 (1950); *Corper v. City & County of Denver*, 36 Colo. App. 118, 536 P.2d 874 (1975), modified, 191 Colo. 252, 552 P.2d 13 (1976); *Shaw v. Aurora Mobile Homes & Real Estate, Inc.*, 36 Colo. App. 321, 539 P.2d 1366 (1975); *Ginsberg v. Stanley Aviation Corp.*, 37 Colo. App. 240, 551 P.2d 1086 (1975); *Page v. Clark*, 40 Colo. App. 24, 572 P.2d 1214 (1977); *Hait v. Miller*, 38 Colo. App. 503, 559 P.2d 260 (1977); In re Heinzman, 40 Colo. App. 227, 579 P.2d 638 (1977); *Mancillas v. Campbell*, 42 Colo. App. 145, 595 P.2d 267 (1979); In re Heinzman, 198 Colo. 36, 596 P.2d 61 (1979); *Tipton v. Zions First Nat'l Bank*, 42 Colo. App.

534, 601 P.2d 352 (1979); *Gray v. Reg'l Transp. Dist.*, 43 Colo. App. 107, 602 P.2d 879 (1979); *Ellis v. Rocky Mt. Empire Sports, Inc.*, 43 Colo. App. 166, 602 P.2d 895 (1979); *Haines v. United Sec. Ins. Co.*, 43 Colo. App. 276, 602 P.2d 901 (1979); *Einarsen v. City of Wheat Ridge*, 43 Colo. App. 232, 604 P.2d 691 (1979); *Naiman v. Warren A. Flickinger & Assocs.*, 43 Colo. App. 279, 605 P.2d 63 (1979); *Ellerman v. Kite*, 626 P.2d 696 (Colo. App. 1979); *First Nat'l Bank v. Collins*, 44 Colo. App. 228, 616 P.2d 154 (1980); *Fuqua Homes, Inc. v. Western Sur. Co.*, 44 Colo. App. 257, 616 P.2d 163 (1980); *Cibere v. Indus. Comm'n*, 624 P.2d 920 (Colo. App. 1980); *Rossmiller v. Romero*, 625 P.2d 1029 (Colo. 1981); *Campbell v. Home Ins. Co.*, 628 P.2d 96 (Colo. 1981); *Broyles v. Fort Lyon Canal Co.*, 638 P.2d 244 (Colo. 1981); *Judd Constr. Co. v. Evans Joint Venture*, 642 P.2d 922 (Colo. 1982); *City & County of Denver v. Eggert*, 647 P.2d 216 (Colo. 1982); *United States v. City & County of Denver*, 656 P.2d 1 (Colo. 1982); People in Interest of W.M., 64 3 P.2d 794 (Colo. Ct. App. 1982); *F.J. Kent Corp. v. Town of Dillon*, 648 P.2d 669 (Colo. App. 1982); *Aspen-Western Corp. v. Bd. of County Comm'rs*, 650 P.2d 1326 (Colo. App. 1982); *Am. Television & Commc'ns Corp. v. Manning*, 651 P.2d 440 (Colo. App. 1982); *Frank v. First Nat'l Bank*, 653 P.2d 748 (Colo. App. 1982); Heinrichsdorff v. Raat, 655 P.2d 860 (Colo. App. 1982); *Ortega v. Bd. of County Comm'rs*, 657 P.2d 989 (Colo. App. 1982); *City of Colo. Springs v. Berl*, 658 P.2d 280 (Colo. App. 1982); *Krause v. Columbia Sav. & Loan Ass'n*, 661 P.2d 265 (Colo. 1983); *Bd. of County Comm'rs v. Pennobscot, Inc.*, 662 P.2d 1091 (Colo. 1983); *Wickham v. Wickham*, 670 P.2d 452 (Colo. App. 1983); *Slovek v. Bd. of County Comm'rs*, 697 P.2d 781 (Colo. App. 1984); *People v. Mountain States Tel. & Tel. Co.*, 739 P.2d 850 (Colo. 1987); People in Interest of B.J.F., 761 P.2d 297 (Colo. App. 1988).

II. Definition; Form.

Validity of a judgment depends on the court's jurisdiction of the person and the subject matter of the issue it decides. *McLeod v. Provident Mut. Life Ins. Co.*, 186 Colo. 234, 526 P.2d 1318 (1974).

It is not approved practice for a trial court to make no independent conclusions of law, but rather make its conclusions by incorporating party's brief. *Metro. Denver Sewage Disposal Dist. No. 1 v. Farmers Reservoir & Irrigation Co.*, 179 Colo. 36, 499 P.2d 1190 (1972).

Judgment rendered without jurisdiction is void and may be attacked directly or collaterally. *McLeod v. Provident Mut. Life Ins. Co.*, 186 Colo. 234, 526 P.2d 1318 (1974).

III. Multiple Claims or Parties.

Law reviews. For note, "Res Judicata-Should It Apply to a Judgment Which is Being Appealed?", see 33 Rocky Mt. L. Rev. 95 (1960). For article, "One Year Review of Civil Procedure and Appeals", see 38 Dicta 133 (1961).

Section (b) is identical to corresponding federal rule. Since section (b) of this rule is identical to the corresponding federal rule, the federal cases interpreting F.R.C.P. 54(b) are persuasive here. *Moore & Co. v. Triangle Constr. & Dev. Co.*, 44 Colo. App. 499, 619 P.2d 80 (1980); *Harding Glass Co. v. Jones*, 640 P.2d 1123 (Colo. 1982); *Forbes v. Goldenhersh*, 899 P.2d 246 (Colo. App. 1994); *State ex rel. Salazar v. Gen. Steel Domestic Sales*, LLC, 129 P.3d 1047 (Colo. App. 2005).

The proper function of a reviewing court in section (b) cases is for the court to fully review whether the trial court completely resolved a single claim for relief; however, some deference should be given where the trial court has made its reasoning clear. *State ex rel. Salazar v. Gen. Steel Domestic Sales, LLC*, 129 P.3d 1047 (Colo. App. 2005).

Section (b) creates an exception to the requirement that an entire case must be resolved by a final judgment before an appeal is brought. *Harding Glass Co. v. Jones*, 640 P.2d 1123 (Colo. 1982); *Nelson v. Elway*, 971 P.2d 245 (Colo. App. 1998).

For the purposes of issue preclusion, a judgment that is still pending on appeal is not final. *Rantz v. Kaufman*, 109 P.3d 132 (Colo. 2005).

A judgment is not final for purposes of issue preclusion until certiorari has been resolved both in the Colorado supreme court and the United States supreme court. Certiorari can be resolved in any of three ways: (1) The parties fail to file a timely petition for certiorari; (2) the court denies the petition for certiorari; or (3) the court issues an opinion after granting certiorari. *Barnett v. Elite Props. of Am.*, 252 P.3d 14 (Colo. App. 2010).

Jurisdiction to hear appeal depends on correctness of certification. An appellate court's jurisdiction to entertain an appeal of a trial court's section (b) certification depends upon the correctness of the certification itself. *Alexander v. City of Colo. Springs*, 655 P.2d 851 (Colo. App. 1982); *Richmond Am. Homes of Colo., Inc. v. Steel Floors, LLC*, 187 P.3d 1199 (Colo. App. 2008).

A premature notice of appeal does not render void for lack of jurisdiction acts of the trial court taken during the interval between the filing of the invalid notice of appeal and the dismissal of the appeal by the court of appeals. *Woznicki v. Musick*, 94 P.3d 1243 (Colo. App. 2004), aff'd, 136 P.3d 244 (Colo. 2006).

Where the trial court incorrectly entered a default judgment the certification of that judgment pursuant to section (b) was likewise improper. Although the court had jurisdiction to decide the legal sufficiency of the section (b) certification, the court lacked jurisdiction to consider the issues raised by the appellant regarding the adequacy of service on him and the denial of his motion to set aside the default judgment. *Salomon Smith Barney, Inc. v. Schroeder*, 43 P.3d 715 (Colo. App. 2001).

Previously, a judgment disposing of less than the entire case could be final and subject to review only where it was a final determination of a distinct claim arising out of a different transaction or occurrence from the other claims involved. *Brown v. Mountain States Tel. & Tel. Co.*, 121 Colo. 502, 218 P.2d 1063 (1950).

Rule grants trial courts the authority to certify a ruling as a final judgment on less than an entire case, without altering the requirements of finality of judgment as to any other claim. *Steven A. Gall, P.C. v. District Court*, 965 P.2d 1268 (Colo. 1998).

An order dismissing an action as to two of the defendants and directing that plaintiffs should have a stated time within which to "Prepare the record in order to apply to the supreme court for appeal" is a final judgment to review. *Ruhter v. Steele*, 120 Colo. 367, 209 P.2d 771 (1949).

Where several items alleged in a complaint all resulted from a single transaction or occurrence, these items of damage still constituted a single claim, and the determination of one of the several asserted legal rights was not a final judgment. *Brown v. Mountain States Tel. & Tel. Co.*, 121 Colo. 502, 218 P.2d 1063 (1950).

In cases which have been consolidated for the purpose of trial, a judgment entered in one case only is not a final appealable judgment absent a specific certification that there is no just reason for delay by the court pursuant to section (b). *Mission Viejo Co. v. Willows Water Dist.*, 818 P.2d 254 (Colo. 1991).

Section (b) of this rule prevents or imposes conditions on the entry of final judgment on less than all of the pending claims. *Harvey v. Morris*, 148 Colo. 489, 367 P.2d 352 (1961).

Trial court may direct entry of final judgment where more than one claim exists. Section (b) of this rule allows a trial court to direct entry of a final judgment upon one or more but less than all of the claims on certain conditions where more than one claim exists. *Hamm v. Twin Lakes Reservoir & Canal Co.*, 150 Colo. 447, 373 P.2d 525 (1962).

Final adjudication of a particular claim in a case involving multiple claims or multiple parties may be certified as a final judgment. *Levine v. Empire Sav. & Loan Ass'n*, 34 Colo. App. 235, 527 P.2d 910 (1974), aff'd, 189 Colo. 64, 536 P.2d 1134 (1975).

This rule directs what must be done where multiple claims are involved and less than all of them decided. *Fidelity & Deposit Co. v. May*, 142 Colo. 195, 350 P.2d 343 (1960).

This rule specifically provides that where multiple claims are involved and less than all of them are decided, in order to effect a final judgment or final disposition of the matters decided, the trial court must expressly determine that there is no just reason for delay and must expressly direct the entry of a judgment with respect to those claims which are decided. *Blackburn v. Skinner*, 156 Colo. 41, 396 P.2d 968 (1964).

In order for a trial court to enter a final judgment on less than all of the claims pending before it pursuant to this rule, the order certified as final must dispose of an "entire claim". Thus, if only a single claim is asserted, but multiple remedies are sought based upon that single claim, an order denying one remedy, but not disposing of the requests for other remedies, cannot be made a final judgment by the entry of a certification pursuant to this rule. *Virdanco, Inc. v. MTS Intern.*, 791 P.2d 1236 (Colo. App. 1990).

In order for a judgment to be "final" with respect to a whole, single claim, that order must fix all damages stemming from that claim. Thus, if the court's order purports to award some damages, but reserves the right to award additional damages at a later date, that order does not dispose of an entire claim and cannot be made a final judgment under this rule. *Virdanco, Inc. v. MTS Intern.*, 791 P.2d 1236 (Colo. App. 1990).

Where the express language required by this rule does not appear in the order of judgment, an appeal must be dismissed. *Blackburn v. Skinner*, 156 Colo. 41, 396 P.2d 968 (1964).

If an order does not constitute final adjudication of a claim, certification of it as such does not operate to make it so.

Levine v. Empire Sav. & Loan Ass'n, 34 Colo. App. 235, 527 P.2d 910 (1974), aff'd, 189 Colo. 64, 536 P.2d 1134 (1975).

Order awarding attorney fees as sanctions under C.R.C.P. 11 and § 13-17-102 held not to be a claim for relief; thus appeal of order was dismissed. *State Farm Fire & Cas. Co. v. Bellino*, 976 P.2d 342 (Colo. App. 1998); *State ex rel. Suthers v. CB Servs. Corp.*, 252 P.3d 7 (Colo. App. 2010).

Colorado rules and decisions discourage the piecemeal review of a cause. *Vandy's Inc. v. Nelson*, 130 Colo. 51, 273 P.2d 633 (1954); *Berry v. Westknit Originals, Inc.*, 145 Colo. 48, 357 P.2d 652 (1960); *Hamm v. Twin Lakes Reservoir & Canal Co.*, 150 Colo. 447, 373 P.2d 525 (1962).

Purpose of requiring that an entire claim for relief be finally adjudicated before certification is proper is to avoid the dissipation of judicial resources through piecemeal appeals. *Harding Glass Co. v. Jones*, 640 P.2d 1123 (Colo. 1982).

Number of precautionary appeals cut. The change from the old version of the rule was made largely to reduce the number of precautionary appeals taken as a result of the difficulty of determining whether several claims arose from a single transaction or occurrence. *Ireland v. Wynkoop*, 36 Colo. App. 206, 539 P.2d 1349 (1975).

This rule expressly provides that in the absence of an express direction by a trial court for the entry of final judgment, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and an order or other form of decision is subject to revision at any time before entry of judgment adjudicating all of the claims. *Broadway Roofing & Supply, Inc. v. District Court*, 140 Colo. 154, 342 P.2d 1022 (1959); *Forbes v. Goldenhersh*, 899 P.2d 246 (Colo. App. 1994).

By its terms, C.R.C.P. 56(d) involves an adjudication of less than the entire action, and consequently, a disposition pursuant to that rule does not purport to be a final judgment. Instead, a trial court remains free to reconsider an earlier partial summary judgment ruling absent the entry of judgment under section (b) of this rule. *Forbes v. Goldenhersh*, 899 P.2d 246 (Colo. App. 1994).

Except as provided in section (b) of this rule, a final judgment is one which ends the particular action in which it is entered, leaving nothing further to be done in determining the rights of the parties involved in the action. *Berry v. Westknit Originals, Inc.*, 145 Colo. 48, 357 P.2d 652 (1960); *Harding Glass Co. v. Jones*, 640 P.2d 1123 (Colo. 1982).

"Final judgment" defined. Only those orders which finally resolve a claim may be certified as final judgments pursuant to this section. *Ball Corp. v. Loran*, 42 Colo. App. 501, 596 P.2d 412 (1979).

A decision on the merits is a final judgment for appeal purposes despite any outstanding issue of attorney fees, and certification pursuant to this rule is not a prerequisite to appellate review of the merits of a case if a judgment has been entered and only the issue of attorney fees remains to be determined. *Baldwin v. Bright Mortg. Co.*, 757 P.2d 1072 (Colo. 1988).

Determination of relief required for final judgment. A trial court's order determining that defendants are liable does not

constitute the final resolution of a claim for purposes of this section unless and until the trial court determines what relief, if any, may be secured. *Ball Corp. v. Loran*, 42 Colo. App. 501, 596 P.2d 412 (1979).

A default judgment that completely disposes of petitioner's claim against defendant individually constitutes a final and appealable judgment for certification under this rule even though other plaintiffs' claims are unresolved. *Kempter v. Hurd*, 713 P.2d 1274 (Colo. 1986).

A judgment is not final which determines the action as to less than all of the defendants, except as provided in section (b) of this rule. *Berry v. Westknit Originals, Inc.*, 145 Colo. 48, 357 P.2d 652 (1960).

When a summary judgment disposes of less than the entire action, the judgment is not final unless the trial court expressly determines that there is no just reason for delay and directs the entry of a final judgment. *Manka v. Martin*, 200 Colo. 260, 614 P.2d 875 (1980), cert. denied, 450 U.S. 913, 101 S. Ct. 1354, 67 L. Ed. 2d 338 (1981).

However, all defendants are potentially jointly and severally liable and subject to judgment as to which finality rule applies unless there has been a specification of only joint liability. *Corporon v. Safeway Stores, Inc.*, 708 P.2d 1385 (Colo. App. 1985).

Before an appeal can be brought, all claims for relief in a case must be resolved by final judgment unless section (b) or another rule or statutory section is applicable. *Alexander v. City of Colo. Springs*, 655 P.2d 851 (Colo. App. 1982).

Denial of a motion for summary judgment is not a final appealable order. *Town of Grand Lake v. Lanzi*, 937 P.2d 785 (Colo. App. 1996).

A final judgment can only enter when the trial court has nothing further to do to determine the rights of the parties involved, unless the judgment meets the requirements of section (b) of this rule. *Hamm v. Twin Lakes Reservoir & Canal Co.*, 150 Colo. 447, 373 P.2d 525 (1962).

Trial court erred in certifying summary judgment in third-party action as final since, at time of judgment, attorney fees, interest, and costs which were part of primary action had not yet been determined. *Corinthian Hill Metro. Dist. v. Keen* , 812 P.2d 721 (Colo. App. 1991).

This rule applies only to a final decision of one or more, but not all, claims for relief. *Trans Cent. Airlines v. McBreen & Assocs.*, 31 Colo. App. 71, 497 P.2d 1033 (1972).

Because a certification pursuant to section (b) applies to a final decision of one or more but not all claims for relief, the trial court retains jurisdiction over those portions of the case not affected by the judgment certified as final for appeal. *Nelson v. Elway*, 971 P.2d 245 (Colo. App. 1998).

The effect of this rule is to permit the trial court to advance the time when such a final decision could be appealed. *Trans Cent. Airlines v. McBreen & Assocs.*, 31 Colo. App. 71, 497 P.2d 1033 (1972).

Trial court makes determination of finality. Under this rule the trial court, not the parties or their counsel, may make the

required determination of finality. *Trans Cent. Airlines v. McBreen & Assocs.*, 31 Colo. App. 71, 497 P.2d 1033 (1972).

A trial court may, by the exercise of its discretion in the interest of sound judicial administration, release for appeal final decisions upon one or more, but less than all, claims in multiple claims actions. *Trans Cent. Airlines v. McBreen & Assocs.*, 31 Colo. App. 71, 497 P.2d 1033 (1972).

The trial court had discretion to certify its adjudication of two allegations, in spite of pending counterclaims. *Ireland v. Wynkoop*, 36 Colo. App. 206, 539 P.2d 1349 (1975).

The timing of such a release is vested by this rule in the discretion of the trial court as the one most likely to be familiar with the case and with any justifiable reasons for delay. *Trans Cent. Airlines v. McBreen & Assocs.*, 31 Colo. App. 71, 497 P.2d 1033 (1972).

A substantial delay between the entry of a ruling and the filing of the section (b) motion caused by nonmovant's failure to prosecute the case does not prevent the court from certifying the ruling as final. *LoPresti v. Brandenburg*, 267 P.3d 1211 (Colo. 2011).

Certification of final judgment is appropriate only when more than one claim for relief is presented in an action, or when multiple parties are involved, and there are claims or counterclaims remaining to be resolved. *San Miguel County Bd. of County Comm'rs v. Roberts*, 159 P.3d 800 (Colo. App. 2006).

In deciding whether to issue a section (b) certification with respect to a decision which does not dispose of the entire case in a multiple claims action, a trial court must engage in a three-step process. First, it must determine that the decision to be certified is a ruling upon an entire "claim for relief". Next, it must conclude that the decision is final in the sense of an ultimate disposition of an individual claim. Finally, the trial court must determine whether there is just reason for delay in entry of a final judgment on the claim. *Harding Glass Co. v. Jones*, 640 P.2d 1123 (Colo. 1982); *Troxel v. Town of Basalt*, 682 P.2d 501 (Colo. App. 1984); *Pub. Serv. Co. of Colo. v. Linnebur*, 687 P.2d 506 (Colo. App. 1984), aff'd, 716 P.2d 1120 (Colo. 1986); *Lytle v. Kite*, 728 P.2d 305 (Colo. 1986); *Keith v. Kinney*, 961 P.2d 516 (Colo. App. 1997); *Carothers v. Archuleta County Sheriff*, 159 P.3d 647 (Colo. App. 2006); *Richmond Am. Homes of Colo., Inc. v. Steel Floors, LLC*, 187 P.3d 1199 (Colo. App. 2008).

Certification under section (b) of this rule is improper if the ruling sought to be appealed disposes of one or more claims against some, but not all, of the parties who may be jointly, but not severally, liable and there remains in the trial court a claim or claims against one or more of the remaining parties who, because of the certification, are not before the appellate court. *Hall v. Bornschelgel*, 740 P.2d 539 (Colo. App. 1987).

For certification under section (b) to be proper, a full adjudication of rights and liabilities regarding appealed claim is necessary. *Corinthian Hill Metro. Dist. v. Keen*, 812 P.2d 721 (Colo. App. 1991).

Certification under section (b) is not required before a judgment can be given preclusive effect for purposes of collateral estoppel. *Carpenter v. Young*, 773 P.2d 561 (Colo. 1989).

Absent certification by the trial court under this rule, a judgment that disposes of fewer than all of the claims in an action may not be appealed. Estate of *Burford v. Burford*, 935 P.2d 943 (Colo. 1997).

A decree of dissolution when entered by the district court is final to dissolve the marriage even when the district court refuses to certify the decree as a final judgment appealable under this rule. *Estate of Burford v. Burford*, 935 P.2d 943 (Colo. 1997).

The same rules of finality apply in probate cases as in other civil cases. An order of the probate court is final if it ends the particular action in which it is entered and leaves nothing further for the court pronouncing it to do in order to completely determine the rights of the parties as to that proceeding. In re Estate of Scott, 119 P.3d 511 (Colo. App. 2004), aff'd, 136 P.3d 892 (Colo. 2006).

Section (b) governs the interlocutory appeal of a probate court order. In re Estate of Scott, 119 P.3d 511 (Colo. App. 2004), aff'd, 136 P.3d 892 (Colo. 2006).

Court has discretion in determining "just reason for delay". The task of assessing whether there is just reason for delay is committed to the trial court's sound judicial discretion, and review of a trial court's ruling on that question is limited to an inquiry into whether that discretion has been abused. *Hardin Glass Co. v. Jones*, 640 P.2d 1123 (Colo. 1982); *Georgian Health Center v. Colonial Paint*, 738 P.2d 809 (Colo. App. 1987).

It is within the trial court's discretion to determine whether there is just reason for delay, and such determination will not be disturbed absent an abuse thereof. The trial court's assessment of equities will be disturbed only if its conclusion was clearly unreasonable. *Messler v. Phillips*, 867 P.2d 128 (Colo. App. 1993).

The discretion accorded the trial court under this rule is limited, and does not permit the court to declare that which is not final under the rules to be final. *Trans Cent. Airlines v. McBreen & Assocs.*, 31 Colo. App. 71, 497 P.2d 1033 (1972).

A trial court's determinations that a claim for relief is the subject of the decision sought to be certified and that the decision is final are not truly discretionary as the correctness of these two determinations is fully reviewable by an appellate court because the trial court cannot in the exercise of its discretion, treat as final that which is not final. *Harding Glass Co. v. Jones*, 640 P.2d 1123 (Colo. 1982); *Kelly v. Mid-Century Ins. Co.*, 695 P.2d 752 (Colo. App. 1984); *Lytle v. Kite*, 728 P.2d 305 (Colo. 1986).

Court abused its discretion in refusing to reconsider and vacate partial summary judgment in favor of one of several defendants where, following defendant's belated production of a key document, an issue as to a material fact was seen to arise. *Halter v. Waco Scaffolding & Equip. Co.*, 797 P.2d 790 (Colo. App. 1990).

Discretion must be exercised with extreme care. Trial court's decision in certifying one of its orders must be exercised with extreme care where a pending counterclaim is involved, and this is particularly true where the counterclaim arguably arises from the same transaction or occurrence as the adjudicated claim. *Ireland v. Wynkoop*, 36 Colo. App. 206, 539 P.2d 1349 (1975).

Order denying motion for summary judgment not final order. Since an order denying a motion for summary judgment is not a final order, a trial court is without power to declare it to be final and appealable. *Trans Cent. Airlines v. McBreen & Assocs.*, 31 Colo. App. 71, 497 P.2d 1033 (1972).

Certification by a trial court is not binding upon the appellate courts. *Trans Cent. Airlines v. McBreen & Assocs.*, 31 Colo. App. 71, 497 P.2d 1033 (1972).

Where a trial court issues a certificate, a reviewing court has no jurisdiction unless the trial court has power to do so, but the trial court's determination that it has such power is not binding upon the appellate court. *Trans Cent. Airlines v. McBreen & Assocs.*, 31 Colo. App. 71, 497 P.2d 1033 (1972).

An appellate court thus will review de novo the legal sufficiency of a trial court's certification. *Richmond Am. Homes of Colo., Inc. v. Steel Floors, LLC*, 187 P.3d 1199 (Colo. App. 2008).

In order to effect a final judgment, thus rendering it reviewable, a trial court should (1) expressly determine that there is no just reason for delay and (2) expressly direct the entry of a judgment. *Fidelity & Deposit Co. v. May*, 142 Colo. 195, 350 P.2d 343 (1960).

Trial court properly concluded that there was no just reason for delay in entering final judgment for the defendant because it had granted summary judgment in favor of the defendant on all of plaintiffs' claims. The trial court made its order in favor of the defendant a final judgment for purposes of section (b). It was not necessary for the trial court to address the defendant's counterclaim once it had disposed of the plaintiffs' claims. *Bickel v. City of Boulder*, 885 P.2d 215 (Colo. 1994), cert. denied, 513 U.S. 1155, 115 S. Ct. 1112, 130 L. Ed. 2d 1076 (1995).

Finality under this rule contemplates more than the rendition of a judgment. *Fidelity & Deposit Co. v. May*, 142 Colo. 195, 350 P.2d 343 (1960).

A determination under this rule must be made in order to pave the way for the filing of an appeal. Allied Colo. *Enters. Co. v. Grote*, 156 Colo. 160, 397 P.2d 225 (1964).

Failure to procure an express finding by a trial court so that an appeal can be properly pursued is fatal. *Smith v. City of Arvada*, 163 Colo. 189, 429 P.2d 308 (1967).

Where, in granting a motion for summary judgment, a court expressly determines that there is no just reason for delay, directs that it be a final judgment, and dispenses with the necessity of filing a motion for new trial, there is created justifiable cause for review by an appellate court under section (b) of this rule. *Hynes v. Donaldson*, 155 Colo. 456, 395 P.2d 221 (1964).

Where appealed claims are factually distinct from the retained claims-i.e., they arise from different transactions or occurrences-multiple "claims for relief" are present, and the current rule may be applied just like the old rule. *Ireland v. Wynkoop*, 36 Colo. App. 206, 539 P.2d 1349 (1975).

Appealable unit is claim for relief. Under the present version of F.R.C.P. 54(b) and section (b) of this rule, the

appealable judicial unit is a "claim for relief", and a "claim, counterclaim, cross-claim or third-party claim" may be a separate unit. *Ireland v. Wynkoop*, 36 Colo. App. 206, 539 P.2d 1349 (1975).

Where dismissed claims and a retained counterclaim are not so inherently inseparable or intertwined, certification of dismissal of the claims was not an abuse of discretion. *Ireland v. Wynkoop*, 36 Colo. App. 206, 539 P.2d 1349 (1975).

The trial court may not certify an order as a final judgment pursuant to this rule after the notice of appeal has been filed. *Levine v. Empire Sav. & Loan Ass'n*, 34 Colo. App. 235, 527 P.2d 910 (1974), aff'd, 189 Colo. 64, 536 P.2d 1134 (1975), overruled in *Musick v. Woznicki*, 136 P.3d 244 (Colo. 2006).

Trial court not authorized to enter judgment without assertion of claim for relief. This rule does not authorize the trial court to enter judgment against a party when no claim for relief has been asserted against that party by the party in whose favor the judgment is to be entered. *A.R.A. Mfg. Co. v. Brady Auto Accessories, Inc.*, 622 P.2d 113 (Colo. App. 1980).

Order dismissing class action aspects of the case determined the legal insufficiency of the complaint as a class action, and therefore, in its legal effect, it is "tantamount to a dismissal of the action as to all members of the class other than petitioners ". *Levine v. Empire Sav. & Loan Ass'n*, 192 Colo. 188, 557 P.2d 386 (1976).

Trial court's order granting class action certification is not an ultimate disposition of an individual claim. *Soto v. Progressive Mtn. Ins. Co.*, 181 P.3d 297 (Colo. App. 2007).

Trial court's C.R.C.P. 54(b) certification of its order granting class action certification as a final judgment was improper. *Soto v. Progressive Mtn. Ins. Co.*, 181 P.3d 297 (Colo. App. 2007).

Decree of dissolution of marriage final. Section 14-10-105 provides that the Colorado rules of civil procedure apply to dissolution proceedings except as "otherwise specifically provided" in article 10 of title 14 ; and § 14-10-120 provides that a decree of dissolution of marriage is "final" when entered, subject to the right of appeal. The trial court is authorized to enter an order pursuant to section (b) of this rule, making the decree final for purposes of appeal. In re Baier, 39 Colo. App. 34, 561 P.2d 20 (1977).

Upon the entry of an order under section (b) of this rule, a decree of dissolution of marriage may be appealed prior to entry of permanent orders on the issues of child custody, support, and division of property. In re Baier, 39 Colo. App. 34, 561 P.2d 20 (1977).

Claims in a forcible entry and detainer action wherein damages as well as possession are sought are sufficiently severable that a final and appealable order may be issued as to possession while the claim for damages (rent owed) is reserved for future determination. *Sun Valley Dev. Co. v. Paradise Valley Country Club*, 663 P.2d 628 (Colo. App. 1983).

Complaint asserting single legal right states only single claim, even though multiple remedies may be sought for the alleged violation of that legal right. *Harding Glass Co. v. Jones*, 640 P.2d 1123 (Colo. 1982); *Messenger v. Main*, 697

P.2d 420 (Colo. App. 1985).

Where the plaintiff requests different remedies for relief, injunction, and damages, but the multiple remedies sought are to redress the violation of one legal right, only one claim is asserted, which, by virtue of its singularity, is not certifiable under section (b). *Alexander v. City of Colo. Springs*, 655 P.2d 851 (Colo. App. 1982).

For purposes of applying section (b), a "claim" is the aggregate of operative facts which give rise to a right enforceable in the courts, and the ultimate determination of multiplicity of claims rests on whether the underlying factual bases for recovery state a number of different claims which could have been separately enforced. *Corporon v. Safeway Stores, Inc.*, 708 P.2d 1385 (Colo. App. 1985).

More pragmatically stated, claims for relief are "multiple claims" for purposes of section (b) when a claimant pleads claims for which his possible recoveries are more than one and when a judgment rendered on one of his claims would not bar a judgment on his other claims. *Corporon v. Safeway Stores, Inc.*, 708 P.2d 1385 (Colo. App. 1985).

Disposition of only one of several elements of damages sought does not constitute an appealable ruling, even when purportedly certified as final under section (b). *Harding Glass Co. v. Jones*, 640 P.2d 1123 (Colo. 1982).

Order dismissing availability of treble damages under the Colorado Antitrust Act was not a final disposition and therefore not ripe for appeal where claims for misappropriation and unjust enrichment were undecided by the trial court. *Smith v. TCI Commc'ns, Inc.*, 981 P.2d 690 (Colo. App. 1999).

Trial court's entry of certification under section (b) cannot transform an interlocutory decision into a final one absent dismissal of the arbitrable claims. *Ferla v. Infinity Dev. Assocs., LLC*, 107 P.3d 1006 (Colo. App. 2004).

Order preventing pursuit of claim for punitive damages is not final judgment. Partial summary judgment of the issue of punitive damages is an interlocutory rather than a final judgment for purposes of certification under section (b). *Harding Glass Co. v. Jones*, 640 P.2d 1123 (Colo. 1982).

Summary judgment for portion of claim cannot be made final under rule. If the trial court enters a summary judgment for only a portion of a claim or counterclaim or any other order that falls short of fully adjudicating at least one claim or counterclaim, the order cannot be made final under this rule, despite an "express determination" and an "express direction". *Moore & Co. v. Triangle Constr. & Dev. Co.*, 44 Colo. App. 499, 619 P.2d 80 (1980).

Barring extraordinary circumstances, a judgment subject to C.R.C.P. 54(b) certification must be so certified in order to be considered final and sufficient to transfer jurisdiction to the court of appeals. Trial court retains jurisdiction to determine substantive matters when a party files a premature notice of appeal of a nonfinal judgment. *Musick v. Woznicki*, 136 P.3d 244 (Colo. 2006) (overruling *Levine v. Empire Sav. & Loan Ass'n*, 34 Colo. App. 235, 527 P.2d 910 (1974), aff'd, 189 Colo. 64, 536 P.2d 1134 (1975)).

Trial court's language held to sufficiently comply with the requirements of section (b). *Chambliss/Jenkins Assocs. v. Forster*, 650 P.2d 1315 (Colo. App. 1982).

Rule as basis for jurisdiction. *Comstock v. Colo. Nat'l Bank*, 37 Colo. App. 468, 552 P.2d 514 (1976), modified on other grounds, 194 Colo. 28, 568 P.2d 1164 (1977); *Crownover v. Gleichman*, 38 Colo. App. 96, 554 P.2d 313 (1976), aff'd, 194 Colo. 48, 574 P.2d 497 (1977), cert. denied, 435 U.S. 905, 98 S.Ct. 1450, 55 L. Ed. 2d 495 (1978); *Silverstein v. Sisters of Charity*, 38 Colo. App. 286, 559 P.2d 716 (1976); *McIntire & Quiros of Colo., Inc. v. Westinghouse Credit Corp.*, 40 Colo. App. 398, 576 P.2d 1026 (1978).

Applied in *Hudler v. New Red Top Valley Ditch Co.*, 121 Colo. 489, 217 P.2d 613 (1950); *Hoff v. Armbruster*, 125 Colo. 324, 244 P.2d 1069 (1952); *McGlasson v. Hilton*, 155 Colo. 237, 393 P.2d 733 (1964); *Perlman v. Great States Life Ins. Co.*, 164 Colo. 493, 436 P.2d 124 (1968); *Cyr v. District Court*, 685 P.2d 769 (Colo. 1984); Floyd v. Coors Brewing Co., 952 P.2d 797 (Colo. App. 1997); Daly v. Aspen Ctr. for Women's Health, Inc., 134 P.3d 450 (Colo. App. 2005); *State ex rel. Salazar v. Gen. Steel Domestic Sales, LLC*, 129 P.3d 1047 (Colo. App. 2005); *Yadon v. Lowry*, 126 P.3d 332 (Colo. App. 2005); *Gunnison County Bd. of County Comm'rs v. BDS Int'l, LLC.*, 159 P.3d 773 (Colo. App. 2006); *Richmond Am. Homes of Colo., Inc. v. Steel Floors, LLC*, 187 P.3d 1199 (Colo. App. 2008).

IV. Demand for Judgment.

Annotator's note. Since section (c) of this rule is similar to § 187 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Section (c) is identical and modeled after F.C.R.P. 54(c). *Dlug v. Wooldridge*, 189 Colo. 164, 538 P.2d 883 (1975).

Under section (c) of this rule, a judgment by default may not be different in kind or exceed in amount that prayed for in the demand for judgment. *Barnard v. Gaumer*, 146 Colo. 409, 361 P.2d 778 (1961); *Toplitsky v. Schilt*, 146 Colo. 428, 361 P.2d 970 (1961); *Burson v. Burson*, 149 Colo. 566, 369 P.2d 979 (1962); *Dept. of Welfare v. Schneider*, 156 Colo. 189, 397 P.2d 752 (1964).

Section 5-12-102 contains no requirement that town request statutory interest in its pleadings for court to award interest pursuant to section (c). *Town of Breckenridge v. Golforce, Inc.*, 851 P.2d 214 (Colo. App. 1992).

Both legal and equitable relief may be given in one action and in one judgment or decree. *Foothills Holding Corp. v. Tulsa Rig, Reel & Mfg. Co.*, 155 Colo. 232, 393 P.2d 749 (1964).

Where a party has misconceived his remedy and is seeking relief to which he is not entitled under the law, this does not mean that his petition should be dismissed, for, if, under the allegations of the petition, he is entitled to any relief, a court upon a hearing may grant him the relief to which he is entitled regardless of the prayer in the petition. *Regennitter v. Fowler*, 132 Colo. 489, 290 P.2d 223 (1955).

The question, therefore, is not whether a party has asked for the proper remedy, but whether under his pleadings he is entitled to any remedy. *Regennitter v. Fowler*, 132 Colo. 489, 290 P.2d 223 (1955).

The rules of civil procedure were intended to deemphasize the theory of a "cause of action" and to place the emphasis

upon the facts giving rise to the asserted claim. *Hutchinson v. Hutchinson*, 149 Colo. 38, 367 P.2d 594 (1961).

The substance of a claim rather than the appellation applied to the pleading by the litigant is what controls. *Hutchinson v. Hutchinson*, 149 Colo. 38, 367 P.2d 594 (1961).

If from the allegations of a complaint the plaintiff is entitled to relief under any "theory", it is sufficient to state a claim. *Hutchinson v. Hutchinson*, 149 Colo. 38, 367 P.2d 594 (1961).

Court will grant relief entitled. If a plaintiff has stated a cause of action for any relief, it is immaterial what he designates it or what he asked for in his prayer; the court will grant him the relief to which he is entitled under the facts pleaded. *Berryman v. Berryman*, 115 Colo. 281, 172 P.2d 446 (1946).

Court has duty to grant relief to which party entitled. Under this rule it is the duty of the court to grant relief to which a party is entitled, even though not specifically demanded in the prayer. *Spears Free Clinic & Hosp. for Poor Children v. State Bd. of Health*, 122 Colo. 147, 220 P.2d 872 (1950).

Should a court determine that the precise relief requested is not appropriate, other means may be formulated. *Davidson v. Dill*, 180 Colo. 123, 503 P.2d 157 (1972).

If a plaintiff declares his intention to seek a particular form of relief and to refuse all other relief, the legality or propriety of the relief sought might properly be determined on a motion to dismiss, though the complaint states facts entitling plaintiff to other relief than that he demands. *Berryman v. Berryman*, 115 Colo. 281, 172 P.2d 446 (1946).

Relief demanded as limiting relief granted. *Snell v. Pub. Utils. Comm'n*, 108 Colo. 162, 114 P.2d 563 (1941).

Equitable relief not precluded. Although the plaintiffs originally sought damages in an action at law, equitable relief was not precluded where a change in circumstances altered the posture of the case and rendered the original relief sought inappropriate. *Rice v. Hilty*, 38 Colo. App. 338, 559 P.2d 725 (1976); *Booth v. Bd. of Educ.*, 950 P.2d 601 (Colo. App. 1997), aff'd in part and rev'd in part on other grounds, 984 P.2d 639 (Colo. 1999).

If the evidence justifies an award, the particular theory pleaded will not prevent the award. *Johnson v. Bovee*, 40 Colo. App. 317, 574 P.2d 513 (1978); *Nix v. Clary*, 640 P.2d 246 (Colo. App. 1981).

Recovery is not limited to the amount specified in the complaint, and final judgment should be in the amount to which plaintiff is entitled where amount of damages can only be estimated at the pleading stage and defendant is provided with notice of the elements of the damage claim. *Worthen Bank & Trust v. Silvercool Serv. Co.*, 687 P.2d 464 (Colo. App. 1984).

Applied in *Bridges v. Ingram*, 122 Colo. 501, 223 P.2d 1051 (1950); *Morrissey v. Achziger*, 14 7 Colo. 510, 364 P.2d 187 (1961); *Colo. Ranch Estates, Inc. v. Halvorson*, 163 Colo. 146, 428 P.2d 917 (1967).

V. Costs.

Law reviews. For article, "Obtaining Costs for Clients Part 1", see 14 Colo. Law. 1974 (1985).

Section (d) violates neither the due process nor equal protection guarantees contained in the federal and state constitutions. The classification between governmental and non-governmental entities is rationally related to the goal of protecting the public treasury. *County of Broomfield v. Farmers Reservoir*, 239 P.3d 1270 (Colo. 2010).

Consistency with the principle of discretion in the assessment of costs is preserved by section (d) of this rule. *Greenwald v. Molloy*, 114 Colo. 529, 166 P.2d 983 (1946).

Generally, when costs are necessarily incurred in preparing for trial and because of litigation, reasonable costs may be awarded to the prevailing party, and trial courts may exercise their discretion in awarding such costs under this rule. *Bainbridge, Inc. v. Bd. of County Comm'rs*, 55 P.3d 271 (Colo. App. 2002).

No discretionary authority in clerk to determine amounts allowable as expert witness fees or attorney fees. Discretionary authority is judicial function not properly delegable to the clerk of court. *Davis v. Bruton*, 797 P.2d 830 (Colo. App. 1990).

To omit an award of costs in a judgment is a proper form for a trial judge to use in "directing" that no costs be allowed a prevailing party. *Grange Mut. Fire Ins. Co. v. Golden Gas Co.*, 133 Colo. 537, 298 P.2d 950 (1956).

Although the omission of an award of costs is a proper form for denial of costs, the court must direct the denial. Coldwell Banker Com. *Group v. Hegge*, 770 P.2d 1297 (Colo. App. 1988).

The specific limitation in the second sentence of § 13-16-113(2) cannot reasonably be interpreted as a general prohibition extending to all motions for summary judgment brought under C.R.C.P. 56, and the defendant's entitlement to an award of costs was properly considered under section (d). *Spencer v. United Mortg. Co.*, 857 P.2d 1342 (Colo. App. 1993).

An award of costs is not prohibited by this rule even if a party is not entitled to costs under § 13-16-104 . *Weeks v. City of Colo. Springs*, 928 P.2d 1346 (Colo. App. 1996).

Because express provision for the award of costs was made in § 13-16-104 , this rule is inapplicable to the extent it makes the awarding of costs discretionary. *Nat'l Canada Corp. v. Dikeou*, 868 P.2d 1131 (Colo. App. 1993).

There is no indication that the provision in § 13-64-402 creating a mechanism for insurers to assert their subrogation rights for medical benefits paid to a plaintiff is meant to supplant a prevailing party's right to recover costs. *Mullins v. Kessler*, 83 P.3d 1203 (Colo. App. 2003).

A prevailing party is one that has succeeded upon a significant issue presented by the litigation and has achieved some of the benefits sought in the lawsuit. *Nat'l Canada Corp. v. Dikeou*, 868 P.2d 1131 (Colo. App. 1993).

The party in whose favor the decision or verdict on liability is rendered is the prevailing party, even where plaintiff received no monetary or other benefit from the jury's verdict. *Weeks v. City of Colo. Springs*, 928 P.2d 1346 (Colo.

App. 1996).

The test for determining a prevailing party in a contract case does not apply to a tort case. *Pastrana v. Hudock*, 140 P.3d 188 (Colo. App. 2006).

Where party prevails on some but not all of multiple claims, the trial court has broad discretion to determine which, if any, party was "the" prevailing party. *Archer v. Farmer Bros. Co.*, 70 P.3d 495 (Colo. App. 2002), aff'd on other grounds, 90 P.3d 228 (Colo. 2004); *Pastrana v. Hudock*, 140 P.3d 188 (Colo. App. 2006).

"Prevailing party" may include a defendant who does not assert counterclaims and, under certain circumstances, may include a defendant who is found partly liable. *Archer v. Farmer Bros. Co.*, 90 P.3d 228 (Colo. 2004).

A water court has the discretion to award costs to the prevailing party in a case to determine whether an application for water rights shall be granted. Once a case is before the water judge, it changes character. The application for water rights becomes litigation at the point it has moved from the jurisdiction of the water referee to the water court, and thus the water court is within its discretion to award costs. *Fort Morgan v. GASP*, 85 P.3d 536 (Colo. 2004).

"Prevailing party" status for award of costs must await the resolution of the claims pending in the water court. Matter of Application for Water Rights, 891 P.2d 981 (Colo. 1995).

Costs are not taxable against the sovereign unless the general assembly so directs. *Shumate v. State Pers. Bd.*, 34 Colo. App. 393, 528 P.2d 404 (1974); *McFarland v. Gunter*, 829 P.2d 510 (Colo. App. 1992); *Smith v. Furlong*, 976 P.2d 889 (Colo. App. 1999).

Costs may not be awarded against state entities pursuant to section (d) in the absence of express legislative authority for such awards. *Central Colo. Water v. Simpson*, 877 P.2d 335 (Colo. 1994).

A water court has the discretion to award costs against a mutual ditch company because a mutual ditch company is not a subdivision of the state. *County of Broomfield v. Farmers Reservoir*, 239 P.3d 1270 (Colo. 2010).

School district is exempt from an award of costs. Trial court erred in awarding costs against school district, which is a political subdivision of the state, because there was no express provision allowing for the costs. *Lombard v. Colo. Outdoor Ed. Center, Inc.*, 266 P.3d 412 (Colo. App. 2011).

Notwithstanding section (d) of this rule, § 13-16-111 allows a prevailing plaintiff in a C.R.C.P. 106(a)(4) action to recover costs against the state, its officers, or agencies. *Branch v. Colo. Dept. of Corr.*, 89 P.3d 496 (Colo. App. 2003).

Section 24-4-106(7) does not take precedence over this rule. While § 24-4-106(7) permits the court "to afford such other relief as may be appropriate", this provision cannot be construed to authorize assessment of costs against the state so as to take precedence over section (d). *Shumate v. State Pers. Bd.*, 34 Colo. App. 393, 528 P.2d 404 (1974).

In state's action to recover costs for treatment in state institutions, the trial court was without jurisdiction to assess

court costs against the executive branch of the state, or its officers. *State ex rel. Fort Logan Mental Health Ctr. v. Harwood*, 34 Colo. App. 213, 524 P.2d 614 (1974).

An award of costs is proper against a municipal corporation. *Kussman v. City & County of Denver*, 671 P.2d 1000 (Colo. App. 1983).

Costs in challenge of driver's license revocation not recoverable. The trial court has no power to award costs to the plaintiff in a case challenging revocation of a driver's license under § 42-4-1202(3)(b), because there is no specific statutory provision allowing for such an award. *Lucero v. Charnes*, 44 Colo. App. 73, 607 P.2d 405 (1980).

Trial courts may exercise discretion to award costs to prevailing party unless there is a statute or rule specifically prohibiting the award of costs. *Rossmiller v. Romero*, 625 P.2d 1029 (Colo. 1981).

Prevailing plaintiff properly charged with defendant's post-offer costs where jury awarded plaintiff less than the defendant's offer. *Whitney v. Anderson*, 784 P.2d 830 (Colo. App. 1989).

The prevailing party for the award of costs is the one in whose favor the decision or verdict on liability is rendered even if the other party also prevailed in part on some of the claims involved in the case. *Mackall v. Jalisco Int'l, Inc.*, 28 P.3d 975 (Colo. App. 2001).

Even if each of the parties can arguably be viewed as having prevailed in part, the award of costs in such a situation is committed to the sole discretion of the trial court. *Mackall v. Jalisco Int'l, Inc.*, 28 P.3d 975 (Colo. App. 2001).

When a party prevailed on only one fairly minor issue and lost on every other substantial issue, the trial court did not abuse its discretion in finding that the party was not a prevailing party. *Farmers Reservoir & Irrigation Co. v. City of Golden*, 113 P.3d 119 (Colo. 2005).

The discretion of the trial court to award costs to a prevailing party is not limited to specific claims upon which the party prevailed, thus even if the prevailing party's expert witness fees were incurred solely in connection with a claim that was dismissed by the court, the award of those fees is proper. *Mackall v. Jalisco Int'l, Inc.*, 28 P.3d 975 (Colo. App. 2001).

Costs of third-party defendant properly divided between plaintiff and defendant when both had claims against third-party defendant since dismissal of the claims made third-party defendant the prevailing party against both. *Cobai v. Young*, 679 P.2d 121 (Colo. App. 1984); *Poole v. Estate of Collins*, 728 P.2d 741 (Colo. App. 1986).

Costs attributable to expert witness fees for expert witnesses that did not testify at trial were properly awarded. These costs were valuation expenses necessarily incurred by reason of the litigation and were necessary for the proper preparation for trial. *Fowler Irrevocable Trust 1992-1 v. City of Boulder*, 992 P.2d 1188 (Colo. App. 1999), aff'd in part and rev'd in part on other grounds, 17 P.3d 797 (Colo. 2001).

Costs may be awarded in tort action under the *Governmental Immunity Act. Lee v. Colo. Dept. of Health*, 718 P.2d 221 (Colo. 1986).

Trial court did not err in awarding plaintiff his costs pursuant to section (d) in his tort action under the Colorado Governmental Immunity Act. *Nguyen v. Reg'l Transp. Dist.*, 987 P.2d 933 (Colo. App. 1999).

Trial court in a far better position to determine whether the challenged costs were reasonable and necessary. Trial court did not abuse its discretion in awarding costs for: (1) Discovery deposition fees; (2) copies of discovery depositions; (3) copies of medical records for injuries not claimed at trial; (4) certain expert fees; (5) fees associated with photographs; and (6) non-itemized copy fees. *Nguyen v. Reg'l Transp. Dist.*, 987 P.2d 933 (Colo. App. 1999).

Even if court of appeals were to agree with RTD that trial court erred in awarding $2.65 in costs on the basis of mathematical errors that originated in plaintiff's bill of costs, any error falls within the scope of the maxim de minimus non curat lex. Hence, court declines to expend judicial resources remanding for correction of this negligible error. *Nguyen v. Reg'l Transp. Dist.*, 987 P.2d 933 (Colo. App. 1999).

Post-trial motion for the award of attorney fees is analagous to a request for taxing costs and should follow procedures established by section (d) of this rule and C.R.C.P 121, sec. 1-22. A trial court may address the issue of the award of attorney fees for services rendered in connection with the underlying litigation on a post-trial basis, whether or not counsel has previously sought to "reserve" the issue. *Roa v. Miller*, 784 P.2d 826 (Colo. App. 1989).

Attempt to have costs assessed pursuant to section (d) and C.R.C.P. 121, 1-22, was ineffective where court had previously reserved matter of costs for future hearing pursuant to C.R.C.P. 68. *Seymour v. Travis*, 755 P.2d 461 (Colo. App. 1988).

Costs may be assessed against the non-prevailing party where the purpose for imposing costs is to sanction counsel for improper conduct which led to a mistrial. *Koehn v. R.D. Werner Co., Inc.*, 809 P.2d 1045 (Colo. App. 1990).

Section (d) of this rule and § 13-16-104 are modified by § 13-17-202(1)(a)(II), which does not allow a party who rejects a settlement offer and recovers less at trial to recover his or her costs, even though that party is determined to be the prevailing party. *Bennett v. Hickman*, 992 P.2d 670 (Colo. App. 1999).

An offer of settlement as to "all claims" unambiguously includes attorney fees and costs if the only claim for attorney fees and costs appears in the complaint. The offer of settlement need not explicitly reference attorney fees and costs. *Bumbal v. Smith*, 165 P.3d 844 (Colo. App. 2007).

Court construed the Health Care Availability Act in harmony with § 13-16-105 and section (d) of this rule to allow a prevailing defendant to recover costs in a medical negligence action. *Mullins v. Kessler*, 83 P.3d 1203 (Colo. App. 2003).

Where a judgment has been successfully appealed, an award of costs previously entered on that judgment is no longer valid because, upon remand, that judgment no longer exists. Where a judgment has been successfully appealed, the identity of the prevailing party is still unknown, and only after the stage of the proceedings where a prevailing party can be identified will a court's order awarding costs be valid. Here, the judgment underlying the award

of costs in the first action was reversed, and the case was remanded for further proceedings. As a result, the board of county commissioners was no longer the prevailing party, and the order awarding costs, which was dependent on and ancillary to that vacated judgment, was reversed. The parties returned to the same positions they were in before the filing of the first action. *Bainbridge, Inc. v. Bd. of County Comm'rs*, 55 P.3d 271 (Colo. App. 2002).

A trial court may award costs to a prevailing party for an expert witness who does not testify, but the court must find that such costs were reasonable. Because homebuilders concede that costs associated with two cost-accounting experts retained by board of county commissioners in the second action are reasonable, trial court's award of such costs is affirmed. *Bainbridge, Inc. v. Bd. of County Comm'rs*, 55 P.3d 271 (Colo. App. 2002).

In view of issue at trial of whether fees charged by board were reasonable in relation to direct and indirect costs of building department, and knowledge of board's uniform building code expert in this area, trial court's award of costs for this witness was reasonable. The expert witness offered advice that may have been relevant to the preparation for the second action, and the board limited the expert witness' involvement in this case. *Bainbridge, Inc. v. Bd. of County Comm'rs*, 55 P.3d 271 (Colo. App. 2002).

A ruling on a class certification is essentially a procedural one that does not ask whether the underlying claims are legally or factually meritorious, so such a ruling does not trigger the award of costs and fees under section (d). Reyher v. State Farm Mut. Auto. Ins. Co., 2012 COA 58, 280 P.3d 64.

VI. Against Partnership.

Law reviews. For note, "Necessity of Resorting to Firm Assets Before Levying on the Assets of an Individual Partner", see 8 Rocky Mt. L. Rev. 134 (1936).

Annotator's note. Since section (e) of this rule is similar to § 14 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Judgment against a partnership binds the joint property of the associates and the separate property of members duly served with process. *Denver Nat'l Bank v. Grimes*, 97 Colo. 158, 47 P.2d 862 (1935).

A court has jurisdiction of partner who is served to proceed to final judgment against him. A judgment having been entered against a partnership and execution thereon having been returned unsatisfied, then, under the provisions of this rule a court has, and continues to have, jurisdiction of a partner who has been served with summons for the purpose of proceeding to final judgment against him. *Denver Nat'l Bank v. Grimes*, 97 Colo. 158, 47 P.2d 862 (1935).

Any member being served with summons has notice that he may appear in the case and set up any defense to the partnership liability or to his liability as a partner. *Denver Nat'l Bank v. Grimes*, 97 Colo. 158, 47 P.2d 862 (1935).

No personal judgment can be obtained against the partners not served, for, as to them, the judgment rendered could bind only their interests in the partnership property. *Peabody v. Oleson*, 15 Colo. App. 346, 62 P. 234 (1900);

Ellsberry v. Block, 28 Colo. 477, 65 P. 629 (1901); *Blythe v. Cordingly*, 20 Colo. App. 508, 80 P. 495 (1905); *Womack v. Grandbush*, 134 Colo. 1, 298 P.2d 735 (1956).

Section 13-50-105 is permissive and not mandatory, as partnership or a limited partnership may sue or be sued either in its common name or by naming its partners. *Frazier v. Carlin*, 42 Colo. App. 226, 591 P.2d 1348 (1979).

Section 13-50-105 and section (e) of this rule contain clear requirements that an individual partner must be named, personally served, and subjected to the jurisdiction of the court to seek recovery from the individual. Plaintiffs actually knew the identity of some of the individual partners but made a conscious decision not to name and serve them. The plaintiffs' judgment was enforceable only against the assets of the partnership. *Gutrich v. Cogswell & Wehrle*, 961 P.2d 1115 (Colo. 1998).

VII. Revival of Judgments.

Law reviews. For article, "Executions and Levies on Tangible Property", see 27 Dicta 143 (1950).

Revived judgments must be entered within 20 years after the entry of the judgment sought to be revived or the court will lose its jurisdiction to do so. *Mark v. Mark*, 697 P.2d 799 (Colo. App. 1984).

By its plain language section (h) requires notice to be served on the judgment debtor and provides the judgment debtor the opportunity to have issues tried and determined by the court. *Hicks v. Joondeph*, 232 P.3d 248 (Colo. App. 2009).

Where a judgment has been entered reducing child support arrears to a fixed sum, such judgment may be revived within 20 years after it was entered, regardless of the date that each child support payment became due. *Santarelli v. Santarelli*, 839 P.2d 525 (Colo. App. 1992).

Judgment lien, based on a domesticated out-of-state judgment, must be revived under Colorado procedural law for the lien to be extended. To extend a judgment lien beyond six years after the date of judgment, Colorado procedural law requires a judgment to be revived pursuant to section (h) and a transcript of the revival to be filed with the clerk and recorder. *Wells Fargo Bank, N.A. v. Kopfman*, 205 P.3d 437 (Colo. App. 2008), aff'd, 226 P.3d 1068 (Colo. 2010).

When a motion to revive a judgment is filed in sufficient time for the procedures of section (h) to be completed before the expiration of the original judgment, but court delays prevent a revived judgment from being entered before the judgment's expiration, then a revived judgment should be entered nunc pro tunc as of a date the motion could have been decided had there been no court delays. *Robbins v. Goldberg*, 185 P.3d 794 (Colo. 2008).

Cross References:

For effect of an order of dismissal, see C.R.C.P. 41(a) and (b) ; for pleadings, see C.R.C.P. 7(a) ; for masters' reports, see C.R.C.P. 53(e) ; for default judgments, see C.R.C.P. 55 ; for creditors' claims against estates, see part 8 of article 12 of title 15, C.R.S.; for service of process by publication, see C.R.C.P. 4(h) ; for provisions encompassing process,

see C.R.C.P. 4 .

Rule 55. Default.

Colorado Court Rules

Colorado Rules of Civil Procedure

Chapter 6. Judgment

As amended through Rule Change 2017(7), effective August 24, 2017

Rule 55. Default

(a) **Entry.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

(b) **Judgment.** A party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, guardian ad litem, conservator, or such other representative who has appeared in the action. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 7 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper. However, before judgment is entered, the court shall be satisfied that the venue of the action is proper under Rule 98.

(c) **Setting Aside Default.** For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) **Plaintiffs, Counterclaimants, Cross Claimants.** The provisions of this Rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) **Judgment Against an Officer or Agency of the State of Colorado.** No judgment by default shall be entered against an officer or agency of the State of Colorado unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

(f) **Judgment on Substituted Service.** In actions where the service of summons was by publication, mail, or personal service out of the state, the plaintiff, upon expiration of the

time allowed for answer, may upon proof of service and of the failure to plead or otherwise defend, apply for judgment. The court shall thereupon require proof to be made of the claim and may render judgment subject to the limitations of Rule 54(c).

Cite as Colo. R. Civ. P. 55

History. Source: (b) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Case Notes:

Annotation

I. General Consideration.

Law reviews. For article, "Judgment: Rules 54-63 ", see 23 Rocky Mt. L. Rev. 581 (1951). For article, "Standard Pleading Samples to Be Used in Quiet Title Litigation", see 30 Dicta 39 (1953). For article, "One Year Review of Civil Procedure and Appeals", see 37 Dicta 21 (1960). For article, "One Year Review of Civil Procedure and Appeals", see 38 Dicta 133 (1961). For article, "One Year Review of Civil Procedure and Appeals", see 39 Dicta 133 (1962). For article, "Motions for Default Judgments", see 24 Colo. Law. 1295 (1995).

Annotator's note. Since this rule is similar to § 186 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Not being present at trial is not an act of default as contemplated under this rule. *Kielsmier v. Foster*, 669 P.2d 630 (Colo. App. 1983).

Judgment entered pursuant to stipulation not default judgment. Where parties deal at arm's length and are represented by counsel who agree to the entry of judgment and there is no fraud on the attorney's part or any professional dereliction of duty inimical to the best interests of the parties, a judgment entered pursuant to their stipulation is not a default judgment, but is a stipulated judgment. In re George, 650 P.2d 1353 (Colo. App. 1982).

Allegations in a motion for default judgment under this rule are sufficient to assert a basis for relief for judgment on the basis of fraud. *Salvo v. De Simone*, 727 P.2d 879 (Colo. App. 1986).

Defaulting codebtor allowed to participate in verdict and judgment against bank on bank's counterclaim against debtors since bank failed to apply for an entry of judgment by default against debtor. *Pierson v. United Bank of Durango*, 754 P.2d 431 (Colo. App. 1988).

Motion for default judgment should have been denied where defendant's answer, though filed late, was filed before default had been entered and before the trial court had ruled on the motion for default judgment. *Colo. Compensation Ins. Auth. v. Raycomm Transworld Indus., Inc.*, 940 P.2d 1000 (Colo. App. 1996).

Motion to strike answer tantamount to default judgement. When trial court struck defendants' answer brief, it effectively denied them the opportunity to litigate their claim, and such motion was unwarranted by defendants' actions. *Pinkstaff v. Black & Decker (U.S.), Inc.*, 211 P.3d 698 (Colo. 2009).

Trial court lacks jurisdiction to enter default judgment against a defendant while an appeal is pending. *Anstine v. Churchman*, 74 P.3d 451 (Colo. App. 2003).

Applied in *Petrini v. Sidwell*, 38 Colo. App. 454, 558 P.2d 447 (1976); *Johnston v. District Court*, 1 96 Colo. 1, 580 P.2d 798 (1978); *City of Trinidad v. District Court*, 1 96 Colo. 106, 581 P.2d 304 (1978); *Norsworthy v. Colo. Dept. of Rev.*, 19 7 Colo. 527, 594 P.2d 1055 (1979); *Security State Bank v. Weingardt*, 42 Colo. App. 219, 597 P.2d 1045 (1979); People in Interest of C.A.W., 660 P.2d 10 (Colo. App. 1982); *O'Brien v. Eubanks*, 701 P.2d 614 (Colo. App. 1984), cert. denied, 474 U.S. 904, 106 S. Ct. 272, 88 L. Ed. 2d 233 (1985); *Denman v. Burlington Northern R. Co., 76 1 P.2d 244 (Colo. App. 1988).*

II. Entry.

Clerk to enter default. Section (a) of this rule provides that the clerk of the court in which an action is pending shall enter default when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend. *Valdez v. Sams*, 134 Colo. 488, 307 P.2d 189 (1957).

A trial court may not enter an order of default when a defendant answers and actively litigates but fails to appear for trial. Instead, a court may receive evidence in the defendant's absence and render judgment on the merits. *Rombough v. Mitchell*, 140 P.3d 202 (Colo. App. 2006).

III. Judgment.

A. By the Clerk

This rule provides that "judgment by default" may be entered by the clerk in those circumstances specifically mentioned. *Valdez v. Sams*, 134 Colo. 488, 307 P.2d 189 (1957).

This rule is not in conflict with the constitution as an invasion of the province of the judiciary, the theory being that the judgment is the sentence which the law itself pronounces as the sequence of statutory conditions, and the judgment, though in fact entered by the clerk, is, in the consideration of the law, what it purports on its face to be, namely, the act and determination of the court itself. The courts of many of the states have acted under similar statutory provisions for many years past, and the validity of such judgment has been upheld by repeated decisions of the highest courts of these states. *Phelan v. Ganebin*, 5 Colo. 14 (1894).

This rule was never intended to deprive the court of its power to render a judgment, but only to give the clerk authority to enter it. *Griffing v. Smith*, 26 Colo. App. 220, 142 P. 202 (1914); *Plaza del Lago Townhomes Ass'n v. Highwood Builders*, 148 P.3d 367 (Colo. App. 2006).

B. By the Court

Default judgments are drastic. Default judgments-particularly in those actions where the defendant has answered and the case is at issue-are serious and drastic. *Civil Serv. Comm'n v. Doyle*, 162 Colo. 1, 424 P.2d 368 (1967).

The ramifications which may ensue may cause loss of time and expense of courts and litigants, as well as, possibly, the denial of inherent rights. *Civil Serv. Comm'n v. Doyle*, 162 Colo. 1, 424 P.2d 368 (1967).

Before a court enters a default judgment where a defendant has appeared, the requirements of this rule as well as the grounds urged for a default judgment, must be considered with utmost care. *Civil Serv. Comm'n v. Doyle*, 162 Colo. 1, 424 P.2d 368 (1967).

Before a court enters judgment by default in a case in which the defendant has appeared, the plaintiff must provide the notice required. *Bankers Union Life Ins. Co. v. Fiocca*, 35 Colo. App. 306, 532 P.2d 57 (1975).

No party should be defaulted unless grounds authorizing it are authoritatively established and are so clear that litigants may know without question that they are subject to default if they do not act in a certain manner. *Missouri ex rel. De Vault v. Fidelity & Cas. Co.*, 107 F.2d 343 (8th Cir. 1939).

Court not representative of nonappearing party. Where the defendants fail to answer a complaint or to make any effort to appear before the trial court, the trial court is not obliged to, and indeed should not, assume a position adversarial to the plaintiffs and representative of the parties declining to appear. *Homsher v. District Court*, 198 Colo. 465, 602 P.2d 5 (1979).

Plaintiff's motion for default judgment is denied without a hearing where no cause of action is pleaded. *Schenck v. Van Ningen*, 719 P.2d 1100 (Colo. App. 1986).

A judgment by default is not designed to be a device to catch the unwary or even the negligent. *R.F. v. D.G.W.*, 192 Colo. 528, 560 P.2d 837 (1977).

A default judgment entered in violation of this rule is void. *Salter v. Bd. of County Comm'rs*, 126 Colo. 39, 246 P.2d 890 (1952).

Where the defendant's attorney has filed an appearance with the court, the defendant has appeared for purposes of the notice requirement of this rule, and if a defendant is not served with notice, a default judgment entered against him is void. *Schaffer v. Martin*, 623 P.2d 77 (Colo. App. 1980).

The failure to give required notice is error. The action of a trial court in entering default judgment on its own motion without the requisite three days' notice to defendant constitutes prejudicial reversible error. *Emerick v. Emerick*, 110 Colo. 52, 129 P.2d 908 (1942).

Although it is not specifically assigned as error, nevertheless it is cogent when considering the question of whether the court had the authority to enter the default judgment and also whether it exceeded its jurisdiction in doing so. *Civil*

Serv. Comm'n v. Doyle, 162 Colo. 1, 424 P.2d 368 (1967).

The requirements of this rule have been fastidiously adhered to by the supreme court. *Civil Serv. Comm'n v. Doyle, 162 Colo*. 1, 424 P.2d 368 (1967).

The requirements of this rule, stating that a three-day written notice of application for default judgment shall be given, have been scrupulously adhered to by this court. *R.F. v. D.G.W.*, 192 Colo. 528, 560 P.2d 837 (1977); *Southerlin v. Automotive Elec. Corp.*, 773 P.2d 599 (Colo. App. 1988).

"Appeared in the action" as used in section (b) requires the defendant to communicate with the court in a manner that demonstrates defendant is aware of and intends to participate in the proceedings. *Plaza del Lago Townhomes Ass'n v. Highwood Builders*, 148 P.3d 367 (Colo. App. 2006).

The essence of an appearance as used in section (b)(2) (now (b)) is a cognitive submission of oneself to the jurisdiction of the court. People in Interest of J.M.W., 36 Colo. App. 398, 542 P.2d 392 (1975).

Ordinarily, a defendant enters a general appearance in a case by seeking relief which acknowledges jurisdiction or by other conduct manifesting consent to jurisdiction. People in Interest of J.M.W., 36 Colo. App. 398, 542 P.2d 392 (1975).

Presence requesting continuance to employ counsel does not constitute appearance. Presence in court without counsel resulting in a continuance to allow time to employ counsel did not constitute an appearance within the meaning of section (b)(2) (now (b)). People in Interest of J.M.W., 36 Colo. App. 398, 542 P.2d 392 (1975).

Purpose of the notice requirement of section (b)(2) (now (b)) of this rule is to protect those parties who, although delinquent in filing pleadings within the time periods specified, have indicated a clear purpose to defend by entry of their appearance. *Bankers Union Life Ins. Co. v. Fiocca*, 35 Colo. App. 306, 532 P.2d 57 (1975); *Best v. Jones*, 644 P.2d 89 (Colo. App. 1982); *Sisneros v. First Nat. Bank of Denver*, 689 P.2d 1178 (Colo. App. 1984).

Responsive pleading is timely when tendered to the clerk of the court following service of the three-day written notice required pursuant to section (b)(2) (now (b)) of this rule and prior to the entry of default judgment. *Bankers Union Life Ins. Co. v. Fiocca*, 35 Colo. App. 306, 532 P.2d 57 (1975).

Judgment obtained by default is entitled to complete legal effect. *DeBoer v. District Court*, 184 Colo. 112, 518 P.2d 942 (1974).

The notice provision in section (b) of this rule is applicable to divorce cases. The notice provision in section (b) of this rule as to serving party against whom default judgment is sought with notice of application therefor at least three days prior to hearing thereon applies in divorce cases, and if not followed it is ground for reversal. *Holman v. Holman*, 114 Colo. 437, 165 P.2d 1015 (1946).

The taking of evidence and entry of judgment in the absence of a party who knows his case is set for trial is not proceeding under the default provisions of this rule, but is instead a trial on the merits. *Davis v. Klaes*, 141 Colo. 19,

346 P.2d 1018 (1959); *Sunshine v. Robinson*, 168 Colo. 409, 451 P.2d 757 (1969).

If a party is absent, his failure to appear does not entitle him to additional notice. *Davis v. Klaes*, 141 Colo. 19, 346 P.2d 1018 (1959); *Sunshine v. Robinson*, 168 Colo. 409, 451 P.2d 757 (1969).

It is an abuse of discretion to enter a default judgment without notice to the parties themselves where their attorney has been discharged and has filed an application to withdraw. *Colo. Ranch Estates, Inc. v. Halvorson*, 163 Colo. 146, 428 P.2d 917 (1967).

Notice not necessary where defendants did not make any contact with the court before entry of judgment against them. *Realty World-Range Realty, Ltd. v. Prochaska*, 691 P.2d 761 (Colo. App. 1984).

The supreme court is disinclined to apply technical concepts in determining whether a party has entered an appearance for purposes of the notice requirement of section (b)(2) of this rule. *R.F. v. D.G.W.*, 192 Colo. 528, 560 P.2d 837 (1977).

Colorado has taken a liberal approach in determining what constitutes an "appearance" under section (b)(2). *Biella v. State Dept. of Hwys.*, 652 P.2d 1100 (Colo. App. 1982).

"Appearance" must be responsive to court action. To be entitled to notice of application for judgment under section (b)(2), a party's appearance must be responsive to the plaintiff's formal court action. The plaintiff's knowledge that the defendants plan to resist the suit is not enough. *Biella v. State Dept. of Hwys.*, 652 P.2d 1100 (Colo. App. 1982); *Sisneros v. First Nat. Bank of Denver*, 689 P.2d 1178 (Colo. App. 1984).

Letter from defendant to court may be sufficient "appearance" under section (b)(2) to entitle the defendant to three days' notice and a hearing. *Carls Constr., Inc. v. Gigliotti*, 40 Colo. App. 535, 577 P.2d 1107 (1978).

Unsigned letter faxed to the court by defendant's son was sufficient "appearance" to trigger the notice requirement of section (b)(2). *BS & C Enters., L.L.C. v. Barnett*, 186 P.3d 128 (Colo. App. 2008).

Corporate officer's attempt to file documents is appearance. An attempt by an officer of a corporation to file documents with the court, while not technically an appearance on behalf of the corporation, is an "appearance" sufficient to trigger the notice requirement of section (b)(2). *Best v. Jones*, 644 P.2d 89 (Colo. App. 1982).

Appearance in small claims court is not appearance in county court. The defendant's appearance by attorney with regard to the same claim in the small claims court and the county court is not sufficient to trigger the requirement for notice under section (b)(2), because the the county court and the district court are separate and distinct courts, and actions in each court are separate and distinct lawsuits. An appearance in the former does not constitute an appearance in the latter. *Yard v. Ambassador Bldr. Corp.*, 669 P.2d 1040 (Colo. App. 1983).

Payment of docket fee is not prerequisite to entry of appearance for the purpose of entitling a party to notice before entry of default judgment. *Carls Constr., Inc. v. Gigliotti*, 40 Colo. App. 535, 577 P.2d 1107 (1978).

Right to notice not extinguished by untimely answer. A party's right to notice under section (b)(2) is not extinguished by the fact that his appearance in the action was not made within the time required for an answer under C.R.C.P. 12(a) prior to entry of default. *Carls Constr., Inc. v. Gigliotti*, 40 Colo. App. 535, 577 P.2d 1107 (1978).

Where a party is not represented by a lawyer, a court should be reluctant to foreclose the opportunity of a litigant to present some defense. *R.F. v. D.G.W.*, 192 Colo. 528, 560 P.2d 837 (1977).

Judgment of default vacated for failure to give notice required by this rule. *R.F. v. D.G.W.*, 192 Colo. 528, 560 P.2d 837 (1977); *Westbrook v. Burris*, 757 P.2d 1142 (Colo. App. 1988).

Failure to comply with the notice provision of this rule mandates vacation of the entry of default as well as the default judgment, thus rendering further proceedings on the default issue unwarranted. *Schaffer v. Martin*, 623 P.2d 77 (Colo. App. 1980).

Express finding of proper venue not required. The requirement in section (b)(2) that the court "be satisfied" that venue is proper is not tantamount to a requirement that an express, written finding be made. Although it might be preferable to include such a finding in the order granting the default, it is not required by the rule. *Wagner Equip. Co. v. Mountain States Mineral Enters., Inc.*, 669 P.2d 625 (Colo. App. 1983).

Improper venue is not a jurisdictional defect that renders a default judgment void. *Swanson v. Precision Sales & Serv.* , 832 P.2d 1109 (Colo. App. 1992).

Hearing on motion for default not necessary where court has all materials required by rules and is satisfied as to sufficiency of service and that defendant is in default. *Crow-Watson No. 8 v. Miranda*, 736 P.2d 1260 (Colo. App. 1986).

No hearing on a motion for default judgment is necessary where only liquidated as opposed to unliquidated damages are involved and defendant, possessed with all of the information available to the court for rendering a judgment, fails to respond. *Crow-Watson No. 8 v. Miranda*, 736 P.2d 1260 (Colo. App. 1986).

Defaulting party has right to appear and present mitigating evidence at hearing on damages. Since, before a default judgment is entered, the court is required to conduct a hearing and take evidence on the amount of damages and section (b)(2) allows the defaulting party to receive notice of and attend such hearing, our adversary system requires that the defaulting party should be allowed to cross-examine witnesses and present mitigating evidence. *Kwik Way Stores, Inc. v. Caldwell*, 709 P.2d 36 (Colo. App. 1985), aff'd in part and rev'd in part on other grounds, 745 P.2d 672 (Colo. 1987).

A trial court is not required to take evidence before entering a default judgment, assuming that the court is satisfied as to sufficiency of service and the fact that defendant is actually in default. *Orebaugh v. Doskocil*, 145 Colo. 484, 359 P.2d 671 (1961).

A defendant who fails to answer within the required time thereby admits the allegations of the complaint, and

allegations deemed admitted need not be proved. *Orebaugh v. Doskocil*, 145 Colo. 484, 359 P.2d 671 (1961).

A court under this rule has wide discretion as to whether a hearing is necessary prior to entry of a default judgment. *Orebaugh v. Doskocil*, 145 Colo. 484, 359 P.2d 671 (1961).

District court is without discretionary power to deny a motion for default judgment where the opposing party, not an agency of the state, fails to comply with a court order requiring that a certain act be done within a specified time and, after expiration of that time, fails to establish that such failure to act was a result of excusable neglect. *Sauer v. Heckers*, 34 Colo. App. 217, 524 P.2d 1387 (1974).

If the court decides to hold a hearing, it also has discretion as to the type of hearing and the degree of its formality. *Orebaugh v. Doskocil*, 145 Colo. 484, 359 P.2d 671 (1961).

While it may be better practice to have a reporter present when testimony is offered prior to the entry of a default judgment, section (b)(2) (now (b)) does not require it. *Orebaugh v. Doskocil*, 145 Colo. 484, 359 P.2d 671 (1961).

It is the duty of the trial court to make sufficient findings to enable the appellate court to clearly understand the basis of the trial court's decision and to enable it to determine the ground on which it rendered its decision granting a default judgment. *Norton v. Raymond*, 30 Colo. App. 338, 491 P.2d 1403 (1971).

There must be proof of cause for divorce. The interest of the public in divorce cases, including the possibility of collusive arrangements therein, is such that a divorce may not be granted on a judgment by default without proof of a cause for divorce. *Holman v. Holman*, 114 Colo. 437, 165 P.2d 1015 (1946).

In default cases where testimony is taken, it must be by the court or referee. *Hotchkiss v. First Nat'l Bank*, 37 Colo. 228, 85 P. 1007 (1906).

Default may be entered for failing to give deposition. Judgment by default may be entered against a party who wilfully fails to appear in response to a proper notice to have his deposition taken under this rule. *Salter v. Bd. of Comm'rs*, 126 Colo. 39, 246 P.2d 890 (1952).

Judgment by default is the penalty for failure to have desposition taken. *Salter v. Bd. of Comm'rs*, 126 Colo. 39, 246 P.2d 890 (1952).

Before this penalty is imposed, there must be given an opportunity to show cause for nonappearance. *Salter v. Bd. of Comm'rs*, 126 Colo. 39, 246 P.2d 890 (1952).

Contempt is not a penalty that goes along with default judgment. *Salter v. Bd. of Comm'rs*, 126 Colo. 39, 246 P.2d 890 (1952).

It is necessary to assess damages. Upon default in an action where the taking of an account, or the proof of any fact, is necessary to enable the court to assess damages or give judgment, final judgment need not be rendered, and ordinarily is not, until the amount of damages is assessed in some appropriate manner. *Melville v. Weybrew*, 108

Colo. 520, 120 P.2d 189 (1941), cert. denied, 315 U.S. 811, 62 S. Ct. 795, 86 L. Ed. 1210, reh'g denied, 315 U.S. 830, 62 S. Ct. 913, 86 L. Ed. 1224 (1942).

A court is required under this rule to take evidence and to determine the amount of damages. *Valdez v. Sams*, 134 Colo. 488, 307 P.2d 189 (1957).

Exemplary damages or execution against the body cannot be awarded in the absence of a specific finding, based upon evidence, that the special circumstances which warrant the extraordinary remedy are in fact present. *Valdez v. Sams*, 134 Colo. 488, 307 P.2d 189 (1957).

IV. Setting Aside Default.

Law reviews. For comment on *Self v. Watt* appearing below, see 26 Rocky Mt. L. Rev. 107 (1953). For comment on *Coerber v. Rath* appearing below, see 45 Den. L.J. 763 (1968).

Annotator's note.

(1) Since section (c) of this rule is similar to §§ 50(e) and 81 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing those sections have been included in the annotations to this rule.

(2) For specific grounds and time to vacate default judgments, see the annotations under C.R.C.P. 60.

Negligence of counsel generally constitutes "good cause shown" for setting aside a default under section (c). *Trujillo v. Indus. Comm'n*, 648 P.2d 1094 (Colo. App. 1982).

A motion to vacate a default judgment is addressed to the sound discretion of the trial court. *Koin v. Mutual Benefit Health & Accident Ass'n*, 96 Colo. 163, 41 P.2d 306 (1935); *Mountain v. Stewart*, 112 Colo. 302, 149 P.2d 176 (1944); *Self v. Watt*, 128 Colo. 61, 259 P.2d 1074 (1953); *Burr v. Allard*, 133 Colo. 270, 293 P.2d 969 (1956); *Riss v. Air Rental, Inc.*, 136 Colo. 216, 315 P.2d 820 (1957); *White, Green & Addison Assocs. v. Monarch Oil & Uranium Corp.*, 141 Colo. 107, 347 P.2d 135 (1959); *Walker v. Assocs. Loan Co.*, 15 3 Colo. 261, 385 P.2d 421 (1963); *Coerber v. Rath*, 164 Colo. 294, 435 P.2d 228 (1967); *Gen. Aluminum Corp. v. District Court*, 165 Colo. 445, 439 P.2d 340 (1968); *Moskowitz v. Michaels Artists & Eng'r Supplies, Inc.*, 29 Colo. App. 44, 477 P.2d 465 (1970); *Snow v. District Court*, 194 Colo. 335, 572 P.2d 475 (1977).

The determination of whether to vacate or set aside a default judgment is within the sound discretion of the trial court. *Dudley v. Keller*, 33 Colo. App. 320, 521 P.2d 175 (1974).

The underlying goal in ruling on motions to set aside default judgments is to promote substantial justice. Whether substantial justice will be served by setting aside a default judgment on the ground of excusable neglect is to be determined by the trial court in the exercise of its sound discretion. Where that discretion is abused, an appellate court will set aside the trial court's order. *Craig v. Rider*, 651 P.2d 397 (Colo. 1982); *Plaisted v. Colo. Springs Sch. Dist. #11* , 702 P.2d 761 (Colo. App. 1985).

A motion to vacate a default judgment is addressed to the sound discretion of the trial court. *Sumler v. District Ct., City & County of Denver*, 889 P.2d 50 (Colo. 1995).

Section (c) of this rule and C.R.C.P. 60(b) leave the matter of setting aside default judgments to the discretion of the trial judge. *Ehrlinger v. Parker*, 13 7 Colo. 514, 327 P.2d 267 (1958).

Same standards apply under section (c) of this rule and under C.R.C.P. 60(b). In considering either type of motion, the trial court should base its decision on (1) whether the neglect that resulted in the entry of judgment by default was excusable; (2) whether the moving party has alleged a meritorious defense; and (3) whether relief from the challenged order would be consistent with considerations of equity. *Dunton v. Whitewater West Recreation, Ltd.*, 942 P.2d 1348 (Colo. App. 1997).

There is a presumption of regularity applicable to trial court ruling setting aside default. *Credit Inv. & Loan Co. v. Guar. Bank & Trust Co.*, 166 Colo. 471, 444 P.2d 633 (1968).

The ruling on setting aside default will not be disturbed unless it appears that there has been an abuse of discretion. *Koin v. Mutual Benefit Health & Accident Ass'n*, 96 Colo. 163, 41 P.2d 306 (1935); *Mountain v. Stewart*, 112 Colo. 302, 149 P.2d 176 (1944); *Self v. Watt*, 128 Colo. 61, 259 P.2d 1074 (1953); *Burr v. Allard*, 133 Colo. 270, 293 P.2d 969 (1956); *Riss v. Air Rental, Inc.*, 136 Colo. 216, 315 P.2d 820 (1957); *White, Green & Addison Assocs. v. Monarch Oil & Uranium Corp.*, 141 Colo. 107, 347 P.2d 135 (1959); *Moskowitz v. Michaels Artists & Eng'r Supplies, Inc.*, 29 Colo. App. 44, 477 P.2d 465 (1970).

The court must refrain from vacating a default judgment until after the opened judgment results in a new judgment on the merits. *Weaver Constr. Co. v. District Court*, 190 Colo. 227, 545 P.2d 1042 (1976).

If a judgment results in favor of the defendant after a trial on the merits, then the original default judgment is vacated-the judgment and judgment lien are dissolved as though they never existed. *Weaver Constr. Co. v. District Court*, 190 Colo. 227, 545 P.2d 1042 (1976).

When a judgment is opened the defendant is allowed to answer to the merits of the claim, but the original judgment and judgment lien remain in effect as security pending the resolution of the trial on the merits. Thus, if a judgment results in plaintiff's favor after the original judgment is opened for a trial on the merits, his judgment lien will remain in full force and effect as if the original default judgment had not been opened. *Weaver Constr. Co. v. District Court*, 190 Colo. 227, 545 P.2d 1042 (1976).

To warrant reversal it must appear that there was an abuse of discretion. *Walker v. Assocs. Loan Co.*, 15 3 Colo. 261, 385 P.2d 421 (1963).

An abuse of discretion in refusing to set aside a default judgment must be shown to warrant reversal. People in Interest of J.M.W., 36 Colo. App. 398, 542 P.2d 392 (1975).

Without a clear portrayal of an abuse of discretion, an appellate court will not reverse. *Credit Inv. & Loan Co. v. Guar.*

Bank & Trust Co., 166 Colo. 471, 444 P.2d 633 (1968).

An appellate court has never hesitated to overrule a trial court where that discretion has been abused. *Coerber v. Rath*, 164 Colo. 294, 435 P.2d 228 (1967).

The discretion of the court in determining an application to vacate a default is not a capricious or arbitrary discretion, but is controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to subserve, and not to impede or defeat, the ends of justice. *Gumaer v. Bell*, 51 Colo. 473, 119 P. 681 (1911); *Burr v. Allard*, 133 Colo. 270, 293 P.2d 969 (1956).

The discretion of the court in considering any application to vacate a default is controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to serve, and not to impede or defeat, the ends of justice. *Dudley v. Keller*, 33 Colo. App. 320, 521 P.2d 175 (1974).

A successor judge may vacate default judgment when the original judge would have had an adequate legal basis to do so. *Sumler v. District Ct., City & County of Denver*, 889 P. 2d 50 (Colo. 1995).

Where there is nothing to indicate that setting aside a default and ordering a trial on the merits would unwarrantedly prejudice plaintiffs, a trial court abuses its discretion in refusing to set aside a default judgment. *Coerber v. Rath*, 164 Colo. 294, 435 P.2d 228 (1967).

Denial of a motion to set aside entry of default was an abuse of discretion where the motion provided a good faith explanation for defendant's behavior, was filed less than three weeks after entry of default, alleged a potentially meritorious defense, and plaintiff conceded that no prejudice would result from setting the default aside. *Singh v. Mortensun*, 30 P.3d 853 (Colo. App. 2001).

A reason for refusing to set aside a default is defendants' delay in making their motion. *Ehrlinger v. Parker*, 13 7 Colo. 514, 327 P.2d 267 (1958).

Where a defendant knows of the judgment against him and does not take prompt steps to vacate the same, but makes numerous efforts to satisfy or compromise such judgment, then these actions being contradictory and inconsistent, the refusal of the trial court to set aside the judgment is not an abuse of discretion. *Ehrlinger v. Parker*, 13 7 Colo. 514, 327 P.2d 267 (1958).

Parties cannot be permitted to disregard the process of the court and after a default judgment is rendered against them come in at their convenience and upon the mere allegation of the existence of a meritorious defense have judgment rendered against them vacated. *Riss v. Air Rental, Inc.*, 136 Colo. 216, 315 P.2d 820 (1957); *White, Green & Addison Assocs. v. Monarch Oil & Uranium Corp.*, 141 Colo. 107, 347 P.2d 135 (1959).

Where an application to vacate a default judgment is made promptly, a defense on the merits should be permitted. *Drinkard v. Spencer*, 72 Colo. 396, 211 P. 379 (1922); *Walker v. Assocs. Loan Co.*, 15 3 Colo. 261, 385 P.2d 421 (1963).

Where a stockholder of a corporation, acting promptly after the entry of a default judgment against the latter, presents to the trial court a petition to have the judgment set aside and for leave to file an answer-it appearing from the petition that he was not a party to the original proceeding, that he would be prejudiced by the judgment if it were permitted to stand, and that he has a good defense to the action-the petition should be granted, since a denial constitutes prejudicial, reversible error. *Senne v. Conley*, 110 Colo. 270, 133 P.2d 381 (1943); *Brown v. Deerksen*, 163 Colo. 194, 429 P.2d 302 (1967).

There must be evidence and justification for any delay. Where a trial court, after a lapse of many years from entry of judgment, sets it aside upon the application of the defendant without evidence or showing of justification for delay in moving to vacate such judgment, the plaintiff is entitled to have original judgment reinstated. *Haskell v. Gross*, 145 Colo. 365, 358 P.2d 1024 (1961).

The burden is upon the defendant to establish the grounds on which he relies to set aside a default entered against him by clear and convincing proof. *Browning v. Potter*, 129 Colo. 478, 271 P.2d 418 (1954); *Burr v. Allard*, 133 Colo. 270, 293 P.2d 969 (1956); *Ehrlinger v. Parker*, 13 7 Colo. 514, 327 P.2d 267 (1958).

A motion to set aside a default judgment is a simple procedural motion taking place within the context of a substantive civil action; therefore, § 13-25-127 , which governs the burden of proof for civil actions, is inapplicable to a motion to set aside a default judgment. *Borer v. Lewis*, 91 P.3d 375 (Colo. 2004).

In enacting § 13-25-127 , the general assembly did not legislatively override the "clear and convincing" burden of proof that has been applied to proceedings to set aside default judgments. To decide otherwise would require the court to find § 13-25-127 unconstitutional as an impermissible infringement on the judiciary's authority to promulgate procedural rules. *Borer v. Lewis*, 91 P.3d 375 (Colo. 2004).

One must show facts that would produce a different judgment. One seeking to have a default judgment set aside must set forth facts which, if established, would produce a judgment other than the one entered. *Ehrlinger v. Parker*, 13 7 Colo. 514, 327 P.2d 267 (1958); *Walker v. Assocs. Loan Co.*, 15 3 Colo. 261, 385 P.2d 421 (1963).

The court should vacate judgment. Where a default judgment has been entered and it is made to appear that in justice to a defendant he is entitled to be heard, and that the tendered defense, if established, would defeat the action, the trial court should vacate the judgment. *Gumaer v. Bell*, 51 Colo. 473, 119 P. 681 (1911); *Walker v. Assocs. Loan Co.*, 15 3 Colo. 261, 385 P.2d 421 (1963).

Trial court erred in denying defendants' motion to vacate default judgment where defendants received no actual or constructive notice of court order authorizing plaintiffs to amend their complaint, where plaintiffs failed to serve defendants with a copy of the amended complaint after the court's order was issued, and where the allegations in the amended complaint against defendants were the same as in the original complaint and were specifically denied in defendant's answer to the original complaint. *Roberts v. Novinger*, 815 P.2d 996 (Colo. App. 1991).

Where a default judgment is set aside on jurisdictional grounds, it also must be vacated. *Weaver Constr. Co. v. District Court*, 190 Colo. 227, 545 P.2d 1042 (1976).

Lack of notice of a default judgment supporting a judgment lien is not a jurisdictional defect that renders the judgment and lien void. *First Nat. Bank of Telluride v. Fleisher*, 2 P.3d 706 (Colo. 2000).

Excusable neglect and meritorious defense ground for setting aside default judgment. The judge was acting within his jurisdiction under this rule when he set aside a default judgment on the ground of "excusable neglect" supported by a specific statement of meritorious defense. *Weaver Constr. Co. v. District Court*, 190 Colo. 227, 545 P.2d 1042 (1976).

A meritorious defense must be set forth. It is necessary in a proceeding to set aside a default judgment for the moving party to set forth a meritorious defense. *Temple v. Miller*, 30 Colo. App. 49, 488 P.2d 252 (1971).

Where a judgment is set aside on grounds other than those challenging the jurisdiction of the court, the judgment is opened and the moving party, after a showing of good cause and a meritorious defense, will be permitted to file an answer to the original complaint and participate in a trial on the merits. *Weaver Constr. Co. v. District Court*, 190 Colo. 227, 545 P.2d 1042 (1976).

There is a failure to show good cause without meritorious defense. One against whom a default judgment has been entered must allege a meritorious defense to the plaintiff's claim, otherwise there is a failure to show good cause. *Coerber v. Rath*, 164 Colo. 294, 435 P.2d 228 (1967).

A meritorious defense does not have to be proven in the hearing to set aside the judgment, for what is necessary is that the defendant allege facts which, if proven true, would alter the judgment entered. *Temple v. Miller*, 30 Colo. App. 49, 488 P.2d 252 (1971).

A motion to set aside a default judgment should be considered in a manner calculated to promote substantial justice. *Burlington Ditch, Reservoir & Land Co. v. Fort Morgan Reservoir & Irrigation Co.*, 59 Colo. 571, 151 P. 432 (1915); Walker v. Assocs. Loan Co., 15 3 Colo. 261, 385 P.2d 421 (1963); *F. & S. Constr. Co. v. Christlieb*, 166 Colo. 67, 441 P.2d 656 (1968); *Norton v. Raymond*, 30 Colo. App. 338, 491 P.2d 1403 (1971).

Where it is clear from the absence of evidence in the record that it is impossible to determine if substantial justice has been done, then, in the interest of substantial justice, the plaintiff should be required to prove his claim and the defendant should be given an opportunity to present his defense. *Norton v. Raymond*, 30 Colo. App. 338, 491 P.2d 1403 (1971).

Default must be first set aside in proper proceeding. Where a defendant has made default, and judgment has been entered against him, he is not entitled to file pleadings contesting the allegations of plaintiff until his default and the judgment entered thereon have been set aside in a proper proceeding; such a defendant has no standing in court to move for a new trial, either for cause or as a matter of right. *Fraka v. Malernee*, 129 Colo. 87, 267 P.2d 651 (1954).

Where defendants' motions do not attack the summons, but are directed instead to the default judgment, praying for an order authorizing the defendants to plead to the complaint, then, by this action, the defendants subject themselves to the jurisdiction of the court. *Barra v. People*, 18 Colo. App. 16, 69 P. 1074 (1902); *Pierce v. Hamilton*, 55 Colo. 448,

135 P. 796 (1913); *Isham v. People*, 82 Colo. 550, 262 P. 89 (1927); *Brown v. Amen*, 147 Colo. 468, 364 P.2d 735 (1961).

A party who seeks to set aside a default judgment and plead to the merits has thereby entered a general appearance and waived the right to question a summons. *Wells Aircraft Parts Co. v. Allan J. Kayser Co.*, 118 Colo. 197, 194 P.2d 326 (1947).

Court acquires jurisdiction, but only to plead or answer, not to validate void default judgment. Since a general appearance has no retroactive force, then where a general appearance is made by defendants in seeking to set aside the default the court therefore acquires jurisdiction over them, but only to grant time to plead or answer to the complaint, and so the general appearance does not validate a void default judgment. *Jones v. Colescott*, 134 Colo. 552, 307 P.2d 464 (1957); *Brown v. Amen*, 147 Colo. 468, 364 P.2d 735 (1961).

Presumption of judgment's validity also includes required notices. The presumption of validity of a judgment entered by a court, which admittedly had jurisdiction of the parties and of the subject matter of the action, carries with it the presumption that notices required by this rule to be given in connection with the entry of judgment by default were complied with. *Haskell v. Gross*, 145 Colo. 365, 358 P.2d 1024 (1961).

Lack of notice is a serious procedural error that can, in some instances, violate the due process rights of the defaulting party and, therefore, require vacating the default judgment. *First Nat. Bank of Telluride v. Fleisher*, 2 P.3d 706 (Colo. 2000).

The burden is upon the party seeking to vacate a judgment to overcome the presumption of validity. *Haskell v. Gross*, 145 Colo. 365, 358 P.2d 1024 (1961).

Since the motion to set aside arose after the judgment was entered, the burden to prove a lack of jurisdiction because of inadequate service of process is on the party challenging the service of process and the resulting lack of jurisdiction. *White Front Auto Sales, Inc. v. Mygatt*, 810 P.2d 234 (Colo. App. 1990).

Overcoming the presumption of validity is not accomplished by presenting a record which fails to show that notice was served. *Haskell v. Gross*, 145 Colo. 365, 358 P.2d 1024 (1961).

Where the notice of trial is served upon an attorney who states that he intends to withdraw from the case, a trial court abuses its discretion in refusing to set aside a default judgment. *Colo. Ranch Estates, Inc. v. Halvorson*, 163 Colo. 146, 428 P.2d 917 (1967).

Review by writ of error is proper procedure. The only proper procedure to secure review of a trial court's order granting an application to set aside a default judgment is by writ of error after final judgment, not prohibition. *Stiger v. District Court*, 188 Colo. 403, 535 P.2d 508 (1975).

Verified answer in sufficient detail to be specifically informative is considered generally to amount to a meritorious defense for purposes of setting aside a default judgment. *Coon v. Ginsberg*, 32 Colo. App. 206, 509 P.2d 1293

(1973).

Gross negligence on the part of counsel resulting in a default judgment is considered excusable neglect on the part of the client entitling him to have the judgment set aside. *Dudley v. Keller*, 33 Colo. App. 320, 521 P.2d 175 (1974).

Gross negligence causing default judgment excusable where attorney's gross negligence could not be imputed to his client. *Sumler v. District Ct., City & County of Denver*, 889 P.2d 50 (Colo. 1995).

When no appeal was taken from an order denying a motion to set aside default judgment, all matters in controversy were finally adjudicated and a second motion to set aside the default judgment was a nullity and should be stricken. *Federal Lumber Co. v. Hanley*, 33 Colo. App. 18, 515 P.2d 480 (1973).

A default judgment may only be the subject of collateral attack when the trial court lacked jurisdiction over the parties or the subject matter. *DeBoer v. District Court*, 184 Colo. 112, 518 P.2d 942 (1974).

Where a default judgment has been entered and made final, it is not a proper subject of collateral attack particularly by strangers to the original action, although the rule prohibiting such attack applies to parties as well. *DeBoer v. District Court*, 184 Colo. 112, 518 P.2d 942 (1974).

Criteria to be utilized by court in ruling on motion to set aside a default judgment include whether the neglect that resulted in entry of judgment by default was excusable, whether the moving party has alleged a meritorious defense, and whether relief from the challenged order would be consistent with equitable considerations, such as the protection of action taken in reliance on the order and the prevention of prejudice by reason of evidence lost or impaired by the passage of time. A consideration of all these factors together in a single hearing would provide the most complete information upon which to base the exercise of informed discretion and would be the preferable procedure in most cases. *Craig v. Rider*, 651 P.2d 397 (Colo. 1982).

The preferred procedure is to consider all three criteria in single hearing, as evidence relating to one factor might shed light on another and consideration of all three factors will provide the most complete information for an informed decision. *Buckmiller v. Safeway Stores, Inc.*, 727 P.2d 1112 (Colo. 1986).

Motion to set aside default judgment under section (c) of this rule on basis of failure to prosecute and motion to vacate judgment under C.R.C.P. 60(b) on basis of excusable neglect are sufficiently analogous to justify application of same standards to either motion; thus, same three criteria which are legal standard are applicable in both motions. *Buckmiller v. Safeway Stores, Inc.*, 727 P.2d 1112 (Colo. 1986).

Party must justify default before asserting meritorious defense. A party in default is not entitled to have an adverse judgment set aside simply because of a weakness in the other party's judgment; rather, the defaulting party must first stand upon the strength of his own justification for being in default and is not entitled to assert a meritorious defense until he successfully does so. *Craig v. Rider*, 628 P.2d 623 (Colo. App. 1980), rev'd on other grounds, 651 P.2d 397 (Colo. 1982).

Party's negligence is not "excusable". Negligence on the part of the one of the parties or its employees cannot be deemed "excusable neglect". *Wagner Equip. Co. v. Mountain States Mineral Enters., Inc.*, 669 P.2d 625 (Colo. App. 1983).

A stockbroker's failure to file a timely answer was due to his own carelessness and does not constitute "good cause shown" or "excusable neglect". *Johnston v. S.W. Devanney & Co., Inc.*, 719 P.2d 734 (Colo. App. 1986).

Default judgment was not void because process was adequately served and trial court therefore had personal jurisdiction over defendant. In case where process was properly served upon defendant's registered agent pursuant to C.R.C.P. 4, agent's failure to timely respond because of his own carelessness and negligence did not constitute excusable neglect. Therefore, trial court erred in setting aside the default judgment pursuant to C.R.C.P. 60(b)(1) and (b)(3). *Goodman Assocs., LLC v. WP Mtn. Props., LLC*, 222 P.3d 310 (Colo. 2010).

Excusable neglect means more than ordinary negligence or carelessness; it occurs where there is a failure to take proper steps at the proper time as a result of some unavoidable occurrence. *Plaisted v. Colo. Springs Sch. Dist. #11*, 702 P.2d 761 (Colo. App. 1985).

Lack of prejudice to the plaintiff, absent other factors indicating good cause, is insufficient to show an abuse of discretion in denying a motion to set aside a default. *Snow v. District Court*, 194 Colo. 335, 572 P.2d 475 (1977); *Johnston v. S.W. Devanney & Co., Inc.*, 719 P.2d 734 (Colo. App. 1986).

Even though motion of defaulting party contains allegations which, if proven, would constitute a meritorious defense, the trial court is not required to set aside the default judgment when it affords that party a full and fair opportunity to present and argue the alleged meritorious defense and concludes that the defense is not proven. *Michael Shinn & Assocs., Inc. v. Dertina*, 697 P.2d 422 (Colo. App. 1985).

Abuse of discretion found where trial court refused to set aside the damages portion of a judgment. *Johnston v. S.W. Devanney & Co., Inc.*, 719 P.2d 734 (Colo. App. 1986).

Rule as basis for jurisdiction. *Kopel v. Davie*, 163 Colo. 57, 428 P.2d 712 (1967).

V. Officer or Agency of State.

The department of corrections' mere failure to respond timely is insufficient grounds for a default judgment. Since the department is a state agency, the plaintiff must establish his claims with sufficient evidence before a default judgment may enter. *Reeves v. Colo. Dept. of Corr.*, 155 P.3d 648 (Colo. App. 2007).

Section (e) does not require an adversary hearing after notice to the state. *Biella v. State Dept. of Hwys.*, 652 P.2d 1100 (Colo. App. 1982).

Evidence held sufficiently "satisfactory to the court" to meet the requirements of section (e). *Biella v. State Dept. of Hwys.*, 652 P.2d 1100 (Colo. App. 1982).

VI. Judgment on Substituted Service.

A plaintiff fails to follow this rule where he does not apply for the judgment by written motion setting forth with particularity the grounds in support of the motion and the relief sought as required by C.R.C.P. 7(b). *Norton v. Raymond*, 30 Colo. App. 338, 491 P.2d 1403 (1971).

Where a plaintiff contends that an affidavit, filed when an oral motion for default is made, constitutes the required proof, such is not the case when the affidavit is basically a form statement and has only one phrase relating to the plaintiff's claim for relief, for even if otherwise acceptable, such an affidavit offers nothing as to the nature of the grounds of proof of plaintiff's claim. *Norton v. Raymond*, 30 Colo. App. 338, 491 P.2d 1403 (1971).

A default judgment cannot be entered in plaintiff's favor without plaintiff making some showing of the right to such. *Osborne v. Holford*, 40 Colo. App. 365, 575 P.2d 866 (1978).

Cross References:

For venue, see C.R.C.P. 98 ; for relief from judgment for mistakes, inadvertence, surprise, excusable neglect, fraud, etc., see C.R.C.P. 60(b) ; for demand for judgment, see C.R.C.P. 54(c) ; for evidence, see C.R.C.P. 43.

Rule 56. Summary Judgment and Rulings on Questions of Law.

Colorado Court Rules

Colorado Rules of Civil Procedure

Chapter 6. Judgment

As amended through Rule Change 2017(7), effective August 24, 2017

Rule 56. Summary Judgment and Rulings on Questions of Law

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, after the expiration of 21 days from the commencement of the action or after filing of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the claiming 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, move with or without supporting affidavits for a summary judgment in the defending party's favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** Unless otherwise ordered by the court, any motion for summary judgment shall be filed no later than 91 days (13 weeks) prior to trial. A cross-motion for summary judgment shall be filed no later than 70 days (10 weeks) prior to trial. The motion may be determined without oral argument. The opposing party may file and serve opposing affidavits within the time allowed for the responsive brief, unless the court orders some lesser or greater time. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, 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) **Case Not Fully Adjudicated on Motion.** If on motion under this Rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be

conducted accordingly.

(e) **Form of Affidavits; Further Testimony; 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, answers to interrogatories, or by 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 the opposing party's pleadings, but the opposing party's response by affidavits or otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If there is no response, summary judgment, if appropriate, shall be entered.

(f) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the opposing party cannot for reasons stated present by affidavit facts essential to justify its opposition, 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.

(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's fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) **Determination of a Question of Law.** At any time after the last required pleading, with or without supporting affidavits, a party may move for determination of a question of law. If there is no genuine issue of any material fact necessary for the determination of the question of law, the court may enter an order deciding the question.

Cite as Colo. R. Civ. P. 56

History. Source: (a), (b), (c), (f), and (g) amended July 9, 1992, effective October 1, 1992; (a) and (c) amended and effective June 28, 2007; (a) and (c) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Case Notes:

Annotation

I. General Consideration.

Law reviews. For article, "Comments on the Rules of Civil Procedure", see 22 Dicta 154 (1945). For article, "Use of Summary Judgments and the Discovery Procedure", see 24 Dicta 193 (1947). For article, "Pre-Trial in Colorado in Words and at Work", see 27 Dicta 157 (1950). For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "Judgment: Rules 54-63 ", see 23 Rocky Mt. L. Rev. 581 (1951). For note, "Comments on Last Clear Chance-Procedure and Substance", see 32 Dicta 275 (1955). For article, "One Year Review of Civil Procedure and Appeals", see 37 Dicta 21 (1960). For article, "One Year Review of Civil Procedure and Appeals", see 38 Dicta 133 (1961). For article, "One Year Review of Civil Procedure and Appeals", see 39 Dicta 133 (1962). For article, "One Year Review of Contracts", see 39 Dicta 161 (1962). For article, "One Year Review of Civil Procedure and Appeals", see 40 Den. L. Ctr. J. 66 (1963). For article, "One Year Review of Torts", see 40 Den. L. Ctr. J. 160 (1963). For note, "One Year Review of Civil Procedure", see 41 Den. L. Ctr. J. 67 (1964). For article, "The One Percent Solution", see 11 Colo. Law. 86 (1982). For article, "A Litigator's Guide to Summary Judgments", see 14 Colo. Law. 216 (1985). For article, "Federal Practice and Procedure", which discusses a recent Tenth Circuit decision dealing with conversion of a motion to dismiss into a motion for summary judgment, see 62 Den. U. L. Rev. 220 (1985). For comment, "*Anderson v. Liberty* Lobby, Inc.: Federal Rules Decision or First Amendment Case?", see 59 U. Colo. L. Rev. 933 (1988). For article "There is Still a Chance: Raising Unpreserved Arguments on Appeal", see 42 Colo. Law. 29 (June 2013).

The obvious purpose to be served by this rule is to further the prompt administration of justice, expedite litigation by avoiding needless trials, and enable one speedily to obtain a judgment by preventing the interposition of unmeritorious defenses for purpose of delay. *Blaine v. Yockey*, 117 Colo. 29, 184 P.2d 1015 (1947).

The summary judgment rule is designed to pierce through the allegations of fact in the pleadings. *Abrahamsen v. Mountain States Tel. & Tel. Co.*, 177 Colo. 422, 494 P.2d 1287 (1972).

This rule is designed to avoid an unnecessary trial. This rule allowing summary judgment is designed to pierce through the allegations of fact in pleadings and to avoid an unnecessary trial where the matter submitted in support of a motion for summary judgment shows 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 under section (c). *Terrell v. Walter E. Heller Co.*, 16 5 Colo. 463, 439 P.2d 989 (1968); *Ruscitti v. Sackheim*, 817 P.2d 1046 (Colo. App. 1991).

The function of this rule authorizing summary judgments is to avoid the expense and delay of trials when all facts are admitted or when a party is unable to support by any competent evidence a contention of fact. *Norton v. Dartmouth Skis, Inc.*, 147 Colo. 436, 364 P.2d 866 (1961).

This rule provides a method whereby it is possible to determine whether a genuine cause of action or defense thereto exists and whether there is a genuine issue of fact warranting the submission of the case to a jury. *Blaine v. Yockey*, 117 Colo. 29, 184 P.2d 1015 (1947).

Violation of section (c) of this rule, providing the opportunity for a response from the opposing party, found to be harmless error under the circumstances. *Union Ins. Co. v. Hottenstein*, 83 P.3d 1196 (Colo. App. 2003).

Issue of sovereign immunity properly decided under C.R.C.P. 12(b)(1) rather than this rule since sovereign immunity issue is one of subject matter jurisdiction. *DiPaolo v. Boulder Valley Sch. Dist.*, 902 P.2d 439 (Colo. App. 1995).

Judgments by confession on notes are not affected. *Cross v. Moffat*, 11 Colo. 210, 17 P. 771 (1888).

Judgment of dismissal for failure to state claim upon which relief can be granted may be entered upon motion for summary judgment. *Van Schaack v. Phipps*, 38 Colo. App. 140, 558 P.2d 581 (1976).

C.R.C.P. 56 is applicable in a termination of parental rights proceeding under the Children's Code. Because termination of the parent-child relationship is a drastic remedy that affects a parent's liberty interest, a court deciding a summary judgment motion seeking to terminate parental rights must apply the standard of clear and convincing evidence to the applicable statutory criteria. People in Interest of A.E., 914 P.2d 534 (Colo. App. 1996).

Court's ruling that the issue of paternity could not be raised in the child support proceeding because it had been previously litigated was based on undisputed facts, and was tantamount to a partial judgment on the pleadings, or a partial summary judgment. As such, no findings of fact and conclusions of law were required. *McNeece v. McNeece*, 39 Colo. App. 160, 562 P.2d 767 (1977).

This rule applies to dependency and neglect. No genuine issue of material fact existed on date of adjudication of dependency and neglect case and, therefore, trial court properly adjudicated child dependent and neglected pursuant to summary judgment rule. In Interest of S.B., 742 P.2d 935 (Colo. App. 1987), cert. denied, 754 P.2d 1177 (Colo. 1988).

This rule applies to eminent domain proceedings. Allowing summary judgment in appropriate eminent domain cases does not abridge a landowner's constitutional right to demand a jury. *City of Steamboat Springs v. Johnson*, 252 P.3d 1142 (Colo. App. 2010).

Party wishing to file a motion for summary judgment in dependency and neglect proceeding cannot comply with both § 19-3-505(3) and section (c) of this rule. Pursuant to C.R.C.P. 81, the timing of § 19-3-505(3) controls. People ex rel. A.C., 170 P.3d 844 (Colo. App. 2007).

Under the doctrine of res judicata, a final judgment on the merits is considered conclusive in any subsequent litigation involving either the same parties or those in privity with them, the same subject matter, and same claims for relief. *Foley Custom Homes, Inc. v. Flater*, 888 P.2d 363 (Colo. App. 1994).

The preclusive effect of the doctrine of res judicata applies not only to the claims and issues that were actually decided, but also to any claims or issues that could have been raised in the first proceeding. *Foley Custom Homes, Inc. v. Flater*, 888 P.2d 363 (Colo. App. 1994).

Res judicata does not apply to bar state action where state and federal claims were based on different claims for relief, and state claims were not truly "available to the parties" in the prior federal action because state claims could only have been asserted in federal court as pendent to federal claims for relief, and federal claim was dismissed on

motion for summary judgment, requiring dismissal of pendent state claims. *City & County of Denver v. Block 173*, 814 P.2d 824 (Colo. 1991).

Claim to quiet title in certain usufructuary rights was absolutely barred by the doctrine of res judicata where there was a prior judgment involving the same subject matter and cause of action and the plaintiffs were in privity with the parties to the previous action. *Rael v. Taylor*, 832 P.2d 1011 (Colo. App. 1991).

Res judicata did not apply where corporate plaintiff seeking to enforce agreement in second case was not identical to the individual shareholder who relied upon the agreement in the first case and was not in privity with shareholder since the corporation was asserting its own claim and there was nothing in the record to suggest that the corporation's claim was adjudicated in the first case. *Foley Custom Homes, Inc. v. Flater*, 888 P.2d 363 (Colo. App. 1994).

Collateral estoppel. Findings of federal district court insufficient to support summary judgment on state claims where identity of issues necessary to invoke collateral estoppel was absent between issues actually and necessarily decided by the federal district court and those necessary to preclude summary judgment on landowner's "bad faith" claims in state court. *City & County of Denver v. Block 173*, 814 P.2d 824 (Colo. 1991).

The function of the doctrines of res judicata and collateral estoppel is to avoid relitigation of the same claims or issues because of the cost imposed upon the parties by multiple lawsuits, the burden upon the judicial system, and need for finality in the judicial process; however, the requirement that the same parties or their privies must have appeared in the first proceeding is intended to avoid penalizing one who did not appear. *Foley Custom Homes, Inc. v. Flater*, 888 P.2d 363 (Colo. App. 1994).

Collateral estoppel and res judicata may apply to give preclusive effect to an arbitration award. *Union Ins. Co. v. Hottenstein*, 83 P.3d 1196 (Colo. App. 2003).

A motion for summary judgment based upon an assertion of the lack of existence of a duty of due care is to be subjected to the same standard as is any other motion for summary judgment. *Sewell v. Pub. Serv. Co. of Colo.*, 832 P.2d 994 (Colo. App. 1991).

Applied in *Eklund v. Safeco Ins. Co. of Am.*, 41 Colo. App. 96, 579 P.2d 1185 (1978); *Posey v. Intermountain Rural Elec. Ass'n*, 41 Colo. App. 7, 583 P.2d 303 (1978); *Martin v. County of Weld*, 43 Colo. App. 49, 598 P.2d 532 (1979); *SaBell's, Inc. v. Flens*, 42 Colo. App. 221, 599 P.2d 950 (1979); *Nelson v. Strode Motors, Inc.*, 198 Colo. 366, 600 P.2d 74 (1979); *Town of De Beque v. Enewold*, 199 Colo. 110, 606 P.2d 48 (1980); *Ruff v. Kezer*, 199 Colo. 182, 606 P.2d 441 (1980); *First Hyland Greens Ass'n v. Griffith*, 618 P.2d 745 (Colo. App. 1980); *Campbell v. Home Ins. Co.*, 628 P.2d 96 (Colo. 1981); *DiChellis v. Peterson Chiropractic Clinic*, 630 P.2d 103 (Colo. App. 1981); *People in Interest of K.A.J.*, 635 P.2d 921 (Colo. App. 1981); In re George, 650 P.2d 1353 (Colo. App. 1982); *Wheeler v. County of Eagle ex rel. County Comm'rs*, 666 P.2d 559 (Colo. 1983); *Knoche v. Morgan*, 664 P.2d 258 (Colo. App. 1983); *DuBois v. Myers*, 684 P.2d 940 (Colo. App. 1984); *Am. West Motel Brokers, Inc. v. Wu*, 697 P.2d 34 (Colo. 1985); *Frontier Exploration v. Blocker Exploration*, 709 P.2d 39 (Colo. App. 1985), aff'd in part and rev'd in part on other grounds, 740 P.2d 983 (Colo. 1987); *Churchey v. Adolph Coors Co.*, 725 P.2d 38 (Colo. App. 1986), aff'd in part and rev'd in part on other grounds, 759 P.2d 1336 (Colo. 1988); *Cooper v. Peoples Bank & Trust Co.*, 725 P.2d 78 (Colo.

App. 1986); *Shaw v. Gen. Motors Corp.*, 727 P.2d 387 (Colo. App. 1986); *Giralt v. Vail Vill. Inn Assocs.*, 759 P.2d 801 (Colo. App. 1988), cert. denied, 488 U.S. 1042, 109 S. Ct. 868, 102 L. Ed. 2d 991 (1989); *Jardel Enters., Inc. v. Triconsultants, Inc.*, 770 P.2d 1301 (Colo. App. 1988); *DeRubis v. Broadmoor Hotel, Inc.*, 772 P.2d 681 (Colo. App. 1989); *Kane v. Town of Estes Park*, 786 P.2d 411 (Colo. 1990); *AF Prop. v. Dept. of Rev.*, 852 P.2d 1267 (Colo. App. 1992); *Dickman v. Jackalope, Inc.*, 870 P.2d 1261 (Colo. App. 1994); *Anderson v. Somatogen, Inc.*, 940 P.2d 1079 (Colo. App. 1996); *Bankr. Estate of Morris v. COPIC Ins. Co.*, 192 P.3d 519 (Colo. App. 2008).

II. For Claimant.

Law reviews. For article, "Plaintiff's Advantageous Use of Discovery, Pre-Trial and Summary Judgment", see 40 Den. L. Ctr. J. 192 (1963).

Summary judgment is proper where adverse party fail to respond by affidavit or otherwise to moving party's affidavit. *GTM Invs. v. Depot, Inc.*, 694 P.2d 379 (Colo. App. 1984).

Applied in *People ex rel. Flanders v. Neary*, 113 Colo. 12, 154 P.2d 48 (1944).

III. For Defending Party.

Section (b) of this rule, does not require that a defendant plead before he files a motion for summary judgment. *Welp v. Crews*, 149 Colo. 109, 368 P.2d 426 (1962).

Since this rule authorizes a motion for summary judgment by the defendant "at any time" and since the theory of the motion is that the defending party is entitled to judgment as a matter of law, there is normally no necessity to serve an answer, whose function is to develop issues, until the motion for summary judgment is disposed of. *Welp v. Crews*, 149 Colo. 109, 368 P.2d 426 (1962).

This rule authorizes a defending party to file a motion for summary judgment prior to answering the complaint. *Guerrero v. City of Colo. Springs*, 507 P.2d 881 (Colo. App. 1972).

Where a defendant files only a motion for summary judgment, he neither files an answer nor does he ask the trial court for leave to plead a defense, and, if no request is made for an evidentiary hearing, he cannot complain that the trial court denied him the opportunity of presenting a defense when he in fact made no effort to present one. *Mercantile Bank & Trust Co. v. Hunter*, 31 Colo. App. 200, 501 P.2d 486 (1972).

Where a defendant raises several defenses in the trial court which are not ruled upon there, when the trial court grants a motion for summary judgment, they cannot be considered as sources of error on appeal of the granted motion. *McKinley Constr. Co. v. Dozier*, 175 Colo. 397, 487 P.2d 1335 (1971).

By arguing the merits of defendant's motions for summary judgment without raising an objection in the trial court as to the manner in which an affirmative defense thereby is asserted, plaintiffs effectively waive any objection they may have to this procedure. *Cox v. Pearl Inv. Co.*, 168 Colo. 67, 450 P.2d 60 (1969).

A motion for summary judgment goes to merits of action and is inconsistent with special appearance for motion to quash service of process for lack of "in personam" jurisdiction. *Texair Flyers, Inc. v. District Court*, 180 Colo. 432, 506 P.2d 367 (1973).

A case is properly determined on a motion for summary judgment where the pleadings, the affidavits, and the deposition filed in the matter show that no genuine issue of material fact exists, the court properly determines as a matter of law that a statute bars plaintiff's action, and defendant is entitled to judgment. *Nicks v. Electron Corp.*, 29 Colo. App. 114, 478 P.2d 683 (1970); *Phelps v. Gates*, 40 Colo. App. 504, 580 P.2d 1268 (1978).

When a defendant's motion for summary judgment becomes untenable in view of his conduct in the matter at issue, a trial court commits error in granting the motion. W. R. Hall Transp. & *Storage Co. v. Gunnison Mining Co.*, 154 Colo. 72, 388 P.2d 768 (1964).

Summary judgment may be based on expiration of statute of limitations. *Maes v. Tuttolimondo*, 31 Colo. App. 248, 502 P.2d 427 (1972).

Plaintiff's failure to allege facts will support summary judgment. The absence of specific factual allegations will support a summary judgment for the defendant on the issue that plaintiff's claim was barred by the statute of limitations, even though plaintiff contends that there are issues of material fact because there might possibly be facts which would toll the statute of limitations and avoid the plea, if he alleges no such facts and raises no such issues. *Norton v. Dartmouth Skis, Inc.*, 147 Colo. 436, 364 P.2d 866 (1961).

Section (b) of this rule does not require affidavits in support of the motion for summary judgment, and judgment can be rendered on the pleadings where there is no dispute as to the facts. *Torbit v. Griffith*, 37 Colo. App. 460, 550 P.2d 350 (1976).

The defense of "res judicata" may, in a proper case, be raised and disposed of by a summary judgment proceeding. *Kaminsky v. Kaminsky, 145 Colo. 492, 359 P.2d 675, 95 A.L.R.2d 643 (1961); Brennan v. City & County of Denver, 156 Colo. 215, 397 P.2d 876 (1964).*

To sustain the defense of "res judicata", facts in support of it must be affirmatively shown either by the evidence adduced at the trial or by way of uncontroverted facts properly presented either in a motion for summary judgment or by a motion to dismiss under C.R.C.P. 12(b) where the court, on the basis of facts properly presented outside of the pleadings, is enabled to treat the same as a motion for summary judgment under this rule 56. *Ruth v. Dept. of Hwys.*, 153 Colo. 226, 385 P.2d 410 (1963).

The fact that plaintiffs' Jefferson county action for rescission of their partnership agreement with defendants was pending resolution on appeal did not mean that it was not a "final judgment" for purposes of res judicata in their Adams county action for breach of contract. *Miller v. Lunnon*, 703 P.2d 640 (Colo. App. 1985), overruled in *Rantz v. Kaufman*, 109 P.3d 132 (Colo. 2005).

For the purposes of issue preclusion, a judgment that is still pending on appeal is not final. *Rantz v. Kaufman*, 109

P.3d 132 (Colo. 2005) (overruling *Miller v. Lunnon*, 703 P.2d 640 (Colo. App. 1985)).

C.R.C.P. 12(b), provides that, if, on a motion asserting the defense to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in this rule. *Alexander v. Morrison-Knudsen Co.*, 166 Colo. 118, 444 P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed. 2d 706 (1969).

A judgment of dismissal for failure to state a claim upon which relief can be granted may be entered upon a motion for summary judgment. *Smith v. Mills*, 123 Colo. 11, 225 P.2d 483 (1950); *Enger v. Walker Field, Colo. Pub. Airport Auth.* , 181 Colo. 253, 508 P.2d 1245 (1973).

It is wholly immaterial whether the trial court considers the judgment of dismissal proper under the provisions of C.R.C.P. 12 or this rule, if the defendant was entitled to judgment under either rule. *Haigler v. Ingle*, 119 Colo. 145, 200 P.2d 913 (1948).

The judgment must specifically disclose the inadequacy of the complaint. *Smith v. Mills*, 123 Colo. 11, 225 P.2d 483 (1950).

Permission to amend should be given where there is a possibility by amendment of an adequate statement of claim. *Smith v. Mills*, 123 Colo. 11, 225 P.2d 483 (1950).

A trial court does not err in granting a motion for summary judgment on the ground that the claim made is a compulsory counterclaim which should have been raised in an earlier case and is therefore barred. *Visual Factor, Inc. v. Sinclair*, 166 Colo. 22, 441 P.2d 643 (1968).

Where no material issue of fact was before the trial court in regard to a specific determination, summary judgment in favor of the defendant was proper. *Valenzuela v. Mercy Hosp.*, 34 Colo. App. 5, 521 P.2d 1287 (1974).

Because the department of health care policy and financing's claim was not time barred and a corrected notice was sent to the estate in time to allow the affected parties a full opportunity to be heard, the estate was not entitled to dismissal of the department's claim on summary judgment. In re Estate of Kochevar, 94 P.3d 1253 (Colo. App. 2004).

Applied in People ex rel. Knott v. City of Montrose, 109 Colo. 487, 126 P.2d 1040 (1942); Klancher v. Anderson, 113 Colo. 478, 158 P.2d 923 (1945); *Mitchell v. Town of Eaton*, 176 Colo. 473, 491 P.2d 587 (1971); *Dominguez v. Babcock*, 696 P.2d 338 (Colo. App. 1984), aff'd, 727 P.2d 362 (Colo. 1986); *Cain v. Guzman*, 761 P.2d 295 (Colo. App. 1988).

IV. Motion and Proceedings.

A. In General.

Law reviews. For comment on *Norton v. Dartmouth Skis* appearing below, see 34 Rocky Mt. L. Rev. 259 (1962). For

note, "The Use of Summary Judgment in Colorado", see 34 Rocky Mt. L. Rev. 490 (1962).

Provisions inapplicable to summary judgment motions. Because of the drastic nature of summary judgment, provisions under C.R.C.P. 121, 1-15, concerning confession of motions are inapplicable to motions, for summary judgment under this rule. *Seal v. Hart*, 755 P.2d 462 (Colo. App. 1988).

When the record is not adequate to permit a conclusion that no material fact dispute exists, the entry of summary judgment is inappropriate. *Kral v. Am. Hardware Mut. Ins. Co.*, 784 P.2d 759 (Colo. 1989).

For conflict between this rule and second judicial district rule 24, which provides that in filing a motion for summary judgment the moving party shall file a memorandum brief in support of the motion and that the adverse party may serve an answer brief within 10 days after service of the movant's brief, but failure to so do is not to be considered as a confession of the motion and which allows for oral argument if a request therefor is endorsed upon the briefs, *see Loup-Miller Constr. Co. v. City & County of Denver*, 38 Colo. App. 405, 560 P.2d 480 (1976).

Failure to give an opportunity to respond to authority cited in support of or in opposition to a motion is harmless unless prejudice is shown. *Benson v. Colo. Comp. Ins. Auth.*, 870 P.2d 624 (Colo. App. 1994).

Ten-day period is essential. It is essential that in order to avoid surprise and to allow for a full and considered response, the party against whom the motion for summary judgment is directed be allowed the full period in which to serve his affidavits. *Jardon v. Meadowbrook-Fairview Metro. Dist.*, 190 Colo. 528, 549 P.2d 762 (1976) (decided prior to the 1983 amendment).

The 10-day provision in section (c) was inserted in the rule to avoid surprise and to allow for a full and considered response. *Cherry v. A-P-A Sports, Inc.*, 662 P.2d 200 (Colo. App. 1983).

On a motion for summary judgment where no factual issue is present, no motion for new trial is necessary. *Brooks v. Zabka*, 168 Colo. 265, 450 P.2d 653 (1969).

A motion to reconsider a summary judgment order is properly characterized as a motion for new trial under C.R.C.P. 59(d)(4). *Zolman v. Pinnacol Assurance*, 261 P.3d 490 (Colo. App. 2011).

A motion under C.R.C.P. 59 is not a prerequisite to appeal from a summary judgment. *Valenzuela v. Mercy Hosp.*, 34 Colo. App. 5, 521 P.2d 1287 (1974).

Nonmovant is entitled to notice of issue regarding which evidence must be introduced to avoid granting of summary judgment; lacking such notice, summary judgment cannot be granted. *Wallman v. Kelley*, 976 P.2d 330 (Colo. App. 1998); *Antelope Co. v. Mobil Rocky Mountain, Inc.*, 51 P.3d 995 (Colo. App. 2001).

B. Purpose and Effect.

The purpose of a motion for summary judgment is to save litigants the expense and time connected with a trial when, as a matter of law based upon admitted facts, one of the parties cannot prevail. *O. C. Kinney, Inc. v. Paul Hardeman,*

Inc., 151 Colo. 571, 379 P.2d 628 (1963); *Abrahamsen v. Mountain States Tel. & Tel. Co.*, 177 Colo. 422, 494 P.2d 1287 (1972); People in Interest of F.L.G., 39 Colo. App. 194, 563 P.2d 379 (1977); *Ginter v. Palmer & Co.*, 196 Colo. 203, 585 P.2d 583 (1978); *Wright v. Bayly Corp.*, 41 Colo. App. 313, 587 P.2d 799 (1978).

This rule was designed to enable parties and courts to expedite litigation by avoiding needless trials. In re *Bunger v. Uncompahgre Valley Water Users Ass'n*, 192 Colo. 159, 557 P.2d 389 (1976); *DuBois v. Myers*, 684 P.2d 940 (Colo. App. 1984).

The intent and purpose of this rule is that, where the facts are undisputed or so certain as not to be subject to dispute, a court is in position to determine the issue strictly as a matter of law. *Morlan v. Durland Trust Co.*, 12 7 Colo. 5, 252 P.2d 98 (1952); *Central Bank & Trust Co. v. Robinson*, 137 Colo. 409, 326 P.2d 82 (1958); *Rogerson v. Rudd*, 140 Colo. 548, 345 P.2d 1083 (1959).

Where there is no genuine issue as to any material fact, the issues are properly resolved as matters of law. *Enger v. Walker Field, Colo. Pub. Airport Auth.*, 181 Colo. 253, 508 P.2d 1245 (1973).

The purpose of summary judgment is to permit the parties to pierce the formal allegations of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail. *Peterson v. Halsted*, 829 P.2d 373 (Colo. 1992); *Graven v. Vail Assocs., Inc.*, 888 P.2d 310 (Colo. App. 1994).

No matter how enticing in an area of congested dockets is a device to dispose of cases without the delay and expense of traditional trials with their sometime cumbersome and time consuming characteristics, summary judgment was not devised for, and must not be used as, a substitute for trial. *Sullivan v. Davis*, 172 Colo. 490, 474 P.2d 218 (1970).

Its wholesome utility is, in advance of trial, to test, not as formerly on bare contentions found in the legal jargon of pleadings, but on the intrinsic merits, whether there is in actuality a real basis for relief or defense. *Sullivan v. Davis*, 172 Colo. 490, 474 P.2d 218 (1970); *Shaw v. Gen. Motors Corp.*, 727 P.2d 387 (Colo. App,. 1986).

A summary judgment denies a litigant the right to trial of his case and should therefore not be granted where there appears any controversy concerning material facts. *McCormick v. Diamond Shamrock Corp.*, 175 Colo. 406, 487 P.2d 1333 (1971); *McKinley Constr. Co. v. Dozier*, 175 Colo. 397, 487 P.2d 1335 (1971); *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231 (Colo. 1984); *Smith v. Cutty's Inc.*, 742 P.2d 347 (Colo. App. 1987).

The summary judgment procedure is not intended to deprive a litigant of the right to trial on the merits of the case. *Tamblyn v. City & County of Denver*, 118 Colo. 191, 194 P.2d 299 (1948).

When defendants file their motion for summary judgment they admit thereby all facts properly pleaded by plaintiff, as they appeared in the record at that time, but such admissions imputed by law are confined to consideration of such motion only and within the limits of movants' theory of the law of the case. *Morlan v. Durland Trust Co.*, 12 7 Colo. 5, 252 P.2d 98 (1952).

C. Evidence and Burden of Proof.

In considering motion for summary judgment, trial court must accept plaintiffs' pleadings as true unless the depositions and admissions on file, together with the affidavits, clearly disclose there is no genuine issue as to any material fact, with any doubts being resolved in plaintiffs' favor. *Norton v. Leadville Corp.*, 43 Colo. App. 527, 610 P.2d 1348 (1979).

On the hearing of a motion for summary judgment the material allegations of the nonmoving party's pleadings must be accepted as true, even in the face of denial by the moving party's pleadings. *Abrahamsen v. Mountain States Tel. & Tel. Co.*, 177 Colo. 422, 494 P.2d 1287 (1972).

The material allegations of a complaint must be accepted as true even in the face of denials in the answer. *Parrish v. De Remer*, 117 Colo. 256, 187 P.2d 597 (1947); *Tamblyn v. City & County of Denver*, 118 Colo. 191, 194 P.2d 299 (1948); *Carter v. Thompkins*, 133 Colo. 279, 294 P.2d 265 (1956).

There shall be no assessment of credibility of proposed evidence. Neither the trial court nor an appellate court may attempt any assessment of the credibility of proposed evidence in conjunction with a motion for summary judgment. *Discovery Land & Dev. Co. v. Colo.-Aspen Dev. Corp.*, 40 Colo. App. 292, 577 P.2d 1101 (1977).

This rule is properly to be exercised only where the facts are clear and undisputed, leaving as the sole duty of the court the determination of the correct legal principles applicable thereto. *Morlan v. Durland Trust Co.*, 12 7 Colo. 5, 252 P.2d 98 (1952); *Central Bank & Trust Co. v. Robinson*, 137 Colo. 409, 326 P.2d 82 (1958); *Rogerson v. Rudd*, 140 Colo. 548, 345 P.2d 1083 (1959).

Summary judgment is appropriate only in the clearest of cases, where no doubt exists concerning the facts. *Roderick v. City of Colo. Springs*, 193 Colo. 104, 563 P.2d 3 (1977).

Summary judgment is appropriate where the admitted facts demonstrate that a party cannot prevail. *Kuehn v. Kuehn*, 642 P.2d 524 (Colo. App. 1981).

Summary judgment is proper only when there is no genuine issue as to any material fact and when the moving party is entitled to judgment as a matter of law. *Backus v. Apishapa Land & Cattle Co.*, 44 Colo. App. 59, 615 P.2d 42 (1980); *Camacho v. Honda Motor Co., Ltd.*, 741 P.2d 1240 (Colo. 1987), cert. dismissed, 485 U.S. 901, 108 S. Ct. 1067, 99 L. Ed. 2d 229 (1988); *W. Am. Ins. Co. v. Baumgartner*, 812 P.2d 696 (Colo. App. 1990), cert. granted, judgment vacated, and case remanded to the Colorado court of appeals for reconsideration in light of *Hecla Min. Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083 (Colo. 1991), 812 P.2d 654 (Colo. 1991); *Kenna v. Huber*, 179 P.3d 189 (Colo. App. 2007), rev'd on other grounds, 205 P.3d 1158 (Colo. 2009); *Suss Pontiac-GMC, Inc. v. Boddicker*, 208 P.3d 269 (Colo. App. 2008).

Summary judgment is appropriate in cases where a public official or public figure seeks to recover damages resulting from a defamatory statement. *DiLeo v. Koltnow*, 200 Colo. 119, 613 P.2d 318 (1980).

Summary judgment is appropriate only when there is no genuine issue as to any material fact. *Norton v. Leadville*

Corp., 43 Colo. App. 527, 610 P.2d 1348 (1979).

Summary judgment is a drastic remedy and is never warranted except on a clear showing that there exists no genuine issue as to any material fact. All doubts as to the existence of such an issue must be resolved against the moving party. *Ridgeway v. Kiowa Sch. Dist. C-2*, 794 P. 2d 1020 (Colo. App. 1989); *Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd.*, 901 P.2d 1251 (Colo. 1995); *Christoph v. Colo. Comm. Corp.*, 946 P.2d 519 (Colo. App. 1997); *Brawner-Ahlstrom v. Husson*, 969 P.2d 738 (Colo. App. 1998).

Absence of genuine issue of fact must be apparent. To authorize the granting of summary judgment the complete absence of any genuine issue of fact must be apparent. *Hatfield v. Barnes*, 115 Colo. 30, 168 P.2d 552 (1946); *Koon v. Steffes*, 124 Colo. 531, 239 P.2d 310 (1951); *Morlan v. Durland Trust Co.*, 12 7 Colo. 5, 252 P.2d 98 (1952); *Abrahamsen v. Mountain States Tel. & Tel. Co.*, 177 Colo. 422, 494 P.2d 1287 (1972); *Halsted v. Peterson*, 797 P.2d 801 (Colo. App. 1990), rev'd on other grounds, 829 P.2d 373 (Colo. 1992).

Summary judgment is proper only when the pleadings, affidavits, depositions, or admissions show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Civil Serv. Comm'n v. Pinder*, 812 P.2d 645 (Colo. 1991); *Travers v. Rainey*, 888 P.2d 372 (Colo. App. 1994); *Merkley v. Pittsburgh Corning Corp.*, 910 P.2d 58 (Colo. App. 1995); *Schultz v. Wells*, 13 P.3d 846 (Colo. App. 2000); *Vigil v. Franklin*, 81 P.3d 1084 (Colo. App. 2003), rev'd on other grounds, 103 P.3d 322 (Colo. 2004); *A.C. Excavating v. Yacht Club II Homeowners Ass'n*, 114 P.3d 862 (Colo. 2005).

Summary judgment is proper when the nonmoving party points to unsworn expert reports, C.R.C.P. 26 disclosures, allegations in the pleadings, and arguments of counsel made in its prior motion for summary judgment because these items lack verification and are not competent to dispel the argument that there were no facts to support the allegations. In contrast, the moving party supported their motion with sworn testimony of experts and sworn testimony of the nonmoving party's C.R.C.P. 30(b)(6) designee that had no evidence to support the nonmoving party's claims. *D.R. Horton, Inc. v. D&S Landscaping, LLC*, 215 P.3d 1163 (Colo. App. 2008).

"Clear and convincing" standard of proof applies in determining a motion for summary judgment in a libel action brought by a public official or public figure. *Pietrafeso v. D.P.I., Inc.*, 757 P.2d 1113 (Colo. App. 1988).

Where the undisputed evidence permits off-setting inferences, the party against whom a motion for summary judgment is made is entitled to all favorable inferences which may be reasonably drawn from the evidence. *O'Herron v. State Farm Mut. Auto. Ins. Co.*, 156 Colo. 164, 397 P.2d 227 (1964).

A motion for summary judgment should be denied if under the evidence reasonable men might reach different conclusions. *Morlan v. Durland Trust Co.*, 12 7 Colo. 5, 252 P.2d 98 (1952); *O'Herron v. State Farm Mut. Auto. Ins. Co.*, 156 Colo. 164, 397 P.2d 227 (1964); *Hasegawa v. Day*, 684 P.2d 936 (Colo. App. 1983), overruled on other grounds in *Casebolt v. Cowan*, 829 P.2d 352 (Colo. 1992); *Graven v. Vail Assocs., Inc.*, 888 P.2d 310 (Colo. App. 1994).

A summary judgment should never be entered, save in those cases where the movant is entitled to such beyond all

doubt, and the facts conceded should show with such clarity the right to a judgment as to leave no room for controversy or debate; they must show affirmatively that plaintiff would not be entitled to recover under any and all circumstances. *Smith v. Mills*, 123 Colo. 11, 225 P.2d 483 (1946); *Discovery Land & Dev. Co. v. Colo.-Aspen Dev. Corp.*, 40 Colo. App. 292, 577 P.2d 1101 (1977).

In assessing a summary judgment motion a court must view all facts in the light most favorable to the nonmoving party, give the nonmoving party the benefit of all favorable inferences that may reasonably be drawn from the evidence, and resolve all doubts as to the existence of a material fact against the moving party. *Vigil v. Franklin*, 81 P.3d 1084 (Colo. App. 2003), rev'd on other grounds, 103 P.3d 322 (Colo. 2004).

Summary judgment is proper when movant's direct, positive, and uncontradicted evidence is opposed only by an unsupported contention that a contrary inference from the evidence might be possible. *Iowa Nat'l Mut. Ins. Co. v. Boatright*, 33 Colo. App. 124, 516 P.2d 439 (1973).

It is error for trial court to treat moving party's factual allegations as true when granting summary judgment. *Han Ye Lee v. Colo. Times, Inc.*, 222 P.3d 957 (Colo. App. 2009).

Determination of propriety of summary judgment. Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. In determining whether summary judgment is proper, the nonmoving party is entitled to the benefit of all favorable inferences that may reasonably be drawn from the undisputed facts, and all doubts must be resolved against the moving party. *Casebolt v. Cowan*, 829 P.2d 352 (Colo. 1992); *Clementi v. Nationwide Mut. Fire Ins. Co.*, 16 P.3d 223 (Colo. 2000); *A.C. Excavating v. Yacht Club II Homeowners Ass'n*, 114 P.3d 862 (Colo. 2005); *Suss Pontiac-GMC, Inc. v. Boddicker*, 208 P.3d 269 (Colo. App. 2008).

Summary judgment was proper when deeds in question conveyed easements of specified width and set forth legal descriptions of their exact locations. Trial court properly refused to consider extraneous circumstances to vary the explicit terms. *Pickens v. Kemper*, 847 P.2d 648 (Colo. App. 1993).

Ultimate burden of persuasion in connection with motion for summary judgment always rests on moving party. *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708 (Colo. 1987); *Kelly v. Central Bank & Trust Co.*, 794 P.2d 1037 (Colo. App. 1989); *Civil Serv. Comm'n v. Pinder*, 812 P.2d 645 (Colo. 1991); *Boyett v. Smith*, 888 P.2d 294 (Colo. App. 1994), aff'd, 908 P.2d 493 (Colo. 1995); *Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd.*, 901 P.2d 1251 (Colo. 1995).

The party moving for a summary judgment has the burden of demonstrating clearly the absence of a genuine issue of fact in order to prevail. *O'Herron v. State Farm Mut. Auto. Ins. Co.*, 156 Colo. 164, 397 P.2d 227 (1964); *Primock v. Hamilton*, 168 Colo. 524, 452 P.2d 375 (1969); *Ginter v. Palmer & Co.*, 196 Colo. 203, 585 P.2d 583 (1978); *Chambliss/Jenkins Assocs. v. Forster*, 650 P.2d 1315 (Colo. App. 1982); *Camacho v. Honda Motor Co., Ltd.*, 741 P.2d 1240 (Colo. 1987), cert. dismissed, 485 U.S. 901, 108 S. Ct. 1067, 99 L. Ed. 2d 229 (1988); *Murphy v. Dairyland Ins. Co.*, 747 P.2d 691 (Colo. App. 1987); *Brawner-Ahlstrom v. Husson*, 969 P.2d 738 (Colo. App. 1998); *Schultz v. Wells*, 13 P.3d 846 (Colo. App. 2000).

Moving party has initial burden of producing and identifying those portions of record and affidavits that demonstrate the absence of any genuine issue of material fact. *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708 (Colo. 1987); *Boyett v. Smith*, 888 P.2d 294 (Colo. App. 1994), aff'd, 908 P.2d 493 (Colo. 1995); *Johnston v. Cigna Corp.*, 916 P.2d 643 (Colo. App. 1996); *Brannan Sand & Gravel v. F.D.I.C.*, 928 P.2d 1337 (Colo. App. 1996), rev'd on other ground, 940 P.2d 393 (Colo. 1997).

Party moving for summary judgment may satisfy initial burden of production by demonstrating that there is absence of evidence in record to support nonmoving party's case, where party moves for summary judgment on issue on which he would not bear ultimate burden of persuasion at trial. *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708 (Colo. 1987).

Absent any significant probative evidence to defeat a properly supported motion for summary judgment, discrediting testimony is normally not sufficient to defeat the motion. *Kelly v. Central Bank & Trust Co.*, 794 P.2d 1037 (Colo. App. 1989).

All doubts thereon must be resolved against the moving party. *Hatfield v. Barnes*, 115 Colo. 30, 168 P.2d 552 (1946); *Koon v. Steffes*, 124 Colo. 531, 239 P.2d 310 (1951); *Morlan v. Durland Trust Co.*, 12 7 Colo. 5, 252 P.2d 98, 36 A.L.R.2d 874 (1952); *Credit Inv. & Loan Co. v. Guaranty Bank & Trust Co.*, 143 Colo. 393, 353 P.2d 1098 (1960); *Primock v. Hamilton*, 168 Colo. 524, 452 P.2d 375 (1969); *Abrahamsen v. Mountain States Tel. & Tel. Co.*, 177 Colo. 422, 494 P.2d 1287 (1972); *Roderick v. City of Colo. Springs*, 193 Colo. 104, 563 P.2d 3 (1977); *Chambliss/Jenkins Assocs. v. Forster*, 650 P.2d 1315 (Colo. App. 1982); *Tapley v. Golden Big O Tires*, 676 P.2d 676 (Colo. 1983); *Dominguez v. Babcock*, 727 P.2d 362 (Colo. 1986); *Banyai v. Arruda*, 799 P.2d 441 (Colo. App. 1990); *Hauser v. Rose Health Care Sys.*, 857 P.2d 524 (Colo. App. 1993).

In determining whether summary judgment is proper, the trial court must resolve all doubts as to whether an issue of fact exists against the moving party. *Jones v. Dressel*, 623 P.2d 370 (Colo. 1981); *Ruscitti v. Sackheim*, 817 P.2d 1046 (Colo. App. 1991); *Johnston v. Cigna Corp.*, 916 P.2d 643 (Colo. App. 1996); *AviComm, Inc. v. Colo. Pub. Utils. Comm'n*, 955 P.2d 1023 (Colo. 1998); *Van Alstyne v. Housing Auth. of City of Pueblo*, 985 P.2d 97 (Colo. App. 1999).

Party against whom a motion is made is entitled to all favorable inferences which may reasonably be drawn from the evidence. *Halsted v. Peterson*, 797 P.2d 801 (Colo. App. 1990), rev'd on other grounds, 829 P.2d 373 (Colo. 1992); *Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd.*, 901 P.2d 1251 (Colo. 1995); *Merkley v. Pittsburgh Corning Corp.*, 910 P.2d 58 (Colo. App. 1995); *Brannan Sand & Gravel v. F.D.I.C.*, 928 P.2d 1337 (Colo. App. 1996), rev'd on other ground, 940 P.2d 393 (Colo. 1997); *AviComm, Inc. v. Colo. Pub. Utils. Comm'n*, 955 P.2d 1023 (Colo. 1998); *Brawner-Ahlstrom v. Husson*, 969 P.2d 738 (Colo. App. 1998); *Van Alstyne v. Housing Auth. of City of Pueblo*, 985 P.2d 97 (Colo. App. 1999).

It is the burden of the moving party to demonstrate the absence of a triable factual issue, and any doubts as to the existence of such an issue must be resolved against that party. Although the party resisting summary judgment is entitled to the benefit of all favorable inferences that may be drawn from the facts presented, the moving party's request must be granted where the facts are undisputed and the opposing party cannot prevail as a matter of law.

Am. Water Dev., Inc. v. City of Alamosa, 874 P.2d 352 (Colo. 1994).

Once the moving party affirmatively shows specific facts probative of its right to judgment, it becomes necessary for the nonmoving party to set forth facts showing that there is a genuine issue for trial. *Durnford v. City of Thornton*, 29 Colo. App. 349, 483 P.2d 977 (1971); *Fort Collins Motor Homes, Inc. v. City of Ft. Collins*, 30 Colo. App. 445, 496 P.2d 1074 (1972); *Meyer v. Schwartz*, 638 P.2d 821 (Colo. App. 1981); *Buttermore v. Firestone Tire & Rubber Co.*, 721 P.2d 701 (Colo. App. 1986); *Civil Serv. Comm'n v. Pinder*, 812 P.2d 645 (Colo. 1991); *Ruscitti v. Sackheim*, 817 P.2d 1046 (Colo. App. 1991); *Snook v. Joyce Homes, Inc.*, 215 P.3d 1210 (Colo. App. 2009).

Once the movant shows that genuine issues are absent, the burden shifts, and unless the opposing party demonstrates true factual controversy, summary judgment is proper. *Heller v. First Nat'l Bank*, 657 P.2d 992 (Colo. App. 1982); *Pearson v. Sublette*, 730 P. 2d 909 (Colo. App. 1986); *Snook v. Joyce Homes, Inc.*, 215 P.3d 1210 (Colo. App. 2009).

Once party moving for summary judgment has met initial burden of production, burden shifts to nonmoving party to establish that there is triable issue of fact. *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708 (Colo. 1987); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988); *Hauser v. Rose Health Care Sys.*, 857 P.2d 524 (Colo. App. 1993); *Merkley v. Pittsburgh Corning Corp.*, 910 P.2d 58 (Colo. App. 1995); *Schultz v. Wells*, 13 P.3d 846 (Colo. App. 2000).

Burden is on opposing party. Once a movant makes a convincing showing that genuine issues are lacking, this rule requires that the opposing party adequately demonstrate by relevant and specific facts that a real controversy exists. *Ginter v. Palmer & Co.*, 196 Colo. 203, 585 P.2d 583 (1978); *Webster v. Mauz*, 702 P.2d 297 (Colo. App. 1985); *Knittle v. Miller*, 709 P.2d 32 (Colo. App. 1985); *Closed Basin Landowners' Ass'n v. Rio Grande*, 734 P.2d 627 (Colo. 1987).

Only if the moving party meets his burden of establishing that no genuine issue of any material fact exists is a case appropriate for summary judgment, and if the moving party meets his burden, the opposing party may, but is not required to, submit an opposing affidavit; obviously, it is perilous for the opposing party to neither proffer an evidentiary explanation nor file a responsive affidavit. *Ginter v. Palmer & Co.*, 196 Colo. 203, 585 P.2d 583 (1978).

Burden showing that material issue of fact existed was met in an action for principal and interest due on promissory notes where record contained an affidavit of the borrower stating that the bank made representations that the proceeds from second loan made to the borrower would be used to repay the initial loan made to such borrower. *Federal Deposit Ins. Corp. v. Cassidy*, 779 P.2d 1382 (Colo. App. 1989).

In response to a motion for summary judgment, an adverse party must by affidavit or otherwise set forth specific facts showing there is a genuine issue for trial. *Brown v. Teitelbaum*, 831 P.2d 1081 (Colo. App. 1991); *Snook v. Joyce Homes, Inc.*, 215 P.3d 1210 (Colo. App. 2009).

Sham affidavit doctrine permits a court under certain circumstances to disregard an affidavit submitted by a party in response to a summary judgment motion where that affidavit contradicts the party's previous sworn deposition testimony. *Luttgen v. Fischer*, 107 P.3d 1152 (Colo. App. 2005).

The sham affidavit doctrine is based on the premise that, had prior deposition testimony been incorrect, the affiant should have corrected the deposition under C.R.C.P. 30(e) and, having not utilized that opportunity, should ordinarily not be allowed to later contradict that testimony simply to survive summary judgment. *Luttgen v. Fischer*, 107 P.3d 1152 (Colo. App. 2005).

Contradictory affidavits should be considered in light of totality of the circumstances test. Affidavit that directly contradicts affiant's own earlier deposition testimony can be rejected as sham affidavit only if it fails to include an explanation for the contradiction that could be found credible by a reasonable jury. This determination cannot be limited to any set of factors, but must be considered in light of the totality of the circumstances, and such determination is a matter of law to be reviewed de novo. *Andersen v. Lindenbaum*, 160 P.3d 237 (Colo. 2007).

In determining whether an affidavit presents a sham issue of fact, the court should consider (1) whether the affiant was cross-examined during his or her earlier testimony, (2) whether the affiant had access to the pertinent evidence at the time of his or her earlier testimony or whether the affidavit was based on newly discovered evidence, and (3) whether the earlier testimony reflected confusion which the affidavit attempted to explain. *Luttgen v. Fischer*, 107 P.3d 1152 (Colo. App. 2005).

Affidavit containing specific factual allegations of widespread practice of systematic denial without justification of worker's compensation claims raises a genuine issue of material fact as to whether the worker's due process rights have been violated. *Walter v. City & County of Denver*, 983 P.2d 88 (Colo. App. 1998).

Plaintiff's speculation that further discovery may uncover specific facts showing that there is a genuine issue for trial is insufficient. An affirmative showing of specific facts, uncontradicted by any counter affidavits, requires a trial court to conclude that no genuine issue of material fact exists. *WRWC, LLC v. City of Arvada*, 107 P.3d 1002 (Colo. App. 2004).

Summary judgment inappropriate when burden not met. While a party against whom a summary judgment is sought may take some risk by not submitting controverting affidavits or other evidence, nevertheless, if the moving party's proof does not itself demonstrate the lack of a genuine factual issue, summary judgment is inappropriate. *Wolther v. Schaarschmidt*, 738 P.2d 25 (Colo. App. 1986).

An affirmative showing of specific facts probative of right to judgment uncontradicted by any counter affidavits submitted leaves a trial court with no alternative but to conclude that no genuine issue of material fact exists. *Terrell v. Walter E. Heller & Co.*, 16 5 Colo. 463, 439 P.2d 989 (1968); *Civil Serv. Comm'n v. Pinder*, 812 P.2d 645 (Colo. 1991).

Where no counter affidavit is filed to indicate any genuine issue as to a material fact when the affidavit and depositions clearly disclose that plaintiff's complaint cannot be sustained, then as a matter of law a summary judgment is proper. *O. C. Kinney, Inc. v. Paul Hardeman, Inc.*, 151 Colo. 571, 379 P.2d 628 (1963); *Reisig v. Resolution Trust Corp.*, 806 P.2d 397 (Colo. App. 1990).

Where plaintiff's counter affidavit filed does not touch the facts determinative of the issue of presence for the purpose of service and on this issue as framed by the pleading his reply to defendant's answer and affirmative defenses state the mere legal conclusion that the defendant is outside of the state and not subject to service, no facts are alleged, and summary judgment is proper. *Norton v. Dartmouth Skis, Inc.*, 147 Colo. 436, 364 P.2d 866 (1961).

There is not any material issue of fact to be resolved, where the answer states that the motion to vacate the judgment or for a new trial has not been ruled upon, when subsequent to this statement, there is filed in support of the motion for summary judgment an attorney's affidavit to the effect that the motion had been ruled upon, to which is attached a copy of the order denying said motion, certified by the clerk of the court under the seal of the court to be a true copy of the order as it appears in the records of that court, although had defendant filed a counter affidavit there might remain a real issue. *Carter v. Carter*, 148 Colo. 495, 366 P.2d 586 (1961).

Failure of party opposing summary judgment to file responsive affidavit does not relieve moving party of burden to establish that summary judgment is appropriate. *People v. Hernandez & Assocs., Inc.*, 736 P.2d 1238 (Colo. App. 1986).

Oral argument not necessary. Trial court did not err in resolving the question on the basis of submitted written arguments. United Bank of *Denver v. Ferris*, 847 P.2d 146 (Colo. App. 1992).

To prevail on a summary judgment motion on the basis that the statute of limitations had run, the defendant must establish a lack of disputed facts as to when the plaintiff knew or should have known of the alleged fraud. *First Interstate Bank v. Berenbaum*, 872 P.2d 1297 (Colo. App. 1993).

D. When Motion May be Granted.

A summary judgment may be granted only where there is no genuine issue as to any material fact. *Credit Inv. & Loan Co. v. Guaranty Bank & Trust Co.*, 143 Colo. 393, 353 P.2d 1098 (1960); *Lutz v. Miller*, 144 Colo. 351, 356 P.2d 242 (1960); *City of Westminster v. Church*, 167 Colo. 1, 445 P.2d 52 (1968); *Pritchard v. Temple*, 168 Colo. 555, 452 P.2d 381 (1969); *First Nat. Bank v. Lohman*, 827 P.2d 583 (Colo. App. 1992); *Harless v. Geyer*, 849 P.2d 904 (Colo. App. 1992).

To warrant the granting of summary judgment, the situation must be such that no material factual issue remains in the case. *Morlan v. Durland Trust Co.*, 12 7 Colo. 5, 252 P.2d 98 (1952); *Central Bank & Trust Co. v. Robinson*, 137 Colo. 409, 326 P.2d 82 (1958); *Rogerson v. Rudd*, 140 Colo. 548, 345 P.2d 1083 (1959); *Huydts v. Dixon*, 199 Colo. 260, 606 P.2d 1303 (1980); *Dominguez v. Babcock*, 727 P.2d 362 (Colo. 1986); *Crouse v. City of Colo. Springs*, 766 P.2d 655 (Colo. 1988).

Generally, when presented with a summary judgment issue, a court must decline to enter such a judgment if there exists a genuine dispute over any material fact. *Sewell v. Pub. Serv. Co. of Colo.*, 832 P.2d 994 (Colo. App. 1991).

A summary judgment is a drastic remedy and is never warranted except on a clear showing that there is no genuine issue as to any material fact. *Hatfield v. Barnes*, 115 Colo. 30, 168 P.2d 552 (1946); *Morland v. Durland Trust Co.*, 12

7 Colo. 5, 252 P.2d 98 (1952); *Credit Inv. & Loan Co. v. Guaranty Bank & Trust Co.*, 143 Colo. 393, 353 P.2d 1098 (1960); *Primock v. Hamilton*, 168 Colo. 524, 452 P.2d 375 (1969); *Abrahamsen v. Mountain States Tel. & Tel. Co.*, 177 Colo. 422, 494 P.2d 1287 (1972); *Ginter v. Palmer & Co.*, 196 Colo. 203, 585 P.2d 583 (1978); *Wright v. Bayly Corp.*, 41 Colo. App. 313, 587 P.2d 799 (1978); Ams. United for Separation of Church & *State Fund, Inc. v. State*, 648 P.2d 1072 (Colo. 1982); *Hasegawa v. Day*, 684 P.2d 936 (Colo. App. 1983), overruled on other grounds in *Casebolt v. Cowan*, 829 P.2d 352 (Colo. 1992); *Closed Basin Landowners' Ass'n v. Rio Grande*, 734 P.2d 627 (Colo. 1987); *Wayda v. Comet Intern. Corp.*, 738 P.2d 391 (Colo. App. 1987); *Kral v. Am. Hardware Mut. Ins. Co.*, 784 P.2d 759 (1989); *Moore & Assocs. Realty, Inc. v. Arrowhead at Vail*, 892 P.2d 367 (Colo. App. 1994); *Crystal Homes, Inc. v. Radetsky*, 895 P.2d 1179 (Colo. App. 1995); *Brannan Sand & Gravel v. F.D.I.C.*, 928 P.2d 1337 (Colo. App. 1996), rev'd on other ground, 940 P.2d 393 (Colo. 1997); *Lazy Dog Ranch v. Telluray Ranch Corp.*, 948 P.2d 74 (Colo. App. 1997); *Terrones v. Tapia*, 967 P.2d 216 (Colo. App. 1998); *Clementi v. Nationwide Mut. Fire Ins. Co.*, 16 P.3d 223 (Colo. 2000); *Lewis v. Emil Clayton Plumbing Co.*, 25 P.3d 1254 (Colo. App. 2000).

Summary judgment is a drastic remedy and is only warranted upon a clear showing that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Bailey v. Clausen*, 557 P.2d 1207 (Colo. 1976); *Pueblo West Metro. Dist. v. Southeastern Colo. Water Conservancy Dist.*, 689 P.2d 594 (Colo. 1984); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988); *Greenwood Trust Co. v. Conley*, 938 P.2d 1141 (Colo. 1997); *Van Alstyne v. Housing Auth. of City of Pueblo*, 985 P.2d 97 (Colo. App. 1999); *Waskel v. Guar. Nat'l Corp.*, 23 P.3d 1214 (Colo. App. 2000); *Goodwin v. Thieman*, 74 P.3d 526 (Colo. App. 2003).

Summary judgment is a drastic remedy and should be granted only where the evidential and legal prerequisites are clearly established. *Gleason v. Guzman*, 623 P.2d 378 (Colo. 1981).

Where a factual issue has been raised as to a material fact, the matter should not have been disposed of by summary judgment. *Brodie v. Mastro*, 638 P.2d 800 (Colo. App. 1981).

A "genuine issue" cannot be raised by counsel simply by means of argument, be it before the trial court or on appeal; certainly the spirit of this rule suggests that if a party really contends that the area in question has in fact been roped off by proper authorities he has the duty to inform the trial court in the manner provided by this rule concerning summary judgments, and not to merely attempt to present the issue by hypothetical argument. *Sullivan v. Davis*, 172 Colo. 490, 474 P.2d 218 (1970); *Schultz v. Wells*, 13 P.3d 846 (Colo. App. 2000).

Trial court has discretion to enter summary judgment simultaneously with denying nonmovant's request for discovery. Section (f) neither requires nor prohibits collapsing the rulings; therefore, the trial court has discretion. The ruling may be reviewed under the abuse of discretion standard. *Bailey v. Airgas-Intermtn., Inc.*, 250 P.3d 746 (Colo. App. 2010).

Where there is no disputed material issue of fact regarding insurance company's duty to defend individual in a civil action because the claims are cast entirely within the insurance policy exclusions, summary judgment is appropriate. *Nikolai v. Farmers Alliance Mut. Ins.*, 830 P.2d 1070 (Colo. App. 1991).

Where the proceedings have indicated that a genuine issue exists, the supreme court has consistently rejected appealing shortcuts, even though it is likely that on a trial the trier will resolve the disputed issues as one of fact in the

same manner as when thought to have been one of law alone, and the supreme court just as consistently rejected any notions that pretense or apparent formal controversy can thwart applications of this rule or hamstring the court in determining whether it is a proper case for it. *Sullivan v. Davis*, 172 Colo. 490, 474 P.2d 218 (1970).

Moving party must be entitled to summary judgment as matter of law. A party is entitled to a summary judgment when there are pleadings, affidavits, depositions, or admissions on file showing 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. *O. C. Kinney, Inc. v. Paul Hardeman, Inc.*, 151 Colo. 571, 379 P.2d 628 (1963); *Durnford v. City of Thornton*, 29 Colo. App. 349, 483 P.2d 977 (1971); *In re Estate of Mall v. Father Flanagan's Boys' Home*, 30 Colo. App. 296, 491 P.2d 614 (1971); *Fort Collins Motor Homes, Inc. v. City of Ft. Collins*, 30 Colo. App. 445, 496 P.2d 1074 (1972); *Van Schaack v. Phipps*, 38 Colo. App. 140, 558 P.2d 581 (1976)); *Chambliss/Jenkins Assocs. v. Forster*, 650 P.2d 1315 (Colo. App. 1982).

Entry of summary judgment under this rule is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In *re Bunger v. Uncompahgre Valley Ass'n*, 192 Colo. 159, 557 P.2d 389 (1976); *Koch v. Sadler*, 759 P.2d 792 (Colo. App. 1988); *Cung La v. State Farm Auto Ins. Co.*, 830 P.2d 1007 (Colo. 1992); *Suss Pontiac-GMC, Inc. v. Boddicker*, 208 P.3d 269 (Colo. App. 2008).

When a party is entitled to prevail as a matter of law, summary judgment is proper. *Happy Canyon Inv. Co. v. Title Ins. Co.*, 38 Colo. App. 385, 560 P.2d 839 (1976).

A summary judgment is proper only where there is no genuine issue as to any material fact, which may be indicated by the pleadings, affidavits, depositions, and/or admissions, and where the moving party is entitled to judgment as a matter of law. *Bailey v. Clausen*, 192 Colo. 297, 557 P.2d 1207 (1976); *Pearson v. Sublette*, 730 P.2d 909 (Colo. App. 1986); *Krane v. Saint Anthony Hosp. Sys.*, 738 P.2d 75 (Colo. App. 1987).

The phrase "as a matter of law", as used in section (c), contains no distinction between legal and equitable principles, so, if there is no question concerning material facts, and the only contention arises over the application of a rule of law, whether "legal" or "equitable" in nature, a summary judgment may be entered. *Linch v. Game & Fish Comm'n*, 124 Colo. 79, 234 P.2d 611 (1951).

Material fact defined. In the context of a summary judgment proceeding, an issue of material fact is one, the resolution of which will affect the outcome of the case. *Krane v. Saint Anthony Hosp. Sys.*, 738 P.2d 75 (Colo. App. 1987).

Where there is no genuine issue of material fact in dispute, summary judgment is proper. *Varela v. Colo. Milling & Elevator Co.*, 31 Colo. App. 49, 499 P.2d 1206 (1972); *Abrahamsen v. Mountain States Tel. & Tel. Co.*, 177 Colo. 422, 494 P.2d 1287 (1972).

A summary judgment is proper, even when factual matters are involved, if the record indicates that the factual matters are not in dispute. *Edwards v. Price*, 191 Colo. 46, 550 P.2d 856 (1976), appeal dismissed, 429 U.S. 1056, 97 S. Ct. 778, 50 L. Ed. 2d 773 (1977).

Where there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law,

summary judgment is warranted. *Am. Water Dev., Inc. v. City of Alamosa*, 874 P.2d 352 (Colo. 1994).

Where the pleadings and the deposition clearly show that as a matter of law one is not entitled to the relief he seeks, then, under such circumstances, it was proper for the court to grant summary judgment. *Goeddel v. Aircraft Fin., Inc.*, 152 Colo. 419, 382 P.2d 812 (1963).

Unless the depositions and admissions on file, together with the affidavits, clearly disclose that there is no genuine issue as to any material fact, as a matter of law, the summary judgment should be entered. *Parrish v. De Remer*, 117 Colo. 256, 187 P.2d 597 (1947); *Carter v. Thompkins*, 133 Colo. 279, 294 P.2d 265 (1956); *Abrahamsen v. Mountain States Tel. & Tel. Co.*, 177 Colo. 422, 494 P.2d 1287 (1972).

Summary judgment was properly issued where briefs contained sufficient information upon which the judge could base his decision, even though the hearing did not address all of the issues before the court. *Lane v. Arkansas Valley Publ'g Co.*, 675 P.2d 747 (Colo. App. 1983), cert. denied, 467 U.S. 1252, 104 S. Ct. 3534, 82 L. Ed. 2d 840 (1984).

Issuance of summary judgment after a hearing that was held within eight days of filing of motion and after parent's offer of proof as to what he would state in opposing affidavits comported with the rule that permits a party to file opposing affidavits within fifteen days. People in Interest of B.M., 738 P.2d 45 (Colo. App. 1987).

It is also proper where plaintiff failed to file a responsive brief or obtain additional time to file and never acted to postpone ruling or to indicate that he intended to challenge the facts submitted by the defendant prior to the court's ruling on the motion. *Ceconi v. Geosurveys, Inc.*, 682 P.2d 68 (Colo. App. 1984); *Buttermore v. Firestone Tire & Rubber Co.*, 721 P.2d 701 (Colo. App. 1986).

Proximate cause deemed "matter of law" only in clearest cases. Proximate cause is a "matter of law" for the court only in the clearest cases when the facts are undisputed and it is plain that all intelligent persons can draw but one inference from them. *Moon v. Platte Valley Bank*, 634 P.2d 1036 (Colo. App. 1981).

If scope and interpretation of insurance policy language, which is question of law, is dispositive of claim, summary judgment of dismissal is justified. *W. Am. Ins. Co. v. Baumgartner*, 812 P.2d 696 (Colo. App. 1990), cert. granted, judgment vacated, and case remanded to the Colorado court of appeals for reconsideration in light of *Hecla Min. Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083 (Colo. 1991), 812 P.2d 654 (Colo. 1991).

Summary judgment on claim of negligent infliction of emotional distress proper where no proof of physical injury and plaintiff not in zone of danger. *Card v. Blakeslee*, 937 P.2d 846 (Colo. App. 1996).

E. When Motion Should be Denied.

Trial courts should not grant motions or deny a trial where there is the slightest doubt. Trial courts should exercise great care in granting motions for summary judgment, and should not deny a litigant a trial where there is the slightest doubt as to the facts. *Smith v. Mills*, 123 Colo. 11, 225 P.2d 483 (1950).

Factual question raised by expert precludes summary judgment. Where a plaintiff in an automobile product liability

action presents an expert who raises a factual question about the reasonableness of the defendant manufacturer's design strategies, the drastic remedy of summary judgment is improper, and the issue of whether the design of the car involved in the accident unreasonably increased the risks of injury by collision should be presented to the jury. *Roberts v. May*, 41 Colo. App. 82, 583 P.2d 305 (1978); *Camacho v. Honda Motor Co., Ltd.*, 741 P.2d 1240 (Colo. 1987), cert. dismissed, 485 U.S. 901, 108 S. Ct. 1067, 99 L. Ed. 2d 229 (1988).

Where a plaintiff in a medical malpractice action presents an expert who raises a factual question about the probability of a heart attack, the issue should be presented to the jury. *Sharp v. Kaiser Found. Health Plan*, 710 P.2d 1153 (Colo. App. 1985), aff'd, 741 P.2d 714 (Colo. 1987).

A litigant is entitled to have disputed facts determined by trial, and it is only in the clearest of cases, where no doubt exists concerning the facts, that a summary judgment is warranted. *Moses v. Moses*, 180 Colo. 397, 505 P.2d 1302 (1973).

It was error for trial court to grant summary judgment when a material question of fact existed with respect to whether petitioner was denied the opportunity to call a witness with information relevant to his defense. *People v. Diaz*, 862 P.2d 1031 (Colo. App. 1993).

Potential existence of conspiracy to defraud bankrupt company's judgment creditor should have precluded issuance of summary judgment. *Magin v. DVCO Fuel Sys. Inc.*, 981 P.2d 673 (Colo. App. 1999).

If any doubt resides in the mind of the court after a consideration of the motion, its resolution must be against the motion. *O'Herron v. State Farm Mut. Auto. Ins. Co.*, 156 Colo. 164, 397 P.2d 227 (1964).

If reasonable persons might reach different conclusions or might draw different inferences from uncontroverted facts, summary judgment should be denied. *Halsted v. Peterson*, 797 P.2d 801 (Colo. App. 1990), rev'd on other grounds, 829 P.2d 373 (Colo. 1992).

Because reasonable persons could disagree as to whether any reasonable use exists for property rezoned from light industrial to agricultural use, summary judgment is not appropriate. *Jafay v. Bd. of County Comm'rs of Boulder County* , 848 P.2d 892 (Colo. 1993).

Summary judgment should not be granted in case of doubt. *Abrahamsen v. Mountain States Tel. & Tel. Co.*, 177 Colo. 422, 494 P.2d 1287 (1972).

Even where it is extremely doubtful that a genuine issue of fact exists, summary judgment is not appropriate. *Abrahamsen v. Mountain States Tel. & Tel. Co.*, 177 Colo. 422, 494 P.2d 1287 (1972).

The question of foreseeability in the context of the legal issue of duty remains a disputed factual issue, if differing factual inferences may be drawn from the evidence, making the entry of summary judgment improper. *Sewell v. Pub. Serv. Co. of Colo.*, 832 P.2d 994 (Colo. App. 1991).

Where there exists a genuine issue as to a very material fact which must be determined, a motion for summary

judgment should be denied. *Tamblyn v. City & County of Denver*, 118 Colo. 191, 194 P.2d 299 (1948).

Where there is an issue as to whether a doctor, who admittedly knew of the high risk of scarring to a particular patient, knowingly concealed that information from the patient, a material issue of fact remains such that summary judgment is inappropriate. *Brodie v. Mastro*, 638 P.2d 800 (Colo. App. 1981).

Summary judgment may not be entered if genuine issues of material fact remain for resolution. *Smith v. Hoffman*, 656 P.2d 1327 (Colo. App. 1982).

It is elementary that summary judgment may not be granted where unresolved genuine issues of material facts remain for determination. *Rogerson v. Rudd*, 140 Colo. 548, 345 P.2d 1083 (1959).

A trial court acts precipitously in granting a motion for summary judgment where there are genuine issues as to several material facts. *Pritchard v. Temple*, 168 Colo. 555, 452 P.2d 381 (1969).

Where issues remain to be adjudicated, it is error to enter a summary judgment. *Harvey v. Morris*, 148 Colo. 489, 367 P.2d 352 (1961).

Where it is perfectly clear from the pleadings and interrogatories and the answers thereto that there is a genuine issue, it is error to enter summary judgment. *McCormick v. Diamond Shamrock Corp.*, 175 Colo. 406, 487 P.2d 1333 (1971).

Where evidence showed that management fired whistle blower in retaliation for whistle blowing, grant of summary judgment dismissing wrongful discharge claim reversed and remanded despite employer's conflicting evidence. *Webster v. Konczak Corp.*, 976 P.2d 317 (Colo. App. 1998).

Where an issue of fact is raised which is not determinable on affidavits and answers to interrogatories propounded, a motion for summary judgment should be denied. *Hatfield v. Barnes*, 115 Colo. 30, 168 P.2d 552 (1946).

Summary judgment is usually inappropriate in cases dealing with potentially unconstitutional motivations. Because evidence concerning motive is almost always subject to a variety of conflicting interpretations, a full trial on the merits is normally the only way to separate permissible motivations from those that merely mask unconstitutional actions. *Ridgeway v. Kiowa Sch. Dist. C-2*, 794 P. 2d 1020 (Colo. App. 1989).

In light of the various defenses in defendants' answer which raise genuine issues of material fact, a trial court is correct in denying the plaintiff's motion for summary judgment against the defendants. *Credit Inv. & Loan Co. v. Guaranty Bank & Trust Co.*, 166 Colo. 471, 444 P.2d 633 (1968).

Defenses based on business judgment rule and denial of harm to corporation precluded summary judgment in case involving unlawful distribution of corporate assets. Such assertions only emphasize that there are disputed issues of material fact. *Polk v. Hergert Land & Cattle Co.*, 5 P.3d 402 (Colo. App. 2000).

When defendants' motion for summary judgment is overruled, their admission of facts under their legal theory

terminates, and it is error for a trial court to give any consideration thereto in connection with its determination of plaintiff's motion. This leaves plaintiff's motion for summary judgment completely unsupported by anything except such as it had itself placed in the record, and which definitely discloses uncertainty of fact and disputable issues for trial. *Morlan v. Durland Trust Co.*, 12 7 Colo. 5, 252 P.2d 98 (1952).

It does not follow that, merely because each side moves for a summary judgment, there is no issue of material fact, for, although a defendant may, on his own motion, assert that, accepting his legal theory, the facts are undisputed, he may be able and should always be allowed to show that, if plaintiff's legal theory be adopted, a genuine dispute as to a material fact exists. *Morlan v. Durland Trust Co.*, 12 7 Colo. 5, 252 P.2d 98 (1952).

The fact that each side in moving for summary judgment in his or its favor, respectively, asserts that there is no genuine issue as to any material fact does not necessarily make it so, and does not bar the court from determining otherwise. *Morlan v. Durland Trust Co.*, 12 7 Colo. 5, 252 P.2d 98 (1952).

An arbitration clause providing arbitration of certain issues only does not mean that the parties cannot agree to submit to arbitration other matters in dispute between them, even though the contract does not require it, and so, where it is impossible to tell whether the defenses were actually submitted for arbitration, a trial court is in error in summarily striking these defenses from the answer filed in the arbitration proceeding and on such basis improvidently granting summary judgment. *Int'l Serv. Ins. Co. v. Ross*, 169 Colo. 451, 457 P.2d 917 (1969).

Summary judgment improper if record inadequate. Where the record has not been adequately developed on a material factual issue, summary judgment is not proper. *Moore v. 1600 Downing St., Ltd.*, 668 P.2d 16 (Colo. App. 1983); *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231 (Colo. 1984).

Where it could not be said as a matter of law that plaintiffs' remedy at law would be adequate to compensate them for the loss suffered, the granting of summary judgment was improper. *Benson v. Nelson*, 725 P.2d 71 (Colo. App. 1986).

Where the moving party filed only a general denial to plaintiff's complaint, summary judgment was improper. *Shaw v. Gen. Motors Corp.*, 727 P.2d 387 (Colo. App. 1986).

Summary judgment in an action for principal and interest due on promissory notes was improper where the determination as to the appropriate primary interest rate could not be made on the face of promissory notes, the motion lacked supporting documentation regarding such rate, and the moving party's supporting brief stating the amount claimed as interest was not verified. *Fed. Deposit Ins. Corp. v. Cassidy*, 779 P.2d 1382 (Colo. App. 1989).

Summary judgment was improperly granted when ambiguity in preemptive clause in contract could be resolved by extrinsic evidence showing the intent of the parties and that parties understood their rights and obligations under said clause. *Polemi v. Wells*, 759 P.2d 796 (Colo. App. 1988).

Reinsurers were not entitled to summary judgment based only on interinsurance exchange's inability to produce actual reinsurance certificates, where affidavit and computer printout indicating serial number of each reinsurance certificate, name of subscriber, period of insurance, and premium charged were based on admissible facts. *Benham v. Pryke*,

703 P.2d 644 (Colo. App. 1985), rev'd on other grounds, 744 P.2d 67 (Colo. 1987).

A question of fact remained on claim to quiet title where § 38-41-116 allowed purchaser to bring an action to enforce any right or title he may have under a contract within ten years from the date of delivery of general warranty deed and parties intent concerning when delivery of the deed was to take place required determination. *Bent v. Ferguson*, 791 P.2d 1241 (Colo. App. 1990).

A question of fact remained on claim concerning entitlement to royalty payments from the production and sale of natural gas. *Westerman v. Rogers*, 1 P.3d 228 (Colo. App. 1999).

F. Responsibility of Court.

In passing upon a motion for summary judgment, it is no part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried. *Morlan v. Durland Trust Co.*, 12 7 Colo. 5, 252 P.2d 98 (1952).

Any issue of fact must be determined by the court or jury at a trial and should not be determined by the court on a motion for summary judgment. *Primock v. Hamilton*, 168 Colo. 524, 452 P.2d 375 (1969); *Meyer v. Schwartz*, 638 P.2d 821 (Colo. App. 1981).

The fact that both parties make motions for summary judgment, and each contends in support of his respective motion that no genuine issue of fact exists, does not require the court to rule that no fact issue exists. Each, in support of his own motion, may be willing to concede certain contentions of his opponent, which concession, however, is only for the purpose of the pending motion. If the motion is overruled, the concession is no longer effective. Appellants' concession that no genuine issue of fact existed was made in support of their own motion for summary judgment. The concession does not continue over into the supreme court's separate consideration of appellee's motion for summary judgment in his behalf after appellants' motion was overruled. *Morlan v. Durland Trust Co.*, 12 7 Colo. 5, 252 P.2d 98 (1952).

It was an abuse of discretion for trial court to fail to rule on the defendants' motion for extension of time until the date summary judgment motion in favor of plaintiff was granted, at which time, the court denied defendants' motion for extension of time. *Pursell v. Hull*, 708 P.2d 490 (Colo. App. 1985).

Trial court did not abuse discretion by ruling on summary judgment motion when motion to compel was pending. *Card v. Blakeslee*, 937 P.2d 846 (Colo. App. 1996).

G. Review.

On appeal of a grant of summary judgment, where there was no testimony taken in the case, the reviewing court must determine the posture of the case as it went before the trial judge on the basis of the pleadings, the affidavits, interrogatories, and answers thereto, and the depositions which are in the record. *McKinley Constr. Co. v. Dozier*, 175 Colo. 397, 487 P.2d 1335 (1971).

Following denial of motion for summary judgment, failure to renew motion at the close of the evidence operates as a waiver of the summary judgment motion and precludes appellate review. *Feiger, Collison & Killmer v. Jones*, 926 P.2d 1244 (Colo. 1996).

A stipulation that, if review is sought by any party, the procedure of considering and determining the legal issue upon a motion for summary judgment will not be assigned as a ground of error does not preclude plaintiffs in error from urging that the contents of a deposition could not be used on review as a basis for determining legality of a trust agreement. *Denver Nat'l Bank v. Brecht*, 137 Colo. 88, 322 P.2d 667 (1958).

Review of judgment granting a motion for summary judgment is de novo. *Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd.*, 901 P.2d 1251 (Colo. 1995); *Brawner-Ahlstrom v. Husson*, 969 P.2d 738 (Colo. App. 1998); *Van Alstyne v. Housing Auth. of City of Pueblo*, 985 P.2d 97 (Colo. App. 1999); *A.C. Excavating v. Yacht Club II Homeowners Ass'n*, 114 P.3d 862 (Colo. 2005); *Meyerstein v. City of Aspen*, __ P.3d __ (Colo. App. 2011).

An order denying motion for summary judgment is interlocutory and not subject to review. *Trans Cent. Airlines v. McBreen & Assocs.*, 31 Colo. App. 71, 497 P.2d 1033 (1972); *Manuel v. Ft. Collins Newspapers, Inc.*, 631 P.2d 1114 (Colo. 1981); *Banyai v. Arruda*, 799 P.2d 441, (Colo. App. 1990); *Feiger, Collison & Killmer v. Jones*, 926 P.2d 1244 (Colo. 1996).

No review of summary judgment denial after trial on merits. A trial court's denial of a motion for summary judgment may not be considered on appeal from a final judgment entered after a trial on the merits. *Manuel v. Fort Collins Newspapers, Inc.*, 631 P.2d 1114 (Colo. 1981).

In order to preserve an issue raised by summary judgment for appeal, the party asserting the argument must make a motion for directed verdict or for judgment notwithstanding the verdict. Failure to do so operates as an abandonment, and therefore a waiver, and the issue cannot then be reviewed on appeal. *Feiger, Collison & Killmer v. Jones*, 926 P.2d 1244 (Colo. 1996); *Karg v. Mitchek*, 983 P.2d 21 (Colo. App. 1998); Davis v. GuideOne Mut. Ins. Co., 2012 COA 70M, 297 P.3d 950.

In reviewing the propriety of a summary judgment, an appellate court must apply the principle that the moving party has the burden of establishing the lack of a triable factual issue, and all doubts as to the existence of such an issue must be resolved against the moving party. *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988); *Peterson v. Halsted*, 829 P.2d 373 (Colo. 1992); *Graven v. Vail Assocs., Inc.*, 888 P.2d 310 (Colo. App. 1994).

Section (c) is the applicable standard of review to be applied by an administrative law judge when ruling upon a motion for summary judgment in a workers' compensation claim. *Fera v. Indus. Claim Appeals Office*, 169 P.3d 231 (Colo. App. 2007).

H. Illustrations.

If differing factual inferences may be drawn from the evidence, the question of foreseeability remains a disputed factual issue, and the entry of summary judgment in such circumstances is improper. *Sewell v. Pub. Serv. Co. of Colo.*

, 832 P.2d 994 (Colo. App. 1991).

Section (c) authorizes a trial court to enter a decree for specific performance of a contract upon motion for a summary judgment over the objection that a summary judgment can only be granted in an action at law, as technically distinguished from an equitable proceeding. *Linch v. Game & Fish Comm'n*, 124 Colo. 79, 234 P.2d 611 (1951).

Court erred in granting summary judgment in negligence case where evidence presented material issue of fact as to whether a defendant water district assumed a duty to have water available for the plaintiff's lumberyard located outside of said district's boundaries; the water district placed a fire hydrant at the said lumberyard upon the fire district's request specifically for the protection of the lumber company. *Wheatridge Lumber Co. v. Valley Water Dist.*, 790 P.2d 874 (Colo. App. 1989).

Generally, the issue of a party's intent is a question of fact, and is not an appropriate issue for summary disposition. *Wolther v. Schaarschmidt*, 738 P.2d 25 (Colo. App. 1986).

Whether an actor owes a duty of due care to another is a question of law for resolution by the court. *Sewell v. Pub. Serv. Co. of Colo.*, 832 P.2d 994 (Colo. App. 1991).

A motion for summary judgment based upon an assertion of the lack of existence of a duty of due care is to be subjected to the same standard as is any other motion for summary judgment; hence, if the record evidence is insufficient to allow the court to determine the question of foreseeability as a matter of law, such motion must be denied. *Sewell v. Pub. Serv. Co. of Colo.*, 832 P.2d 994 (Colo. App. 1991).

Material question of fact whether employee hired for indefinite term could be terminated at will precluded entry of summary judgment for employee in wrongful discharge action, where employee manual outlined termination procedures that employer proposed to follow, and employee allegedly received copy of manual either at start or during course of employment. *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708 (Colo. 1987).

Summary judgment was properly denied where plaintiff's evidence failed to show the existence of a right of employment or protected contractual rights that were violated by the defendant's action and the evidence was insufficient to overcome the defendants' claim of qualified immunity. *Wilkerson v. State*, 830 P.2d 1121 (Colo. App. 1992).

Defendant entitled to summary judgment on claim of negligent hiring since evidence was insufficient to satisfy the test set forth in *Connes v. Molalla Transport Sys.*, *Inc. Spencer v. United Mortg. Co.*, 857 P.2d 1342 (Colo. App. 1993).

A living trust is valid and binding as against a motion for summary judgment where such does not disclose within its four corners that it is sham or an abortive attempt on the part of a settlor to evade the statute of wills. *Denver Nat'l Bank v. Brecht*, 137 Colo. 88, 322 P.2d 667 (1958).

Where trial court found that failure to pay entire bonus as specified in top lease of mineral estate defeated the entire agreement, there was no genuine issue of material fact and the trial court properly quieted title to mineral interest in

plaintiffs. *Sohio Petroleum Co. v. Grynberg*, 757 P.2d 1125 (Colo. App. 1988).

Issue of whether contract is adhesion contract does not preclude entry of summary judgment in the absence of any genuine issue of material fact. *Jones v. Dressel*, 623 P.2d 370 (Colo. App. 1981).

Summary judgment was appropriate in case involving dismissal, for academic reasons, of student from university clinical program where the evidence submitted detailed the grounds for discharge and no evidence was submitted that the procedure applied departed from accepted academic norms. *Dillingham v. Univ. of Colo., Bd. of Regents*, 790 P.2d 851 (Colo. App. 1989).

Summary judgment was appropriate in case involving failing grade of student in pediatrics course necessary to complete junior year where student failed to demonstrate that failing grade was given for any reason other than his unsatisfactory academic performance. *Davis v. Regis Coll., Inc.*, 830 P.2d 1098 (Colo. App. 1991).

Civil service commission was entitled to judgment as a matter of law restricting access to examination results where person requesting access presented no evidence disputing the factual issue of whether substantial injury to the public interest would result if the information were not restricted under § 24-72-204(6). *Civil Serv. Comm'n v. Pinder*, 812 P.2d 645 (Colo. 1991).

Where there is no disputed material issue of fact regarding insurance company's duty to defend individual in a civil action because the claims are cast entirely within the insurance policy exclusions, summary judgment is appropriate. *Nikolai v. Farmers Alliance Mut. Ins.*, 830 P.2d 1070 (Colo. App. 1991).

Summary judgment is appropriate where insurance company met its burden by submitting affidavits establishing that it did not engage in intentional conduct probative of waiver and insured failed to raise a genuine issue of disputed fact by refuting the showing. *Nikolai v. Farmers Alliance Mut. Ins. Co.*, 830 P.2d 1070 (Colo. App. 1991).

Summary judgment improperly granted when there existed a material question of fact as to whether petitioner's use of or presence in vehicle was causally related to injuries incurred and therefore covered under automobile insurance policy. *Cung La v. State Farm Auto. Ins. Co.*, 830 P.2d 1007 (Colo. 1992).

Summary judgment improperly granted when the doctrine of collateral estoppel improperly applied. *Bebo Constr. Co. v. Mattox & O'Brien*, 990 P.2d 78 (Colo. 1999).

Record established defendant's entitlement to summary judgment on claims of trespass and breach of deed of trust and plaintiff not entitled to compensation for items allegedly stolen by defendant's agent since agent was not acting within the scope of his employment at the time of the theft. *Spencer v. United Mortg. Co.*, 857 P.2d 1342 (Colo. App. 1993).

Defendant entitled to summary judgment on claim for outrageous conduct where plaintiff failed to establish a sufficient basis for such claim. *Spencer v. United Mortg. Co.*, 857 P.2d 1342 (Colo. App. 1993).

Summary judgment based on qualified immunity was properly denied where plaintiff children pled facts necessary to

establish a violation of a clearly established constitutional right in support of a 42 U.S.C. § 1983 claim against county department of social services employees regarding the employees' placement and adoption decisions. Shirk v. Forsmark, 2012 COA 3, 272 P.3d 1118.

I. Continuance for Discovery.

Under section (f), an abuse of discretion may result when the court refuses to grant a party a reasonable continuance to permit use of discovery procedures as provided by the rules of civil procedure and when it is premature to grant a motion for summary judgment. *Miller v. First Nat. Bank*, 156 Colo. 358, 399 P.2d 99 (1965); *Holland v. Bd. of County Comm'rs*, 883 P.2d 500 (Colo. App. 1994).

Where plaintiff had a reasonable period within which to conduct discovery and was given reasonable notice that no further extensions of time would be granted, summary judgment was proper. *Holland v. Bd. of County Comm'rs*, 883 P.2d 500 (Colo. App. 1994).

It is not an abuse of discretion to deny a section (f) request where movant has failed to demonstrate that the proposed discovery is necessary and could produce facts that would preclude summary judgment. *Henisse v. First Transit, Inc.*, 220 P.3d 980 (Colo. App. 2009), rev'd on other grounds, 247 P.3d 577 (Colo. 2011).

V. Case Not Fully Adjudicated.

Under section (d) of this rule, a court may grant a partial summary judgment as to material facts existing without substantial controversy and reserve disputed facts for subsequent proceedings. City of *Westminster v. Church*, 167 Colo. 1, 445 P.2d 52 (1968); *Hauser v. Rose Health Care Sys.*, 857 P.2d 524 (Colo. App. 1993).

By its terms, section (d) involves an adjudication of less than the entire action, and consequently, a disposition pursuant to this rule does not purport to be a final judgment. Instead, a trial court remains free to reconsider an earlier partial summary judgment ruling absent the entry of judgment under C.R.C.P. 54(b). *Forbes v. Goldenhersh*, 899 P.2d 246 (Colo. App. 1994).

Where summary judgment order reserved until trial on all issues other than the amount of admitted liability, and one of these issues would be the amount of interest to be awarded, plaintiff properly raised the question of interest in its motion to amend the judgment. *Kwal Paints, Inc. v. Travelers Indem. Co.*, 34 Colo. App. 74, 525 P.2d 471 (1974), aff'd, 189 Colo. 66, 536 P.2d 1136 (1975).

Partial summary judgment affirmed. Certified Indem. *Co. v. Thompson*, 180 Colo. 341, 505 P.2d 962 (1973); *Werkmeister v. Robinson Dairy, Inc.*, 669 P.2d 1042 (Colo. App. 1983).

Court abused its discretion in refusing to reconsider and vacate partial summary judgment in favor of one of several defendants where, following defendant's belated production of a key document, an issue as to a material fact was seen to arise. *Halter v. Waco Scaffolding & Equip. Co.*, 797 P.2d 790 (Colo. App. 1990).

VI. Form of Affidavits.

This rule permits a motion for a summary judgment with or without supporting affidavits. *O. C. Kinney, Inc. v. Paul Hardeman, Inc.*, 151 Colo. 571, 379 P.2d 628 (1963); *Johnson v. Mountain Sav. & Loan Ass'n*, 162 Colo. 474, 426 P.2d 962 (1967).

Although the party moving for a summary judgment has the burden of showing that he is entitled to judgment, still, it has always been perilous for an opposing party neither to proffer any evidentiary explanatory material nor file a section (f) affidavit. *Sullivan v. Davis*, 172 Colo. 490, 474 P.2d 218 (1970).

Although it may be risky for a party not to respond to a motion for summary judgment, the absence of a response does not relieve the moving party of its burden to establish that summary judgment is appropriate. *USA Leasing, Inc. v. Montelongo*, 25 P.3d 1277 (Colo. App. 2001).

Where an affidavit is filed by plaintiff's attorney rather than a witness and does not affirmatively show that the attorney has personal knowledge of the relevant facts, the requirements of section (e) are not met. *USA Leasing, Inc. v. Montelongo*, 25 P.3d 1277 (Colo. App. 2001).

An affidavit that sets forth only a conclusory assertion without factual allegations to support it does not meet the requirements of section (e). *USA Leasing, Inc. v. Montelongo*, 25 P.3d 1277 (Colo. App. 2001).

A litigant by merely asserting a fact, without any evidence to support it, cannot avoid a summary disposition of his case. *Norton v. Dartmouth Skis, Inc.*, 147 Colo. 436, 364 P.2d 866 (1961).

Particularly on such issues as good faith, intent, and purpose, the bald declaration of a party by affidavit is not sufficient to resolve the issue in the face of a pleaded denial, and a motion for summary judgment should be denied. *Hatfield v. Barnes*, 115 Colo. 30, 168 P.2d 552 (1946).

A "genuine issue" cannot be raised by counsel simply by means of argument, be it before the trial court or on appeal; certainly the spirit of this rule suggests that if a party really contends that the area in question has in fact been roped off by proper authorities he has the duty to inform the trial court in the manner provided by this rule concerning summary judgments, and not to merely attempt to present the issue by hypothetical argument. *Sullivan v. Davis*, 172 Colo. 490, 474 P.2d 218 (1970).

A "genuine issue" cannot be raised by counsel simply by means of argument. People in Interest of F.L.G., 39 Colo. App. 194, 563 P.2d 379 (1977).

Argument of counsel alone cannot create a factual issue. *Ginter v. Palmer & Co.*, 39 Colo. App. 221, 566 P.2d 1358 (1977), rev'd on other grounds, 196 Colo. 203, 585 P.2d 583 (1978).

The purpose of a motion for summary judgment would be defeated if at a hearing on such motion oral argument and the taking of testimony were allowed as a matter of right. People in Interest of F.L.G., 39 Colo. App. 194, 563 P.2d 379 (1977).

In a breach of contract proceeding, a party seeking damages for future lost profits must establish with reasonable, but not necessarily mathematical, certainty both the fact of the injury and the amount of the loss. *Terrones v. Tapia*, 967 P.2d 216 (Colo. App. 1998).

In summary judgment proceeding in a breach of contract action, a party seeking damages for future lost profits must present sufficient evidence to compute a fair approximation of future loss. *Terrones v. Tapia*, 967 P.2d 216 (Colo. App. 1998).

A court may enter summary judgment precluding recovery for lost profits if a plaintiff offers only speculation or conjecture to establish damages. *Terrones v. Tapia*, 967 P.2d 216 (Colo. App. 1998).

When a movant makes out a convincing showing that genuine issues of fact are lacking, it is required that the adversary adequately demonstrate by receivable facts that a real, not formal, controversy exists, and, of course, he does not do that by mere denial or holding back evidence. *Sullivan v. Davis*, 172 Colo. 490, 474 P.2d 218 (1970); *Guerrero v. City of Colo. Springs*, 507 P.2d 881 (Colo. App. 1972).

Once a movant makes a convincing showing that genuine issues are lacking, section (e) requires that the opposing party adequately demonstrate by relevant and specific facts that a real controversy exists. *Hadley v. Moffat County Sch. Dist. Re-1*, 641 P.2d 284 (Colo. App. 1981); *McLaughlin v. Allen*, 689 P.2d 1169 (Colo. App. 1984).

Where plaintiffs' affidavits failed to reveal that any discovery relating to plaintiffs' allegations would have resulted in any facts that would preclude summary judgment, trial court did not abuse its discretion in suspending discovery under section (f). *Sundheim v. Bd. of County Comm'rs of Douglas County*, 904 P.2d 1337 (Colo. App. 1995), aff'd, 926 P.2d 545 (Colo. 1996).

Where a plaintiff offers no evidence to contradict an affirmative showing of nonliability made by defendants in support of their motion for summary judgment, nor did the plaintiff show that any other evidence he might have produced at trial would contradict the evidence, a trial court has no alternative but to conclude that there is no genuine issue of fact upon which the defendants could be found liable, and it properly grants their motions for summary judgment. *Guerrero v. City of Colo. Springs*, 507 P.2d 881 (Colo. App. 1972).

Where a defendant asserts a counterclaim and plaintiff denies the allegation in a reply, but does not file an affidavit denying such, the plaintiff is not entitled to summary judgment. *McKinley Constr. Co. v. Dozier*, 175 Colo. 395, 487 P.2d 1335 (1971).

A party is not compelled to try his case on affidavits with no opportunity to cross-examine affiants. *Hatfield v. Barnes*, 115 Colo. 30, 168 P.2d 552 (1946); *Parrish v. De Remer*, 117 Colo. 256, 187 P.2d 597 (1946); *Primock v. Hamilton*, 168 Colo. 524, 452 P.2d 375 (1969).

Where affidavits show conflict, there is a genuine issue of material fact which should be determined by a fact-finding body after both parties have presented evidence in support of their respective positions. *McKinley Constr. Co. v. Dozier*, 175 Colo. 397, 487 P.2d 1335 (1971).

This rule provides for sworn or certified copies of all pertinent papers which are referred to in the affidavits to accompany the motion. *Johnson v. Mountain Sav. & Loan Ass'n*, 162 Colo. 474, 426 P.2d 962 (1967).

While technically it is an error not to have certified the papers attached to such motion, one waives any objection to the lack of certification by their reliance upon some of these exhibits as bases for their position and for their appeal. *Johnson v. Mountain Sav. & Loan Ass'n*, 162 Colo. 474, 426 P.2d 962 (1967).

An affidavit of counsel which only recites that the attached documents are certified copies of a court judgment does comply with the provisions of C.R.C.P. 59(e) (now 59(a)(4)). *Kaminsky v. Kaminsky*, 145 Colo. 492, 359 P.2d 675 (1961).

Single purpose affidavit does not violate rule of "personal knowledge". An affidavit of counsel which serves the single purpose of placing before the court certified copies of relevant documents does not violate the requirements of the rule that affidavits be made on "personal knowledge". *Kaminsky v. Kaminsky*, 145 Colo. 492, 359 P.2d 675 (1961).

Certified court records in and of themselves constitute a sufficient affidavit in support of a motion for summary judgment. *Kaminsky v. Kaminsky*, 145 Colo. 492, 359 P.2d 675 (1961).

Court cannot consider files, records, and other documents in prior case involving another party in the same manner. *Parrish v. De Remer*, 117 Colo. 256, 187 P.2d 597 (1947).

Mere allegations of fraudulent concealment insufficient to establish genuine issue of fact. Where the plaintiff had neither pleaded nor proved that the defendant was connected with or responsible for the non-availability to her of her hospital records, in the context of the defendant's motion for summary judgment, therefore, the plaintiff's "mere allegations" of fraudulent concealment by the defendant were insufficient to set up a genuine issue of fact as to the defendant's asserted fraudulent acts and, accordingly, as to the equitable estoppel urged by the plaintiff. *Mishek v. Stanton*, 200 Colo. 514, 616 P.2d 135 (1980).

Affidavit containing hearsay meets requirements of this rule since hearsay would be admissible in court under exception to hearsay rule. K.H.R. by and through *D.S.J. v. R.L.S.*, 807 P.2d 1201 (Colo. App. 1990).

Amendment of complaint by argument and affidavit. When there are allegations in a complaint and facts appearing in an affidavit which may be construed as supporting the theories of estoppel and waiver, and these theories are argued to the trial court, although the theories were not specifically alleged in the complaint, the trial court must treat the complaint as amended for purposes of considering a motion for summary judgment. *Discovery Land & Dev. Co. v. Colo.-Aspen Dev. Corp.*, 40 Colo. App. 292, 577 P.2d 1101 (1977).

Failure to state admissible facts in affidavit may justify summary judgment. A failure to state admissible facts in the affidavit, based on the affiant's personal knowledge, may justify the court in entering summary judgment for the opposing party. In re Estate of Abbott, 39 Colo. App. 536, 571 P.2d 311 (1977).

Thus, summary judgment was proper where discrepancies were inadmissible to create a disputed issue of fact.

Affidavits based on inadmissible hearsay are insufficient for purposes of summary judgment determination. *Henderson v. Master Klean Janitorial, Inc.*, 70 P.3d 612 (Colo. App. 2003).

Depositions held insufficient basis for summary judgment. Where none of the depositions offered in support of a motion for summary judgment show that any of the persons deposed had personal knowledge of actions being sued on or of the amount or details of the claimed losses, the testimony in the depositions is not admissible and the depositions cannot stand as the basis for the summary judgment. *Nat'l Sur. Corp. v. Citizens State Bank*, 651 P.2d 460 (Colo. App. 1982).

Court's ruling without oral argument not denial of due process. Defendant was not denied due process of law by the fact that the court ruled on the motion for summary judgment without oral argument. People in Interest of F.L.G., 39 Colo. App. 194, 563 P.2d 379 (1977).

Due process does not include the right to oral argument on a motion for summary judgment, especially where the party against whom the motion is directed had ample opportunity to file any affidavits or legal arguments he might have had during the time between the filing of the motion and the date for hearing. People in Interest of F.L.G., 39 Colo. App. 194, 563 P.2d 379 (1977).

Neither the law of the case doctrine nor collateral estoppel precluded plaintiffs from contesting an issue addressed in first motion for summary judgment from submitting affidavits in opposition to same issue in a subsequent motion for summary judgment. *Stotler v. Geibank Indus. Bank*, 827 P.2d 608 (Colo. App. 1992).

Applied in *Commercial Indus. Const., Inc. v. Anderson*, 683 P.2d 378 (Colo. App. 1984); *Wasalco, Inc. v. El Paso County*, 689 P.2d 730 (Colo. App. 1984); *Conrad v. Imatani*, 724 P.2d 89 (Colo. App. 1986); *People v. Hernandez and Assocs., Inc.*, 736 P.2d 1238 (Colo. App. 1986); *McDaniels v. Laub*, 186 P.3d 86 (Colo. App. 2008).

VII. When Affidavits Unavailable.

A trial court abuses its discretion in refusing to grant one a reasonable continuance to permit utilization of the discovery procedures provided by the rules of civil procedure, and it is precipitous and premature in granting a motion for summary judgment. *Miller v. First Nat'l Bank*, 156 Colo. 358, 399 P.2d 99 (1965).

Where responses to discovery, although not timely filed, demonstrate a disputed issue concerning material fact, a motion for summary judgment is improper. *Moses v. Moses*, 180 Colo. 398, 505 P.2d 1302 (1973).

By not answering requests for admissions in a summary judgment motion, the relevant subject matters of the requests for admissions are deemed admitted under C.R.C.P. 36. *Cox v. Pearl Inv. Co.*, 168 Colo. 67, 450 P.2d 60 (1969).

Trial court does not err when it rules on motion ex parte unless a party requests oral argument or a continuance. *People ex rel. Garrison v. Lamm*, 622 P.2d 87 (Colo. App. 1980).

Whether to grant a request for discovery pursuant to section (f) lies within the discretion of the trial court. It is not an abuse of discretion to deny a section (f) discovery request if the movant has failed to demonstrate that the proposed

discovery is necessary and could produce facts that would preclude summary judgment. *A-1 Auto Repair & Detail v. Bilunas-Hardy*, 93 P.3d 598 (Colo. App. 2004).

VIII. Form of Judgment.

Findings of fact and conclusions of law are not required when ruling on a motion under this rule or under C.R.C.P. 12. *United Bank of Denver v. Ferris*, 847 P.2d 146 (Colo. App. 1992).

Absent circumstances not present in the case, the denial of a motion for summary judgment may not be considered on appeal from a final judgment after trial on the merits. *Manuel v. Fort Collins Newspapers, Inc.*, 631 P.2d 1114 (Colo. 1981); *Grogan v. Taylor*, 877 P.2d 1374 (Colo. App. 1993); *Fire Ins. Exch. v. Rael by Rael*, 895 P.2d 1139 (Colo. App. 1995).

Cross References:

For depositions and discovery, see C.R.C.P. 26 to 37 ; for civil contempt, see C.R.C.P. 107.

Rule 57. Declaratory Judgments.

Colorado Court Rules

Colorado Rules of Civil Procedure

Chapter 6. Judgment

As amended through Rule Change 2017(7), effective August 24, 2017

Rule 57. Declaratory Judgments

(a) **Power to Declare Rights, etc.; Force of Declaration.** District and superior courts within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceedings shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

(b) **Who May Obtain Declaration of Rights.** Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

(c) **Contract Construed Before Breach.** A contract may be construed either before or after there has been a breach thereof.

(d) **For What Purposes Interested Person May Have Rights Declared.** Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in respect thereto:

(1) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or other; or

(2) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

(3) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

(e) **Not a Limitation.** The enumeration in sections (b), (c), and (d) of this Rule does not limit

or restrict the exercise of the general powers conferred in section (a) of this Rule, in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

(f) **When Court May Refuse to Declare Right.** The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

(g) **Review.** All orders, judgments, and decrees under this Rule may be reviewed as other orders, judgments, and decrees.

(h) **Further Relief.** Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application is deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

(i) **Issues of Fact.** When a proceeding under this Rule involves the determination of an issue of fact, such issues may be tried and determined in the same manner as issues of facts are tried and determined in other actions in the court in which the proceeding is pending.

(j) **Parties; Municipal Ordinances.** When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and is entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and is entitled to be heard.

(k) **Rule is Remedial; Purpose.** This Rule is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and is to be liberally construed and administered.

(l) **Interpretation and Construction.** This Rule shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgment and decrees.

(m) **Trial by Jury; Remedies; Speedy Hearing.** Trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

Cite as Colo. R. Civ. P. 57

Case Notes:

Annotation

I. General Consideration.

Law reviews. For article, "Declaratory Judgments in Colorado", see 6 Dicta 20 (Feb. 1929). For article, "A Decade of Colorado Law: Conflict of Laws, Security, Contracts and Equity", see 23 Rocky Mt. L. Rev. 247 (1951). For article, "Judgment: Rules 54-63 ", see 23 Rocky Mt. L. Rev. 581 (1951). For article, "One Year Review of Cases on Contracts", see 33 Dicta 57 (1956). For article, "One Year Review of Civil Procedure", see 34 Dicta 69 (1957). For article, "One Year Review of Criminal Law and Procedure", see 39 Dicta 81 (1962). For comment on *Meier v. Schooley* appearing below, see 34 Rocky Mt. L. Rev. 414 (1962). For comment, *"Pre-Enforcement Judicial Review: CF & I Steel Corp. v. Colorado Air Pollution Control Commission"*, see 58 Den. L.J. 693 (1981). For article, "Declaratory Judgment Actions to Resolve Insurance Coverage Questions", see 18 Colo. Law. 2299 (1989).

Annotator's note. Since this rule is similar to CSA, C. 93, §§ 78 to 92, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this rule.

The declaratory judgment act is constitutional. *San Luis Power & Water Co. v. Trujillo*, 93 Colo. 385, 26 P.2d 537 (1933).

The Colorado declaratory judgment act is incorporated in this rule. *People ex rel. Inter-Church Temperance Movement v. Baker*, 133 Colo. 398, 297 P.2d 273 (1956); State Bd. of Control for State Homes for *Aged v. Hays*, 149 Colo. 400, 369 P.2d 431 (1962).

Review pursuant to this rule is appropriate where C.R.C.P. 106(a)(4) relief is unavailable because the challenged action is legislative or because review of the record is an insufficient remedy. *Grant v. District Court*, 635 P.2d 201 (Colo. 1981).

Declaratory relief under this rule is an appropriate means of challenging administrative governmental actions that are not subject to review under C.R.C.P. 106(a)(4). *Chellsen v. Pena*, 857 P.2d 472 (Colo. App. 1992).

Review pursuant to this rule is appropriate even in the context of a quasi-judicial proceeding where a declaratory judgment is requested and C.R.C.P. 106(a)(4) does not provide an adequate remedy. Constitutional questions and challenges to the overall validity of a statute or ordinance are more properly reviewed under this rule. *Native Am. Rights Fund, Inc. v. City of Boulder*, 97 P.3d 283 (Colo. App. 2004).

Review under this rule is not available where sufficient review has already been provided under C.R.C.P. 106(a)(4). *Denver Ctr. for Performing Arts v. Briggs*, 696 P.2d 299 (Colo. 1985); *Carney v. Civil Serv. Comm'n*, 30 P.3d 861 (Colo. App. 2001).

Plaintiffs' claim for declaratory relief asserting that planning commission did not provide sufficient notice to them of a permit review meeting was properly dismissed under C.R.C.P. 106(b). Because C.R.C.P. 106(a)(4) is the exclusive remedy for reviewing quasi-judicial decisions, all claims that effectively seek such review (whether framed as claims under section (a)(4) of this rule or not) are subject to the 30-day deadline under C.R.C.P. 106(b). Thus, claims for declaratory relief under this rule that seek review of quasi-judicial decisions must be filed within 30 days. *JJR 1, LLC v. Mt. Crested Butte*, 160 P.3d 365 (Colo. App. 2007).

The granting of declaratory relief is a matter resting in the sound discretion of the trial court and is not precluded even when there is another adequate remedy. *Troelstrup v. District Court*, 712 P.2d 1010 (Colo. 1986).

Ordinances legislative in nature are reviewable under this rule. Ordinances establishing general policies, such as a zoning ordinance, even though accompanied by procedures for notice and public hearing, are, when determining the proper procedure for review, legislative in nature and reviewable under this rule when the constitutional application of the ordinance is involved. *Margolis v. District Court*, 638 P.2d 297 (Colo. 1981).

A zoning ordinance amendment is subject to review pursuant to this rule and is not reviewable pursuant to C.R.C.P. 106(a)(4) where it is an amendment of general application, may be enacted by initiative, and is subject to referendum. *Russell v. City of Central*, 892 P.2d 432 (Colo. App. 1995).

Although a master plan is ordinarily not reviewable under this rule, the plan is reviewable when it is no longer advisory. Since the plan at issue was adopted as a zoning resolution by the board of county commissioners acting in a legislative capacity, it is no longer advisory. *Condiotti v. Bd. of County Comm'rs*, 983 P.2d 184 (Colo. App. 1999).

It is permissible to join § 24-4-106 action and action under this rule for purposes of review. *Utah Int'l, Inc. v. Bd. of Land Comm'rs*, 41 Colo. App. 72, 579 P.2d 96 (1978).

Action under rule attacking constitutionality of administrative regulation not barred as untimely. While agency rules and regulations are indeed reviewable under § 24-4-106(4), expiration of that section's filing period does not invariably bar as untimely an action under this rule attacking the constitutionality of an administrative regulation promulgated by § 24-4-103 rule-making. *Collopy v. Wildlife Comm'n*, 625 P.2d 994 (Colo. 1981).

Court lacks subject matter jurisdiction in action for declaratory judgment when plaintiff has not exhausted administrative remedies. *Leete v. Bd. of Med. Exam'rs*, 807 P.2d 1249 (Colo. App. 1991).

Declaratory judgment is proper procedure for preenforcement challenge to regulation. Declaratory judgment is a proper procedure by which to make a preenforcement challenge to a regulation promulgated by a state agency. *CF&I Steel Corp. v. Colo. Air Pollution Control Comm'n*, 199 Colo. 270, 610 P.2d 85 (1980).

Action for declaratory judgment is appropriate method for challenging governmental action that is not quasi-judicial and therefore not subject to C.R.C.P. 106(a)(4) review. *Russell v. City of Central*, 892 P.2d 432 (Colo. App. 1995).

The supreme court will not render an advisory opinion in declaratory judgment actions. *Associated Master Barbers,*

Local 115 v. Journeyman Barbers, Local 205, 132 Colo. 52, 285 P.2d 599 (1955).

There can be no coercive judgment in a proceeding under the declaratory judgment rule. *Taylor v. Tinsley*, 138 Colo. 182, 330 P.2d 954 (1958).

Declaratory judgment is not the proper remedy to determine status of a person confined in the state penitentiary, the proper remedy being habeas corpus where if warranted a coercive order could be entered. *Taylor v. Tinsley*, 138 Colo. 182, 330 P.2d 954 (1958).

Court may treat improper petition for a habeas corpus as a petition for declaratory relief to serve the interests of finality and judicial economy. *Collins v. Gunter*, 834 P.2d 1283 (Colo. 1992).

The only new remedy afforded by the declaratory judgment law is to provide an adequate remedy in cases where no cause of action has arisen authorizing an executory judgment and where no relief is or could be claimed, and, while relief under this statute cannot be had where another established remedy is available, it is not intended to abolish the well-known causes of action, nor does it afford an additional remedy where an adequate one existed before, and it should not be resorted to where there is no necessity for a declaratory judgment. *Taylor v. Tinsley*, 138 Colo. 182, 330 P.2d 954 (1958).

This act is not intended to repeal the statute prohibiting judges from giving legal advice nor to impose the duties of the profession upon the courts, nor to provide advance judgments as the basis of commercial enterprises, nor to settle mere academical questions. *Taylor v. Tinsley*, 138 Colo. 182, 330 P.2d 954 (1958).

Where, under the pleadings in an action for a declaratory judgment, no question is presented which is properly cognizable under the uniform declaratory judgments act, the suit should be dismissed. *Fairall v. Frisbee*, 104 Colo. 553, 92 P.2d 748 (1939).

In a declaratory judgment action in which the court rules against the position of the plaintiff, it should enter a declaratory judgment and not sustain a motion to dismiss. *Karsh v. City & County of Denver*, 176 Colo. 406, 490 P.2d 936 (1971).

The uniform declaratory judgments act was never intended to be a substitute for, or a short cut to, proper pleading and specifically provides that all issues of fact shall be tried and determined as in other cases. *Home Owners' Loan Corp. v. Meyer*, 110 Colo. 501, 136 P.2d 282 (1943).

Actions for declaratory judgment were not intended as a substitute for statutory procedure. *Shotkin v. Perkins*, 118 Colo. 584, 199 P.2d 295, cert. denied, 335 U.S. 888, 69 S. Ct. 230, 93 L. Ed. 426 (1948), reh'g denied, 335 U.S. 909, 69 S. Ct. 409, 93 L. Ed. 442, cert. denied, 338 U.S. 907, 70 S. Ct. 303, 94 L. Ed. 558 (1949), reh'g denied, 338 U.S. 952, 70 S. Ct. 479, 94 L. Ed. 588 (1950); *Hays v. City & County of Denver*, 127 Colo. 154, 254 P.2d 860 (1953).

Termination of a dissolution proceeding as a result of the death of one of the parties did not render the controversy over the antenuptial agreement moot. Even though the death of one spouse mooted the dissolution proceeding,

because the antenuptial agreement had a practical legal effect on an ongoing probate proceeding, the trial court was in error when it ruled the agreement invalid. *Schwartz v. Schwartz*, 183 P.3d 552 (Colo. 2008).

Applied in *State Bd. of Cosmetology v. District Court*, 187 Colo. 175, 530 P.2d 1278 (1974); *Cline v. City of Boulder*, 35 Colo. App. 349, 532 P.2d 770 (1975); *City of Arvada v. City & County of Denver*, 36 Colo. App. 146, 539 P.2d 1294 (1975); *City & County of Denver v. City of Arvada*, 192 Colo. 88, 556 P.2d 76 (1976); *Mohler v. Buena Vista Bank & Trust Co.*, 42 Colo. App. 4, 588 P.2d 894 (1978); *Newton v. Nationwide Mut. Fire Ins. Co.*, 197 Colo. 462, 594 P.2d 1042 (1979); *Hide-A-Way Massage Parlor, Inc. v. Bd. of County Comm'rs*, 198 Colo. 175, 597 P.2d 564 (1979); *Jeffrey v. Colo. State Dept. of Soc. Servs.*, 198 Colo. 265, 599 P.2d 874 (1979); *Bd. of County Comm'rs v. Fifty-First Gen. Ass'y*, 198 Colo. 302, 599 P.2d 887 (1979); *DuHamel v. People ex rel. City of Arvada*, 42 Colo. App. 491, 601 P.2d 639 (1979); *Spiker v. City of Lakewood*, 198 Colo. 528, 603 P.2d 130 (1979); *CF & I Steel Corp. v. Colo. Air Pollution Control Comm'n*, 44 Colo. App. 111, 606 P.2d 1306 (1978); *Estate of Daigle*, 634 P.2d 71 (Colo. 1981); *Stone Envtl. Eng'r Servs., Inc. v. Colo. Dept. of Health*, 631 P.2d 1185 (Colo. App. 1981); *Empire Sav., Bldg. & Loan Ass'n v. Otero Sav. & Loan Ass'n*, 640 P.2d 1151 (Colo. 1982); *Tri-State Generation & Transmission Co. v. City of Thornton*, 647 P.2d 670 (Colo. 1982); *Citizens for Free Inter. v. Dept. of Rev.*, 649 P.2d 1054 (Colo. 1982); *Two G's, Inc. v. Kalbin*, 666 P.2d 129 (Colo. 1983); *DuPuis v. Charnes*, 668 P.2d 1 (Colo. 1983); *Denver & R.G.W.R.R. v. City & County of Denver*, 673 P.2d 354 (Colo. 1983); *Martynes & Assocs. v. Devonshire Square Apts.*, 680 P.2d 246 (Colo. App. 1984); *Lakewood Fire Protect. v. City of Lakewood*, 710 P.2d 1124 (Colo. App. 1985).

II. Power to Declare Rights; Force of Declaration.

Since the adoption of the uniform declaratory judgments act, the supreme court is permitted to declare and adjudge rights and liabilities under a given state of facts irrespective of whether it directly supplies remedies to enforce them. *Employers Mut. Ins. Co. v. Bd. of County Comm'rs*, 102 Colo. 177, 78 P.2d 380 (1938).

A declaratory judgment can only be taken to be a determination as to the rights of the parties before the court. *Farmers Elevator Co. v. First Nat'l Bank*, 176 Colo. 168, 489 P.2d 318 (1971).

For a declaratory judgment to be binding, the necessary parties must be before the court. *Beacom v. Bd. of County Comm'rs*, 657 P.2d 440 (Colo. 1983).

A declaratory judgment is conclusive as to questions raised by parties and passed upon by court. *Atchison v. City of Englewood*, 180 Colo. 407, 506 P.2d 140 (1973); City & County of Denver v. Chuck Ruwart Chevrolet, Inc., 32 Colo. App. 191, 508 P.2d 789 (1973).

The equitable jurisdiction of a court may be invoked to meet the ends of justice in order that a multiplicity of suits may be prevented. *Hamilton v. City & County of Denver*, 176 Colo. 6, 490 P.2d 1289 (1971).

The plaintiff in requesting a declaratory judgment should not be required to risk violation of the statute in order to obtain a declaration of its validity. *Colo. State Bd. of Optometric Exam'rs v. Dixon*, 165 Colo. 488, 440 P.2d 287 (1968).

A case was clearly within the contemplation of this provision where certain beneficiaries of a life insurance policy brought an action against an insurance company to establish the applicability of a double indemnity clause to the death of the insured whose death was caused by an overdose of luminal: A contract was involved, persons were interested, and there was a controversy concerning the construction of the policy. *Equitable Life Assur. Soc'y v. Hemenover*, 100 Colo. 231, 67 P.2d 80 (1937).

Trial court abused its discretion in dismissing due process claim based on ripeness where professors already worked under an employment contract, they entered into the contract in reliance on the terms stated in the contract, and they faced uncertainty as to the terms of the contract because it was later modified with the intent to apply it retroactively. *Saxe v. Bd. of Trs. of Metro. State Coll.*, 179 P.3d 67 (Colo. App. 2007).

III. Who May Obtain Declaration of Rights.

The general assembly is without power to require courts to exercise nonjudicial functions; but it is not without the power to impose upon courts jurisdiction over certain enumerated actions seeking declaratory judgments on matters that lend themselves to and receive judicial determination in otherwise litigated cases, as it at once appears, such would not be nonjudicial in their nature. *San Luis Power & Water Co. v. Trujillo*, 93 Colo. 385, 26 P.2d 537 (1933).

Declaratory judgment act neither expands nor contracts the jurisdiction of Colorado's courts. In creating a new remedy the general assembly did not by implication grant political subdivisions of the state the right to sue the state. *Romer v. Fountain Sanitation Dist.*, 898 P.2d 37 (Colo. 1995).

One whose rights are affected by statute may have its construction or validity determined by a declaratory judgment. *Toncray v. Dolan*, 197 Colo. 382, 593 P.2d 956 (1979).

One whose rights are favorably affected by a statute is entitled to seek a judicial determination thereof so long as the court is provided with a properly adverse context. *Silverstein v. Sisters of Charity*, 38 Colo. App. 286, 559 P.2d 716 (1976).

One whose rights or status may be affected by statute is entitled to have any question of construction determined provided that a substantial controversy between adverse parties of sufficient immediacy to warrant the issuance of a declaratory judgment exists. *Silverstein v. Sisters of Charity*, 38 Colo. App. 286, 559 P.2d 716 (1976).

Proper forum for challenge to constitutionality of statute or ordinance under which an administrative agency acts is district court where declaratory judgment can be sought. *Arapahoe Roofing & Sheet Metal v. Denver*, 831 P.2d 451 (Colo. 1992).

A liberal construction of the statute and the rule rejects the proposition that a person adversely affected by a statute and seeking relief from uncertainty and insecurity with respect to his rights by reason of a statute or a rule of a board or commission must take the risk of prosecutions, fines, imprisonment, loss of property, or loss of profession in order to secure adjudication of his rights. *Colo. State Bd. of Optometric Exam'rs v. Dixon*, 165 Colo. 488, 440 P.2d 287 (1968).

This rule establishes the procedural mechanism for implementation of the declaratory judgment act. *Romer v. Fountain Sanitation Dist.*, 898 P.2d 37 (Colo. 1995).

A proceeding for declaratory judgment must be based upon an actual controversy. *Farmers Elevator Co. v. First Nat'l Bank*, 176 Colo. 168, 489 P.2d 318 (1971); *Beacom v. Bd. of County Comm'rs*, 657 P.2d 440 (Colo. 1983).

When the questions presented are not uncertain or hypothetical, and they are presented in an action seeking a declaratory judgment, they are no less justiciable than if presented by injunction or otherwise. *San Luis Power & Water Co. v. Trujillo*, 93 Colo. 385, 26 P.2d 537 (1933).

Although a declaratory judgment action must be based on an actual controversy, a party need not violate the challenged statute or regulation in order to obtain a declaration of its invalidity. It is sufficient that a party will be adversely affected by the challenged regulation. *Bowen/Edwards v. Bd. of County Comm'rs*, 812 P.2d 656 (Colo. App. 1990), aff'd in part and rev'd in part on other grounds, 830 P.2d 1045 (Colo. 1992).

The right to a declaratory judgment extends to a party who claims to be adversely affected by a regulation. Plaintiff contended that he was an interested party under a written agreement between the social security administration and the department of human services. Thus, even if the authorization signed by the plaintiff allowing the social security administration to send his federal benefits check directly to the department of human services itself were not deemed a contract, plaintiff stated a claim for declaratory relief and was entitled to have a determination on the merits rather than dismissal. *Martinez v. Dept. of Human Servs.*, 97 P.3d 152 (Colo. App. 2003).

A justiciable controversy existed, and so the dismissal of a declaratory judgment claim was an abuse of discretion, where a town's ordinance limited a developer's rights under an existing contract with the town, notwithstanding the fact that the developer had not applied for a permit from the town. *Lot Thirty-Four Venture, L.L.C. v. Town of Telluride*, 976 P.2d 303 (Colo. App. 1998), aff'd on other grounds, 3 P.3d 30 (Colo. 2000).

Court is not required to reply to mere speculative inquiries. *Gabriel v. Bd. of Regents*, 83 Colo. 582, 267 P. 407 (1928).

Specific threat of enforcement of a rent control statute created a sufficient actual controversy for purposes of this rule. *Meyerstein v. City of Aspen*, __ P.3d __ (Colo. App. 2011).

A declaratory judgment may not issue under the provisions of section (b) of this rule on the validity of a city ordinance to create a storm sewer district, where the proposed ordinance is in contemplation only and has not been passed by the city council. *City & County of Denver v. Denver Land Co.*, 85 Colo. 198, 274 P. 743 (1929).

As desirable as it might be to have an announcement of the court upon a question, it would be improper for it to decide in the absence of the necessary parties. *City & County of Denver v. Denver Land Co.*, 85 Colo. 198, 274 P. 743 (1929); *Continental Mut. Ins. Co. v. Cochrane*, 89 Colo. 462, 4 P.2d 308 (1931).

No proceeding lies under our declaratory judgment act to obtain merely an advisory opinion. *Farmers Elevator Co. v.*

First Nat'l Bank, 176 Colo. 168, 489 P.2d 318 (1971).

The declaratory judgment leaves the parties to pursue the remedies which the law provides, after performing its office of declaring the existence of a certain liability. *San Luis Power & Water Co. v. Trujillo*, 93 Colo. 385, 26 P.2d 537 (1933).

Preventative relief in some instances is just as properly a matter of judicial function as remedial relief and if given by a declaratory order in the construction of a statute, it is res judicata as to the questions of construction raised between the parties and passed upon. *San Luis Power & Water Co. v. Trujillo*, 93 Colo. 385, 26 P.2d 537 (1933).

Plaintiff had standing to pursue declaratory judgment action where the complaint demonstrated that the regulations threatened to cause it injury by alleging it would be adversely affected by compliance with the regulations, that if it complied with the regulations, it would suffer economic injury because the Board's permit fees and bond requirements are greater than those of the state, and that if it proceeded with oil and gas development without a county permit it would be subject to criminal sanctions. *Bowen/Edwards v. Bd. of County Comm'rs*, 812 P.2d 656 (Colo. App. 1990), aff'd in part and rev'd in part on other grounds, 830 P.2d 1045 (Colo. 1992).

The fact that a party confesses judgment in part or in whole does not automatically lead to a declaratory judgment as prayed for by the plaintiffs. *Bennett v. City of Fort Collins*, 190 Colo. 198, 544 P.2d 982 (1975).

The declaratory judgment is applicable to a dispute over the right to the use of spring waters not tributary to any natural stream. *Colo. & Utah Coal Co. v. Walter*, 75 Colo. 489, 226 P. 864 (1924).

For determination of rights under the teachers' salary law, *see Washington County High Sch. Dist. v. Bd. of Comm'rs*, 85 Colo. 72, 273 P. 879 (1928).

In an action under the declaratory judgments act to determine whether or not a municipality has the power to issue bonds and levy taxes for the payment thereof, the city auditor, being a person whose legal relations are affected by the proposal, is the proper person to initiate the proceedings. *McNichols v. City & County of Denver*, 101 Colo. 316, 74 P.2d 99 (1937).

Where results to occur from the enforcement of a statutory provision can be predicted with certainty or where the basic right of the state to enter legislative fields said to be the domain of the federal government is questioned, a court properly may declare with respect to the validity of a statute. *Am. Fed'n of Labor v. Reilly*, 113 Colo. 90, 155 P.2d 145 (1944).

A court should not enter into a speculative inquiry for the purpose of upholding or condemning statutory provisions, the effect of which, in concrete situations not yet developed, could not be definitely perceived. *Am. Fed'n of Labor v. Reilly*, 113 Colo. 90, 155 P.2d 145 (1944).

The validity of zoning ordinances has been challenged by certiorari review under C.R.C.P. 106(a)(4) and declaratory relief under this rule, and on occasion, these forms of relief have been pursued simultaneously. *Snyder v. City of*

Lakewood, 189 Colo. 421, 542 P.2d 371 (1975).

Judicial review remedy for rezoning challenge. As a general rule, judicial review by way of C.R.C.P. 106(a)(4) is the exclusive remedy for one challenging a rezoning determination on a parcel of property. However, where persons have not had prior notice of a rezoning hearing and have not participated in it, certiorari review is not always an effective remedy, and a hearing de novo under a declaratory judgment is a proper and effective remedy. *Norby v. City of Boulder*, 195 Colo. 231, 577 P.2d 277 (1978).

Income tax statute and regulations may be determined by declaratory judgment. Where a taxpayer's liability for income taxes turns on the construction of a statute and the validity, or invalidity, of regulations purporting to interpret that statute, the case is well within the purpose of a declaratory judgment. *Toncray v. Dolan*, 197 Colo. 382, 593 P.2d 956 (1979).

Relief may be afforded to persons uncertain about rights under penal statute. Relief in the nature of a declaratory judgment will be afforded in appropriate circumstances to those persons who claim uncertainty and insecurity with respect to their rights under a penal statute or law. *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982).

An action for declaratory judgment may be properly maintained by an insurance company to determine if it will be liable to its insured for a defense and for payment of a possible judgment arising from a specified occurrence. *Beeson v. State Auto. & Cas. Underwriters*, 32 Colo. App. 62, 508 P.2d 402, aff'd, 183 Colo. 284, 516 P.2d 623 (1973).

Insurance coverage may be declared. When a reasonable likelihood is established that alleged tortious conduct of an insured is excluded from coverage under his homeowner's policy, a trial judge may appropriately exercise discretion in affording insurer opportunity to obtain declaration of its obligations under the policy prior to the personal injury trial. *Troelstrup v. District Court*, 712 P.2d 1010 (Colo. 1986).

Physicians who were denied staff privileges at private hospital were not entitled to relief in form of declaratory judgment that hospital's board violated state law by not following hospital's bylaws. *Green v. Lutheran Med. Ctr. Bd. of Dirs.*, 739 P.2d 872 (Colo. App. 1987).

Declaratory judgment actions may be filed to determine the existence of, or rights under, an oral contract. *Berenergy Corp. v. Zab, Inc.*, 94 P.3d 1232 (Colo. App. 2004), aff'd, 136 P.3d 252 (Colo. 2006).

A licensee of the owner of real estate is entitled to declaratory judgment regarding a proposed modification to an easement on the owner's property, particularly where both the owner and its licensee are parties to the proceeding. *City of Boulder v. Farmer's Reservoir & Irrig. Co.*, 214 P.3d 563 (Colo. App. 2009).

Although section (b) of this rule details situations in which declaratory judgment actions may be brought, it does not restrict the court's ability to grant declaratory relief in other situations when appropriate. *Berenergy Corp. v. Zab, Inc.*, 94 P.3d 1232 (Colo. App. 2004), aff'd, 136 P.3d 252 (Colo. 2006).

IV. Contract Construed Before Breach.

The purpose of this rule is for a judicial declaration of rights under a contract. *Associated Master Barbers, Local 115 v. Journeyman Barbers, Local 205*, 132 Colo. 52, 285 P.2d 599 (1955).

A proposed contract affords plaintiff no right to have it construed. *Associated Master Barbers, Local 115 v. Journeyman Barbers, Local 205*, 132 Colo. 52, 285 P.2d 599 (1955).

One who is not a party to a contract is without standing to obtain a declaratory judgment determining the validity of such contract. *Associated Master Barbers, Local 115 v. Journeyman Barbers, Local 205*, 132 Colo. 52, 285 P.2d 599 (1955).

In an action under the declaratory judgments act to determine the validity of a contract, the complaint failing to allege that the validity of the contract had been questioned, or that a question had arisen under it, no cause of action was stated. *Gabriel v. Bd. of Regents*, 83 Colo. 582, 267 P. 407 (1928).

Section (c) inapplicable where undetermined, extrinsic facts. Although § 13-51-107 and section (c) of this rule provide that a contract may be interpreted prior to breach, these provisions are inapplicable where the dispute requires an interpretation in light of extrinsic facts which are not yet determinable. *McDonald's Corp. v. Rocky Mt. McDonald's, Inc.* , 42 Colo. App. 143, 590 P.2d 519 (1979).

V. For What Purposes Interested Persons May Have Rights Declared.

Section (d) of this rule confers no new authority concerning wills and trusts, because district courts had full and complete jurisdiction before the passage of the declaratory judgments act to construe wills and trusts and to control executors and trustees in the administration of estates. *Mulcahy v. Johnson*, 80 Colo. 499, 252 P. 816 (1927).

A declaratory judgment is a proper proceeding when the amounts involved are substantial and there is a threat of multiplicity of suits, particularly when the plaintiffs are public employees. *Hamilton v. City & County of Denver*, 176 Colo. 6, 490 P.2d 1289 (1971).

VI. When Court May Refuse to Declare Right.

Declaratory judgment actions should be considered only in cases where "the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding, and it follows that when neither of these results can be accomplished, the court should decline to render the declaration prayed". *People ex rel. Inter-Church Temperance Movement v. Baker*, 133 Colo. 398, 297 P.2d 273 (1956).

A declaratory judgment is appropriate when it will terminate a controversy. *Heron v. City & County of Denver*, 159 Colo. 314, 411 P.2d 314 (1966).

The district court properly dismissed a declaratory judgment complaint for lack of a justiciable controversy concerning the plaintiff's alleged right to select the location of the defendant's proposed oil and gas wells where the defendant had not yet submitted an application for a permit to drill wells at specific locations. *Burkett v. Amoco Prod. Co.*, 85 P.3d

576 (Colo. App. 2003).

Where parties whose interests would be affected by the action were not made parties thereto, and declaratory judgment would not terminate litigation, a holding that necessary and indispensable parties were not before the trial court was not error. *Ahern v. Baker*, 148 Colo. 408, 366 P.2d 366 (1961).

It is not the function of the courts, even by way of declaration, to adjudicate with respect to administrative orders in the absence of a showing that a judgment, if entered, would afford a plaintiff present relief. *Taylor v. Tinsley*, 138 Colo. 182, 330 P.2d 954 (1958).

A judicial tribunal is not required to render a judicial opinion on a matter which has become moot. *Crowe v. Wheeler*, 165 Colo. 289, 439 P.2d 50 (1968).

A case is moot when a judgment, if rendered, will have no practical legal effect upon an existing controversy. *Crowe v. Wheeler*, 165 Colo. 289, 439 P.2d 50 (1968).

An action is considered moot when it no longer presents a justiciable controversy because the issues involved have become academic or dead, and in a declaratory judgment action there is a tendency to construe the mootness doctrine more narrowly. *Sigma Chi Fraternity v. Regents of Univ. of Colo.*, 258 F. Supp. 515 (D. Colo. 1966).

Declaratory judgment proceedings may not be invoked to resolve a question which is nonexistent, even though it can be assumed that at some future time such question may arise. *Taylor v. Tinsley*, 138 Colo. 182, 330 P.2d 954 (1958); *Heron v. City & County of Denver*, 159 Colo. 314, 411 P.2d 314 (1966).

The jurisdiction of the court to enter declaratory judgments does not properly extend to entering advisory judgments as to hypothetical issues which may never arise. *Heron v. City & County of Denver*, 159 Colo. 314, 411 P.2d 314 (1966).

In action for declaratory judgment under this rule, the complaint must state a question which is existent and not one which is academic or nonexistent; there must be a justiciable issue or legal controversy extant, and not a mere possibility that at some future time such question may arise. *Heron v. City & County of Denver*, 159 Colo. 314, 411 P.2d 314 (1966).

In a suit to procure a declaratory judgment fixing the applicability of the sales tax to certain merchandising transactions, where it appears from the record that matters other than those shown by the pleadings must be presented to disclose the real controversy, the actual dispute can only be resolved by a consideration of proven or stipulated facts, and in such a situation the trial court, although properly holding that a demurrer to the complaint should have been overruled, should have, notwithstanding defendant elected to stand upon his demurrer, refused to render judgment granting the relief asked until evidence was produced affording a basis for conclusions with respect to proper declarations to be made and the relief to be granted. *Armstrong v. Carman Distrib. Co.*, 108 Colo. 223, 115 P.2d 386 (1941).

Applied in *City & County of Denver v. Denver Land Co.*, 85 Colo. 198, 274 P. 743 (1929).

VII. Review.

When an administrative remedy has not been sought in a timely manner, this rule does not provide jurisdiction for judicial review. *Jefferson Sch. D. R-1 v. Div. of Labor*, 791 P.2d 1217 (Colo. App. 1990).

Since judicial review would not be significantly aided by an additional administrative decision, petitioner's failure to appeal should not bar his only defense to a criminal prosecution. *Hamilton v. City & County of Denver*, 176 Colo. 6, 490 P.2d 1289 (1971).

Applied in *McNichols v. City & County of Denver*, 101 Colo. 316, 74 P.2d 99 (1937); *Young v. Bd. of County Comm'rs* , 102 Colo. 342, 79 P.2d 654 (1938).

VIII. Further Relief.

This rule provides for further relief based on a declaratory judgment, but unless such relief is asked in the same action wherein the declaratory judgment is sought, and in connection therewith, it can be obtained only as to damages accruing subsequent to the date of the declaratory judgment. *Lane v. Page*, 126 Colo. 560, 251 P.2d 1078 (1952).

Because a declaratory judgment should not be sought in order to try a controversy by piecemeal, or to try particular issues without settling the entire controversy, where the damages were antecedent and might with propriety have been determined in the same proceeding in which declaratory judgment alone was sought, such judgment should operate as a bar to any subsequent claim therefor. This is in accord with the general rule. *Lane v. Page*, 126 Colo. 560, 251 P.2d 1078 (1952).

A declaratory judgment does not constitute absolute bar to subsequent proceedings where parties are seeking other remedies, even though based upon claims which could have been asserted in original action. *Atchison v. City of Englewood*, 180 Colo. 407, 506 P.2d 140 (1973); *City & County of Denver v. Chuck Ruwart Chevrolet, Inc.*, 32 Colo. App. 191, 508 P.2d 789 (1973); *Eason v. Bd. of County Comm'rs of County of Boulder*, 961 P.2d 537 (Colo. App. 1997).

Subsequent relief sought by party to prior declaratory judgment action need not be sought by amendment of complaint in original action, but may be sought by separate action. *Atchison v. City of Englewood*, 180 Colo. 407, 506 P.2d 140 (1973).

Relief is not limited by language of statute or rule to prevailing party in declaratory judgment action. *Atchison v. City of Englewood*, 180 Colo. 407, 506 P.2d 140 (1973).

Reversal of an underlying declaratory judgment is not the "further relief" contemplated by § 13-51-112 and section (h) of this rule but is, instead, ordinary postjudgment relief. While "further relief" is not limited to the original prevailing party, nevertheless, such relief must seek remedies different from those granted in the declaratory judgment. *Spencer v. Bd. of County Comm'rs*, 39 P.3d 1272 (Colo. App. 2001).

Where plaintiff received no personal direct benefit from prosecuting declaratory judgment action, but the subject matter of the judgment was enhanced or preserved by the litigation, plaintiff's attorney is permitted a reasonable fee which should be awarded by the trial court. *Agee v. Trustees of Pension Bd.*, 33 Colo. App. 268, 518 P.2d 301 (1974).

IX. Issues of Fact.

The majority rule is that whether a party is entitled to have disputed issues of fact decided by a jury is not determined by the fact that a declaratory judgment is sought, but whether the right to a jury trial existed prior to the passage of the declaratory judgment act in the type of action involved, if so, there is a right to trial by jury in such action. *Baumgartner v. Schey*, 143 Colo. 373, 353 P.2d 375 (1960).

The right to jury trial must be determined by the real, meritorious controversy between parties, as shown by the whole case, and in determining the essential character of a suit or remedy within this rule, the entire pleadings and all issues raised are to be examined and not merely the plaintiff's declaration, complaint, petition, or evidence, but a plaintiff may not defeat a defendant's right to a jury trial by framing his complaint so that his action would be cognizable only in equity under the old procedure, by the blending of a claim cognizable at law with a demand for equitable relief, by an allegation of an equitable cause of action which does not exist, or by joining a legal with an equitable cause of action; and at least, a joinder of legal and equitable causes of actions in a complaint does not deprive the defendant of a right to trial by jury of the purely legal issues. *Baumgartner v. Schey*, 143 Colo. 373, 353 P.2d 375 (1960).

If the action in which declaratory relief is sought would have been an action at law had it been permitted to mature without intervention of declaratory procedure, the right to trial by jury of disputed questions of fact is not affected. *Baumgartner v. Schey*, 143 Colo. 373, 353 P.2d 375 (1960).

That pleadings, depositions, admissions or affidavits contain undisputed matter and can be taken as true is not decisive of the question of whether there is a genuine issue of any material fact, because an issue of fact may arise from countervailing inferences which are permissible from evidence accepted as true. *O'Herron v. State Farm Mut. Auto. Ins. Co.*, 156 Colo. 164, 397 P.2d 227 (1964).

In an action for declaratory judgment, where the evidence was in conflict as to whether a tenant was entitled to remain in possession under the farm lease for the succeeding crop year, and trial to a jury resulted in a verdict favorable to the tenant, it was error to set the verdict aside and give judgment for plaintiff, defendant being entitled to a jury trial. *Baumgartner v. Schey*, 143 Colo. 373, 353 P.2d 375 (1960).

Factual determinations may be necessary in order to declare rights, status, or legal relations, and an action for declaratory judgment may be properly maintained by an insurance company to fix liability vel non, notwithstanding that factual determinations are necessary to make a declaration on the controlling issue. *O'Herron v. State Farm Mut. Auto. Ins. Co.*, 156 Colo. 164, 397 P.2d 227 (1964); *Am. Family Mut. Ins. Co. v. Bowser*, 779 P.2d 1376 (Colo. App. 1989).

X. Parties - Municipal Ordinances.

A case for a declaratory judgment, under a statute providing for declaratory judgments in cases of actual controversies only, which shall have the effect of final judgments, must be formally presented with proper parties. *People ex rel. Inter-Church Temperance Movement v. Baker*, 133 Colo. 398, 297 P.2d 273 (1956).

A plaintiff, seeking a determination of any cause by means of a judgment declaring rights, liabilities, and jural relations, must comply with the provisions of the declaratory judgment statute by naming all of the persons as parties who have a right to defend the action, or who are interested therein, or who will be affected by the making of a declaration of rights. *People ex rel. Inter-Church Temperance Movement v. Baker*, 133 Colo. 398, 297 P.2d 273 (1956).

The indispensable and necessary parties in any declaratory judgment action are those who have conflicting legal interests in the controversy to be adjudicated and whose rights will be affected thereby, and the trial court should insist that jurisdiction be obtained of all such parties either personally or in an appropriate class action under the provisions of C.R.C.P. 23 ; otherwise the court should dismiss the action, for a declaratory judgment action is intended to completely terminate the controversy, and if the court does not have jurisdiction of such interested parties, its judgment would not settle the questions presented and thus lead to multifarious litigation. *People ex rel. Inter-Church Temperance Movement v. Baker*, 133 Colo. 398, 297 P.2d 273 (1956).

All "parties who have or claim any interest which would be affected by the declaration" must be made parties to the proceeding, for neither in the declaratory judgment action nor in any other judicial proceeding may the rights of persons not parties to a judicial proceeding be bound by the action of a court in that proceeding. *People ex rel. Inter-Church Temperance Movement v. Baker*, 133 Colo. 398, 297 P.2d 273 (1956).

Only persons who have a legally cognizable interest must be made parties to an action, and no real controversy is presented until a judgment is entered. *Connecticut Gen. Life Ins. Co. v. A.A.A. Waterproofing, Inc.*, 911 P.2d 684 (Colo. App. 1995), aff'd on other grounds sub nom. *Constitution Assoc. v. N.H. Ins. Co.*, 930 P.2d 556 (Colo. 1996).

The interest which a party must have in the subject matter in order to make him a necessary party defendant must be a present substantial interest, as distinguished from a mere expectancy or future contingent interest. *Game & Fish Comm'n v. Feast*, 15 7 Colo. 303, 402 P.2d 169 (1965).

It is not necessary to make the state of Colorado a party defendant when two agencies of the state government are parties defendant and are represented by the state attorney general, because when suit is brought against an agency or department of the state government, it is in effect against the state itself. *Game & Fish Comm'n v. Feast*, 15 7 Colo. 303, 402 P.2d 169 (1965).

Attorney general must be served with a copy of the declaratory judgment proceeding and afforded the opportunity to be heard, but it is within his discretion whether he elects to be heard. *Lakewood Pawnbrokers, Inc. v. City of Lakewood*, 182 Colo. 315, 512 P.2d 1241 (1973).

Notice to attorney general not necessary where constitutional question arises during trial. Section 13-51-115 and this rule, mandating notice to the attorney general when allegations of unconstitutionality are made, do not address the

situation where the question of constitutionality arises for the first time during the course of trial. *Howell v. Woodlin Sch. Dist. R-104*, 198 Colo. 40, 596 P.2d 56 (1979).

It is error to deny petitions of intervention of junior colleges whose rights would be directly affected by a declaration of unconstitutionality depriving them of funds. *Mesa County Junior College Dist. v. Donner*, 150 Colo. 156, 371 P.2d 442 (1962).

Where by stipulation all persons having any interest regarding the interpretation of liability insurance policies place themselves before the court, all the possible tort-feasors, in essence, challenge the respective insurance companies to defend the various named insureds pursuant to the terms of their contracts, and the insurance companies deny any liability, a controversy of sufficient immediacy and reality to warrant the issue of a declaratory judgment is raised. *Beeson v. State Auto. & Cas. Underwriters*, 32 Colo. App. 62, 508 P.2d 402, aff'd, 183 Colo. 284, 516 P.2d 623 (1973).

Where the city was not made a party, and the attorney general of the state of Colorado has not been served with a copy of the proceeding and has had no opportunity to be heard, the essential conditions required by the rule are not present, and under such circumstances a determination of the questions argued by counsel cannot be had in this proceeding. *Meier v. Schooley*, 147 Colo. 244, 363 P.2d 653 (1961).

For discussion of member municipalities in sewage disposal district being found to be indispensable parties, *see Bancroft-Clover Water & San. Dist. v. Metro. Denver Sewage Disposal Dist. No. 1* , 670 P.2d 428 (Colo. App. 1983).

Membership policyholders of a mutual insurance company had a substantial interest in the declaratory judgment sought by the company and should have been made parties thereto, because in their absence the declaratory judgment would not have terminated the uncertainty or controversy. *Continental Mut. Ins. Co. v. Cochrane*, 89 Colo. 462, 4 P.2d 308 (1931).

Where plaintiffs seek a judicial declaration not as to their own rights and status but attempt to have others not named or served declared to be in some "unlawful" status, no error was committed by the trial court in holding that declaratory judgment was not a proper remedy. *Ahern v. Baker*, 148 Colo. 408, 366 P.2d 366 (1961).

XI. Rule is Remedial - Purpose.

The general or primary purpose of a declaratory judgments statute and rule is to provide a ready and speedy remedy, in cases of actual controversy, for determining issues and adjudicating the legal rights, duties, or status of the respective parties, before controversies with regard thereto lead to the repudiation of obligations, the invasion of rights, and the commission of wrongs. *People ex rel. Inter-Church Temperance Movement v. Baker*, 133 Colo. 398, 297 P.2d 273 (1956); *Ahern v. Baker*, 148 Colo. 408, 366 P.2d 366 (1961).

Primary purpose of declaratory judgment procedure is to provide a speedy, inexpensive, and readily accessible means of determining actual controversies which depend on the validity or interpretation of some written instrument of law. *Toncray v. Dolan*, 197 Colo. 382, 593 P.2d 956 (1979).

The purpose of the statute and the rule is to be remedial and to afford relief from uncertainty and insecurity, and the statute and rule expressly provide that they be liberally construed and administered. *Colo. State Bd. of Optometric Exam'rs v. Dixon*, 165 Colo. 488, 440 P.2d 287 (1968).

A liberal construction of the statute and the rule rejects the proposition that a person adversely affected by a statute and seeking relief from uncertainty and insecurity with respect to his rights by reason of a statute or a rule of a board or commission must take the risk of prosecutions, fines, imprisonment, loss of property, or loss of profession in order to secure adjudication of his rights. *Colo. State Bd. of Optometric Exam'rs v. Dixon*, 165 Colo. 488, 440 P.2d 287 (1968).

XII. Trial by Jury.

It is clear that in a proper case a jury trial may be had in an action brought under a declaratory judgments rule. *Baumgartner v. Schey*, 143 Colo. 373, 353 P.2d 375 (1960).

The fact that an action is for a declaratory judgment is not, in and of itself, determinative of the type of action brought for purposes of determining whether there is a right to trial by jury. *Zick v. Krob*, 872 P.2d 1290 (Colo. App. 1993).

The historical test to be applied to determine whether a right to a jury trial exists in a declaratory judgments action is that if any of the parties would have a constitutional right to a jury trial on any issue involved prior to the adoption of the declaratory judgments rule, such right remains. *Baumgartner v. Schey*, 143 Colo. 373, 353 P.2d 375 (1960).

If the action in which declaratory relief is sought would have been an action at law had it been permitted to mature without the intervention of declaratory procedure, the right to trial by jury of disputed questions of fact is not affected, and this has the salutary effect of permitting the defendant a trial by jury whether the action is brought under the common law or under the declaratory judgments rule. *Baumgartner v. Schey*, 143 Colo. 373, 353 P.2d 375 (1960).

Cross References:

For declaratory judgments, see article 51 of title 13, C.R.S.; for jury trials of right, see C.R.C.P. 38 ; for trial by jury or by the court, see C.R.C.P. 39.

Rule 58. Entry of Judgment.

Colorado Court Rules

Colorado Rules of Civil Procedure

Chapter 6. Judgment

As amended through Rule Change 2017(7), effective August 24, 2017

Rule 58. Entry of Judgment

(a) **Entry**. Subject to the provisions of C.R.C.P. 54(b), upon a general or special verdict of a jury, or upon a decision by the court, the court shall promptly prepare, date, and sign a written judgment and the clerk shall enter it on the register of actions as provided in C.R.C.P. 79(a). The term "judgment" includes an appealable decree or order as set forth in C.R.C.P. 54(a). The effective date of entry of judgment shall be the actual date of the signing of the written judgment. The notation in the register of actions shall show the effective date of the judgment. Entry of the judgment shall not be delayed for the taxing of costs. Whenever the court signs a judgment and a party is not present when it is signed, a copy of the signed judgment shall be immediately mailed or e-served by the court, pursuant to C.R.C.P. 5 , to each absent party who has previously appeared.

(b) **Satisfaction**. Satisfaction in whole or in part of a money judgment may be entered in the judgment record (Rule 79(d)) upon an execution returned satisfied in whole or in part, or upon the filing of a satisfaction with the clerk, signed by the judgment creditor's attorney of record unless a revocation of authority is previously filed, or by the signing of such satisfaction by the judgment creditor, attested by the clerk, or notary public, or by the signing of the judgment record (Rule 79(d)) by one herein authorized to execute satisfaction. Whenever a judgment shall be so satisfied in fact otherwise than upon execution, it shall be the duty of the judgment creditor or the judgment creditor's attorney to give such satisfaction, and upon motion the court may compel it or may order the entry of such satisfaction to be made without it.

Cite as Colo. R. Civ. P. 58

History. Source: (a) amended February 7, 1991, effective June 1, 1991; (a) amended March 17, 1994, effective July 1, 1994; (b) amended and adopted February 27, 1997, effective July 1, 1997; (a) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Case Notes:

Annotation

I. General Consideration.

Law reviews. For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "Judgment: Rules 54-63 ", see 23 Rocky Mt. L. Rev. 581 (1951).

Applied in *Dill v. County Court*, 37 Colo. App. 45, 541 P.2d 1272 (1975); *Ayala v. Colo. Dept. of Rev.*, 43 Colo. App. 357, 603 P.2d 979 (1979); *Hawkins v. Powers*, 635 P.2d 915 (Colo. App. 1981); *Marks v. District Court*, 643 P.2d 741 (Colo. 1982); *Henley v. Wendt*, 640 P.2d 271 (Colo. App. 1982); *Davis Mfg. & Supply Co. v. Coonskin Props., Inc.*, 646 P.2d 940 (Colo. App. 1982); *Pasbrig v. Walton*, 651 P.2d 459 (Colo. App. 1982); In re Chambers, 657 P.2d 458 (Colo. App. 1982); *Moore & Co. v. Williams*, 657 P.2d 984 (Colo. App. 1982); People in Interest of C.A.W., 660 P.2d 10 (Colo. App. 1982); *Bassett v. Eagle Telecommunications*, 750 P.2d 73 (Colo. App. 1987); In re Hoffner, 778 P.2d 702 (Colo. App. 1989).

II. Entry.

The entry of judgment is a purely ministerial act. *Joslin Dry Goods Co. v. Villa Italia, Ltd.*, 35 Colo. App. 252, 539 P.2d 137 (1975); *Joslin Dry Goods Co. v. Villa Italia, Ltd.*, 541 P.2d 118 (Colo. App. 1975).

Relief sought, and therefore time limitations, for judgment entered pursuant to this rule is pursuant to C.R.C.P. 59(a)(4) even though relief sought was from costs taxed by clerk pursuant to C.R.C.P. 54. *Davis v. Bruton*, 797 P.2d 830 (Colo. App. 1990).

Section (a) indicates a sequence of events in which the entry of judgment follows, in point of time, the preparation of the written form of judgment. *Joslin Dry Goods Co. v. Villa Italia, Ltd.*, 35 Colo. App. 252, 539 P.2d 137 (1975); *Joslin Dry Goods Co. v. Villa Italia, Ltd.*, 541 P.2d 118 (Colo. App. 1975).

This rule provides that upon a special verdict the court shall direct the appropriate judgment, and other provisions indicate that the court shall direct the entry of a judgment. *City of Aurora v. Powell*, 153 Colo. 4, 383 P.2d 798 (1963).

This rule requires that a court's preparation of the written form of the judgment precede the clerk's entry of judgment. *Joslin Dry Goods Co. v. Villa Italia, Ltd.*, 35 Colo. App. 252, 539 P.2d 137 (1975); *Joslin Dry Goods Co. v. Villa Italia, Ltd.*, 541 P.2d 118 (Colo. App. 1975).

The clerk's entries are administrative, not judicial. *City of Aurora v. Powell*, 153 Colo. 4, 383 P.2d 798 (1963).

Court's "findings, conclusions, and order" is sufficient to function as the written form of the judgment required by section (a). *Joslin Dry Goods Co. v. Villa Italia, Ltd.*, 35 Colo. App. 252, 539 P.2d 137 (1975); *Joslin Dry Goods Co. v. Villa Italia, Ltd.*, 541 P.2d 118 (Colo. App. 1975).

Where the record does not contain any document executed before the clerk's notation of judgment in the register of

actions, the notation cannot function as an entry of judgment. *Joslin Dry Goods Co. v. Villa Italia, Ltd.*, 35 Colo. App. 252, 539 P.2d 137 (1975); *Joslin Dry Goods Co. v. Villa Italia, Ltd., 541 P.2d 118 (Colo. App. 1975).*

Lack of a proper order determining a C.R.C.P. 59 motion was not fatal to appeal where party appealed from underlying order of dissolution of marriage, not from denial of the rule 59 motion. In re Christen, 899 P.2d 339 (Colo. App. 1995).

Section (a) of this rule applies in dissolution of marriage cases with multiple issues. *Poor v. District Court*, 190 Colo. 433, 549 P.2d 756 (1976).

Until the written form of a dissolution decree, together with the written permanent orders were prepared, signed by the judge, and then entered on the register of actions, there was no entry of judgment. *Poor v. District Court*, 190 Colo. 433, 549 P.2d 756 (1976).

Likewise, a magistrate's order shall be signed and in writing in accordance with section (a). A magistrate's order modifying child support decree becomes effective, for the purposes of appeal, when the magistrate's order is signed. A nunc pro tunc order shall not affect a party's right to review. In re Spector, 867 P.2d 181 (Colo. App. 1993).

Written decree terminating a parental relationship constitutes "a written form of the judgment" within the intent of section (a). People in Interest of A.M.D., 648 P.2d 625 (Colo. 1982).

In dissolution proceeding, where trial court incorporated partial separation agreement as well as oral supplemental agreement into the degree of dissolution, there was a final, appealable order notwithstanding the fact that wife's counsel failed to prepare and file a written form of the supplemental agreement. The decree was dated and signed by the trial court and, by expressly incorporating both the partial separation agreement and the supplemental agreement, it left nothing further for the court to do in order to completely determine the rights of the parties. In re Sorensen, 166 P.3d 254 (Colo. App. 2007).

Judgment is not entered until there is a signed written order. *Sayat Nova, Inc. v. District Court*, 619 P.2d 764 (Colo. 1980); *Neoplan USA Corp. v. Indus. Comm'n*, 721 P.2d 157 (Colo. App. 1986); *Church v. Amer. Standard Ins. Co. of Wis.*, 742 P.2d 971 (Colo. App. 1987); In re Estate of Royal, 813 P.2d 790 (Colo. App. 1991); Hall v. Am. Standard Ins. Co. of Wis., 2012 COA 201, 292 P.3d 1196.

Where court entered its "Findings of Fact, Conclusions of Law and Judgment" and ordered separate decree quieting title to be prepared, there was no final judgment until the quiet title decree was signed. *Reser v. Aspen Park Ass'n*, 727 P.2d 378 (Colo. App. 1986).

Judgment may be entered without the court's signature when that judgment is not prepared by counsel. *Moore & Co. v. Williams*, 672 P.2d 999 (Colo. 1983).

For purposes of timely filing of a motion for new trial under C.R.C.P. 59(a)(1), a judgment is "entered" only upon notation in the judgment docket pursuant to section (a) of this rule and C.R.C.P. 79(d). *City & County of Denver v. Just*

, 175 Colo. 260, 487 P.2d 367 (1971).

The timeliness of a civil appeal is governed by C.A.R. 4(a) (appeals as of right), not section (a) of this rule. Section (a) of this rule, however, does control the date of entry of judgment for the purposes of a C.R.C.P. 59, new trial motion. *Moore & Co. v. Williams*, 672 P.2d 999 (Colo. 1983); *Luna v. Fisher*, 690 P.2d 264 (Colo. App. 1984).

Final entry of judgment for purposes of timely notice of appeal under C.A.R. 4(a) based on denial of new trial motion is date on which court filed written judgment in fixed amount on special verdict since this written ruling adjudicated all claims, rights, and liabilities of parties. *Vallejo v. Eldridge*, 764 P.2d 417 (Colo. App. 1988).

Order entered on minutes is effective as "written order" under section (a) of this rule. *Wesson v. Bowling*, 199 Colo. 30, 604 P.2d 23 (1979).

A minute order was sufficiently clear and precise and may be entered on the register pursuant to section (a) of this rule where the order detailed the amount of the judgment and setoffs and assessed costs, gave the plaintiff the right to possession, provided that the plaintiff apply the defendant's security deposit to the judgment, allowed the plaintiff interest to the date of the judgment on the amount due on a note, and, finally, gave both parties 20 days to file motions. *Hebron v. District Court*, 192 Colo. 346, 558 P.2d 997 (1977).

Entry of judgment effective upon notation in register. Both section (a) of this rule and C.R.C.P. 79(a) clearly state that entry of a judgment is effective upon notation in the register of actions. *Hebron v. District Court*, 192 Colo. 346, 558 P.2d 997 (1977).

Written order denying motion for reconsideration of dismissal without prejudice complied with subsection (a) of this rule. The prior order dismissing the case without prejudice was not reduced to writing and did not comply with the requirements of this rule. *SMLL, L.L.C. v. Daly*, 128 P.3d 266 (Colo. App. 2005).

Judgment becomes final upon notation, though not recorded in judgment record. *Hebron v. District Court*, 192 Colo. 346, 558 P.2d 997 (1977).

A judgment is final when it disposes of the entire litigation on the merits and a motion for costs does not stay the finality of that judgment. *Driscoll v. District Court*, 870 P.2d 1250 (Colo. 1994).

The court has the authority to supplement and modify the opinions it expresses in its oral remarks until the judgment has been reduced to writing, dated, and signed. In re West, 94 P.3d 1248 (Colo. App. 2004).

Conclusion of juvenile hearing does not occur until filing in clerk's office. For purposes of § 19-1-110 (now § 19-1-108) (5), the "conclusion of the juvenile hearing" does not occur until the juvenile commissioner signs the written findings and recommendations and transmits them to the juvenile judge by filing in the office of the clerk. The five-day period within which to file a request for review does not commence running until the filing date. People in Interest of M.C.L., 671 P.2d 1339 (Colo. App. 1983).

C.R.C.P. 6(e) does apply to extend time under this rule. *Bonanza Corp. v. Durbin*, 696 P.2d 818 (Colo. 1985).

No reviewable judgment presented. An appellate court must see that the actual judgment has been pronounced by the court and then entered by the clerk and that it appears in the record; otherwise no reviewable judgment is presented. *Joslin Dry Goods Co. v. Villa Italia, Ltd.*, 35 Colo. App. 252, 539 P.2d 137 (1975); *Joslin Dry Goods Co. v. Villa Italia, Ltd.*, 541 P.2d 118 (Colo. App. 1975).

Relation back of judgment so as to extinguish appeal right unconstitutional. Trial court's action in relating back matters decided on May 28 to the May 15 entry on the judgment docket had the effect of extinguishing the petitioner's right to appeal from the determination made on May 28. Under these circumstances, the 10-day period of C.R.C.P. 59(b), expired before the remaining issues in the case had even been determined by the trial court. This result contravenes the right of appeal granted by the Colorado constitution. In re Gardella, 190 Colo. 402, 547 P.2d 928 (1976) (decided prior to amendments made in 1977, 1984, and 1987).

Read together, the rules provide that a motion for a new trial must be filed not later than 10 days following the notation of judgment in the trial court's register of actions (or judgment docket). In re Gardella, 190 Colo. 402, 547 P.2d 928 (1976) (decided prior to amendments made in 1977, 1984, and 1987).

Time for motion after entry of order not issuance. Where the trial court issued its order nunc pro tunc on April 22, 1974, but the order was not noted in the registry of actions until May 31, 1974, the motion for new trial filed within 10 days from that date was timely filed. In re Talarico, 36 Colo. App. 389, 540 P.2d 1147 (1975) (decided prior to amendments made in 1977, 1984, and 1987).

Even though a nunc pro tunc order generally is fully operative on the litigants' rights as of the prescribed effective date, a nunc pro tunc order cannot be used to reduce the time nor to defeat the right to take an appeal. *Joslin Dry Goods Co. v. Villa Italia, Ltd.*, 35 Colo. App. 252, 539 P.2d 137 (1975); *Joslin Dry Goods Co. v. Villa Italia, Ltd.*, 541 P.2d 118 (Colo. App. 1975).

The filing on September 26 of an order nunc pro tunc as of September 25 cannot give effect to a clerk's September 25 entry of judgment, especially where the record does not indicate that the September 26 order was subsequently entered in the register of actions. *Joslin Dry Goods Co. v. Villa Italia, Ltd.*, 35 Colo. App. 252, 539 P.2d 137 (1975); *Joslin Dry Goods Co. v. Villa Italia, Ltd.*, 541 P.2d 118 (Colo. App. 1975).

Where notice of entry of judgment is mailed to only one party in contravention of subsection (a) of this rule, the time provided by C.R.C.P. 59(a) for filing a post-trial motion commences from the date that the notice is mailed by that party to the party subsequently moving for post-trial relief. *Padilla v. D.E. Frey & Co., Inc.*, 939 P.2d 475 (Colo. App. 1997).

Trial judge's failure to sign minute order does not prevent the court of appeals from considering the appeal. *Furlong v. Gardner*, 956 P.2d 545 (Colo. 1998).

Applied in *Lewis v. Buckskin Joe's, Inc.*, 156 Colo. 46, 396 P.2d 933 (1964).

III. Satisfaction.

Court has authority to order satisfaction apart from acknowledgment. A court has the authority to order a satisfaction of judgment even though there had not been an acknowledgment by the judgment creditor and without the filing of a motion by the debtor to compel such an acknowledgment. *Osborn Hdwe. Co. v. Colo. Corp.*, 32 Colo. App. 254, 510 P.2d 461 (1973).

Execution sale constitutes satisfaction to extent of proceeds. In the absence of a defect justifying setting an execution sale aside, a levy and sale under an execution constitutes a satisfaction only to the extent of the proceeds of the sale. *Gale v. Rice*, 636 P.2d 1280 (Colo. App. 1981).

Rule authorizes a court to enter satisfaction of judgment on behalf of a judgment debtor, even though a judgment creditor refuses to acknowledge payment, so long as the judgment debtor has paid the judgment amount into the court registry. *Vento v. Colo. Nat'l Bank*, 985 P.2d 48 (Colo. App. 1999).

Applied in *Chateau Chaumont Condo. v. Aspen Title Co.*, 676 P.2d 1246 (Colo. App. 1983).

Cross References:

For judgment upon multiple claims or involving multiple parties, see C.R.C.P. 54(b) ; for judgment record, see C.R.C.P. 79(d) ; for attachments, see C.R.C.P. 102 ; for garnishment, see C.R.C.P. 103 ; for replevin, see C.R.C.P. 104.

Rule 59. Motions for Post-Trial Relief.

Colorado Court Rules

Colorado Rules of Civil Procedure

Chapter 6. Judgment

As amended through Rule Change 2017(7), effective August 24, 2017

Rule 59. Motions for Post-Trial Relief

(a) **Post-Trial Motions**. Within 14 days of entry of judgment as provided in C.R.C.P. 58 or such greater time as the court may allow, a party may move for post-trial relief including:

(1) A new trial of all or part of the issues;

(2) Judgment notwithstanding the verdict;

(3) Amendment of findings; or

(4) Amendment of judgment.

Motions for post-trial relief may be combined or asserted in the alternative. The motion shall state the ground asserted and the relief sought.

(b) **No Post-Trial Motion Required**. Filing of a motion for post-trial relief shall not be a condition precedent to appeal or cross-appeal, nor shall filing of such motion limit the issues that may be raised on appeal.

(c) **On Initiative of Court**. Within the time allowed the parties and upon any ground available to a party, the court on its own initiative, may:

(1) Order a new trial of all or part of the issues;

(2) Order judgment notwithstanding the verdict;

(3) Order an amendment of its findings; or

(4) Order an amendment of its judgment.

The court's order shall specify the grounds for such action.

(d) **Grounds for New Trial**. Subject to provisions of Rule 61, a new trial may be granted for any of the following causes:

(1) Any irregularity in the proceedings by which any party was prevented from having a fair trial;

(2) Misconduct of the jury;

(3) Accident or surprise, which ordinary prudence could not have guarded against;

(4) Newly discovered evidence, material for the party making the application which that party could not, with reasonable diligence, have discovered and produced at the trial;

(5) Excessive or inadequate damages; or

(6) Error in law.

When application is made under grounds (1), (2), (3), or (4), it shall be supported by affidavit filed with the motion. The opposing party shall have 21 days after service of an affidavit within which to file opposing affidavits, which period may be extended by the court or by written stipulation between the parties. The court may permit reply affidavits.

(e) **Grounds for Judgment Notwithstanding Verdict**. A judgment notwithstanding verdict may be granted for either of the following grounds:

(1) Insufficiency of evidence as a matter of law; or

(2) No genuine issue as to any material fact and the moving party being entitled to judgment as a matter of law.

A motion for directed verdict shall not be a prerequisite to any form of post-trial relief, including judgment notwithstanding verdict.

(f) **Scope of Relief in Trials to Court**. On motion for post-trial relief in an action tried without a jury, the court may, if a ground exists, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct entry of a new judgment.

(g) **Scope of Relief in Trials to a Jury**. On motion for post-trial relief in a jury trial, the court may, if a ground exists, order a new trial or direct entry of judgment. If no verdict was returned, the court may, if a ground exists, direct entry of judgment or order a new trial.

(h) **Effect of Granting New Trial**. The granting of a new trial shall not be an appealable order, but a party by participating in the new trial shall not be deemed to have waived any objection to the granting of the new trial, and the validity of the order granting new trial may be raised by appeal after final judgment has been entered in the case.

(i) **Effect of Granting Judgment Notwithstanding Verdict, Amendment of Findings or Amendment of Judgment**. Subject to C.R.C.P. 54(b), granting of judgment notwithstanding the verdict, amendment of findings or amendment of judgment shall be an appealable order.

(j) **Time for Determination of Post-Trial Motions**. The court shall determine any post-trial motion within 63 days (9 weeks) of the date of the filing of the motion. Where there are

multiple motions for post-trial relief, the time for determination shall commence on the date of filing of the last of such motions. Any post-trial motion that has not been decided within the 63-day determination period shall, without further action by the court, be deemed denied for all purposes including Rule 4(a) of the Colorado Appellate Rules and time for appeal shall commence as of that date.

(k) **When Judgment Becomes Final**. For purposes of this Rule 59, judgment shall be final and time for filing of notice of appeal shall commence as set forth in Rule 4(a) of the Colorado Appellate Rules.

Cite as Colo. R. Civ. P. 59

History. Source: (a) amended March 17, 1994, effective July 1, 1994; entire rule amended and effective October 11, 2001; IP(a), (a) last paragraph, (d) last paragraph, and (j) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Case Notes:

Annotation

I. General Consideration.

Law reviews. For article, "Misconduct of Jury-Ground for New Trial", see 16 Dicta 317 (1939). For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "Judgment: Rules 54-63 ", see 23 Rocky Mt. L. Rev. 581 (1951). For article, "Appellate Procedure and the New Supreme Court Rules", see 30 Dicta 1 (1953). For article, "Civil Remedies and Civil Procedure", see 30 Dicta 465 (1953). For article, "One Year Review of Civil Procedure", see 34 Dicta 69 (1957). For article, "One Year Review of Civil Procedure and Appeals", see 36 Dicta 5 (1959). For article, "One Year Review of Civil Procedure and Appeals", see 37 Dicta 21 (1960). For article, "One Year Review of Civil Procedure and Appeals", see 38 Dicta 133 (1961). For article, "One Year Review of Civil Procedure and Appeals", see 39 Dicta 133 (1962). For article, "One Year Review of Civil Procedure and Appeals", see 40 Den. L. Ctr. J. 66 (1963). For note, "One Year Review of Civil Procedure", see 41 Den. L. Ctr. J. 67 (1964). For note, "New Trial Motion in Colorado-Some Significant Changes", see 37 U. Colo. L. Rev. 379 (1965). For a discussion of federal jurisdiction arising under this rule, see survey of Tenth Circuit decisions on federal practice and procedure, 53 Den. L.J. 153 (1976). For article, "The One Percent Solution", see 11 Colo. Law. 86 (1982). For article, "Federal Practice and Procedure", which discusses a recent Tenth Circuit decision dealing with post-trial motions, see 62 Den. U. L. Rev. 232 (1985). For article, "Post-Trial Motions in the Civil Case: An Appellate Perspective", see 32 Colo. Law. 71 (November 2003).

Annotator's note. Since this rule, as it existed prior to January 1, 1985, was similar to §§ 237 and 238 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, and, since present provisions of sections (e) and (i) of this rule are similar to C.R.C.P. 50(b) and (c), as they existed prior to January 1, 1985, relevant cases construing §§ 237 and 238 of the former code and former C.R.C.P. 50(b) and (c) have been included

in the annotations to this rule.

Purpose of a motion for a new trial is to give the trial court an opportunity to correct alleged errors. *Danielson v. Kerbs AG., Inc*., 646 P.2d 363 (Colo. 1982).

The primary purpose of a motion to amend judgment or for new trial is to give the court an opportunity to correct any errors that it may have made. In re Jones, 668 P.2d 980 (Colo. App. 1983).

Relief sought, and therefore time limitations, for judgment entered pursuant to C.R.C.P. 58 is pursuant to subsection (a)(4) of this rule even though relief sought was from costs taxed by clerk pursuant to C.R.C.P. 54. *Davis v. Bruton*, 797 P.2d 830 (Colo. App. 1990).

This rule authorizes the filing of a motion for new trial and empowers the court under certain conditions to grant a new trial on all or part of the issues. *Dale v. Safeway Stores, Inc*., 152 Colo. 581, 383 P.2d 795 (1963).

A motion for reconsideration of an order granting a new trial is not governed by this section because such order is not a final judgment. *Bowman v. Songer*, 820 P.2d 1110 (Colo. 1991).

A motion to reconsider is not specifically delineated in this rule, and no other rule or statute establishes a party's right to file such a motion, except under the Administrative Procedure Act and the Colorado appellate rules. *Stone v. People*, 895 P.2d 1154 (Colo. App. 1995).

A motion to reconsider in light of new circumstances or newly discovered evidence is not subject to the limitations in section (d) of this rule. *UIH-SFCC Holdings, L.P. v. Brigato*, 51 P.3d 1076 (Colo. App. 2002).

New trial is the only means for trial court to change judgment. Once a valid judgment is entered the only means by which the trial court may thereafter alter, amend, or vacate the judgment is by appropriate motion under either this rule or C.R.C.P. 60. *Cortvriendt v. Cortvriendt*, 146 Colo. 387, 361 P.2d 767 (1961); In re Warner, 719 P.2d 363 (Colo. App. 1986).

Plaintiff's motion to reconsider the summary judgment determination must be characterized as a motion for new trial under subsection (d)(4). The primary purpose of a motion for a new trial is to give the trial court an opportunity to correct any errors it may have made. *Graven v. Vail Assocs., Inc*., 888 P.2d 310 (Colo. App. 1994); *Zolman v. Pinnacol Assurance*, 261 P.3d 490 (Colo. App. 2011).

Retired judge may not entertain a motion for a new trial. After the expiration of his term of office, a judge may not entertain a motion under this rule, even though such motion is filed in a proceeding wherein the "former" judge had himself entered the final judgment at a time when he was actually serving as a judge. *Olmstead v. District Court*, 157 Colo. 326, 403 P.2d 442 (1965).

An appellate court does not grant or deny motions filed subsequent to entry of judgment under this rule since this is a function of the trial court; once a trial court has acted, however, an appellate court may in appropriate proceedings be called upon to review the propriety of the action thus taken by it. *Olmstead v. District Court*, 157 Colo. 326, 403 P.2d

442 (1965).

Court of appeals had subject matter jurisdiction to rule on issue to setoff two judgments and to enter single judgment despite fact that second notice of appeal to amended judgment was untimely where plaintiff raised issue of lack of setoff in trial court. *Husband v. Colo. Mountain Cellars*, 867 P.2d 57 (Colo. App. 1993).

Motion for new trial is analogous to motion for reconsideration, reargument, or rehearing in a proceeding before the public utilities commission. *Peoples Natural Gas Div. v. Pub. Utils. Comm'n*, 626 P.2d 159 (Colo. 1981).

An order denying a motion for a new trial does not deprive the court of jurisdiction to reconsider. *Zehnder v. Thirteenth Judicial Dist. Court*, 193 Colo. 502, 568 P.2d 457 (1977).

Lack of a proper order, entered in accordance with C.R.C.P. 58, determining a motion under this rule was not fatal to appeal where party appealed from underlying order of dissolution of marriage, not from denial of the motion. In re Christen, 899 P.2d 339 (Colo. App. 1995).

After reconsideration of the motion to set aside, the court can adhere to its order which has the effect of striking the motion for a new trial. *Zehnder v. Thirteenth Judicial Dist. Court*, 193 Colo. 502, 568 P.2d 457 (1977).

Court has duties upon timely filing of motion. Where a timely motion for a new trial is filed, it is then incumbent upon the district court to either set the motion for hearing or to dispense with oral argument and decide the motion on the basis of the written briefs alone. *Danielson v. Kerbs AG., Inc*., 646 P.2d 363 (Colo. 1982).

A trial court has great discretion in granting of motions for new trials. *DeMott v. Smith*, 29 Colo. App. 531, 486 P.2d 451 (1971).

In determining whether a new trial should be granted, the trial court has broad discretionary powers. *Park Stations, Inc., v. Hamilton*, 38 Colo. App. 216, 554 P.2d 311 (1976).

Whether or not a new trial is granted is usually a matter for the sound discretion of the trial judge whose presence and observation at the trial better equip him for making this decision. *First Nat'l Bank v. Campbell*, 198 Colo. 344, 599 P.2d 915 (1979).

The trial court properly exercised discretion when granting a motion for reconsideration in order to correct a previous erroneous ruling on a motion to reconsider if done within 60 days of the prior ruling. In re Nixon, 785 P.2d 151 (Colo. App. 1989).

Where the record indicated that no further issues of material fact remained to be addressed, summary judgment was a final judgment despite trial court order indicating that genuine issues of material fact remained to be addressed, and district court lacked jurisdiction for further orders. *Driscoll v. District Court*, 870 P.2d 1250 (Colo. 1994).

Order reversed where court substitutes opinion on disputed facts. Orders granting new trials are subject to reversal where it appears from the record that the trial court has merely substituted its opinion on disputed questions of fact for

that of the jury. *DeMott v. Smith*, 29 Colo. App. 531, 486 P.2d 451 (1971); *Roth v. Stark Lumber Co*., 31 Colo. App. 121, 500 P.2d 145 (1972).

Where the court failed to rule on a motion for reconsideration within 60 days, the court effectively denied the motion, the judgment became final, and the court lost jurisdiction for any further action. *Driscoll v. District Court*, 870 P.2d 1250 (Colo. 1994).

Automatic denial after the 60-day determination period described in section (j) of this rule is mandatory. Actions taken by the court under this rule after the 60-day period are outside the court's jurisdiction and void. *De Avila v. Estate of DeHerrera*, 75 P.3d 1144 (Colo. App. 2003).

But divestiture of jurisdiction under this rule does not preclude the court from considering proper motions made under C.R.C.P. 60. *De Avila v. Estate of DeHerrera*, 75 P.3d 1144 (Colo. App. 2003).

A trial judge may not change the substance of a jury's verdict upon his own motion. *Leo Payne Pontiac, Inc. v. Ratliff*, 178 Colo. 361, 497 P.2d 997 (1972).

The granting of a new trial by the trial court should be reversed if the reasons for granting a new trial do not constitute legal grounds, or do not in fact exist. *DeMott v. Smith*, 29 Colo. App. 531, 486 P.2d 451 (1971).

In trial by court, judge retains jurisdiction after motion filed. Upon the filing of the motion for new trial within the time provided by rule, the trial court retained full power to correct any and all errors theretofore committed in the trial to the court. *Goodwin v. Eller*, 12 7 Colo. 529, 258 P.2d 493 (1953).

Filing of motion operates to continue jurisdiction of court. Where a trial was to the court, and its findings were announced, and counsel gave notice of a motion for a new trial, and subsequently at the same term filed his motion, but the motion was not disposed of until the subsequent term, held that the proceedings at the first term, subsequent to the findings, operated to reserve the case and to continue the jurisdiction beyond that term, for the purpose of disposing of the motion and the settling of the bill of exceptions. *Gomer v. Chaffe*, 5 Colo. 383 (1880).

The trial court may reverse judgment. Where an action has been tried to the court without a jury, and a motion for new trial has been filed after entry of findings and judgment, the trial court has the power, upon consideration of such motion, to vacate the original findings and judgment, reverse itself, and enter a judgment in favor of the opposite party. *Goodwin v. Eller*, 12 7 Colo. 529, 258 P.2d 493 (1953); *Smith v. Whitlow*, 129 Colo. 239, 268 P.2d 1031 (1954).

Trial court properly refused to consider the issues raised in affidavits and did not abuse its discretion in denying plaintiff's motion to reconsider since affidavits filed after the granting of a motion for summary judgment cannot be considered on a motion to reconsider and a court need not entertain new theories on a motion to reconsider following the grant of summary judgment. *Graven v. Vail Assocs., Inc*., 888 P.2d 310 (Colo. App. 1994).

The court will not address issues raised for the first time in a reply brief on a post-trial motion for the same reason that issues will not be considered when raised for the first time in reply briefs on appeal. *Flagstaff Enters. Constr. Inc. v.*

Snow, 908 P.2d 1183 (Colo. App. 1995).

Court may limit issues to be retried. When error exists as to only one or more issues and the judgment is in other respects free from error, a reviewing court may, when remanding the cause for a new trial, whether by the court or a jury, limit the new trial to the issues affected by the error whenever these issues are entirely distant and separable from the matters involved in other issues and the trial can be had without danger of complication with other matters. *Murrow v. Whitely*, 125 Colo. 392, 244 P.2d 657 (1952).

Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice to either party. *Murrow v. Whiteley*, 125 Colo. 392, 244 P.2d 657 (1952).

Where the issues of damages and of liability in the action are closely intertwined, it would be error to confine the new trial solely to the liability issue. Where the issues at trial are interrelated and depend upon one another for determination, then error which requires a new trial on one issue will, of necessity, require a new trial as to all issues. *Bassett v. O'Dell*, 30 Colo. App. 215, 491 P.2d 604 (1971), aff'd, 178 Colo. 425, 498 P.2d 1134 (1972).

Under this rule, the court may, on review, subject dependency proceedings to a complete review, in furtherance of which he is empowered, inter alia, to reconsider the petition, take additional testimony, amend findings of fact and conclusions of law, or make new findings and conclusions, and direct the entry of a new order. People in Interest of S.S.T., 38 Colo. App. 110, 553 P.2d 418 (1976).

The motion for a new trial set forth numerous alleged errors of the trial court relating to the admission of evidence, exhibits, the giving and refusal of instructions, and other matters bearing directly upon the issue of liability and which, if overruled, defendants would be entitled to have reviewed upon writ of error. To limit the retrial to the issue of damages alone would deprive them of the full review covering all elements of the case to which they are unquestionably entitled. The trial court acted within its discretion and authority in declining to limit the issues upon retrial. *Piper v. District Court*, 147 Colo. 87, 364 P.2d 213 (1961).

Original judgment retains force until modified. Irregular and erroneous judgments necessarily retain their force and have effect until modified by a trial court in consequence of its authority in certain circumstances, or until vacated pursuant to new trial procedures under this rule, or until reversed by an appellate court in review proceedings. Such judgments are subject only to direct attack; they are not vulnerable to collateral assault. *Davidson Chevrolet, Inc. v. City & County of Denver*, 138 Colo. 171, 330 P.2d 1116 (1958), cert. denied, 359 U.S. 926, 79 S. Ct. 609, 3 L. Ed. 2d 629 (1959).

Interest runs from original judgment when motion for new trial is denied. Where a motion for a new trial is overruled and thereafter a trial court computes interest on the verdict and orders judgment in the amount of the verdict and interest, this concludes the trial court's action relative to the judgment and becomes the final judgment. *Green v. Jones*, 134 Colo. 208, 304 P.2d 901 (1956).

A memorandum in support of a motion for new trial is not mandatory but it is within the discretion of the trial judge to

consider a motion for new trial without a memorandum. *West-Fir Studs, Inc. v. Anlauf Lumber Co*., 190 Colo. 298, 546 P.2d 487 (1976).

Memorandum brief is for benefit of trial court. Although section (a) (now section (d)) formerly required a memorandum brief and it was within the discretion of the trial court to strike a motion for new trial unaccompanied by such a brief, this requirement was for the benefit of the trial court in its own review and evaluation of its determination of the case, and where the trial court ruled on a motion for new trial without requiring a brief, the brief requirement was waived. *L.C. Fulenwider, Inc. v. Ginsberg*, 36 Colo. App. 246, 539 P.2d 1320 (1975) (decided prior to 1985 amendment).

The requirement of a memorandum brief in support of a motion for new trial is for the benefit of the trial court in its review of its determination of the case. Where the trial court considers the brief to be sufficient and considers the brief in its ruling on the motion, the brief has fulfilled its purpose as intended by the rules of procedure. In re Flohr, 672 P.2d 1024 (Colo. App. 1983).

Counsel is not entitled to free transcript to aid in preparation of motion. In absence of statute authorizing furnishing of free transcript of proceedings to aid in preparation of motion for new trial, counsel is not entitled to copy for preparation of such motion. People in Interest of A.R.S., 31 Colo. App. 268, 502 P.2d 92 (1972).

A motion for new trial filed in apt time suspends the judgment so that it becomes final only when the motion is overruled. *Bates v. Woodward*, 66 Colo. 555, 185 P. 351 (1919); *Kinney v. Yoelin Bros. Mercantile Co*., 74 Colo. 295, 220 P. 998 (1923).

This rule does not apply to appeals in a district court from judgments of a county court. Such appeals are pure creatures of statute, and no motion for a new trial is provided for in such cases. *Erbaugh v. Jacobson*, 140 Colo. 182, 342 P.2d 1026 (1959).

After an appeal of a final judgment has been perfected, the trial court is without jurisdiction to entertain any motion or any order affecting the judgment. People in Interest of J.L.P., 870 P.2d 1252 (Colo. App. 1994).

Requirement of supporting affidavit serves to demonstrate that one, who moves for a new trial alleging irregularities in prior proceedings that denied him a fair trial, is acting upon a basis of knowledge, not upon a suspicion or mere hope. *Peoples Natural Gas Div. v. Pub. Utils. Comm'n*, 626 P.2d 159 (Colo. 1981).

Affidavit of losing counsel allowed to support motion for new trial where the affidavit contains factual allegations and a basis of knowledge upon which the motion for a new trial rests. *Aldrich v. District Court*, 714 P.2d 1321 (Colo. 1986).

Successor judge has discretion to rule on a motion for a new trial which challenges the sufficiency of the evidence. *Faris v. Rothenberg*, 648 P.2d 1089 (Colo. 1982).

There is nothing in the rules prohibiting early filing of a motion for new trial; they only proscribe motions filed too late. *Haynes v. Troxel*, 670 P.2d 812 (Colo. App. 1983).

A judgment is final when it disposes of the entire litigation on the merits and a motion for costs does not stay the

finality of that judgment. *Driscoll v. District Court*, 870 P.2d 1250 (Colo. 1994).

The provisions of C.R.C.P. 6(e) authorize the addition of three days to the prescribed period for taking certain actions following service by mail. However, the time for filing a rule 59 motion is specifically triggered either by entry of judgment in the presence of the parties or by mailing of notice of the court's entry of judgment if all parties were not present when judgment was entered. As a result, C.R.C.P. 6(e) is not applicable to the filing of rule 59 motions. *Wilson v. Fireman's Fund Ins. Co.*, 931 P.2d 523 (Colo. App. 1996).

Attorney fee issues. Trial court retains jurisdiction to determine motions on attorney fee issues even though the merits of the judgment are pending appeal. *Koontz v. Rosener*, 787 P.2d 192 (Colo. App. 1989).

Where each party prevails in part an award of costs is committed to sole discretion of trial court and court's discretion remains unaffected by fact that judgment awarded to one party is larger than judgment awarded to the other. *Husband v. Colo. Mountain Cellars*, 867 P.2d 57 (Colo. App. 1993).

A request for costs is outside the purview of this section because a decision concerning a request for costs does not amend or otherwise affect the finality of the judgment on the merits. Because a request for costs is not subject to the 60-day limitation, the trial court had jurisdiction to consider the defendant's bill of costs following the expiration of that period. *Hierath-Prout v. Bradley*, 982 P.2d 329 (Colo. App. 1999).

Rule not applicable. Motions filed following a jury trial that pertained to unresolved, substantive claims raised in the complaint are not directed at post-judgment relief and, therefore, this rule is not applicable. *Church v. Amer. Standard Ins. Co. of Wis.*, 742 P.2d 971 (Colo. App. 1987).

No error by trial court in denying appellant's motion for leave to file a motion for reconsideration of motion to dismiss and in rejecting arguments to clarify trial court's original order. Failure to file motion within time allowed by section (a), absent extension, deprives court of jurisdiction to act under rule. Here, time to file motion for post-trial relief ended before appellant filed motion for leave to file motion for reconsideration of motion to dismiss. As such, motion for leave was untimely, and trial court did not err in denying it. *Titan Indem. Co. v. Travelers Prop. Cas. Co. of Am.*, 181 P.3d 303 (Colo. App. 2007).

Applied in *Miller v. Carnation Co.*, 33 Colo. App. 62, 516 P.2d 661 (1973); *City of Englewood v. Reffel*, 34 Colo. App. 103, 522 P.2d 1241 (1974); *Bd. of County Comm'rs v. Evergreen, Inc.*, 35 Colo. App. 171, 532 P.2d 777 (1974); *Cline v. City of Boulder*, 35 Colo. App. 349, 532 P.2d 770 (1975); *Lehman v. Williamson*, 35 Colo. App. 372, 533 P.2d 63 (1975); *Joslin Dry Goods Co. v. Villa Italia, Ltd.*, 35 Colo. App. 252, 539 P.2d 137 (1975), 541 P.2d 118 (Colo. App. 1975); *Dill v. County Court*, 37 Colo. App. 75, 541 P.2d 1272 (1975); In re Franks, 189 Colo. 499, 542 P.2d 845 (1975); *Lewis v. People in Interest of C.K.L.*, 189 Colo. 552, 543 P.2d 722 (1975); *Poor v. District Court*, 190 Colo. 433, 549 P.2d 756 (1976); *Miller v. Carnation Co.*, 39 Colo. App. 1, 564 P.2d 127 (1977); *Allred v. City of Lakewood*, 40 Colo. App. 238, 576 P.2d 186 (1977); *Catron v. Catron*, 40 Colo. App. 476, 577 P.2d 322 (1978); *Bd. of Water Works v. Pueblo Water Works Employees Local 1045*, 196 Colo. 308, 586 P.2d 18 (1978); *Taylor v. Barnes*, 41 Colo. App. 246, 586 P.2d 238 (1978); *State Dept. Natural Res. v. Benjamin*, 41 Colo. App. 520, 587 P.2d 1207 (1978); *First Nat'l Bank v. Campbell*, 41 Colo. App. 406, 589 P.2d 501 (1978); *Matthews v. Tri-County Water Conservancy Dist.*, 42

Colo. App. 80, 594 P.2d 586 (1979); *O'Hara Group Denver, Ltd. v. Marcor Hous. Sys.*, 19 7 Colo. 530, 595 P.2d 679 (1979); *City of Colo. Springs v. Gladin*, 198 Colo. 333, 599 P.2d 907 (1979); *Hitti v. Montezuma Valley Irrigation Co.*, 42 Colo. App. 194, 599 P.2d 918 (1979); *Ayala v. Colo. Dept. of Rev.*, 43 Colo. App. 357, 603 P.2d 979 (1979); In re Stroud, 657 P.2d 960 (Colo. App. 1979); People in Interest of J.B.P., 44 Colo. App. 95, 608 P.2d 847 (1980); *Matthews v. Tri-County Water Conservancy Dist.*, 200 Colo. 202, 613 P.2d 889 (1980); *Prof'l Group, Ltd. v. Great Falls Props., Inc.*, 44 Colo. App. 370, 622 P.2d 76 (1980); *D.E.B. Adjustment Co. v. Cawthorne*, 623 P.2d 82 (Colo. App. 1981); *Fitzgerald v. Edelen*, 623 P.2d 418 (Colo. App. 1981); *Fort Lupton State Bank v. Murata*, 626 P.2d 757 (Colo. App. 1981); *Craig v. Rider*, 628 P.2d 623 (Colo. App. 1980); In re Stroud, 631 P.2d 168 (Colo. 1981); *Maltby v. J.F. Images, Inc.*, 632 P.2d 646 (Colo. App. 1981); In re Stedman, 632 P.2d 1048 (Colo. App. 1981); *Young v. Golden State Bank*, 632 P.2d 1053 (Colo. App. 1981); In re Van Camp, 632 P.2d 1062 (Colo. App. 1981); People in Interest of E.A., 638 P.2d 278 (Colo. 1981); In re Smith, 641 P.2d 301 (Colo. App. 1981); *Duran v. Lamm*, 644 P.2d 66 (Colo. App. 1981); *Cavanaugh v. State Dept. of Soc. Servs.*, 644 P.2d 1 (Colo. 1982); *Baum v. S.S. Kresge Co.*, 646 P.2d 400 (Colo. App. 1982); *Davis Mfg. & Supply Co. v. Coonskin Props., Inc.*, 646 P.2d 940 (Colo. App. 1982); *Jameson v. Foster*, 646 P.2d 955 (Colo. App. 1982); *Kennedy v. Leo Payne Broadcasting*, 648 P.2d 673 (Colo. App. 1982); *State Dept. of Highways v. Pigg*, 656 P.2d 46 (Colo. App. 1982); In re Chambers, 657 P.2d 458 (Colo. App. 1982); *Parry v. Walker*, 657 P.2d 1000 (Colo. App. 1982); *Ackmann v. Merchants Mtg. & Trust Corp.*, 659 P.2d 697 (Colo. App. 1982); *Moore v. Wilson*, 662 P.2d 160 (Colo. 1983); *Acme Delivery Serv., Inc., v. Samsonite Corp.*, 663 P.2d 621 (Colo. 1983); *Blecker v. Kofoed*, 714 P.2d 909 (Colo. 1986); *Blue Cross of W. New York v. Bulkumez*, 736 P.2d 834 (Colo. 1987); Top Rail Ranch Estates, LLC v. Walker, 2014 COA 9, __ P.3d __.

II. Post-Trial Motions.

A. New Trial.

The purpose of filing a post-trial motion is to give a trial court an opportunity to correct any errors. *Walter v. Walter*, 136 Colo. 405, 318 P.2d 221 (1957); *Minshall v. Pettit*, 151 Colo. 501, 379 P.2d 394 (1963); *Rowe v. Watered Down Farms*, 195 Colo. 152, 576 P.2d 172 (1978).

A motion for a new trial is not to be regarded as a routine or perfunctory matter. Its obvious purpose is to direct the attention of the trial court with at least some degree of specificity to that which the losing litigant asserts to be error, all to the end that the trial court will be afforded a last look, and an intelligent last look, at the controversy still before it. General allegations of error do not comply. *Martin v. Opdyke Agency, Inc.*, 156 Colo. 316, 398 P.2d 971 (1965); *Hamilton v. Gravinsky*, 28 Colo. App. 408, 474 P.2d 185 (1970).

Order granting new trial is an interlocutory order, and the trial court retains jurisdiction to modify or rescind the order prior to the entry of any final judgment thereafter. A motion for reconsideration of such an order does not challenge the entry of the judgment and is not subject to the limitations of this rule. *Songer v. Bowman*, 804 P.2d 261 (Colo. App. 1990).

Section (f) of this rule, through the language "if a ground exists", incorporates the six specific grounds upon which post-trial relief may be granted, which are found in section (d) of the rule. *Kincaid v. Western Oper. Co.*, 890 P.2d 249 (Colo. App. 1994).

Section (b) (now (a)) permits a motion for new trial to be filed within 10 (now 15) days after entry of judgment, which means after entry of an adverse judgment. *Bushner v. Bushner*, 141 Colo. 283, 348 P.2d 153 (1959).

Where the trial court issued its order nunc pro tunc on April 22, 1974, but the order was not noted in the registry of actions until May 31, 1974, the motion for new trial filed within 10 (now 15) days from that date was timely filed. In re Talarico, 36 Colo. App. 389, 540 P.2d 1147 (1975).

When 10-day rule not applicable. Where the court was granting plaintiff's motion for a new trial and not acting on its own motion, the 10-day rule set forth in section (b) (now (a)) of this rule was not applicable. *Park Stations, Inc. v. Hamilton*, 38 Colo. App. 216, 554 P.2d 311 (1976) (decided prior to 1977 and 1985 amendments).

Provision of section (b) (now (a)) is mandatory. *Austin v. Coll./Univ. Ins. Co. of Am.*, 30 Colo. App. 502, 495 P.2d 1162 (1972).

Section (b) (now (a)) is mandatory, and failure to comply with it requires a dismissal of the appeal. *SCA Servs., Inc. v. Gerlach*, 37 Colo. App. 20, 543 P.2d 538 (1975); *Henley v. Wendt*, 640 P.2d 271 (Colo. App. 1982).

Timely filing is jurisdictional. Timely filing of a motion for a new trial is jurisdictional. *SCA Servs., Inc. v. Gerlach*, 37 Colo. App. 20, 543 P.2d 538 (1975).

The failure to file a motion for a new trial within the time prescribed by section (b) (now (a)), as extended by any orders of court pursuant to motions timely made, deprives the court of jurisdiction and requires dismissal of the appeal. *Nat'l Account Sys. v. District Court*, 634 P.2d 48 (Colo. 1981); *Schuster v. Zwicker*, 659 P.2d 687 (Colo. 1983); *Liberty Mutual Ins. Co. v. Safeco Ins. Co.*, 679 P.2d 1115 (Colo. App. 1984); In re McSoud, 131 P.3d 1208 (Colo. App. 2006).

A timely motion for a new trial, or to alter or amend the judgment, is a jurisdictional prerequisite to appellate review of such judgment. *Watered Down Farms v. Rowe*, 39 Colo. App. 169, 566 P.2d 710 (1977), rev'd on other grounds, 195 Colo. 152, 576 P.2d 172 (1978).

Period for filing a motion for a new trial begins when notice of entry of judgment is mailed to the parties, but C.R.C.P. 6(e) extends that period when a judgment is mailed. Because C.R.C.P. 6(e) does not specifically exclude C.R.C.P. 59 motions from its provisions, C.R.C.P. 6(e) extends the time for filing a C.R.C.P. 59 motion when the parties were not present when the judgment was signed and the notice of entry of judgment was mailed to the parties. *Littlefield v. Bamberger*, 10 P.3d 710 (Colo. App. 2000).

Extension of time is discretionary. Trial judge's extension of the time for filing the motion for new trial, from 10 (now 15) to 20 days, is within his discretion. *City & County of Denver v. Bd. of Adjustment*, 31 Colo. App. 324, 505 P.2d 44 (1972).

Discretion to grant or deny belated request. Where party did not file motion for fees until 24 days after expiration of 15-day period and did not request extension of time nor offer excuse for delay, court did not abuse its discretion by denying the motion. *Major v. Chons Bros., Inc.*, 53 P.3d 781 (Colo. App. 2002).

Extension of time for filing post-trial motions. Where the trial court, following judgment, grants a "stay" in order for counsel to have an "opportunity to pursue the matter further", it intends to extend the permissible time for filing post-trial motions. *Blecker v. Kofoed*, 672 P.2d 526 (Colo. 1983).

Court of review will assume extension was properly made. Where the time for filing a motion for new trial was extended to 15 (now regular time limit) days after the entry of judgment, the court of review will assume that the extension was properly made, in the absence of proper objections to the order of the county court. *Niles v. Shinkle*, 119 Colo. 458, 204 P.2d 1077 (1949).

Failure to file motion in time is fatal. The failure to file a motion for a new trial within the time provided by this rule, or within the extended period fixed by the court for so doing, is fatal to the right of review. Therefore, the county court was without jurisdiction to entertain a motion for a new trial after the time allowed by the court; and such motion should have been stricken from the files. *Niles v. Shinkle*, 119 Colo. 458, 204 P.2d 1077 (1949); *City & County of Denver v. Just*, 175 Colo. 260, 487 P.2d 367 (1971).

Trial court proceeded in excess of its jurisdiction when it vacated the jury verdict and ordered a new trial outside of the time limits provided by this rule. The trial court had jurisdiction to order a new trial within the time limit only. *Beavers v. Archstone Comtys. Ltd.*, 64 P.3d 855 (Colo. 2003).

For permissibility of filing motion with judge or clerk, *see Sprott v. Roberts*, 154 Colo. 252, 390 P.2d 465 (1964).

Defendant must file for new trial after his case is dismissed, not after conclusion of entire case. Where a complaint is dismissed as to certain defendants and judgment of dismissal entered under C.R.C.P. 41(b)(1), a court has no power after the time to file a motion for a new trial has expired as to such defendants, to grant a motion for a new trial as to all defendants, such dismissal constituting a judgment on the merits under C.R.C.P. 41 . *Graham v. District Court*, 137 Colo. 233, 323 P.2d 635 (1958).

A judgment is entered only when noted in judgment docket. For purposes of timely filing of a motion for new trial under section (b) (now (a)) of this rule, a judgment is "entered" only upon notation in the judgment docket pursuant to C.R.C.P. 58(a)(3) (now (a)) and C.R.C.P. 79(d). *City & County of Denver v. Just*, 175 Colo. 260, 487 P.2d 367 (1971).

If this section is not complied with, supreme court cannot review. Where a record on error fails to show compliance with this section requiring the filing of a motion for a new trial, or that a trial court otherwise ordered under section (f), the supreme court will not consider the merits on review. *Sullivan v. Modern Music Co.*, 137 Colo. 292, 324 P.2d 374 (1958) (decided prior to 1985 amendment).

C.R.C.P. 6(a) does apply to extend time under this rule. *Bonanza Corp. v. Durbin*, 696 P.2d 818 (Colo. 1985).

Court did not forestall 60-day deadline by taking inconclusive action within said period, i.e. scheduling hearing on motion. *Canton Oil v. District Court*, 731 P.2d 687 (Colo. 1987).

Motion may be filed prior to entry of judgment. A motion for new trial may properly be filed prior to the execution of the

written order entering the judgment. In re Jones, 668 P.2d 980 (Colo. App. 1983).

Date of entry of judgment on jury verdict is effective date. The date that judgment on a jury verdict is entered in open court is the effective date of entry of judgment which governs the filing of a motion for new trial under section (b) (now (a)). *Henley v. Wendt*, 640 P.2d 271 (Colo. App. 1982).

C.R.C.P. 58(a) controls date of entry of judgment. The timeliness of a civil appeal is governed by C.A.R. 4(a) (appeal as of right), not C.R.C.P. 58(a); C.R.C.P. 58(a), however, does control the date of entry of judgment for the purposes of this rule. *Moore & Co. v. Williams*, 672 P.2d 999 (Colo. 1983).

When post-trial motion is filed prior to entry of judgment, it is deemed to have been filed on the date of entry of judgment, and the 60-day period within which to rule on motion commences to run from said date. People in Interest of T.R.W., 759 P.2d 768 (Colo. App. 1988).

Post-trial motions for attorney fees are subject to the provisions of this rule, and the effect of such motions upon the time limitations of C.A.R. 4(a) are as specified in this rule. *Torrez v. Day*, 725 P.2d 1184 (Colo. App. 1986).

Evidence was not "newly discovered" when the party seeking a new trial had the evidence in its possession two months prior to the trial court's judgment, but did not file the evidence with the trial court. *Mortgage Invs. Corp. v. Battle Mountain Corp.*, 70 P.3d 1176 (Colo. App. 2003).

Where there has never been a trial, this section cannot be violated. In a proceeding under the Colorado Children's Code, title 19, where it was argued that the petition for new trial and demand for jury trial were filed too late, and thus were not in accordance with section (b) (now (a)) of this rule, this argument was rejected since according to the record there had never been any trial held or evidence presented in support of the dependency petition and, hence, no violation of said section could have occurred. *C. B. v. People in Interest of J. T. B.*, 30 Colo. App. 269, 493 P.2d 691 (1971).

The running of the time for filing a notice of appeal is terminated upon the timely filing of a motion for new trial, and the time begins to run anew when that motion is denied. A subsequent motion for new trial that raises issues that either were or could have been raised in the movant's prior motion does not affect the running of the time for filing the notice of appeal. *Wright Farms, Inc. v. Weninger*, 669 P.2d 1054 (Colo. App. 1983).

Trial court erred in failing to consider a motion for new trial and motion to amend judgment which were filed after court entered judgment from bench but before judgment was signed as written order and filed. *Haynes v. Troxel*, 670 P.2d 812 (Colo. App. 1983).

For distinction between considerations governing determination of effect of time limitations in criminal cases and in civil cases, *see People v. Moore*, 193 Colo. 81, 562 P.2d 749 (1977).

Where defendant did not seek to reopen the divorce proceeding until approximately five years after entry of judgment, none of the grounds of this rule or C.R.C.P. 60 were available to him to reopen the divorce proceeding. *McNeece v.*

McNeece, 39 Colo. App. 160, 562 P.2d 767 (1977).

Extinguishing right of appeal by relating action back to date of judgment. Trial court's action in relating back matters decided on May 28 to the May 15 entry on the judgment docket had the effect of extinguishing the petitioner's right to appeal from the determinations made on May 28. Under these circumstances, the 10-day period of section (b) (now (a)) of this rule expired before the remaining issues in the case had even been determined by the trial court. This result contravenes the right of appeal granted by the Colorado constitution. In re Gardella, 190 Colo. 402, 547 P.2d 928 (1976) (decided prior to the 1977 and 1985 amendments).

Motion for judgment "non abstante" is wholly separate and distinct from motion for new trial and does not take the place of one. *Ross v. Arrow Mfg. Co.*, 134 Colo. 530, 307 P.2d 196 (1957).

A motion for a new trial may be joined with a motion for judgment "non abstante" or a new trial may be prayed in the alternative. *Ross v. Arrow Mfg. Co.*, 134 Colo. 530, 307 P.2d 196 (1957).

Granting a motion for judgment n.o.v. does not effect an automatic denial of an alternative motion for a new trial. *Grange Mut. Fire Ins. Co. v. Golden Gas Co.*, 133 Colo. 537, 298 P.2d 950 (1956).

Ruling on both should be made at same time. Where a motion for judgment notwithstanding the verdict or in the alternative for a new trial is filed under this rule, a trial court should make a ruling on both phases of the motion at the same time. *Grange Mut. Fire Ins. Co. v. Golden Gas Co.*, 133 Colo. 537, 298 P.2d 950 (1956).

This rule contemplates that either party to an action is entitled to the trial judge's decision on both motions, if both are presented. *Ross v. Arrow Mfg. Co.*, 134 Colo. 530, 307 P.2d 196 (1957).

If a trial court errs in granting the motion n.o.v., the party against whom the verdict goes is entitled to have his motion for a new trial considered in respect of asserted substantial trial errors and matters appealing to the discretion of the judge. *Ross v. Arrow Mfg. Co.*, 134 Colo. 530, 307 P.2d 196 (1957).

The cause will be remanded for a ruling on such motion. Where a motion for judgment notwithstanding the verdict or in the alternative for a new trial is filed, and the court erroneously grants the motion for judgment, leaving the motion for a new trial undecided, the cause will be remanded for a ruling on such motion. *Ross v. Arrow Mfg. Co.*, 134 Colo. 530, 307 P.2d 196 (1957).

A decision in favor of the moving party upon the motion for judgment ends the litigation and often makes it possible for an appellate court to dispose of the case without remanding it for a new trial. *Ross v. Arrow Mfg. Co.*, 134 Colo. 530, 307 P.2d 196 (1957).

Trial court may grant a motion for a new trial on all or part of the issues. *Trione v. Mike Wallen Standard, Inc.*, 902 P.2d 454 (Colo. App. 1995).

Before granting a partial new trial, it should clearly appear that the issue to be retried is entirely distinct and separable from the other issues involved in the case and that a partial retrial can be had without injustice to any party. *Bassett v.*

O'Dell, 178 Colo. 425, 498 P.2d 1134 (1972); *Trione v. Mike Wallen Standard, Inc.*, 902 P.2d 454 (Colo. App. 1995).

If a trial court, in reviewing and examining the facts, is dissatisfied with the verdict because it is against the weight, sufficiency, or preponderance of the evidence, it may, under certain limitations, set the same aside and grant a new trial so that the issues of fact may ultimately be determined. *Burenheide v. Wall*, 131 Colo. 371, 281 P.2d 1000 (1955).

In passing upon such motions, a trial judge is necessarily required to weigh the evidence, so that he may determine whether the verdict was one which might reasonably have been reached. *Singer v. Chitwood*, 126 Colo. 173, 247 P.2d 905 (1952).

The trial judge has discretion to grant a new trial before another jury if he thinks the verdict is wrong, though there be some evidence to support it, and his action is generally not subject to review on appeal. *Burenheide v. Wall*, 131 Colo. 371, 281 P.2d 1000 (1955).

Applied in *Thorpe v. Durango Sch. Dist. No. 9 -R*, 41 Colo. App. 473, 591 P.2d 1329 (1978); *Luna v. Fisher*, 690 P.2d 264 (Colo. App. 1984).

B. Judgment Notwithstanding the Verdict.

Law reviews. For article, "Colorado Criminal Procedure-Does It Meet Minimum Standards?", see 28 Dicta 14 (1951).

This rule provides the method for securing a judgment "non obstante veredicto" when a motion for a directed verdict has been properly requested. *Grange Mut. Fire Ins. Co. v. Golden Gas Co.*, 133 Colo. 537, 298 P.2d 950 (1956).

This rule adds nothing of substance to the rights of litigants previously available through a more cumbersome procedure. *Burenheide v. Wall*, 131 Colo. 371, 281 P.2d 1000 (1955).

The reason underlying this rule is that an opportunity should be given a trial court to reexamine, as a matter of law, the facts which have been considered and resolved by a jury. *Ross v. Arrow Mfg. Co.*, 134 Colo. 530, 307 P.2d 196 (1957).

Motion for directed verdict must be made at conclusion of evidence. In actions where the issues are submitted to a jury for determination, it is an essential prerequisite to the right of either party to file a motion for judgment notwithstanding the verdict that a motion for directed verdict shall have been made at the conclusion of all the evidence. *Ross v. Arrow Mfg. Co.*, 134 Colo. 530, 307 P.2d 196 (1957).

This rule does not compel a party against whom a verdict is directed to make a motion for a directed verdict in his favor as a condition to the right to file a motion for judgment notwithstanding the verdict, since a verdict having been directed by the court, the reason for the requirement no longer exists. *Ross v. Arrow Mfg. Co.*, 134 Colo. 530, 307 P.2d 196 (1957).

Where a motion to dismiss is interposed at the conclusion of all the evidence and after verdict and judgment a motion for a new trial is filed, one of the grounds thereof being that a court erred in denying the motion to dismiss made at the

conclusion of all the evidence, such motion is sufficient to authorize a trial court to enter judgment for a defendant notwithstanding the verdict. *Mountain States Mixed Feed Co. v. Ford*, 140 Colo. 224, 343 P.2d 828 (1959).

For a court to set aside a verdict as against the weight of evidence, the evidence may be merely insufficient in fact and it may be either insufficient in law or it may have more weight and not enough to justify the court in exercising the control which the law gives it to prevent unjust verdicts to allow a verdict to stand. *Gossard v. Watson*, 122 Colo. 271, 221 P.2d 353 (1950); *Singer v. Chitwood*, 126 Colo. 173, 247 P.2d 905 (1952).

This rule does not allow for a belated disturbance of a jury's finding on the facts when a reservation has been made to determine law questions only. *Wallower v. Elder*, 126 Colo. 109, 247 P.2d 682 (1952).

Filing a motion for judgment notwithstanding the verdict within 10 days after receipt of the verdict is mandatory. *Ross v. Arrow Mfg. Co.*, 134 Colo. 530, 307 P.2d 196 (1957).

Unless such motion is filed within that time, a court has no power to pass on it. *Ross v. Arrow Mfg. Co.*, 134 Colo. 530, 307 P.2d 196 (1957); *Arrow Mfg. Co. v. Ross*, 141 Colo. 1, 346 P.2d 305 (1959).

Appellate court forbidden to enter judgment. In the absence of a motion for judgment notwithstanding the verdict made in the trial court within 10 days after reception of a verdict, the rule forbids the trial judge or an appellate court to enter such a judgment. *Mero v. Holly Hudson Motor Co.*, 129 Colo. 282, 269 P.2d 698 (1954).

Standard for granting judgment n.o.v. A jury's verdict can be set aside and judgment notwithstanding the verdict entered only if the evidence is such that reasonable men could not reach the same conclusion as the jury. *Thorpe v. Durango Sch. Dist. No. 9 -R*, 41 Colo. App. 473, 591 P.2d 1329 (1978), aff'd, 200 Colo. 268, 614 P.2d 880 (1980); *Wesley v. United Servs. Auto Ass'n*, 694 P.2d 855 (Colo. App. 1984); *Smith v. Denver*, 726 P.2d 1125 (Colo. 1986); *Alzado v. Blinder, Robinson & Co., Inc.*, 752 P.2d 544 (Colo. 1988); *Nelson v. Hammond*, 802 P.2d 452 (Colo. 1990); *McCafferty v. Musat*, 817 P.2d 1039 (Colo. App. 1990).

When order enlarging time to file motion for judgment n.o.v. permissible. Although C.R.C.P. 6(b) expressly limits a trial court's ability to extend a time for acting under section (b) of this rule, there is an exception to that limitation where a party reasonably relies and acts upon an erroneous or misleading statement of ruling by a trial court regarding the time for filing post-trial motions. *Converse v. Zinke*, 635 P.2d 882 (Colo. 1981).

Motion for judgment "non abstante" is wholly separate and distinct from motion for new trial and does not take the place of one. *Ross v. Arrow Mfg. Co.*, 134 Colo. 530, 307 P.2d 196 (1957).

A motion for a new trial may be joined with a motion for judgment "non abstante" or a new trial may be prayed in the alternative. *Ross v. Arrow Mfg. Co.*, 134 Colo. 530, 307 P.2d 196 (1957).

Granting a motion for judgment n.o.v. does not effect an automatic denial of an alternative motion for a new trial. *Grange Mut. Fire Ins. Co. v. Golden Gas Co.*, 133 Colo. 537, 298 P.2d 950 (1956).

The standard for granting a motion for judgment notwithstanding the verdict is complicated when statutory

presumptions exist. Such presumptions may be rebutted only by clear and convincing evidence that persuades the finder of fact that the truth of the contention is highly probable and free from serious and substantial doubt. People in Interest of M.C., 844 P.2d 1313 (Colo. App. 1992).

This rule contemplates that either party to an action is entitled to the trial judge's decision on both motions, if both are presented. *Ross v. Arrow Mfg. Co.*, 134 Colo. 530, 307 P.2d 196 (1957).

Ruling on both should be made at same time. Where a motion for judgment notwithstanding the verdict or in the alternative for a new trial is filed under this rule, a trial court should make a ruling on both phases of the motion at the same time. *Grange Mut. Fire Ins. Co. v. Golden Gas Co*., 133 Colo. 537, 298 P.2d 950 (1956).

If a trial court errs in granting the motion n.o.v., the party against whom the verdict goes is entitled to have his motion for a new trial considered in respect of asserted substantial trial errors and matters appealing to the discretion of the judge. *Ross v. Arrow Mfg. Co*., 134 Colo. 530, 307 P.2d 196 (1957).

The cause will be remanded for a ruling on such motion. Where a motion for judgment notwithstanding the verdict or in the alternative for a new trial is filed, and the court erroneously grants the motion for judgment, leaving the motion for a new trial undecided, the cause will be remanded for a ruling on such motion. *Ross v. Arrow Mfg. Co*., 134 Colo. 530, 307 P.2d 196 (1957).

A decision in favor of the moving party upon the motion for judgment ends the litigation and often makes it possible for an appellate court to dispose of the case without remanding it for a new trial. *Ross v. Arrow Mfg. Co*., 134 Colo. 530, 307 P.2d 196 (1957).

If a trial court, in reviewing and examining the facts, is dissatisfied with the verdict because it is against the weight, sufficiency, or preponderance of the evidence, it may, under certain limitations, set the same aside and grant a new trial so that the issues of fact may ultimately be determined. *Burenheide v. Wall*, 131 Colo. 371, 281 P.2d 1000 (1955).

In ruling on motion for judgment notwithstanding the verdict, the court must determine whether a reasonable person could not have reached the same conclusion as did the jury and, in making such determination, the court cannot consider the weight of the evidence or the credibility of the witnesses and must consider the evidence in the light most favorable to the verdict. People in Interest of T.R.W., 759 P.2d 768 (Colo. App. 1988); *Tuttle v. ANR Freight Sys., Inc* ., 797 P.2d 825 (Colo. App. 1990); *Durdin v. Cheyenne Mountain Bank*, 98 P.3d 899 (Colo. App. 2004).

A judgment notwithstanding the verdict may be entered only if a reasonable person could not reach the same conclusion as the jury, when viewing the evidence in the light most favorable to the party against whom the motion is directed. Every reasonable inference that may be drawn from the evidence must be drawn in favor of the non-moving party. *Boulder Valley Sch. Dist. R-2 v. Price*, 805 P.2d 1085 (Colo. 1991).

In passing upon such motions, a trial judge is necessarily required to weigh the evidence, so that he may determine whether the verdict was one which might reasonably have been reached. *Singer v. Chitwood*, 126 Colo. 173, 247 P.2d 905 (1952).

The trial judge has discretion to grant a new trial before another jury if he thinks the verdict is wrong, though there be some evidence to support it, and his action is generally not subject to review on appeal. *Burenheide v. Wall*, 131 Colo. 371, 281 P.2d 1000 (1955).

The trial court did not view the evidence presented in appellant's favor and thereby misapplied the standard for granting a judgment notwithstanding the verdict. People in Interest of M.C., 844 P.2d 1313 (Colo. App. 1992).

Applied in *Alden Sign Co. v. Roblee*, 121 Colo. 432, 217 P.2d 867 (1950); *Farmer v. Norm "Fair Trade" Stamp, Inc.*, 164 Colo. 156, 433 P.2d 490, 36 A.L.R.3d 232 (1967); *DeCaire v. Pub. Serv. Co.*, 173 Colo. 402, 479 P.2d 964 (1971); *Wheller & Lewis v. Slifer*, 195 Colo. 291, 577 P.2d 1092 (1978); *Thorpe v. Durango Sch. Dist. No. 9 -R*, 41 Colo. App. 473, 591 P.2d 1329 (1978).

C. Amendment of Judgment.

Section (e) (now (a)) requires that a motion to alter or amend must be filed within 10 (now 15) days after entry of judgment. *Vanadium Corp. of Am. v. Wesco Stores Co.*, 135 Colo. 77, 308 P.2d 1011 (1957).

(Former) section (e) of this rule provides for the filing of a motion to alter or amend a judgment, which is the motion that is referred to in (former) section (f) of this rule, and it is not to be confused with a (former) C.R.C.P. 52(b) motion to amend the findings. *Austin v. Coll./Univ. Ins. Co. of Am.*, 30 Colo. App. 502, 495 P.2d 1162 (1972).

When trial court amends pursuant to a motion, original judgment is not final. Section (e) (now (a)) of this rule specifies that a party may move to alter or amend a judgment by a motion filed not later than 10 (now 15) days after entry of judgment. Appellee filed such a motion within the allotted time, and the trial court subsequently did amend its judgment pursuant to such motion and the supplemental motion. Under these circumstances, the original trial court's judgment never became final. It was not enforceable by either divorced party with respect to his or her property rights. It did not create an enforceable right either in the husband or in his estate to take a divided share of the joint tenancy property. *Sarno v. Sarno*, 28 Colo. App. 598, 478 P.2d 711 (1970).

A judgment amended to comply with a motion therefor is the only judgment to which a writ of error will lie. *Green v. Jones*, 134 Colo. 208, 304 P.2d 901 (1956).

C.R.C.P. 6(b) divests the court of jurisdiction to extend the time for taking action under C.R.C.P. 6(b). *Vanadium Corp. of Am. v. Wesco Stores Co.*, 135 Colo. 77, 308 P.2d 1011 (1957).

C.R.C.P. 6(b), gives trial court wide latitude in extending 10-day (now 15-day) period of section (e) (now (a)). *Farmer v. Norm "Fair Trade" Stamp, Inc.*, 164 Colo. 156, 433 P.2d 490 (1967).

Memorandum brief must be filed with motion. The rule requiring a short memorandum brief to be filed with a motion for new trial applies equally to a motion to alter or amend the judgment. *Zehnder v. Thirteenth Judicial Dist. Court*, 193 Colo. 502, 568 P.2d 457 (1977) (decided before 1985 amendment).

Court loses jurisdiction to hear plaintiff's application for attorney's fees if the plaintiff fails to file a motion to amend the

judgment within 15 days. *Wesson v. Johnson*, 622 P.2d 104 (Colo. App. 1980).

Omission of order for costs indicates no allowance of costs. As determined by the court entering judgment, the omission of an order relating to costs constitutes a direction by it that no costs, including attorney fees, are allowed. *Wesson v. Johnson*, 622 P.2d 104 (Colo. App. 1980).

Appellants barred on appeal from asserting error by trial court. Where, after two cases were tried and the parties' rights and obligations were determined by partial summary judgments which were not made final judgments under C.R.C.P. 54(b), appellants could have, and indeed should have, moved for a new trial or an altered or amended judgment under this rule and where they did not timely file such motions and allow the trial court an opportunity to review its possible errors, appellants were barred on appeal from asserting error by the trial court. *Manka v. Martin*, 200 Colo. 260, 614 P.2d 875 (1980), cert. denied, 450 U.S. 913, 101 S. Ct. 1354, 67 L. Ed. 2d 338 (1981).

Repeated assurances by the court clerk that the defendant's motion to alter and amend the judgment had been forwarded to the presiding judge when, in fact, no notification of said motion had been given to the judge did not constitute an "extreme situation" allowing relief under C.R.C.P. 60(b)(5). *Sandoval v. Trinidad Area Health Ass'n*, 752 P.2d 1062 (Colo. App. 1988).

Court properly denied motion to amend judgment in malpractice claim against attorney as defendant is not entitled to set-off fees which would otherwise have been collected from original action. *McCafferty v. Musat*, 817 P.2d 1039 (Colo. App. 1990).

Where notice of entry of judgment is mailed to only one party in contravention of C.R.C.P. 58(a), the time provided by section (a) of this rule for filing a post-trial motion commences from the date that the notice is mailed by that party to the party subsequently moving for post-trial relief. *Padilla v. D.E. Frey & Co., Inc.*, 939 P.2d 475 (Colo. App. 1997).

Trial court's property division in dissolution of marriage action reflects no abuse of discretion based on husband's economic circumstances, the characterization of property as marital or separate, or wife's depletion of marital property, where trial court did its best in dividing marital property based only on wife's evidence since husband elected not to participate in the action. In re Eisenhuth, 976 P.2d 896 (Colo. App. 1999).

Applied in *Hughes v. Worth*, 162 Colo. 429, 427 P.2d 327 (1967); Bittle v. CAM-Colo., LLC, 2012 COA 93, 318 P.3d 65.

III. On Initiative of Court.

The trial court has an immemorial right to grant a new trial whenever, in its opinion, the justice of the particular case so requires. *Brncic v. Metz*, 28 Colo. App. 204, 471 P.2d 618 (1970).

New trials are not abridged or disfavored by the new rules. The judge may even grant one on his own initiative without a motion. *Singer v. Chitwood*, 126 Colo. 173, 247 P.2d 905 (1952).

Judge may grant new trial even if party's motion is insufficient. Where plaintiffs filed a motion for new trial in apt time

on the ground of an erroneous instruction to the jury, the fact that the court granted a new trial on a portion of motion which correctly stated the law and hence was insufficient to justify granting the new trial did not support claim that the court erroneously acted upon its own initiative under this rule where the instruction was patently erroneous in other respects. *Callaham v. Slavsky*, 153 Colo. 291, 385 P.2d 674 (1963).

C.R.C.P. 51, does not apply to trial court when it sua sponte grants new trial. The purposes of the contemporaneous objection requirement of C.R.C.P. 51 are not violated when the trial court acts on its own initiative to order a new trial under this rule. *First Nat'l Bank v. Campbell*, 198 Colo. 344, 599 P.2d 915 (1979).

Where status of minor children at stake, court remanded for findings. While a motion may fail to comply strictly with the requirements of this rule when the status of minor children is at stake, a court of appeals will notice error in the trial court proceedings and remand for findings. In re Brown, 626 P.2d 755 (Colo. App. 1981).

An order enlarging the time within which to file a motion for judgment n.o.v. is without effect in view of the provisions of C.R.C.P. 6(b). *Mumm v. Adam*, 134 Colo. 493, 307 P.2d 797 (1957).

C.R.C.P. 6(b) provides that a court may not extend the time for taking any action under this rule. *Ross v. Arrow Mfg. Co*., 134 Colo. 530, 307 P.2d 196 (1957).

District court exceeded its jurisdiction by ordering, sua sponte, a new trial on all the issues of marriage dissolution proceeding because the district court acted outside its time limits mandated by section (c) of this rule to initiate such post-trial relief and failed to state adequate grounds for a new trial as required by said rule. *Koch v. District Court, Jefferson County*, 948 P.2d 4 (Colo. 1997).

IV. Grounds for New Trial.

A. In General.

Annotator's note. Since former subsection (a)(1) (now (d)(1)) of this rule is similar to § 237 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Use of "shall" in section (a). Prior to 1985, former section (a) of this rule specified that the memorandum brief "shall be filed with the motion". There is a presumption that the word "shall" when used in a statute or rule is mandatory. *Anlauf Lumber Co. v. West-Fir Studs, Inc*., 35 Colo. App. 119, 531 P.2d 980 (1974), aff'd, 190 Colo. 298, 546 P.2d 487 (1976) (decided prior to the 1985 amendment).

This rule specifies that an application for new trial, under certain circumstances, "shall be supported by affidavit", and there is a presumption that the word "shall" when used in a statute or rule is mandatory. *Park Stations, Inc., v. Hamilton*, 38 Colo. App. 216, 554 P.2d 311 (1976); In re Fleet, 701 P.2d 1245 (Colo. App. 1985).

Notwithstanding the affidavit requirement in section (d) of this rule, C.R.E. 606(b) acts to preclude juror affidavits as a basis for seeking post-trial relief, unless the exceptions in that rule apply. *Stewart v. Rice*, 47 P.3d 316 (Colo. 2002).

Issues must be preserved for consideration on appeal. Where a party fails to preserve issues for review in his motion for a new trial or in his motion to amend judgment, the court will not consider them on appeal. *Hawkins v. Powers*, 635 P.2d 915 (Colo. App. 1981).

Court not required to act in absence of affidavit. Upon receipt of a motion for a new trial on those grounds which, according to the rules, must be supported by affidavit, the court is not required to act in the absence of such affidavit. *Park Stations, Inc., v. Hamilton*, 38 Colo. App. 216, 554 P.2d 311 (1976).

A motion to alter or amend judgment, or for new trial, does not in itself amount to a memorandum brief. *Zehnder v. Thirteenth Judicial Dist. Court*, 193 Colo. 502, 568 P.2d 457 (1977) (decided prior to the 1985 amendment).

Where events forming the basis for the granting of a new trial occurred in the presence of the court and during the trial, the trial judge obviously had sufficient first hand knowledge to determine whether there was adequate ground for a new trial under this rule, and, under such circumstances, the absence of an affidavit does not deprive the court of the power to grant relief. *Park Stations, Inc. v. Hamilton*, 38 Colo. App. 216, 554 P.2d 311 (1976).

Where a motion for a new trial is based on misconduct of counsel which occurred in the presence of the court, the court may act upon and grant such motion even if no affidavit is submitted. *Park Stations, Inc. v. Hamilton*, 38 Colo. App. 216, 554 P.2d 311 (1976).

New trial may be granted upon misconduct of counsel. The granting of a new trial may be founded upon counsel's misstatements of fact, or on his statements of fact which have not been introduced in or established by evidence, or on a finding that counsel has made a statement or argument appealing to the emotions and prejudices of the jury. *Park Stations, Inc. v. Hamilton*, 38 Colo. App. 216, 554 P.2d 311 (1976).

A new trial is not granted for misconduct of counsel as a disciplinary measure, but to prevent a miscarriage of justice. *Park Stations, Inc. v. Hamilton*, 38 Colo. App. 216, 554 P.2d 311 (1976).

Fact that the court found defendant's counsel to be guilty of misconduct during the course of the trial for more reasons than those alleged by plaintiff does not put the court in the position of acting on its own initiative in granting motion for new trial. *Park Stations, Inc. v. Hamilton*, 38 Colo. App. 216, 554 P.2d 311 (1976).

Filing of motion tolls time for filing notice of appeal. The filing of a motion to alter or amend a judgment tolls the running of the time for filing notice of appeal. *Valenzuela v. Mercy Hosp*., 34 Colo. App. 5, 521 P.2d 1287 (1974).

Affidavit filed after time allowed is not to be considered. An affidavit filed in support of a motion for a new trial without leave of the court, and after the time limited by a previous order, is not to be considered. *Denver & R. G. R. R. v. Heckman*, 45 Colo. 470, 101 P. 976 (1909).

Sufficiency of affidavit required. An affidavit merely stating what the opposing counsel had directed his client to do, but not showing that in fact anything was done pursuant to the direction, is insufficient to convict the party of misconduct. *Denver & R. G. R. R. v. Heckman*, 45 Colo. 470, 101 P. 976 (1909).

The requirement of an affidavit presupposes that the affiant has firsthand information rather than possessing only hearsay. *Hansen v. Dillon*, 156 Colo. 396, 400 P.2d 201 (1965).

The reception of oral testimony at the time the motion for new trial is under consideration is a matter within the discretion of the trial court. The record in the instant case does not suggest an abuse of this discretion. *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913).

Hearsay and conclusory allegations are insufficient under rule. *Peoples Natural Gas Div. v. Pub. Utils. Comm'n*, 626 P.2d 159 (Colo. 1981).

B. Irregularity in Proceedings.

Ruling on motion for new trial on ground of misconduct of witness is within discretion of trial court. *Hicks v. Cramer*, 85 Colo. 409, 277 P. 299 (1929); *Simon v. Williams*, 123 Colo. 505, 232 P.2d 181 (1951).

Ruling will not be disturbed in absence of showing that the court's discretion was abused. *Hicks v. Cramer*, 85 Colo. 409, 277 P. 299 (1929).

For when discretion is allowed, *see Simon v. Williams*, 123 Colo. 505, 232 P.2d 181 (1951).

The finding of the court cannot be disturbed unless it was manifestly against the weight of the testimony. *Liutz v. Denver City Tramway Co*., 54 Colo. 371, 131 P. 258 (1913).

Objection on ground of misconduct of witness must be made before verdict. A party to a trial who, although knowing of apparent misconduct on the part of a witness, remains silent until after the verdict has gone against him, may not then assign such misconduct as a ground for a new trial. *Hicks v. Cramer*, 85 Colo. 409, 277 P. 299 (1929).

Conduct of witness held insufficient to warrant reversal. The fact that a witness was seen in conversation with a juror during a recess of the court, is insufficient to warrant a reversal of the judgment, where there was nothing to indicate any attempt to influence the juror. *Hicks v. Cramer*, 85 Colo. 409, 277 P. 299 (1929).

Giving cigars to jurors after verdict is not grounds for new trial. The fact that the attorney of the successful party treated four of the jurors to cigars, after the verdict, merely in a way of civility, and without any design or forethought, held no ground to vacate the verdict, though the court suggested that, upon ethical grounds the act of the attorney was indiscreet. *Liutz v. Denver City Tramway Co*., 54 Colo. 371, 131 P. 258 (1913).

Improper remarks by employees of a party to jury may be grounds for new trial. If persons employed by a suitor hang about the purlieus of the court, mingle with those summoned as jurors, converse with them touching causes in which the suitor is concerned, and by flattery, ridicule, and like insidious means, endeavor to improperly influence them, a verdict shown to have been influenced by such practices should be unhesitatingly vacated. *Liutz v. Denver City Tramway Co*., 54 Colo. 371, 131 P. 258 (1913).

Improper remarks to jurors which manifestly had no effect upon their deliberations are not ground for a new trial. *Liutz v. Denver City Tramway Co*., 54 Colo. 371, 131 P. 258 (1913).

Seeing of excluded exhibit by jury may be grounds for new trial. A mistake or inadvertence whereby the jury was permitted to have access to an exhibit which had been excluded from consideration was an irregularity in the proceedings, and under the provisions of this rule, the proper method of presenting it in a motion for a new trial is to support and file an affidavit with the motion. *Maloy v. Griffith*, 125 Colo. 85, 240 P.2d 923 (1952).

If trial court instructs jury on improper closing remarks, there are no grounds for new trial. Where remarks in closing argument are improper but the trial court immediately and subsequently properly instructs, the reviewing court must presume that the jury followed the trial court's instructions, such not constituting grounds for new trial. *Candelaria v. People*, 177 Colo. 136, 493 P.2d 355 (1972).

Denial of a motion for a continuance because of the unavoidable absence of a party during litigation is grounds for the granting of a new trial because the attendance of a litigant is necessary for a fair presentation of his case. *Gonzales v. Harris*, 189 Colo. 518, 542 P.2d 842 (1975).

For deficiency in trial record which requires reversal of judgment but not new trial, *see Moore v. Fischer*, 31 Colo. App. 425, 505 P.2d 383 (1972), aff'd, 183 Colo. 392, 517 P.2d 458 (1973).

No relief under this rule for malpractice of party's own attorney. In re Jaeger, 883 P.2d 577 (Colo. App. 1994).

Untimely filing of motion contending irregularity in proceedings fails because the court was deprived of jurisdiction after the time allowed by section (a) had run. When plaintiff did not argue that the trial court erred in ruling her motion under this rule was untimely, she was considered to have abandoned the issue of timeliness. In re McSoud, 131 P.3d 1208 (Colo. App. 2006).

C. Misconduct of Jury.

Annotator's note. Since subsection (a)(2) (now (d)(2)) of this rule is similar to § 237 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Disposition of motion is within discretion of trial court. Disposition of a motion for a new trial based on the ground of misconduct of jurors is within the sound discretion of the trial court. *Denver Alfalfa Milling & Prods. Co. v. Erickson*, 7 7 Colo. 583, 239 P. 17 (1925).

Verdict set aside where misconduct revealed. Jury verdict will be set aside when juror's affidavit revealed certain misconduct on the part of one or more of the jurors. *Santilli v. Pueblo*, 184 Colo. 432, 521 P.2d 170 (1974).

Ruling on motion will not be disturbed on review, unless the discretion has been abused or the ruling is manifestly against the weight of the evidence. *Denver Alfalfa Milling & Prods. Co. v. Erickson*, 7 7 Colo. 583, 239 P. 17 (1925).

Test of misconduct is capacity of influencing result. The test for determining whether a new trial will be granted because of the misconduct of jurors or the intrusion of irregular influences is whether such matters could have a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs and the court's charge. If the irregular matter has that tendency on the face of it, a new trial should be granted without further inquiry as to its actual effect. The test is not whether the irregular matter actually influenced the result, but whether it had the capacity of doing so. *Butters v. Wann*, 147 Colo. 352, 363 P.2d 494 (1961); *T.S. v. G.G.*, 679 P.2d 118 (Colo. App. 1984); *People v. Wadle*, 77 P.3d 764 (Colo. App. 2003), aff'd, 97 P.3d 932 (Colo. 2004).

Sympathy for a plaintiff's injured condition is not tantamount to the passion or prejudice necessary to overturn a jury verdict. *Whitlock v. Univ. of Denver*, 712 P.2d 1072 (Colo. App. 1985), rev'd on other grounds, 744 P.2d 54 (Colo. 1987).

Test is determined as a matter of law. It is not the province of the court to speculate, conjecture or determine what or how much effect upon a verdict the gross misconduct of a juror or jurors may in fact have in a particular case. While a correct determination might be possible in some cases, the inquiry would be impractical and fruitless in many cases and in all cases contain an element of speculation. The proper function of the court is to hear the facts of the alleged misconduct and to determine as a matter of law the effect reasonably calculated to be produced upon the minds of the jury by such misconduct. *Butters v. Wann*, 147 Colo. 352, 363 P.2d 494 (1961); People v. Wadle, 77 P.3d 764 (Colo. App. 2003), aff'd, 97 P.3d 932 (Colo. 2004).

A new trial on all issues, not the granting of remittitur of the verdict, must be ordered when a trial court makes a finding that an excessive jury verdict resulted from bias, prejudice, or passion. *Whitlock v. Univ. of Denver*, 712 P.2d 1072 (Colo. App. 1985), rev'd on other grounds, 744 P.2d 54 (Colo. 1987).

Movant seeking to set aside verdict based upon jury misconduct must establish fact of improper communication and as a result thereof the movant was prejudiced. *Ravin v. Gambrell by and through Eddy*, 788 P.2d 817 (Colo. 1990).

A party seeking a new trial on the basis of a jury's improper exposure to extraneous information must establish that the information was revealed to the jury and that it had the capacity to influence the verdict. *Destination Travel, Inc. v. McElhanon*, 799 P.2d 454 (Colo. App. 1992); *Stevens v. Humana of Delaware, Inc.*, 832 P.2d 1076 (Colo. App. 1992).

Misconduct of a juror, if known to counsel, should be made the ground of objection at the time, and before the cause is submitted. If first suggested in the motion for a new trial it is within the discretion of the court to disregard it. *Denver City Tramway Co. v. Armstrong*, 21 Colo. App. 640, 123 P. 136 (1912).

The reason for a supporting affidavit where there is an accusation of juror misconduct is to require the movant to prove his good faith and, by particularizing, demonstrate that his serious allegation of juror misconduct is based on knowledge, not suspicion or mere hope. *Cawthra v. City of Greeley*, 154 Colo. 483, 391 P.2d 876 (1964).

Motion unsupported by affidavit denied summarily. A motion for new trial based on alleged juror misconduct unsupported by affidavit, and lacking any indication that the movant had a legal excuse for its failure to do so, should be summarily denied. *Cawthra v. City of Greeley*, 154 Colo. 485, 391 P.2d 876 (1964); *Hansen v. Dillon*, 156 Colo.

396, 400 P.2d 201 (1965).

Juror affidavit revealing that some jury members had stated that they had learned of codefendant's plea of guilty was insufficient to impeach jury verdict when it was determined from questioning jurors that they learned of plea only after completion of their deliberations. *People v. Thornton*, 712 P.2d 1095 (Colo. App. 1985).

Only the affidavit of losing counsel, and itself largely hearsay and conclusionary, is insufficient. *Hansen v. Dillon*, 156 Colo. 396, 400 P.2d 201 (1965).

A quotient verdict as such is invalid. A quotient verdict, as such, is invalid, but where there is no antecedent agreement, or if after the quotient is ascertained, the jury proceeds to discuss and consider the propriety of the rendition of a verdict for an amount equal to the quotient, the verdict is good. *City of Colo. Springs v. Duff*, 15 Colo. App. 437, 62 P. 959 (1900); *City & County of Denver v. Talarico*, 99 Colo. 178, 61 P.2d 1 (1936).

Quotient verdict will be permitted to stand if it is an expression of deliberation. Quotient verdict, shown to have been afterwards voted upon and accepted by the jury as a legitimate expression of their deliberations, will be permitted to stand upon a showing of very little proof in this direction. *Pawnee Ditch & Imp. Co. v. Adams*, 1 Colo. App. 250, 28 P. 662 (1891); *Greeley Irrigation Co. v. Von Trotha*, 48 Colo. 12, 108 P. 985 (1910).

Impeachment of a verdict on grounds which delve into the mental processes of the jury deliberation is not permitted. *Santilli v. Pueblo*, 184 Colo. 432, 521 P.2d 170 (1974); *Rome v. Gaffrey*, 654 P.2d 333 (Colo. App. 1982).

Extrajudicial investigation on inadmissible matters was manifestly improper. The question of the deceased's contributory negligence and his intoxication at the time of the accident was material. The extrajudicial investigation made during the course of the trial by the juror of the deceased's drinking habits, intoxication on other occasions, and the revocation of his driver's license, matters which had been specifically declared incompetent and inadmissible by the court, is misconduct as a matter of law the tendency of which is to influence the mind of the juror and for which a new trial should have been granted. In such cases the court should not consider whether the verdict was or was not influenced by the petitioner. The conduct complained of is so manifestly improper that there is but one course open. *Butters v. Wann*, 147 Colo. 352, 363 P.2d 494 (1961).

A new trial is not automatically required whenever a jury is exposed to extraneous information during trial or deliberations. *Stevens v. Humana of Delaware, Inc*., 832 P.2d 1076 (Colo. App. 1992).

Extraneous information concerning the symptoms of a disease listed on a grocery bag obtained by a juror did not require a new trial. *Stevens v. Humana of Delaware, Inc*., 832 P.2d 1076 (Colo. App. 1992).

D. Accident or Surprise.

Annotator's note. Since subsection (a)(3) (now (d)(3)) of this rule is similar to § 237 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Surprise must be called to attention of court at trial. A party cannot avail himself of a motion for a new trial on the ground of surprise unless he calls the attention of the court to the matter at the time when it occurs and asks for proper relief. It is too late for him to manifest his surprise for the first time after the cause has been submitted to the jury and a verdict rendered against him. *Outcalt v. Johnston*, 9 Colo. App. 519, 49 P. 1058 (1897); *Agnew v. Mathieson*, 26 Colo. App. 59, 140 P. 484 (1914).

Untimely filing of motion contending "accident or surprise" fails because the court was deprived of jurisdiction after the time allowed by section (a) had run. When plaintiff did not argue that the trial court erred in ruling her motion under this rule was untimely, she was considered to have abandoned the issue of timeliness. In re McSoud, 131 P.3d 1208 (Colo. App. 2006).

E. Newly Discovered Evidence.

Annotator's note. Since subsection (a)(4) (now (d)(4)) of this rule is similar to § 237 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Motions for new trial on ground of newly discovered evidence are viewed with suspicion. *Sebold v. Rieger*, 26 Colo. App. 209, 142 P. 201 (1914); *Eachus v. People*, 77 Colo. 445, 236 P. 1009 (1925); *Gasper v. People*, 83 Colo. 341, 265 P. 97 (1928).

Granting of new trial is a matter of trial court's discretion. Whether to grant a new trial because of newly discovered evidence is a matter that lies within the sound discretion of the trial court. *Am. Nat'l Bank v. Christensen*, 28 Colo. App. 501, 476 P.2d 281 (1970); *Meyer v. Schwartz*, 638 P.2d 821 (Colo. App. 1981).

In the absence of abuse of discretion the judge's decision on the merits of a motion for new trial will not be disturbed. *Bushner v. Bushner*, 141 Colo. 283, 348 P.2d 153 (1959); *Hudson v. Am. Founders Life Ins. Co*., 151 Colo. 54, 377 P.2d 391 (1962).

New trial is to be granted only if the newly discovered evidence, if received, would probably change the result. *Crespin v. Largo Corp*., 698 P.2d 826 (Colo. App. 1984), aff'd, 727 P.2d 1098 (Colo. 1986).

The following requirements are essential to sustain a motion for new trial on the grounds of newly discovered evidence: (1)The evidence could not have been discovered in the exercise of reasonable diligence and produced at the trial; (2)the evidence is material to some issue before the court under the pleadings; (3)if received, the evidence would probably change the result. *Kennedy v. Bailey*, 169 Colo. 43, 453 P.2d 808 (1969); *Am. Nat'l Bank v. Christensen*, 28 Colo. App. 501, 476 P.2d 281 (1970); *C.K.A. v. M.S*., 695 P.2d 785 (Colo. App. 1984), cert. denied, 705 P.2d 1391 (Colo. 1985); *Durbin v. Bonanza Corp*., 716 P.2d 1124 (Colo. App. 1986); *People v. Distel*, 759 P.2d 654 (Colo. 1988).

Three factors affecting decision under subsection (d)(4), as adopted in cases interpreting this rule, are not discrete items that lend themselves to mechanistic application, but rather are closely interrelated and require the exercise of a

prudential judgment informed by considerations of fundamental fairness. *Aspen Skiing Co. v. Peer*, 804 P.2d 166 (Colo. 1991).

For necessity of evidence being sufficient to change result, *see Colo. Springs & Interurban Ry. v. Fogelsong*, 42 Colo. 341, 94 P. 356 (1908); *Specie Payment Gold Mining Co. v. Kirk*, 56 Colo. 275, 139 P. 21 (1914); *Lanham v. Copeland* , 66 Colo. 27, 178 P. 562 (1919); *Wiley v. People*, 71 Colo. 449, 207 P. 478 (1922); *Eachus v. People*, 77 Colo. 445, 236 P. 1009 (1925); *Heishman v. Hope*, 79 Colo. 1, 242 P. 782 (1925); *Warshauer Sheep & Wool Co. v. Rio Grande State Bank*, 81 Colo. 463, 256 P. 21 (1927); *Trinidad Creamery Co. v. McDonald*, 82 Colo. 328, 259 P. 1028 (1927); *City of Ft. Collins v. Smith*, 84 Colo. 511, 272 P. 6 (1928); *Schlessman v. Brainard*, 104 Colo. 514, 92 P.2d 749 (1939).

Party cannot reframe issues where facts were known at time of trial. No issue of mental competency was raised in the probate court during the trial of this action, despite the fact that counsel for plaintiffs were aware of the fact that an issue of competency had been raised in the federal court and could have been made in the probate court. In legal effect, the motions for new trial were insufficient and made no showing of the discovery of any new evidence which was pertinent to any issue tried in the probate court. Actually, the plaintiffs attempt to reframe the issues and inject into the proceedings a complete new theory upon which they elected not to rely at the time of the trial. *Kennedy v. Bailey*, 169 Colo. 43, 453 P.2d 808 (1969).

A motion for a new trial on the ground of newly discovered evidence will not be granted where counsel seeks to advance at a second trial a new theory based on different evidence which was available during the first trial. People in Interest of P.N., 663 P.2d 253 (Colo. 1983).

A new trial is not to be awarded for the discovery of evidence merely cumulative. *Griffin v. Carrig*, 23 Colo. App. 313, 128 P. 1126 (1913); *Hudson v. Am. Founders Life Ins. Co*., 151 Colo. 54, 377 P.2d 391 (1962).

It is error to grant a new trial on the ground of newly discovered evidence, when such evidence would be immaterial. *Warshauer Sheep & Wool Co. v. Rio Grande State Bank*, 81 Colo. 463, 256 P. 21 (1927).

Newly discovered evidence to justify the granting of a new trial must be relevant and material. *Barton v. Laws*, 4 Colo. App. 212, 35 P. 284 (1894).

New trial will not be granted for new evidence which is merely impeaching or discrediting. The general rule is that a new trial will not be granted for new evidence which is merely impeaching or discrediting. Hence, impeaching evidence which is merely cumulative of what might have been produced at the trial is not a sufficient ground for a new trial. *Trinidad Creamery Co. v. McDonald*, 82 Colo. 328, 259 P. 1028 (1927).

Denial of motion for new trial upheld where newly discovered evidence allegedly demonstrating that plaintiff perjured himself at trial could have been obtained through reasonable diligence more than two years prior to trial. *Aspen Skiing Co. v. Peer*, 804 P.2d 166 (Colo. 1991).

Denial of motion for new trial was proper where defendant was not denied access to her bank balance and account

activity and could, therefore, have discovered the canceled checks showing payment of the disputed insurance premiums. *CNA Ins. Co. v. Berndt*, 839 P.2d 492 (Colo. App. 1992).

Application for new trial should be supported by affidavit. In an application for a new trial on the ground of newly discovered evidence, the application should be supported by an affidavit of the newly discovered witness, stating the facts to which he will testify, and if such affidavit is not attached to the application, there should be a showing that it was impossible or impracticable to secure the same. *Wiley v. People*, 71 Colo. 449, 207 P. 478 (1922).

Affidavit must show that by exercise of reasonable diligence such evidence could not have been produced. If it does not appear from the affidavits in support of a motion for new trial, on the ground of newly discovered evidence, that by the exercise of reasonable diligence such evidence could not have been produced at the trial, the showing is insufficient. *Outcalt v. Johnston*, 9 Colo. App. 519, 49 P. 1058 (1897).

The affidavits for a new trial on the ground of newly discovered evidence must show the efforts made by the applicant to locate the additional witnesses proposed to be examined, and must exclude all inference of delay or neglect on the part of the applicant. Evidence as to matters not controverted on the trial will not suffice. *Sebold v. Rieger*, 26 Colo. App. 209, 142 P. 201 (1914).

For denial of new trial because party made no effort to present evidence, *see Sall v. Sall*, 173 Colo. 464, 480 P.2d 576 (1971).

Where application is based upon the recent discovery of a document, a copy thereof should be set forth, or at least the substance of it shown; otherwise its pertinency as evidence does not appear. *Colo. & S. Ry. v. Breniman*, 22 Colo. App. 1, 125 P. 855 (1912).

The affidavit of counsel, based upon information and belief, of what a witness will testify is insufficient to secure a new trial on the ground of newly discovered evidence. *Cole v. Thornburg*, 4 Colo. App. 95, 34 P. 1013 (1893).

After reversal, initially successful party may move for new trial. After reversal by the supreme court the party originally successful in the trial court can file a motion for new trial on the ground of newly discovered evidence, and only on that ground. To hold otherwise would deprive a party of an absolute right he would have had if the trial judge had made no error. *Bushner v. Bushner*, 141 Colo. 283, 348 P.2d 153 (1959).

Where the contention is that perjury has been committed, the motion for a new trial must be grounded upon newly discovered evidence. *Buchanan v. Burgess*, 99 Colo. 307, 62 P.2d 465 (1936); *Schlessman v. Brainard*, 104 Colo. 514, 92 P.2d 749 (1939).

Motion for new trial held properly overruled. In an action for damages resulting from an automobile accident, the contention of defendant that a new trial should have been granted on the ground of newly discovered evidence was considered and overruled. *Morgan v. Gore*, 96 Colo. 508, 44 P.2d 918 (1935).

Newly discovered evidence must be credible. In order for newly discovered evidence to serve as a basis for granting a

new trial, it must be credible. *Crespin v. Largo Corp*., 698 P.2d 826 (Colo. App. 1984), aff'd, 727 P.2d 1098 (Colo. 1986).

Although determining the credibility of a witness is normally the function of the trier of fact, when dealing with a motion for new trial based on newly discovered evidence, the trial court necessarily must include a determination of credibility in its evaluation of whether the new evidence would, if received, change the result already reached. *Crespin v. Largo Corp*., 698 P.2d 826 (Colo. App. 1984), aff'd, 727 P.2d 1098 (Colo. 1986).

Denial of motion for new trial upheld. *Phillips v. Monarch Recreation Corp*., 668 P.2d 982 (Colo. App. 1983); Gilmore v. Rubeck, 708 P.2d 486 (Colo. App. 1985).

Standards set forth in subsection (a)(4) (now (d)(4)) are not unduly rigorous when applied to evidence discovered after an order for summary judgment has been entered. *DuBois v. Myers*, 684 P.2d 940 (Colo. App. 1984).

F. Excessive or Inadequate Damages.

Annotator's note. Since subsection (a)(5) (now (d)(5)) of this rule is similar to § 237 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Excessive damages are legitimate grounds for granting a motion for new trial. *Leo Payne Pontiac, Inc. v. Ratliff*, 29 Colo. App. 386, 486 P.2d 477 (1971), modified, 178 Colo. 361, 497 P.2d 997 (1972).

Award of inadequate damages is a proper ground for the granting of a new trial. *Roth v. Stark Lumber Co*., 31 Colo. App. 121, 500 P.2d 145 (1972).

New trial may be had as to single issue of damages. Where damages assessed by verdict were grossly inadequate and there was no need of another trial on other issues raised in a negligence action, new trial would be granted as to damages only. *Whiteside v. Harvey*, 124 Colo. 561, 239 P.2d 989 (1951).

When an award of damages is excessive but liability is clear, it may be permissible to order a new trial limited to the issue of damages only. *Marks v. District Court*, 643 P.2d 741 (Colo.), cert. denied, 458 U.S. 1107, 102 S. Ct. 3486, 73 L. Ed. 2d 1368 (1982).

Excessive verdict based on bias requires new trial. Where the trial judge makes a finding that the excessive jury verdict resulted from bias, prejudice, and passion, firmly established precedent requires that a new trial on all issues be granted. *Marks v. District Court*, 643 P.2d 741 (Colo.), cert. denied, 458 U.S. 1107, 102 S. Ct. 3486, 73 L. Ed. 2d 1368 (1982).

Where the issue of liability is properly determined, but the jury has failed in its function adequately to assess the compensation required, it is mandatory that the court order a new trial on the issue of damages alone. *Brncic v. Metz*, 28 Colo. App. 204, 471 P.2d 618 (1970).

Court may order new trial on all issues where motion limited to damages. A party by moving for a new trial on the question of damages only cannot restrict the judge so as to prevent the exercise of sound judicial discretion. *Dale v. Safeway Stores, Inc*., 152 Colo. 581, 383 P.2d 795 (1963).

Where jury refuses to award compensatory damages, new trial on damages alone is warranted. Where the jury failed in its function in rendering a verdict by refusing to recognize the undisputed facts concerning plaintiff's injuries and to award him compensatory damages to which he was entitled, a new trial on the issue of damages only is warranted. *Kistler v. Halsey*, 173 Colo. 540, 481 P.2d 722 (1971).

New trial on the issue of damages only is warranted when there are undisputed facts as to injuries. In an action by a bicyclist seeking damages for injuries suffered as a result of an intersection pickup truck-bicycle collision, where the verdict, considering the undisputed evidence of severe multiple physical injuries sustained by plaintiff, was manifestly inadequate, indicating that the jury disregarded the trial court's instructions on damages, held a new trial on issue of damages only is warranted since the jury failed in its function to render a true verdict by refusing to recognize the undisputed facts concerning plaintiff's injuries and to award him compensatory damages to which he was entitled. *Kistler v. Halsey*, 173 Colo. 540, 481 P.2d 722 (1971).

Plaintiff's participation in new trial on damages alone waives other objections. Where plaintiffs, dissatisfied with verdict on first trial, file a motion for additur or a new trial on the question of damages only and the trial court grants a new trial on all issues, the plaintiffs by voluntarily participating in the second trial as ordered by the trial court waive any other error occurring in first trial. *Dale v. Safeway Stores, Inc*., 152 Colo. 581, 383 P.2d 795 (1963).

Verdict must be manifestly inadequate to be set aside. It is an abuse of discretion on the part of the court to set aside the verdict of the jury and grant a new trial solely on the ground of inadequacy of the verdict unless, under the evidence, it can be definitely said that the verdict is grossly and manifestly inadequate, or unless the amount thereof is so small as to clearly and definitely indicate that the jury neglected to take into consideration evidence of pecuniary loss or were influenced either by prejudice, passion or other improper considerations. *Lehrer v. Lorenzen*, 124 Colo. 17, 233 P.2d 382 (1951); *King v. Avila*, 12 7 Colo. 538, 259 P.2d 268 (1953); *DeMott v. Smith*, 29 Colo. App. 531, 486 P.2d 451 (1971).

Where plaintiff's evidence showed damages considerably in excess of the original jury award and the trial court could properly determine that the jury disregarded the instructions or ignored the evidence, there is no error in granting a new trial on the issue of damages. *Thorpe v. City & County of Denver*, 30 Colo. App. 284, 494 P.2d 129 (1971).

Jury damage award set aside on basis of inadequacy when evidence was undisputed with respect to the existence and nature of the injuries sustained, and the jury failed to award any damages for noneconomic losses. *Martinez v. Shapland*, 833 P.2d 837 (Colo. App. 1992).

Retrial on damages only was ordered because of the inconsistency in the damage award of the jury. The award of $3,000 for economic losses for the treatment and alleviation of pain is inconsistent with the award of zero dollars for noneconomic damages. *Kepley v. Kim*, 843 P.2d 133 (Colo. App. 1992).

When a new trial will be granted for excessive or inadequate damages rests in the discretion of the trial court, in cases where there is no legal measure of damages, or where the correctness of the result is not determinable by any definite and precise rule. *Clark v. Aldenhoven*, 26 Colo. App. 501, 143 P. 267 (1914).

The court of review will not interfere where there is evidence to support the verdict. *Clark v. Aldenhoven*, 26 Colo. App. 501, 143 P. 267 (1914).

Neither the Colorado supreme court nor any other appellate tribunal stands in as good a position as the trial court to review the relationship between an award of exemplary damages and the purposes these damages are to serve and, absent a clear abuse of discretion, the trial court's determination in this regard will not be disturbed on review. *eo Payne Pontiac, Inc. v. Ratliff*, 178 Colo. 361, 497 P.2d 997 (1972).

Trial court may give prevailing party option to remit excessive damages. Following a motion for a new trial based on excessive damage, the trial judge may grant the motion for a new trial, but at the same time give the prevailing party the option of remitting that portion of the jury's award which is deemed to be excessive, or facing a new trial on damages. If the prevailing party thereafter remits this portion of the award, the trial court would thereupon deny the motion for a new trial and enter a final judgment. *Leo Payne Pontiac, Inc. v. Ratliff*, 178 Colo. 361, 497 P.2d 997 (1972); *McCrea & Co. Auctioneers, Inc. v. Dwyer Auto Body*, 799 P.2d 394 (Colo. App. 1989).

A trial court has the power to grant a new trial under this rule or, in the alternative, to deny the new trial on the condition that the plaintiff will agree to a remittitur of the amount of the damages found by the court to be excessive. *Marks v. District Court*, 643 P.2d 741 (Colo.), cert. denied, 458 U.S. 1107, 102 S. Ct. 3486, 73 L. Ed. 2d 1368 (1982).

Option of remittitur or new trial permissible where damages manifestly excessive. The option of remittitur or new trial is permissible in cases where the trial court considers the damages manifestly excessive, subsection (a)(5) (now (d)(5)), but cannot conclude that the damages were a product of bias, prejudice, or passion. *Burns v. McGraw-Hill Broadcasting Co*., 659 P.2d 1351 (Colo. 1983); *E-470 Pub. Hwy. Auth. v. Jagow*, 30 P.3d 798 (Colo. App. 2001), aff'd, 49 P.3d 1151 (Colo. 2002).

Remittitur appropriate where evidence did not show that damages for fraud and those for breach of contract were separate and distinct, nor that damages for business interference were greater than or different from lost profits resulting from the breach. *McCrea & Co. Auctioneers, Inc. v. Dwyer Auto Body*, 799 P.2d 394 (Colo. App. 1989).

Remittitur is not sustainable where the amount of damages awarded is supported by the court's instruction and the evidence presented or, alternatively, where the plaintiff is not offered an opportunity to refuse the modified amount and request a new trial. *Belfor USA Group v. Rocky Mtn. Caulking & Waterproofing*, 159 P.3d 672 (Colo. App. 2006).

Trial court must enter findings to support order of remittitur. *Belfor USA Group v. Rocky Mtn. Caulking & Waterproofing*, 159 P.3d 672 (Colo. App. 2006).

New trial granted where trial court erred in damages instruction. *Walton v. Kolb*, 31 Colo. App. 95, 500 P.2d 149 (1972).

G. Error in Law.

A judicial admission can be made in closing argument. Counsel's statements that plaintiff had incurred some physical injury in the accident must be considered a binding judicial admission and a new trial ordered on the issue of damages. *Larson v. A.T.S.I.*, 859 P.2d 273 (Colo. App. 1993).

V. Grounds for Judgment Notwithstanding Verdict.

Annotator's note. Since subsection (a)(6) (now (e)(1)) of this rule is similar to § 237 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

The weight of evidence does not depend upon its volume or the number of witnesses. Jurors exercise a large discretion in judging of the credibility of witnesses, and separating the true from the false. Their conclusions will not be disturbed, unless the verdict manifests bias, prejudice, or a wanton disregard of their duties and obligation by the jurors. *Clark v. Aldenhoven*, 26 Colo. App. 501, 143 P. 267 (1914).

As a general rule, when the evidence is conflicting the trial court will refuse a new trial even though there may be a slight preponderance against the verdict. *Clark v. Aldenhoven*, 26 Colo. App. 501, 143 P. 267 (1914).

The trial court's action will not be reviewed unless a manifest abuse of discretion appears. *Clark v. Aldenhoven*, 26 Colo. App. 501, 143 P. 267 (1914).

Where the verdict of a jury is manifestly against the weight of the evidence, it will be set aside by the appellate court. *Denver & R. G. R. R. v. Peterson*, 30 Colo. 77, 69 P. 578 (1902); *McGraw v. Kerr*, 23 Colo. App. 163, 128 P. 870 (1912).

Where the record fails to disclose any satisfactory evidence as to the real merits of the controversy, the judgment will be reversed and the cause remanded for a new trial. *Scott v. Conrad*, 24 Colo. App. 452, 135 P. 135 (1913).

In actions for tort a verdict will not so readily be vacated as against the weight of evidence, as in actions ex contractu. A verdict will not be set aside either in the trial court or the court of review unless it is so manifestly against the weight of evidence as to warrant a presumption that the jury misunderstood the evidence or misconstrued its effect, or were influenced by improper motives. *Clark v. Aldenhoven*, 26 Colo. App. 501, 143 P. 267 (1914).

VI. Effect of Granting New Trial.

To grant a new trial decides no one's rights finally, but only submits them to another jury, with an opportunity to each party to bring forward better evidence if he can, and with opportunity to the judge to correct his own errors if any. *Singer v. Chitwood*, 126 Colo. 173, 247 P.2d 905 (1952).

A litigant may elect not to participate in trial and still seek review. In Colorado a litigant against whom a new trial has been ordered may elect to stand on such order, obtain a dismissal of the action, and thereupon seek review by

appeal. *Chartier v. Winslow Crane Serv. Co*., 142 Colo. 294, 350 P.2d 1044 (1960).

New trial participation does not waive other objections. Prior to the amendment in 1964, a party against whom an order granting a new trial had been entered waived any error in the order by participating in the new trial. The amendment merely removed this waiver. It did not change the rule of *Chartier in Chartier v. Winslow* (142 Colo. 294, 350 P.2d 1044 (1960)) that a party may decline to participate in a new trial, permit judgment to be entered against him and sue out appeal for a determination of the correctness of the order granting the new trial. *Rice v. Groat*, 16 7 Colo. 554, 449 P.2d 355 (1969).

Proceeding to terminate parental rights. The granting of a new trial in a proceeding to terminate parental rights placed the parties in the positions they occupied prior to the vacated hearing. People in Interest of M.B., 188 Colo. 370, 535 P.2d 192 (1975).

VII. Effect of Granting Judgment Notwithstanding Verdict, Amendment of Findings, or Amendment of Judgment.

The effect of this rule is merely to render unnecessary a request for a formal reservation of the question of law raised by the motion for a directed verdict and, in addition, to regulate the time and manner of moving for direction and of moving for judgment on the basis of the refusal to direct. *Burenheide v. Wall*, 131 Colo. 371, 281 P.2d 1000 (1955).

VIII. Time for Determination of Post-Trial Motions.

Section (j) is applicable only to motions filed on or after January 1, 1985, and does not apply to motions which were pending upon that date. *Stientjes v. Olde-Cumberlin Auctioneers, Inc*. 754 P.2d 1384 (Colo. App. 1988).

Motion for costs is not a motion for post-trial relief governed by this section and, therefore, need not be determined within 60 days under section (j). *Meier v. McCoy*, 119 P.3d 519 (Colo. App. 2004).

Construction of "determine" within context of section (j) for purposes of resolving timeliness of notices of appeal. Trial court made a "determination" on post-trial motions upon oral ruling from bench within 60 days from date of filing of last of such motions even though written order was not signed and entered until after expiration of 60-day period. In re Forsberg, 783 P.2d 283 (Colo. 1989).

Motion for amendment of findings and judgment was "determined" when trial court came to a decision on the merits of such motion and directed movant's counsel to prepare order reflecting such decision, which order was not signed and entered until after 60-day period. In re Forsberg, 783 P.2d 283 (Colo. 1989).

A motion made pursuant to C.R.C.P. 60 cannot be used to circumvent the operation of section (j) unless the facts of the case constitute an "extreme situation" justifying relief from a judgment pursuant to C.R.C.P. 60(b)(5). *Sandoval v. Trinidad Area Health Ass'n*, 752 P.2d 1062 (Colo. App. 1988).

The "unique circumstances" doctrine is not available to a party seeking to modify the time for determination of a post-trial motion pursuant to section (j). *Sandoval v. Trinidad Area Health Ass'n*, 752 P.2d 1062 (Colo. App. 1988).

Time limits for filing notice of appeal under C.A.R. 4 must be met for appeals of judgments for attorney fees. The award of attorney fees in a case is sufficiently separate from an underlying judgment on the merits to require that a notice of appeal of the judgment awarding attorney fees be filed within the time limits of C.A.R. 4 independently of the judgment entered on the merits of the underlying case. If this is not done, the court of appeals is not vested with subject matter jurisdiction to determine issues related to the award of attorney fees. *Dawes Agency v. Am. Prop. Mortg.*, 804 P.2d 255 (Colo. App. 1990).

Timely filing of motion for reconsideration of a completed post-trial ruling on an attorney fees issue tolls the time for filing a notice of appeal until the court determines the motion or the motion is deemed denied after 60 days pursuant to section (j). *Jensen v. Runta*, 80 P.3d 906 (Colo. App. 2003).

Time limits for filing notice of appeal under C.A.R. 4 are terminated as to all parties by timely filing of a motion under this rule. Thereafter, time begins to run upon determination of the motion or the date the motion is deemed denied, whichever is earlier. *United Bank of Boulder, N.A. v. Buchanan*, 836 P.2d 473 (Colo. App. 1992); *Stone v. People*, 895 P.2d 1154 (Colo. App. 1995).

Section (j) is designed to encourage expeditious determination of post-trial motions and to provide certainty in the calculation of the time within which a party must file a notice of appeal. *Campbell v. McGill*, 810 P.2d 199 (Colo. 1991).

Section (j) does not apply to issues concerning recovery of attorney fees not sought as damages. *Tallitsch v. Child Support Servs., Inc.*, 926 P.2d 143 (Colo. App. 1996).

Section (j) satisfied where the court acted on motion within 60 days following the filing of the last multiple motions and where the court orally ruled upon the motions within 60 days, even though the written order was signed and entered after the period. *Fenton v. Fibreboard Corp.*, 827 P.2d 564 (Colo. App. 1991).

Section (j) satisfied where plaintiff's motion for reconsideration was entered within 60 days of the date trial court granted plaintiff's motion to represent himself. *Campbell v. McGill*, 810 P.2d 199 (Colo. 1991).

The provisions of C.R.C.P. 54(b) regarding a trial court's jurisdiction to revise its initial judgment are expressly incorporated in C.R.C.P. 58 and, therefore, are applicable to motions filed pursuant to this rule. The 60-day limit specified in section (j) did not bar trial court's determination of a motion for new trial in case involving multiple claims and multiple parties when trial court did not make an express direction for entry of final judgment under C.R.C.P. 54(b) and there could be no entry of final judgment under C.R.C.P. 58(a). *Smeal v. Oldenettel*, 814 P.2d 904 (Colo. 1991).

Ruling on post-trial motion must be entered within 60-day time limit specified in section (j) and any order entered after such 60-day limitation is null and void. In re Micaletti, 796 P.2d 54 (Colo. App. 1990); *Spencer v. Bd. of County Comm'rs*, 39 P.3d 1272 (Colo. App. 2001).

A court loses jurisdiction when it fails to rule on a post-judgment motion within 60 days. The language of section (j) is mandatory and provides that the district court shall rule within 60 days or the motion shall be automatically denied.

Arguelles v. Ridgeway, 827 P.2d 553 (Colo. App. 1991).

A motion under section (j) is automatically deemed denied after 60 days, however the court had authority under C.R.C.P. 60(a) to vacate such denial and rule on the motion because the court was unaware that defendant's motion was pending at the time it entered judgment in favor of plaintiff. *Farmers Ins. Exchange v. Am. Mfrs. Mut. Ins. Co*., 897 P.2d 880 (Colo. App. 1995).

The time period for responding to motions is not extended when a court grants a party additional time to respond to the opposing party's briefs. *Arguelles v. Ridgeway*, 827 P.2d 553 (Colo. App. 1991).

Failure to obtain an extension of time within which to file motion under this rule deprived the district court of jurisdiction to hear any motion filed after the 15-day period had expired and the untimely filing of that motion did not toll the running of the 45 days for the filing of a notice of appeal under C.A.R. 4 . *Stone v. People*, 895 P.2d 1154 (Colo. App. 1995).

While section (a) provides that motions for amendment of judgment shall be filed within 15 days or such greater time as the court may allow, a court may only allow greater time during the 15 days following the entry of judgment. Once that period expires, the court loses jurisdiction to grant additional time. *Spencer v. Bd. of County Comm'rs*, 39 P.3d 1272 (Colo. App. 2001).

Plaintiff abandons timeliness issue if he or she does not argue that the trial court erred in rejecting her motion under this rule as untimely. In re McSoud, 131 P.3d 1208 (Colo. App. 2006).

Rule 60. Relief from Judgment or Order.

Colorado Court Rules

Colorado Rules of Civil Procedure

Chapter 6. Judgment

As amended through Rule Change 2017(7), effective August 24, 2017

Rule 60. Relief from Judgment or Order

(a) **Clerical Mistakes.** Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal such mistakes may be so corrected before the case is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes; Inadvertence; Surprise; Excusable Neglect; Fraud; etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than 182 days after the judgment, order, or proceeding was entered or taken. A motion under this section (b) does not affect the finality of a judgment or suspend its operation. This Rule does not limit the power of a court: (1) To entertain an independent action to relieve a party from a judgment, order, or proceeding, or (2) to set aside a judgment for fraud upon the court; or (3) when, for any cause, the summons in an action has not been personally served within or without the state on the defendant, to allow, on such terms as may be just, such defendant, or his legal representatives, at any time within 182 days after the rendition of any judgment in such action, to answer to the merits of the original action. Writs of coram nobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Cite as Colo. R. Civ. P. 60

History. Subdivision (b) amended effective January 12, 2017.

Case Notes:

Annotation

I. General Consideration.

Law reviews. For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "Judgment: Rules 54-63 ", see 23 Rocky Mt. L. Rev. 581 (1951). For article, "One Year Review of Civil Procedure", see 34 Dicta 69 (1957). For article, "One Year Review of Civil Procedure", see 35 Dicta 3 (1958). For article, "One Year Review of Civil Procedure and Appeals", see 37 Dicta 21 (1960). For article, "One Year Review of Civil Procedure and Appeals", see 40 Den. L. Ctr. J. 66 (1963). For note, "One Year Review of Civil Procedure", see 41 Den. L. Ctr. 67 (1964). For a discussion of federal jurisdiction arising under this rule, see survey of Tenth Circuit decisions on federal practice and procedure, 53 Den. L.J. 153 (1976). For article, "Post-Trial Motions in the Civil Case: An Appellate Perspective", see 32 Colo. Law. 71 (November 2003).

Annotator's note. Since this rule is similar to §§ 50(e) and 81 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that sections have been included in the annotations to this rule.

Once a valid judgment is entered, the only means by which the trial court may thereafter alter, amend, or vacate the judgment is by appropriate motion under either C.R.C.P. 59 or this rule. *Cortvriendt v. Cortvriendt*, 146 Colo. 387, 361 P.2d 767 (1961).

This rule prescribes the conditions upon which the court may relieve a party from a final judgment. *Riss v. Air Rental, Inc.*, 136 Colo. 216, 315 P.2d 820 (1957).

Court may relieve only a party or a party's legal representative from a final judgment; therefore, garnishor of judgment debtor could not seek to modify or set aside an order in the principal case since it was not a party to that case. *Law Offices of Quiat v. Ellithorpe*, 917 P.2d 300 (Colo. App. 1995).

A motion under this rule may not be used to circumvent the operation of C.R.C.P. 59(j), absent extraordinary circumstances involving extreme situations. *Anderson v. Molitor*, 770 P.2d 1305 (Colo. App. 1988).

A motion for relief from judgment under section (b) of this rule may not be construed to avoid C.R.C.P. 59(j) and its 60-day requirement. *Diamond Back Servs., Inc. v. Willowbrook Water*, 9 61 P.2d 1134 (Colo. App. 1998).

This rule is not a substitute for appeal, but instead is meant to provide relief in the interest of justice in extraordinary circumstances. Thus, a motion under this rule generally cannot be used to circumvent the operation of C.R.C.P. 59(j). *De Avila v. Estate of DeHerrera*, 75 P.3d 1144 (Colo. App. 2003).

After the expiration of his term of office, a judge may not entertain a motion under this rule, even though such motion is filed in a proceeding wherein the "former" judge had himself entered the final judgment at a time when he was actually serving as a judge. *Olmstead v. District Court*, 157 Colo. 326, 403 P.2d 442 (1965).

A court's error in interpreting a statutory grant of jurisdiction is not equivalent to acting with a total lack of jurisdiction. *King v. Everett*, 775 P.2d 65 (Colo. App. 1989), cert. denied, *Everett v. King*, 786 P.2d 411 (Colo. 1989).

Trial court could not amend judgment to include prejudgment interest when omission was intentional. *Jennings v. Ibarra*, 921 P.2d 62 (Colo. App. 1996).

A judgment creditor is not required to get an amended judgment showing trial court intended to award post-judgment interest where court inadvertently failed to do so. *Bainbridge, Inc., v. Douglas County Sch. Dist.*, 973 P.2d 684 (Colo. App. 1998) (declining to follow *Jennings v. Ibarra*, 921 P.2d 62 (Colo. App. 1996)).

An appellate court does not grant or deny motions filed subsequent to entry of judgment under this rule, since this is a function of the trial court; once a trial court has acted, however, an appellate court may in appropriate proceedings be called upon to review the propriety of the action thus taken by it. *Olmstead v. District Court*, 157 Colo. 326, 403 P.2d 442 (1965).

Default judgment entered after a hearing on damages was a final judgment because it left the court with nothing to do but execute upon the judgment. Therefore, motion to set aside the default judgment filed within six months was timely filed. *Sumler v. District Ct.*, City & County of Denver, 889 P.2d 50 (Colo. 1995).

There were no grounds for vacating the default judgment where plaintiff failed to show a reason for not amending the original complaint during the three months before default judgment was entered. Since the judgment was not vacated, it was within the court's discretion to deny the motion to amend the original complaint after entry of the default judgment. *Wilcox v. Reconditioned Office Sys.*, 881 P.2d 398 (Colo. App. 1994).

Where none of the grounds prescribed by this rule, upon which a party may be relieved from a final judgment or order is urged in a motion to vacate, no abuse of discretion in denying such motion can be shown. *Cortvriendt v. Cortvriendt* , 146 Colo. 387, 361 P.2d 767 (1961).

There were no grounds for vacating the default judgement where the federal district court entered an order denying defendant's attempt to remove the case to federal court and remanded the case to state court prior to the trial date. Plaintiff's request for reconsideration of the federal court's order did not cut off the state court's jurisdiction since, under federal law, remand orders are not reviewable on appeal or otherwise. Blazer Elec. *Supply Co. v. Bertrand*, 952 P.2d 857 (Colo. App. 1998).

Meritorious defense not grounds for vacation of judgment. A party may not have a judgment vacated solely upon an allegation of the existence of a meritorious defense. *Craig v. Rider*, 628 P.2d 623 (Colo. App. 1980), rev'd on other grounds, 651 P.2d 397 (Colo. 1982).

The mere existence of a meritorious defense is not sufficient alone to justify vacating the judgment. *Biella v. State Dept. of Hwys.*, 652 P.2d 1100 (Colo. App. 1982).

Appellate review limited to whether trial court abused its discretion. Appellate review of the grant or denial of a motion under section (b) is normally limited to determining whether the district court abused its discretion. In re Stroud, 631 P.2d 168 (Colo. 1981).

It is within the discretion of the trial court to determine whether a party's conduct justifies relief from a judgment, and such determination will be upheld unless the court abused its discretion. *Messler v. Phillips*, 867 P.2d 128 (Colo. App. 1993).

Appellate review of the denial of a motion under section (b) of this rule is limited to whether the trial court abused its discretion. A trial court abuses its discretion if its decision is manifestly arbitrary, unreasonable, or unfair. *Guevara v. Foxhoven*, 928 P.2d 793 (Colo. App. 1996).

A motion pursuant to section (b) must meet the requirements of the rule in order to be subject to exercise of the court's discretion. Especially with respect to the residuary provision of section (b)(5), which has been narrowed to include only extreme situations and extraordinary circumstances, a trial court's ruling must be reviewed in light of the purposes of the rule and the importance to be accorded the principle of finality. *Davidson v. McClellan*, 16 P.3d 233 (Colo. 2001).

Where defendant failed to object to plaintiff's motion for substitution of parties and also failed to object to trial court's order permitting the substitution, the right to appeal on those issues is waived. *Thomason v. McAlister*, 748 P.2d 798 (Colo. App. 1987).

Where there has been a hearing on a motion pursuant to this rule involving controverted issues of fact, a motion for new trial is a jurisdictional prerequisite for appellate review. *Canady v. Dept. of Admin.*, 678 P.2d 1056 (Colo. App. 1983).

Order granting relief on insufficient grounds not void. Failure to allege sufficient grounds for relief from a prior judgment does not make the subsequent order granting that motion void; rather, the court's action is legal error, vulnerable to reversal upon appeal. In re Stroud, 631 P.2d 168 (Colo. 1981).

Judgment must be final before time limitations apply. Where order of default was entered against one of two defendants but action remained pending and no C.R.C.P. 54(b) certification was obtained, timeliness of motion would be gauged in relation to date of dismissal of action against second defendant. *United Bank of Boulder, N.A. v. Buchanan*, 836 P.2d 473 (Colo. App. 1992).

Time limit inapplicable where judgment exceeded jurisdiction. Where a claim is made that the district court's judgment exceeded its jurisdiction, the time limit of section (b) does not apply. *Mathews v. Urban*, 645 P.2d 290 (Colo. App. 1982); *United Bank of Boulder, N.A. v. Buchanan*, 836 P.2d 473 (Colo. App. 1992).

Even though a motion under C.R.C.P. 59(j) is automatically denied after 60 days, the court had authority under section (a) to vacate the judgment on its own motion because the court was unaware that defendant's motion was pending at the time it entered judgment in favor of plaintiff. *Farmers Ins. Exch. v. Am. Mfrs. Mut. Ins. Co.*, 897 P.2d 880 (Colo. App. 1995).

Successor judge may consider challenges to rulings of law presented in a motion for a new trial. *Faris v. Rothenberg*, 648 P.2d 1089 (Colo. 1982).

Appeal from denial of motion. Denial of a motion under this rule is appealable independently of an underlying judgment. *United Bank of Boulder, N.A. v. Buchanan*, 836 P.2d 473 (Colo. App. 1992).

An order denying a motion under section (b) of this rule is appealable independently of an underlying judgment and requires a separate notice of appeal. *Sender v. Powell*, 902 P.2d 947 (Colo. App. 1995); *Guevara v. Foxhoven*, 928 P.2d 793 (Colo. App. 1996).

District court has jurisdiction to review a section (b)(2) motion where a magistrate has authority under § 13-5-301 to hear the motion without the consent of the parties. In re Malewicz, 60 P.3d 772 (Colo. App. 2002).

A section (b)(2) motion filed within six months of the district court's order is timely filed under this rule. In re Malewicz, 60 P.3d 772 (Colo. App. 2002).

Court's order discharging a receiver appointed under predecessor to § 38-38-601 is a final judgment subject to appellate review, and any claim based on misfeasance or malfeasance of the receiver must be presented prior to discharge, if at all, unless grounds exist for relief from judgment under this rule. *Four Strong Winds, Inc. v. Lyngholm*, 826 P.2d 414 (Colo. App. 1992).

Relief from foreign judgments available under this rule is limited by full faith and credit clause of federal constitution to: (1) Judgments based upon fraud; (2) void judgments; and (3) judgments which have been satisfied, released, or discharged, or a prior judgment upon which it was based has been reversed or vacated, or it is no longer equitable that judgment should have prospective application. *Marworth, Inc. v. McGuire*, 810 P.2d 653 (Colo. 1991).

A trial court's ruling in resolving a motion for relief from judgment predicated on newly discovered evidence under section (b) will not be disturbed absent a clear showing of an abuse of discretion. *Sender v. Powell*, 902 P.2d 947 (Colo. App. 1995).

Failure to submit financial information to the trial court and the failure of the trial court to review the modified child support agreement between the parties rendered the resulting trial court order subject to being set aside under section (b)(5). In re Smith, 928 P.2d 828 (Colo. App. 1996).

The provisions for vacating, modifying, or correcting an arbitration award are set forth in §§ 13-22-223 and 13-22-224 and are the exclusive means for challenging an award. Therefore, this rule is not the appropriate vehicle to challenge the award. *Superior Constr. Co. v. Bentley*, 104 P.3d 331 (Colo. App. 2004).

Applied in *Valenzuela v. Mercy Hosp.*, 34 Colo. App. 5, 521 P.2d 1287 (1974); *Janicek v. Hinnen*, 34 Colo. App. 68, 522 P.2d 113 (1974); *Bankers Union Life Ins. Co. v. Fiocca*, 35 Colo. App. 306, 532 P.2d 57 (1975); In re Estate of Bonfils, 190 Colo. 70, 543 P.2d 701 (1975); *Duran v. District Court*, 190 Colo. 272, 545 P.2d 1365 (1976); *Johnston v. District Court*, 196 Colo. 261, 580 P.2d 798 (1978); In re Gallegos, 41 Colo. App. 116, 580 P.2d 838 (1978); *O'Hara Group Denver, Ltd. v. Marcor Hous. Sys.*, 19 7 Colo. 530, 595 P.2d 679 (1979); *Sec. State Bank v. Weingardt*, 42 Colo. App. 219, 597 P.2d 1045 (1979); In re Stroud, 657 P.2d 960 (Colo. App. 1979); *Collection Agency, Inc. v. Golding*, 44 Colo. App. 421, 616 P.2d 988 (1980); *Town of Breckenridge v. City & County of Denver*, 620 P.2d 1048 (Colo. 1980); *People in Interest of T.A.F. v. B.F.*, 624 P.2d 349 (Colo. App. 1980); In re Van Camp, 632 P.2d 1062 (Colo. App. 1981); *Soehner v. Soehner*, 642 P.2d 27 (Colo. App. 1981); *Cross v. District Court*, 643 P.2d 39 (Colo. 1982); *Best v. Jones*, 644 P.2d 89 (Colo. App. 1982); *Moore & Co. v. Williams*, 657 P.2d 984 (Colo. App. 1982); *Kendall v. Costa*, 659 P.2d 715 (Colo. App. 1982); *Falzon v. Home Ins. Co.*, 661 P.2d 696 (Colo. App. 1982); *Ground Water Comm'n v. Shanks*, 658 P.2d 847 (Colo. 1983); In re Hiner, 669 P.2d 135 (Colo. App. 1983); *Yard v. Ambassador Bldr. Corp.*, 669 P.2d 1040 (Colo. App. 1983); *Wright Farms, Inc. v. Weninger*, 669 P.2d 1054 (Colo. App. 1983); In re Ward, 670 P.2d 1260 (Colo. App. 1983); *Turchick & Kempter v. Hurd & Titan Constr.*, 674 P.2d 969 (Colo. App. 1983); *Realty World-Range Realty, Ltd. v. Prochaska*, 691 P.2d 761 (Colo. App. 1984); *E.B. Jones Constr. Co. v. Denver*, 717 P.2d 1009 (Colo. App. 1986); In re Allen, 724 P.2d 651 (Colo. 1986); *People v. Caro*, 753 P.2d 196 (Colo. 1988); *Blesch v. Denver Publ'g Co.*, 62 P.3d 1060 (Colo. App. 2002).

II. Clerical Mistakes.

The failure to include interest is an oversight or omission and falls squarely within this rule. *Crosby v. Kroeger*, 138 Colo. 55, 330 P.2d 958 (1958); *Reasoner v. District Court*, 19 7 Colo. 516, 594 P.2d 1060 (1979).

Since the statute required an award of prejudgment interest and failure to include such interest was merely a ministerial oversight, passage of five years since entry of the award would not prevent the addition of prejudgment interest, even though the original amount of the award had been satisfied. *Brooks v. Jackson*, 813 P.2d 847 (Colo. App. 1991).

It is not error for a court to correct a judgment by including interest when the omission is called to its attention. *Crosby v. Kroeger*, 138 Colo. 55, 330 P.2d 958 (1958).

An error in the calculation of interest is merely clerical and does not require court intervention and stay of execution. *Schaffer v. District Court*, 172 Colo. 43, 470 P.2d 18 (1970).

Where the written, final decree does not reflect the oral findings of fact and an earlier order of the court, the decree is not in accord with the expectations and understanding of the court and the parties and that is the type of error section (a) of this rule is designed to remedy. *Reasoner v. District Court*, 19 7 Colo. 516, 594 P.2d 1060 (1979).

This rule provides that a trial court may correct an oversight while the case is pending on appeal, provided leave of the appellate court is obtained. *Callaham v. Slavsky*, 153 Colo. 291, 385 P.2d 674 (1963).

Language of the order of remand was sufficiently broad to authorize the trial court's amendment of its order. *Flatiron*

Paving Co. v. Wilkin, 725 P.2d 103 (Colo. App. 1986).

Where the failure is not that of a judge in entering an incorrect judgment or decree, or that of a clerk in incorrectly recording the proceedings had in a case, but rather, it is the attorney's failure to prosecute with due diligence the proceedings which he has commenced on behalf of a plaintiff, then, under these circumstances, relief is properly denied under section (a) of this rule. *Hatcher v. Hatcher*, 169 Colo. 174, 454 P.2d 812 (1969).

Attorney's failure to proceed diligently not clerical error. Unexcused attorney failure to diligently proceed on behalf of his client does not constitute clerical error justifying relief under section (a). *Cavanaugh v. State Dept. of Soc. Servs.*, 644 P.2d 1 (Colo. 1982), appeal dismissed for want of substantial federal question, 459 U.S. 1011, 103 S. Ct. 367, 74 L. Ed. 2d 504 (1982), reh'g denied, 460 U.S. 1104, 103 S. Ct. 1806, 76 L. Ed. 2d 369 (1983).

Where the record reflects the court's intent to include amounts owing under a contract, the amount due under the contract was virtually undisputed, and the court made extensive findings that the contract was wrongfully terminated, it was judicial error and correctable under section (a) when the court omitted such amounts from its final order. *Diamond Back Servs., Inc. v. Willowbrook Water*, 9 61 P.2d 1134 (Colo. App. 1998).

Where plaintiff filed a motion under C.R.C.P. 59 for post-judgment relief for a clerical error made by the court for failure to include the amount unpaid in a wrongfully terminated contract, the court's failure to rule on the C.R.C.P. 59 motion did not bar the plaintiff from seeking relief under section (a) of this rule. *Diamond Back Servs., Inc. v. Willowbrook Water*, 9 61 P.2d 1134 (Colo. App. 1998).

A motion under section (a) is limited to making a judgment speak the truth as originally intended, and not intended to relitigate the matter before the court. *Diamond Back Servs., Inc. v. Willowbrook Water*, 9 61 P.2d 1134 (Colo. App. 1998).

A motion or order under section (a) does not extend the time for filing a notice of appeal of the underlying judgment. An order clarifying the original judgment relates back to the time of the filing of the initial judgment and does not extend the time for appeal of that judgment. In re Buck, 60 P.3d 788 (Colo. App. 2002).

Clerical error in a verdict form does not include an alleged error that either alters the legal effect of the jury's verdict or addresses the jury's misunderstanding or misapplication of the court's instructions. Clerical error corrections to a jury's verdict are disfavored. *Stewart v. Rice*, 47 P.3d 316 (Colo. 2002).

Use of Larimer county as the venue defendant had erroneously identified on the caption of the proposed order authorizing foreclosure sale was a clerical error that did not affect its validity. Colorado law looks to the substance of a pleading and not to the form of its caption. Moreover, under section (a), courts have the power to correct a clerical error in an order. Upon defendant's motion brought under section (a), district court magistrate corrected the clerical error by issuing an amended order, nunc pro tunc. *Estates in Eagle Ridge, LLLP v. Valley Bank & Trust*, 141 P.3d 838 (Colo. App. 2005).

Equipment failure resulting in the lack of a complete transcript is not a clerical error. Correction of clerical errors under

section (a) is a matter within the discretion of the trial court, and the court here did not abuse its discretion in ruling that plaintiff's motion for a new trial based on equipment failure was not a clerical error as contemplated by section (a). In re McSoud, 131 P.3d 1208 (Colo. App. 2006).

III. Mistake; Inadvertence; Surprise; Excusable Neglect; Fraud; Etc.

A. In General.

Law reviews. For article, "Appellate Procedure and the New Supreme Court Rules", see 30 Dicta 1 (1953). For article, "One Year Review of Appeals and Agency", see 33 Dicta 13 (1956). For article, "One Year Review of Civil Procedure and Appeals", see 36 Dicta 5 (1959). For note, "Res Judicata - Should It Apply to a Judgment Which is Being Appealed?", see 33 Rocky Mt. L. Rev. 95 (1960). For note, "*Batton v. Massar: The Finality of Colorado Adoptions*", see 35 U. Colo. L. Rev. 314 (1963).

Authority for relief from a judgment order or proceeding is conferred in an appropriate proceeding by section (b) of this rule. *Peercy v. Peercy*, 154 Colo. 575, 392 P.2d 609 (1964).

It is incumbent upon one to prove mistake, inadvertence, surprise, excusable neglect, or fraud or that a judgment is void because no service was had upon him. *Riss v. Air Rental, Inc.*, 136 Colo. 216, 315 P.2d 820 (1957).

In order to be entitled to relief under this rule, a defendant has to demonstrate to the trial court either mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation, or other misconduct on the part of plaintiff. *Eisenson v. Eisenson*, 158 Colo. 394, 407 P.2d 20 (1965).

Party seeking relief from judgment must demonstrate by clear, strong, and satisfactory proof that such relief is warranted. *Domenico v. Sw. Props. Venture*, 914 P.2d 390 (Colo. App. 1995).

A motion to vacate a judgment must allege a defense which is "prima facie" meritorious. *Henritze v. Borden Co.*, 163 Colo. 589, 432 P.2d 2 (1967).

A meritorious defense must be stated with such particularity that the court can see that it is a substantial and meritorious defense, and not merely a technical or frivolous one. *Henritze v. Borden Co.*, 163 Colo. 589, 432 P.2d 2 (1967).

This rule prescribes the conditions upon which a court may relieve a party from a final judgment. *Riss v. Air Rental, Inc.*, 136 Colo. 216, 315 P.2d 820 (1957).

Motions for relief from a final order are governed by this rule under which the time for filing such motions is expressly limited to six months. *Love v. Rocky Mt. Kennel Club*, 33 Colo. App. 4, 514 P.2d 336 (1973).

To be entitled to have a judgment vacated or set aside, a disadvantaged party must bring himself within the terms and conditions of this rule. *Peercy v. Peercy*, 154 Colo. 575, 392 P.2d 609 (1964).

Surety bond not required. Section (b) of this rule, providing that a court may set aside a judgment upon such terms as may be just, does not warrant an order of court requiring defendants to post a surety bond in the full amount of a plaintiffs' claim as a condition to having their defense heard. *Prather v. District Court*, 13 7 Colo. 584, 328 P.2d 111 (1958); *Rencher v. District Court*, 160 Colo. 523, 418 P.2d 289 (1966).

This rule provides for the granting of relief from judgments entered by mistake, inadvertence, surprise, excusable neglect, fraud, etc. *Prather v. District Court*, 13 7 Colo. 584, 328 P.2d 111 (1958).

Section (b) of this rule permits a court to relieve a party from a final judgment or order for "mistake, inadvertence, surprise, or excusable neglect". *Burson v. Burson*, 149 Colo. 566, 369 P.2d 979 (1962); *Dept. of Welfare v. Schneider* , 156 Colo. 189, 397 P.2d 752 (1964); *Domenico v. Sw. Props. Venture*, 914 P.2d 390 (Colo. App. 1995).

A court may set aside a judgment in favor of a debtor if the judgement was entered into in violation of the automatic stay provision of the federal bankruptcy code. *McGuire v. Champion Fence & Contstr., Inc.*, 104 P.3d 327 (Colo. App. 2004).

Relief under section (b) is limited to setting aside an order or judgment. It is beyond the authority of a court to grant additional affirmative relief, such as reformation of a settlement agreement, in instances of fraud, misrepresentation, or other misconduct. *Affordable Country Homes, LLC v. Smith*, 194 P.3d 511 (Colo. App. 2008).

Father's motion for relief not time-barred because judgment was void. Where notice through publication was inadequate because birth mother made fraudulent misrepresentations to the court, birth father was deprived of his constitutional right to due process, thus making the judgment terminating his parental rights void by default. The requirements of due process take precedence over statutory enactments. In re C.L.S., 252 P.3d 556 (Colo. App. 2011).

C.R.C.P. 11 imposes sanctions upon those who violate its provisions, it does not preclude relief under section (b)(1) of this rule. *Domenico v. Sw. Props. Venture*, 914 P.2d 390 (Colo. App. 1995).

Relief under section (b) is available for judgments entered pursuant to § 13-17-202 . *Domenico v. Sw. Props. Venturez*, 914 P.2d 390 (Colo. App. 1995).

Responsibility for reasons under clause (1) in the first sentence of section (b) shall be of party. The mistake, inadvertence, surprise, or excusable neglect subject to correction under this rule must be by a party to the action or his legal representative. *Columbia Sav. & Loan Ass'n v. District Court*, 186 Colo. 212, 526 P.2d 661 (1974).

Acceptance under judgment waives right to review. A party who accepts an award or legal advantage under a judgment normally waives his right to any review of the adjudication which may again put in issue his right to the benefit which he has accepted. *Farmers Elevator Co. v. First Nat'l Bank*, 181 Colo. 231, 508 P.2d 1261 (1973).

A motion to vacate upon any of the grounds must be made within a "reasonable time". *Sunshine v. Robinson*, 168 Colo. 409, 451 P.2d 757 (1969).

A motion to vacate judgment must be filed within a "reasonable time" under this rule. *Salter v. Bd. of County Comm'rs* , 133 Colo. 138, 292 P.2d 345, cert. denied, 352 U.S. 829, 77 S. Ct. 37, 1 L. Ed. 2d 48 (1956).

For purposes of motion based on evidence of perjury, there is a critical difference between perjury and the mere presence of factual conflicts or deficiencies in the evidence; proponent must show that discrepancies or inaccuracies in testimony were not the result of the usual shortcomings inherent in human perception and memory but rather were the result of a willful fabrication of evidence bearing on a material issue. *Aspen Skiing Co. v. Peer*, 804 P.2d 166 (Colo. 1991); In re Eisenhuth, 976 P.2d 896 (Colo. App. 1999).

In dissolution of marriage case trial court did not abuse its discretion in denying husband's motion under section (b)(2) even though husband contended wife undervalued, omitted, or otherwise hid marital assets at dissolution of marriage hearings where husband did not show that such alleged discrepancies or inaccuracies in wife's testimony resulted from a willful fabrication of evidence. In re Eisenhuth, 976 P.2d 896 (Colo. App. 1999).

Denial of motion for new trial upheld where newly discovered evidence allegedly demonstrating that plaintiff perjured himself at trial was equally consistent with theory that plaintiff's perceptions and recollections of accident honestly differed from those of certain other witnesses. *Aspen Skiing Co. v. Peer*, 804 P.2d 166 (Colo. 1991).

Denial of motion for new trial upheld where intentional misconduct was ameliorated before and during trial. Court held that there was no reason to presume that defendant's misconduct substantially impaired plaintiff's ability to prepare for and proceed at trial. *Antolovich v. Brown Group Retail, Inc.*, 183 P.3d 582 (Colo. App. 2007).

Relief from the operation of a judgment alleged to have resulted from mistake must be pursued by motion, to be made within a "reasonable time". *Peercy v. Peercy*, 154 Colo. 575, 392 P.2d 609 (1964).

"Any other reason justifying relief" language of section (b)(5) encompasses newly discovered evidence. A motion for relief from a judgment pursuant to this rule on the ground of newly discovered evidence should be resolved by the same criteria applicable to a C.R.C.P. 59(d)(4) motion: Applicant must establish that the evidence could not have been discovered by the exercise of reasonable diligence and produced at the first trial; the evidence was material to an issue in the first trial; and the evidence, if admitted, would probably change the result of the first trial. *S.E. Colorado Water Conservancy Dist. v. O'Neill*, 817 P.2d 500 (Colo. 1991), aff'd, 854 P.2d 167 (Colo. 1993).

Section (b)(5) is a residuary clause for application only in situations not covered by other sections in this rule. *McElvaney v. Batley*, 824 P.2d 73 (Colo. App. 1991); *Domenico v. Sw. Props. Venture*, 914 P.2d 390 (Colo. App. 1995).

Section (b)(5) does not apply where motion is based on "fraudulent acts and misrepresentations". Instead, such a motion is subject to section (b)(2) and the corresponding six-month time limit. In re Adoption of P.H.A., 899 P.2d 345 (Colo. App. 1995).

This rule may be used as a mechanism for obtaining relief from a final judgment due to a change in case law precedent. *State Farm Mut. Auto. Ins. Co. v. McMillan*, 925 P.2d 785 (Colo. 1996).

However, while C.R.C.P. 59 gives a trial court "full power to correct any and all errors committed," under section (b)(5) of this rule, the erroneous application of the law is simply not a sufficient basis for relief. *Spencer v. Bd. of County Comm'rs*, 39 P.3d 1272 (Colo. App. 2001); *SR Condos., LLC v. K.C. Constr., Inc.*, 176 P. 3d 866 (Colo. App. 2007).

Section (b) of this rule requires any motion for relief of judgment on the grounds of mistake or fraud to be made within six months after judgment. *Schaffer v. District Court*, 172 Colo. 43, 470 P.2d 18 (1970).

Less than five weeks is not unreasonable. A delay of less than five weeks, if the allegation of when they learned of the judgment be true, cannot be said to be unreasonable. *Sunshine v. Robinson*, 168 Colo. 409, 451 P.2d 757 (1969).

Relief must be sought not more than six months after the judgment by section (b) of this rule. *Burson v. Burson*, 149 Colo. 566, 369 P.2d 979 (1962); *Peercy v. Peercy*, 154 Colo. 575, 392 P.2d 609 (1964); *Dept. of Welfare v. Schneider* , 156 Colo. 189, 397 P.2d 752 (1964).

Under section (b)(1) a motion to vacate must be filed within six months, or it is barred. *Atlas Constr. Co. v. District Court*, 197 Colo. 66, 589 P.2d 953 (1979).

Where a judgment resulted from a mistaken belief in the existence of a terminated order, this constitutes grounds for relief under section (b)(1), and the "reasonable time" limitation of this rule for avoiding the effects of the judgment upon such grounds cannot exceed six months. *Sauls v. Sauls*, 40 Colo. App. 275, 577 P.2d 771 (1977).

Where one seeks to be relieved from the judgment more than six months after its entry, such attempt is too late. *Peercy v. Peercy*, 154 Colo. 575, 392 P.2d 609 (1964).

A motion filed seven months after entry of judgment is filed too late. *Fiant v. Town of Naturita*, 12 7 Colo. 571, 259 P.2d 278 (1953); *Salter v. Bd. of County Comm'rs*, 133 Colo. 138, 292 P.2d 345, cert. denied, 352 U.S. 829, 77 S. Ct. 37, 1 L. Ed. 2d 48 (1956).

Since each of the installments for support becomes a judgment when it accrues, the only relief from judgment on the grounds of fraud or mistake would pertain to those installments which became due six months or less before the final judgment. *Schaffer v. District Court*, 172 Colo. 43, 470 P.2d 18 (1970).

Section (b) of this rule cannot be applied to bar a motion brought under § 14-10-122(1)(c) for retroactive modification of child support based on a mutually agreed upon change of physical custody. Section (b) of the rule imposes a time limit for the motion and is inconsistent with the procedure contemplated in the statute. In re Green, 93 P.3d 614 (Colo. App. 2004).

A court has no authority to grant relief. Where a motion is filed after the six-month deadline required by this rule, a court would have had no authority to grant relief. *AA Constr. Co. v. Gould*, 28 Colo. App. 161, 470 P.2d 916 (1970).

Where plaintiff's motion for reinstatement of the case was not timely filed within the specified six-month period following entry of the order of dismissal, the trial court was without authority to reinstate the case or to provide further relief. *Love v. Rocky Mt. Kennel Club*, 33 Colo. App. 4, 514 P.2d 336 (1973).

When the limiting period has passed, an order vacating judgment is absolutely void for lack of jurisdiction. *Elder v. Richmond Gold & Mining Co.*, 58 F. 536 (8th Cir. 1893); *Empire Const. Co. v. Crawford*, 57 Colo. 281, 141 P. 474 (1914); *Bd. of Control v. Mulertz*, 60 Colo. 468, 154 P. 742 (1916).

Claim preclusion (otherwise known as res judicata) bars independent damages actions for wrongs committed in dissolution proceedings. After the six-month period following entry of judgment provided by section (b)(2), independent damages action for wrongs allegedly committed in the dissolution proceeding are barred. *Gavrilis v. Gavrilis*, 116 P.3d 1272 (Colo. App. 2005).

There was no fraud upon the court in dissolution of marriage action where husband's fraudulent nondisclosure of assets and income was purely between the parties. In re Gance, 36 P.3d 114 (Colo. App. 2001).

Void judgment may be vacated at any time regardless of time limits established by rules of civil procedure. *Don J. Best Trust v. Cherry Creek Nat. Bank*, 792 P.2d 302 (Colo. App. 1990).

Independent equitable action permitted. The propriety of an independent equitable action to afford relief from a prior judgment is expressly permitted under the provisions of section (b) of this rule. *Dudley v. Keller*, 33 Colo. App. 320, 521 P.2d 175 (1974).

Six-month limitation has no application to independent equitable action. An independent action to obtain equitable relief from a prior judgment is not brought under section (b) of this rule, and, hence, the six months' time limitation contained in this rule has no application. *Terry v. Terry*, 154 Colo. 41, 387 P.2d 902 (1963); *Caldwell v. District Court*, 644 P.2d 26 (Colo. 1982).

An independent equitable action to afford relief from a prior judgment is not restricted by the six-month time limitation upon motions made under clauses (1) to (5) in the first sentence of this rule. *Dudley v. Keller*, 33 Colo. App. 320, 521 P.2d 175 (1974).

Because an independent equitable action is not brought under this rule, the six-month time limit of clauses (1) and (2) in the first sentence of section (b) do not apply; rather, an independent equitable action must only be brought within a "reasonable time". *Atlas Constr. Co. v. District Court*, 197 Colo. 66, 589 P.2d 953 (1979).

An independent equitable action may provide additional remedies. An independent equitable action to afford relief from a prior judgment may provide remedies in addition to those afforded under section (b) of this rule. *Dudley v. Keller*, 33 Colo. App. 320, 521 P.2d 175 (1974).

Essential criteria upon which relief may be granted in an equitable action to afford relief from a prior judgment contemplated by section (b) are as follows: (1) That the judgment ought not, in equity and good conscience, be enforced; (2) that there can be asserted a meritorious defense to the cause of action on which the judgment is founded; (3) that fraud, accident, or mistake prevented the defendant in the action from obtaining the benefit of his defense; (4) that there is an absence of fault or negligence on the part of defendant; (5) and that there exists no

adequate remedy at law. *Dudley v. Keller*, 33 Colo. App. 320, 521 P.2d 175 (1974); In re Gance, 36 P.3d 114 (Colo. App. 2001).

Independent action to obtain equitable relief from prior judgment not brought under rule; rather, it is a new action, commenced in the same manner as any other civil action. *Atlas Constr. Co. v. District Court*, 197 Colo. 66, 589 P.2d 953 (1979).

Dismissal of judgment debtor's motion for relief under section (b)(4) on the basis of settlement agreement between judgment debtor and judgment creditor was proper where such motion was not timely filed and the court lacked jurisdiction since judgment debtor elected to litigate settlement agreement in a separate action. *Tripp v. Parga*, 764 P.2d 367 (Colo. App. 1988).

A party may not use an independent equitable action to accomplish what it could have accomplished by appeal. In case where plaintiff argued that second complaint was an independent equitable action seeking relief from order dismissing his first complaint, plaintiff's proper remedy was to seek timely appellate relief. Therefore, district court properly dismissed plaintiff's second complaint. *Kelso v. Rickenbaugh Cadillac Co.*, 262 P.3d 1001 (Colo. App. 2011).

This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding. *Terry v. Terry*, 154 Colo. 41, 387 P.2d 902 (1963).

Claimant seeking relief through an independent equitable action based on fraud must establish extrinsic fraud as opposed to mere intrinsic fraud. A mere showing of intrinsic fraud, such as perjury or nondisclosure between the litigants concerning the subject matter of the original action, is insufficient. In re Gance, 36 P.3d 114 (Colo. App. 2001).

Husband's concealment of income and assets in dissolution of marriage action pertained to the substance and merits of the litigation and involved the parties themselves; it therefore did not rise to the level of fraud necessary to support an independent equitable action to vacate the underlying permanent orders. In re Gance, 36 P.3d 114 (Colo. App. 2001).

"Excusable neglect" sufficient to vacate an order results from circumstances which would cause a reasonably careful person to neglect a duty, and the issue of negligence is determined by the trier of fact. *Craig v. Rider*, 628 P.2d 623 (Colo. App. 1980), rev'd on other grounds, 651 P.2d 397 (Colo. 1982).

Party's own negligence not excusable neglect. Where a party's own carelessness resulted in its failure to file a responsive pleading, this carelessness does not constitute excusable neglect. *Biella v. State Dept. of Hwys.*, 652 P.2d 1100 (Colo. App. 1982); *Johnston v. S.W. Devanney & Co., Inc.*, 719 P.2d 734 (Colo. App. 1986).

In general, excusable neglect involves unforeseen occurrences that would cause a reasonably prudent person to overlook a required act in the performance of some responsibility. Failure to act because of carelessness and negligence is not excusable neglect. *Messler v. Phillips*, 867 P.2d 128 (Colo. App. 1993).

Reliance on opposing party's pleadings held to be "excusable neglect". A defendant's reliance upon the plaintiff's verified statement and pleadings appearing to drop the defendant from the action, coupled with the advice of an attorney that he need not be concerned about the proceedings, constitutes "excusable neglect" as a matter of law. People in Interest of C.A.W., 660 P.2d 10 (Colo. App. 1982).

Reliance on district court's statements held to be "excusable neglect". A defendant's failure to move for a new trial, based on the district court's assurance that such a motion was unnecessary in order for the defendant to appeal, constitutes excusable neglect under this rule. *Tyler v. Adams County Dept. of Soc. Servs.*, 697 P.2d 29 (Colo. 1985).

Excusable neglect not found. Pro se plaintiff's failure to comply with notice provisions of § 24-10-109 does not constitute excusable neglect. *Deason v. Lewis*, 706 P.2d 1283 (Colo. App. 1985).

The rule that negligence on the part of an attorney may constitute excusable neglect on the part of the client has no application if the client itself is also negligent. *Johnson v. Capitol Funding, LTD.*, 725 P.2d 1179 (Colo. App. 1986).

Common carelessness and negligence do not amount to excusable neglect and a party's conduct constitutes excusable neglect when the surrounding circumstances would cause a reasonably careful person similarly to neglect a duty. *Guynn v. State Farm Mut. Auto Ins. Co.*, 725 P.2d 1162 (Colo. App. 1986).

Defendant's assertion that its agent was without authority to enter into a contract with plaintiff was not excusable neglect. *Merrill Chadwick Co. v. October Oil Co.*, 725 P.2d 17 (Colo. App. 1986).

Conduct of a party's legal representative constitutes excusable neglect when surrounding circumstances would cause a reasonably prudent person to overlook a required act in the performance of some responsibility; however, common carelessness and negligence by the party's attorney does not amount to excusable neglect. *Guevara v. Foxhoven*, 928 P.2d 793 (Colo. App. 1996).

Failure of settlement offer made by defendant's insurance attorney to specify whether offer addressed fewer than all of the claims between the parties, did not constitute excusable neglect. *Guevara v. Foxhoven*, 928 P.2d 793 (Colo. App. 1996).

Excusable neglect does not constitute grounds for relief from the operation of C.R.C.P. 59(j). *Sandoval v. Trinidad Area Health Ass'n*, 752 P.2d 1062 (Colo. App. 1988).

Relief from a judgment may be granted on equitable grounds. *Continental Nat'l Bank v. Dolan*, 39 Colo. App. 16, 564 P.2d 955 (1977).

A motion under this rule cannot be overturned on appeal in the absence of an abuse of discretion by the district court. *Front Range Partners v. Hyland Hills Metro.*, 706 P.2d 1279 (Colo. 1985); *Domenico v. Sw. Props. Venture*, 914 P.2d 390 (Colo. App. 1995).

Abuse of discretion will warrant reversal. While the grant or denial of relief from a judgment on equitable grounds is within the discretion of the trial court, an abuse of this discretion will warrant reversal. *Continental Nat'l Bank v. Dolan*,

39 Colo. App. 16, 564 P.2d 955 (1977); S.E. Colo. *Water Conservancy Dist. v. O'Neill*, 817 P.2d 500 (Colo. 1991), aff'd, 854 P.2d 167 (Colo. 1993); *Blesch v. Denver Publ'g Co.*, 62 P.3d 1060 (Colo. App. 2002).

It is error to deny relief where dismissal erroneously ordered on court's own motion. Where court on own motion dismissed action for failure to prosecute without complying with notice requirements of C.R.C.P. 41(b) and C.R.C.P. 121, § 1-10 (2), erroneous dismissal constituted sufficient reason to justify relief. *Maxwell v. W.K.A. Inc.*, 728 P.2d 321 (Colo. App. 1986).

Abuse of discretion found where trial court refused to set aside the damages portion of a judgment. *Johnston v. S.W. Devanney & Co., Inc.*, 719 P.2d 734 (Colo. App. 1986).

Abuse of discretion not found. Luna v. Fisher, 690 P.2d 264 (Colo. App. 1984); *Merrill Chadwick Co. v. October Oil Co.*, 725 P.2d 17 (Colo. App. 1986).

Existence of meritorious defense and lack of prejudice to the plaintiff are insufficient to show an abuse of discretion in denying a motion to set aside a default. *Johnston v. S.W. Devanney & Co., Inc.*, 719 P.2d 734 (Colo. App. 1986).

Even without tainted expert's testimony, trial court found that other evidence in the case supported the judgment. People ex rel. S.G., 91 P.3d 443 (Colo. App. 2004).

This rule is not applicable to a motion to reform a property settlement agreement incorporated into a divorce decree, since C.R.C.P. 81(b) provides that the Rules of Civil Procedure shall not govern procedure and practice in divorce actions if in conflict with applicable statutes. *Ingels v. Ingels*, 29 Colo. App. 585, 487 P.2d 812 (1971).

This rule is not applicable to a juvenile court's entry of an order terminating probation by mistake. The Colorado Rules of Civil Procedure apply only to juvenile matters that are not governed by the Colorado Children's Code. People in Interest of M.T., 950 P.2d 669 (Colo. App. 1997).

District court erred in denying husband relief from provision of dissolution of marriage decree requiring him to pay part of his future social security benefits to wife. State law equitable estoppel principles cannot be applied to bar a party from challenging a judgment rendered void by the supremacy clause of the U.S. constitution. In re Anderson, 252 P.3d 490 (Colo. App. 2010).

A decree determining property rights in a divorce matter is final and cannot be subsequently modified by reason of a change of circumstances. *Ferguson v. Olmsted*, 168 Colo. 374, 451 P.2d 746 (1969).

Where a court may provide for custody of children by orders made "before or after" the entry of a final decree, the trial court may provide for the custody of the child even though the subject was not mentioned in the original decree. *Kelley v. Kelley*, 161 Colo. 486, 423 P.2d 315 (1967).

Six-month limit applicable in child support action. Where defendant in a child support action alleged there was fraud, extrinsic to the record, perpetrated by plaintiff, unless the fraud alleged was such as to defeat the jurisdiction of the court, defendant was subject to the six-month limit of this rule. *McNeece v. McNeece*, 39 Colo. App. 160, 562 P.2d

767 (1977).

Where defendant did not seek to reopen the divorce proceeding until approximately five years after entry of judgment, none of the grounds of C.R.C.P. 59 or this rule were available to him to reopen the divorce proceeding. *McNeece v. McNeece*, 39 Colo. App. 160, 562 P.2d 767 (1977).

Clause (5) of section (b) is residuary clause, covering extreme situations not covered by the preceding clauses in section (b). *Atlas Constr. Co. v. District Court*, 197 Colo. 66, 589 P.2d 953 (1979); *Sisneros v. First Nat. Bank of Denver*, 689 P.2d 1178 (Colo. App. 1984); *Canton Oil v. District Court*, 731 P.2d 687 (Colo. 1987).

A motion under this rule cannot be used to circumvent the operation of C.R.C.P. 59(j) unless the facts of the case constitute an "extreme situation" justifying relief from a judgment pursuant to clause (5) of section (b). *Sandoval v. Trinidad Area Health Ass'n*, 752 P.2d 1062 (Colo. App. 1988).

Total lack of judicial review of property division provisions of a separation agreement constitutes an omission falling within the ambit of clause (5) of section (b). In re Seely, 689 P.2d 1154 (Colo. App. 1984).

Reason alleged by a movant under clause (5) of section (b) must justify relief. *Atlas Constr. Co. v. District Court*, 197 Colo. 66, 589 P.2d 953 (1979); *Sisneros v. First Nat. Bank of Denver*, 689 P.2d 1178 (Colo. App. 1984).

Grievous jury misconduct raising sensitive issues of religion presents grounds for relief under clause (5) ("other reason") of section (b). *Canton Oil v. District Court*, 731 P.2d 687 (Colo. 1987).

Where there is misconduct of jurors or the intrusion of irregular influences in the course of a trial, the test for determining whether a new trial will be granted is whether such matters had capacity of influencing result. *Butters v. Dee Wann*, 363 P.2d 494 (1961); *Canton Oil v. District Court*, 731 P.2d 687 (Colo. 1987).

While trial court personally expressed belief that verdict would have been same with a "decent" jury, trial court made necessary finding, in setting aside judgment, that jurors' conduct had capacity of influencing verdict. *Canton Oil v. District Court*, 731 P.2d 687 (Colo. 1987).

Untimely assertion of federal statutory venue right is not an extreme situation justifying relief under clause (5) of section (b). *Sisneros v. First Nat. Bank of Denver*, 689 P.2d 1178 (Colo. App. 1984).

Repeated assurances by the court clerk that the defendant's motion to alter and amend the judgment had been forwarded to the presiding judge when, in fact, no notification of said motion had been given to the judge did not constitute an "extreme situation" allowing relief under clause (5) of section (b). *Sandoval v. Trinidad Area Health Ass'n* , 752 P.2d 1062 (Colo. App. 1988).

Defense not timely raised. The existence of a defense not timely raised does not constitute an extreme situation justifying relief from a default judgment under clause (5) of section (b). *Sisneros v. First Nat. Bank of Denver*, 689 P.2d 1178 (Colo. App. 1984).

Changes in decisional law, even by the United States supreme court and even involving constitutionality, do not necessarily amount to the extraordinary circumstances required for relief pursuant to section (b)(5). *Davidson v. McClellan*, 16 P.3d 233 (Colo. 2001); *SR Condos., LLC v. K.C. Constr., Inc.*, 176 P. 3d 866 (Colo. App. 2007).

Jurisdictional prerequisite for review of action on section (b) motion. A motion for a new trial is a jurisdictional prerequisite for appellate review of a grant or denial of a section (b) motion when there has been a hearing involving controverted issues of fact. *Rowe v. Watered Down Farms*, 195 Colo. 152, 576 P.2d 172 (1978).

Erroneous "in personam" decision may be vacated. A trial court may properly vacate its order of dismissal against a defendant where the original decision of the trial court to dismiss under the theory that the action was "in personam" and not "in rem" was erroneous. *Linker v. Linker*, 28 Colo. App. 136, 470 P.2d 882 (1970).

When a defendant voluntarily pays a judgment, he is barred from questioning any technicalities, either of pleading or form, incident to the entry of the judgment. *Salter v. Bd. of County Comm'rs*, 133 Colo. 138, 292 P.2d 345, cert. denied, 352 U.S. 829, 77 S. Ct. 37, 1 L. Ed. 2d 48 (1956).

Misplaced reliance on the advice of counsel is not in itself sufficient grounds for granting of relief under section (b) of this rule. *BB v. SS*, 171 Colo. 534, 468 P.2d 859 (1970); *Luna v. Fisher*, 690 P.2d 264 (Colo. App. 1984).

Where a party commits a cause to the agency of an attorney, the neglect, omission, or mistake of such attorney resulting in the rendition of a judgment against the party is available to authorize the vacation of the judgment. *Fidelity Fin. Co. v. Groff*, 124 Colo. 223, 235 P.2d 994 (1951); *Domenico v. Sw. Props. Venture*, 914 P.2d 390 (Colo. App. 1995).

When a trial court permits counsel to withdraw from a case without notice to his client and then adjudicated his rights "ex parte", a judgment entered is void for lack of due process. *Dalton v. People in Interest of Moors*, 146 Colo. 15, 360 P.2d 113 (1961); *Sunshine v. Robinson*, 168 Colo. 409, 451 P.2d 757 (1969).

Malfeasance by attorney, consisting of failure to notify clients of motion for summary judgment or to respond to motion while under suspension from the practice of law, furnished grounds for relief from judgment where clients were unaware of the motion or of their attorney's suspension. *Valley Bank of Frederick v. Rowe*, 851 P.2d 267 (Colo. App. 1993).

Action of trial court renders judgment void if defendants had no notice. The action of the trial judge in permitting the withdrawal of counsel and proceeding to judgment "ex parte" constituted a failure to protect the constitutional right of defendants to their day in court and renders judgment void if defendants had no notice that their counsel intended to seek permission to withdraw. *Calkins v. Smalley*, 88 Colo. 227, 294 P. 534 (1930); *Blackwell v. Midland Fed. Sav. & Loan Ass'n*, 132 Colo. 45, 284 P.2d 1060 (1955); *Sunshine v. Robinson*, 168 Colo. 409, 451 P.2d 757 (1969).

Where a judgment is entered upon a cognovit note without notice to the defendant, a motion in apt time is thereafter filed to set aside the same, and a meritorious defense is tendered by answer, it is the duty of a court to vacate the judgment and try the case on the merits. *Richards v. First Nat'l Bank*, 59 Colo. 403, 148 P. 912 (1915); *Commercial*

Credit Co. v. Calkins, 78 Colo. 257, 241 P. 529 (1925); *Mitchell v. Miller*, 81 Colo. 1, 252 P. 886 (1927); *Denver Indus. Corp. v. Kesselring*, 90 Colo. 295, 8 P.2d 767 (1932); *Lucero v. Smith*, 110 Colo. 165, 132 P.2d 791 (1943); *Prather v. District Court*, 13 7 Colo. 584, 328 P.2d 111 (1958); *Rencher v. District Court*, 160 Colo. 523, 418 P.2d 289 (1966).

If a judgment of dismissal has terminated and put an end to, a case remains final for all purposes and is unaffected by a motion to grant relief therefrom. *Johnson v. Johnson*, 132 Colo. 236, 287 P.2d 49 (1955); *Robles v. People in Interest of Robles*, 150 Colo. 462, 373 P.2d 701 (1962).

A motion under section (b) does not affect the finality of a judgment or suspend its operation. *Robles v. People in Interest of Robles*, 150 Colo. 462, 373 P.2d 701 (1962).

A motion, in any event, is directed to the discretion of a trial court. *Johnson v. Johnson*, 132 Colo. 236, 287 P.2d 49 (1955); *Robles v. People in Interest of Robles*, 150 Colo. 462, 373 P.2d 701 (1962).

When one files such a motion, he admits for all practical purposes that the judgment is in all respects regular on the face of the record, but asserts that the record would show differently except for mistake, inadvertence, or excusable neglect on behalf of counsel or client. *Johnson v. Johnson*, 132 Colo. 236, 287 P.2d 49 (1955); *Robles v. People in Interest of Robles*, 150 Colo. 462, 373 P.2d 701 (1962).

The ruling on a motion to "dismiss and vacate" is not a final judgment from which an appeal will lie. *Fiant v. Town of Naturita*, 12 7 Colo. 571, 259 P.2d 278 (1953); *Salter v. Bd. of County Comm'rs*, 133 Colo. 138, 292 P.2d 345, cert. denied, 352 U.S. 829, 77 S. Ct. 37, 1 L. Ed. 2d 48 (1956).

Where defendant in prior action sought and obtained dismissal for failure to prosecute but did not specifically request dismissal with prejudice, order of dismissal did not so specify, and no good cause was shown for defendant's failure to request dismissal with prejudice, subsequent "clarification" of order to specify dismissal with prejudice was ineffective. *McElvaney v. Batley*, 824 P.2d 73 (Colo. App. 1991).

Where a judgment is set aside on jurisdictional grounds, it is vacated and of no force and effect. *Weaver Constr. Co. v. District Court*, 190 Colo. 227, 545 P.2d 1042 (1976).

Party who lets judgment become final without objection to the court's jurisdiction is precluded from attacking the subject matter jurisdiction through a motion under this rule. In re Mallon, 956 P.2d 642 (Colo. App. 1998).

Original judgment opened. Where a judgment is set aside on grounds other than those challenging the jurisdiction of the court, the judgment is opened and the moving party, after a showing of good cause and a meritorious defense, will be permitted to file an answer to the original complaint and participate in a trial on the merits. *Weaver Constr. Co. v. District Court*, 190 Colo. 227, 545 P.2d 1042 (1976).

If an issue is not res judicata, the district court's judgment may be challenged as void through a motion pursuant to section (b) of this rule to vacate the judgment or through an independent action. *Moore & Co. v. Williams*, 672 P.2d 999 (Colo. 1983).

A void judgment is a judgment entered where jurisdictional defects exist and is a nullity, whereas an erroneous judgment is one rendered in accordance with method of procedure and practice allowed by law but is contrary to law; if a trial court has jurisdiction, it may correct an erroneous judgment. In re Pierce, 720 P.2d 591 (Colo. App. 1985).

Judgment rendered without jurisdiction is void and may be attacked directly or collaterally. In re Stroud, 631 P.2d 168 (Colo. 1981).

Judgment entered on legal holiday not void and becomes effective next business day. Section 13-1-118(1) does not provide that any judicial business transacted in violation of its provisions is void. Rather, the statute is silent as to the effect of any order entered or other judicial business transacted in violation of its prohibitions. Section 13-1-118(2) provides that the effect of having a day fixed for the opening of a court that falls on a prohibited day is that "the court shall stand adjourned until the next succeeding day." Thus, the effect of the trial court's entry of an order reviving judgment on a legal holiday was not to invalidate the order but, rather, merely to postpone its effective date until the next day the courts were open. Because the challenged judgment is not void, section (b)(3) of this rule provides no basis for relief. *Arvada 1st Indus. Bank v. Hutchison*, 15 P.3d 292 (Colo. App. 2000).

Government agencies treated same as other litigants. Absent an express statutory mandate to the contrary, government agencies are to be treated as would be any other litigant while before the court. *Biella v. State Dept. of Hwys.*, 652 P.2d 1100 (Colo. App. 1982).

C.R.C.P. 6(b)(2) is controlling over this rule as to whether a trial court may extend the period of time for filing a motion for new trial under C.R.C.P. 59(b) (now (a)(1)) after the original filing period has expired. *Liberty Mutual Ins. Co. v. Safeco Ins. Co.*, 679 P.2d 1115 (Colo. App. 1984).

Where court had lost jurisdiction under C.R.C.P. 59(b) (now (a)(1)), court had jurisdiction to set aside judgment under clause (5) of section (b) of this rule without unduly expanding the contours of the rule or undercutting C.R.C.P. 59(b) (now (a)(1)). *Canton Oil v. District Court*, 731 P.2d 687 (Colo. 1987).

Only issues contained in a motion under this rule are properly before the appellate court for review; constitutional objections not appearing in the motion will not be reviewed. *Front Range Partners v. Hyland Hills Metro.*, 706 P.2d 1279 (Colo. 1985).

No evidentiary hearing need be conducted by the trial court considering a motion under this rule nor is there an abuse of discretion when a trial court determines such a motion without conducting such a hearing. *Front Range Partners v. Hyland Hills Metro.,* 706 P.2d 1279 (Colo. 1985).

But nothing in this rule prevents a trial court from holding an evidentiary hearing on a motion under this rule if such a hearing would assist in reaching a just determination of the issues raised by the motion. *Sharma v. Vigil*, 967 P.2d 197 (Colo. App. 1998).

Reversal of conviction in criminal case grounds for relief from monetary forfeiture judgment. While a conviction is not required in every civil forfeiture case, the reversal of the conviction was relevant here because the court relied on that

conviction in its forfeiture judgment. The physical evidence upon which the trial court had based its forfeiture judgment had been determined to be unconstitutionally seized, making it relevant. *People v. $11,200 U.S. Currency, __ P.3d __* (Colo. App. 2011), rev'd on other grounds, 2013 CO 64, 313 P.3d 554.

Section (b) permits a trial court to rectify or reverse a prior judgment that, in light of new facts, is now erroneous. However, a holding that the forfeiture against a defendant's property was void does not equate to a ruling that defendant is entitled to a return of the property or monetary relief from the government because a motion under section (b) is not a claim for the return of property. To the extent that the trial court's order set aside the forfeiture judgment, the order was consistent with the power expressly granted the court under section (b). Section (b) does not empower the trial court to go further and order return of the property. People v. $11,200.00 U.S. Currency, 2013 CO 64, 313 P.3d 554.

B. Default Judgments.

Law reviews. For comment on Self v. Watt, appearing below, see 26 Rocky Mt. L. Rev. 107 (1953). For comment on *Coerber v. Rath* appearing below, see 45 Den. L.J. 763 (1968).

Annotator's note. For annotations relating to motions to vacate default judgments, see the annotations under the analysis title "IV. Setting Aside Default" under C.R.C.P. 55.

Review by writ of error is proper procedure. The only proper procedure to secure review of a trial court's order granting an application to set aside a default judgment is by writ of error after final judgment, not prohibition. *Stiger v. District Court*, 188 Colo. 403, 535 P.2d 508 (1975).

Section (b) of this rule sets forth the procedure to be followed where one seeks to set aside a judgment entered by default. *Fraka v. Malernee*, 129 Colo. 87, 267 P.2d 651 (1954).

Section (b)(3) is the proper basis for vacating a default judgment if the defaulting party's due process rights were violated by failure to receive notice of a default judgment. *First Nat. Bank of Telluride v. Fleisher*, 2 P.3d 706 (Colo. 2000).

Section (b) of this rule and C.R.C.P. 55(c) leave the matter of setting aside defaults and judgments entered thereon to the discretion of a trial judge. *Ehrlinger v. Parker*, 13 7 Colo. 514, 327 P.2d 267 (1958).

Allegations in a C.R.C.P. 55 motion for default are sufficient to assert a basis for relief from judgment on the basis of fraud. *Salvo v. De Simone*, 727 P.2d 879 (Colo. App. 1986).

Motion for a new trial is a jurisdictional prerequisite for appellate review of denial of a motion to vacate a default judgment, unless the hearing on the motion to vacate does not involve "controverted issues of fact". *Rowe v. Watered Down Farms*, 195 Colo. 152, 576 P.2d 172 (1978).

The granting or denial of an application to vacate a default based on excusable neglect rests in the sound judicial discretion of a trial court. *Browning v. Potter*, 129 Colo. 448, 271 P.2d 418 (1954); *Burr v. Allard*, 133 Colo. 270, 293

P.2d 969 (1956); *Ehrlinger v. Parker*, 13 7 Colo. 514, 327 P.2d 267 (1958).

The determination of granting or denying relief under this rule rests in the sound discretion of the trial court on the particular facts of the case. *Weeks v. Sigala*, 32 Colo. App. 121, 509 P.2d 320 (1973).

The determination of whether to vacate or set aside a default judgment is within the sound discretion of the trial court. *Dudley v. Keller*, 33 Colo. App. 320, 521 P.2d 175 (1974).

A trial court's determination of a motion to vacate a judgment under this rule will not be disturbed on appellate review in the absence of a clear abuse of discretion. *Columbine Valley Constr. Co. v. Bd. of Dirs.*, 626 P.2d 686 (Colo. 1981).

The underlying goal in ruling on motions to set aside default judgments is to promote substantial justice. Whether substantial justice will be served by setting aside a default judgment on the ground of excusable neglect is to be determined by the trial court in the exercise of its sound discretion. *Craig v. Rider*, 651 P.2d 397 (Colo. 1982).

Where the moving party has delayed substantially in seeking to set aside a default judgment, relief is disfavored by the courts. *Martinez v. Dixon*, 710 P.2d 498 (Colo. App. 1985).

The trial court's order on a motion for relief, based on a residuary clause covering extreme situations, may not be reversed absent an abuse of discretion. *Fukutomi v. Siegel*, 785 P.2d 147 (Colo. App. 1989).

To warrant a reversal, it must appear that there is an abuse of the court's discretion. *Browning v. Potter*, 129 Colo. 448, 271 P.2d 418 (1954); *Burr v. Allard*, 133 Colo. 270, 293 P.2d 969 (1956); *Ehrlinger v. Parker*, 13 7 Colo. 514, 327 P.2d 267 (1958).

The determination of granting or denying relief under this rule will not be disturbed on review unless it clearly appears that there has been abuse of that discretion. *Weeks v. Sigala*, 32 Colo. App. 121, 509 P.2d 320 (1973).

Where service is not proper, judgment is void and may be challenged at any time. *United Bank of Boulder, N.A. v. Buchanan*, 836 P.2d 473 (Colo. App. 1992).

Discretion of the court in considering any application to vacate a default is controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to serve, and not to impede or defeat, the ends of justice. *Dudley v. Keller*, 33 Colo. App. 320, 521 P.2d 175 (1974).

A default judgment as to a party was properly set aside by the judge on the ground that he was not subjected to the personal jurisdiction of the court at the time of the judgment due to a lack of service of process because service had been served on his behalf on his alleged wife, but at the time of service, the couple had been divorced for over a month. *Weaver Constr. Co. v. District Court*, 190 Colo. 227, 545 P.2d 1042 (1976).

Default judgment was not void because process was adequately served and trial court therefore had personal jurisdiction over defendant. In case where process was properly served upon defendant's registered agent pursuant to C.R.C.P. 4, agent's failure to timely respond because of his own carelessness and negligence did not constitute

excusable neglect. Therefore, trial court erred in setting aside the default judgment pursuant to sections (b)(1) and (b)(3) of this rule. *Goodman Assocs., LLC v. WP Mtn. Props., LLC*, 222 P.3d 310 (Colo. 2010).

Judgment must be final before time limitations apply. Where order of default was entered against one of two defendants but action remained pending and no C.R.C.P. 54(b) certification was obtained, timeliness of motion would be gauged in relation to date of dismissal of action against second defendant. *United Bank of Boulder, N.A. v. Buchanan*, 836 P.2d 473 (Colo. App. 1992).

Where a motion is not filed within six months after the default was entered, then, under section (b) of this rule, a trial court is correct in denying the motion to vacate the default. *Browning v. Potter*, 129 Colo. 448, 271 P.2d 418 (1954).

The trial court had no jurisdiction to hear, much less grant, a motion for relief from judgment filed more than six months after entry of judgment. *Wesson v. Johnson*, 622 P.2d 104 (Colo. App. 1980).

Seventeen years is not a "reasonable time". Where for a period of more than 17 years one took no action to vacate or otherwise attack the validity of a default judgment, it can hardly be said that under such circumstances 17 years is a "reasonable time". *Haskell v. Gross*, 145 Colo. 365, 358 P.2d 1024 (1961).

Petition to vacate such a judgment held filed in apt time. *Senne v. Conley*, 110 Colo. 270, 133 P.2d 381 (1943).

In cases such as this, a defendant must establish his grounds for relief by clear, strong, and satisfactory proof. *Browning v. Potter*, 129 Colo. 448, 271 P.2d 418 (1954); *Riss v. Air Rental, Inc.*, 136 Colo. 216, 315 P.2d 820 (1957); *Moskowitz v. Michaels Artists & Eng'r Supplies, Inc.*, 29 Colo. App. 44, 477 P.2d 465 (1970).

It is not sufficient to show that the neglect which brought about the default is excusable. *Gumaer v. Bell*, 51 Colo. 473, 119 P. 681 (1911); *Riss v. Air Rental, Inc.*, 136 Colo. 216, 315 P.2d 820 (1957); *Moskowitz v. Michaels Artists & Eng'r Supplies, Inc.*, 29 Colo. App. 44, 477 P.2d 465 (1970).

To vacate a default, a mere showing of excusable neglect is not sufficient. *Burr v. Allard*, 133 Colo. 270, 293 P.2d 969 (1956); *Orebaugh v. Doskocil*, 145 Colo. 484, 359 P.2d 671 (1961).

A defendant must show a meritorious defense to the action. *Gumaer v. Bell*, 51 Colo. 473, 119 P. 681 (1911); *Riss v. Air Rental, Inc.*, 136 Colo. 216, 315 P.2d 820 (1957); *Moskowitz v. Michaels Artists & Eng'r Supplies, Inc.*, 29 Colo. App. 44, 477 P.2d 465 (1970); *Weeks v. Sigala*, 32 Colo. App. 121, 509 P.2d 320 (1973).

The judge was acting within his jurisdiction under this rule when he set aside a default judgment on the ground of "excusable neglect" supported by a specific statement of meritorious defense. *Weaver Constr. Co. v. District Court*, 190 Colo. 227, 545 P.2d 1042 (1976).

A defense to the action "prima facie" meritorious must also appear. *Burr v. Allard*, 133 Colo. 270, 293 P.2d 969 (1956); *Orebaugh v. Doskocil*, 145 Colo. 484, 359 P.2d 671 (1961).

It must be stated with such fullness and particularity that the court can see it is substantial, not technical, meritorious,

and not frivolous. *Burr v. Allard*, 133 Colo. 270, 293 P.2d 969 (1956); *Orebaugh v. Doskocil*, 145 Colo. 484, 359 P.2d 671 (1961).

Where there were no reasons proffered to the trial court as grounds for relief under section (b) other than youth and indifference, the trial court's denial of motion to set aside default judgment was not an abuse of discretion. People in Interest of J.M.W., 36 Colo. App. 398, 542 P.2d 392 (1975).

It is not the duty of the trial court to relieve one of the consequences incident to the mistakes of his counsel. *Self v. Watt*, 128 Colo. 61, 259 P.2d 1074 (1953).

Where it is clear that defendants' counsel was negligent and that such neglect was the primary cause for their failure, counsel's neglect is inexcusable, but this neglect should not be imputed to the defendants. *Coerber v. Rath*, 164 Colo. 294, 435 P.2d 228 (1967).

Gross negligence on the part of counsel resulting in a default judgment is considered excusable neglect on the part of the client entitling him to have the judgment set aside. *Temple v. Miller*, 30 Colo. App. 49, 488 P.2d 252 (1971); *Dudley v. Keller*, 33 Colo. App. 320, 521 P.2d 175 (1974).

Gross negligence on the part of counsel, under certain circumstances, should be considered excusable neglect on the part of a client sufficient to permit the client to set aside a default judgment. *Weeks v. Sigala*, 32 Colo. App. 121, 509 P.2d 320 (1973).

Although a court recognizes the gross neglect of counsel, yet enters a default, it unwarrantly punishes defendants whose only dereliction is the misplacing of confidence in their attorney. *Coerber v. Rath*, 164 Colo. 294, 435 P.2d 228 (1967).

To hold that such reasons are inapplicable because a defendant failed to check the progress of the litigation is to make the client erroneously totally responsible for the attorney's negligent failure to comply with the rules of civil procedure. *Temple v. Miller*, 30 Colo. App. 49, 488 P.2d 252 (1971).

Where one was, or should have been, aware that his interest in the action was adverse to another, his reliance on such individual does not constitute excusable neglect so as to justify vacating entry of default judgment. *Moskowitz v. Michaels Artists & Eng'r Supplies, Inc.*, 29 Colo. App. 44, 477 P.2d 465 (1970).

Where the record discloses that the defendant himself was guilty of negligence separate and apart from that of his counsel, the alleged negligence of counsel would not be considered as excusable neglect for purpose of setting aside default judgment. *Weeks v. Sigala*, 32 Colo. App. 121, 509 P.2d 320 (1973).

The entry of a default judgment does not apply to a stipulated judgment. Where parties dealing at arm's length have stipulated for the entry of a judgment, it is not a default judgment in the true sense of the word, but a stipulated judgment; consequently, there is no mistake, inadvertence, surprise or excusable neglect. *Kopel v. Davie*, 163 Colo. 57, 428 P.2d 712 (1967).

Where the parties to litigation, dealing at arm's length, stipulate for the entry of a judgment of dismissal, and they do not claim mistake, inadvertence, surprise, or excusable neglect, nor are any of the parties to the action seeking to have the order set aside, that judgment is final. *Columbia Sav. & Loan Ass'n v. District Court*, 186 Colo. 212, 526 P.2d 661 (1974).

A default judgment may only be the subject of collateral attack when the trial court lacked jurisdiction over the parties or the subject matter. *DeBoer v. District Court*, 184 Colo. 112, 518 P.2d 942 (1974).

Where a default judgment has been entered and made final, it is not a proper subject of collateral attack particularly by strangers to the original action, although the rule prohibiting such attack applies to parties as well. *DeBoer v. District Court*, 184 Colo. 112, 518 P.2d 942 (1974).

Criteria to be utilized by court in ruling on a motion to vacate a judgment include whether the neglect that resulted in entry of judgment by default was excusable, whether the moving party has alleged a meritorious defense, and whether relief from the challenged order would be consistent with considerations of equity. *Buckmiller v. Safeway Stores, Inc.*, 727 P.2d 1112 (Colo. 1986); *Dunton v. Whitewater West Recreation, Ltd.*, 942 P.2d 1348 (Colo. App. 1997); *Goodman Assocs., LLC v. WP Mtn. Props., LLC*, 222 P.3d 310 (Colo. 2010).

The preferred procedure is to consider all three criteria in a single hearing, as evidence relating to one factor might shed light on another and consideration of all three factors will provide the most complete information for an informed decision. *Buckmiller v. Safeway Stores, Inc.*, 727 P.2d 1112 (Colo. 1986); *Dunton v. Whitewater West Recreation, Ltd.* , 942 P.2d 1348 (Colo. App. 1997).

Motion to vacate judgment under this rule on basis of excusable neglect and motion to set aside default judgment under C.R.C.P. 55(c) on the basis of failure to prosecute are sufficiently analogous to justify application of the same standards to either motion; thus, the same three criteria which are legal standard are applicable in both motions. *Buckmiller v. Safeway Stores, Inc.*, 727 P.2d 1112 (Colo. 1986).

In determining whether a party has established excusable neglect to obtain relief, the court should not impute gross negligence of an attorney to his client for the purpose of foreclosing the client from relief. *Buckmiller v. Safeway Stores, Inc.*, 727 P.2d 1112 (Colo. 1986).

Moving party must establish by factual averments, and not simply by legal conclusions, that claim previously dismissed was indeed meritorious and substantial. *Buckmiller v. Safeway Stores, Inc.*, 727 P.2d 1112 (Colo. 1986).

In determining whether relief would be consistent with equitable considerations, court should take into account promptness of moving party in filing motion, fact of any detrimental reliance by opposing party on order or judgment of dismissal, and any prejudice to opposing party if motion were to be granted, including impairment of party's ability to adduce proof at trial in defense of claim. *Buckmiller v. Safeway Stores*, Inc., 727 P.2d 1112 (Colo. 1986).

The mere existence of some negligence by client does not serve as per se basis to automatically deny relief, where motion was made based upon excusable neglect. *Buckmiller v. Safeway Stores, Inc.*, 727 P.2d 1112 (Colo. 1986).

Defendant failed to show excusable neglect where he failed to seek a continuance or communicate with the trial court in any manner while seeking to remove the case to federal court and failed to appear and participate at trial even though he knew the federal court had remanded the case back to state court. *Blazer Elec. Supply Co. v. Bertrand*, 952 P.2d 857 (Colo. App. 1998).

Rule as basis for jurisdiction. *Welborn v. Hartman*, 28 Colo. App. 11, 470 P.2d 82 (1970); *Morehart v. Nat'l Tea Co.*, 29 Colo. App. 465, 485 P.2d 907 (1971).

Applied in *Finegold v. Clarke*, 713 P.2d 401 (Colo. App. 1985).

Cross References:

For stay of proceedings to enforce judgments, see C.R.C.P. 62(b) ; for setting aside default, see C.R.C.P. 55(c).

Rule 61. Harmless Error.

Colorado Court Rules

Colorado Rules of Civil Procedure

Chapter 6. Judgment

As amended through Rule Change 2017(7), effective August 24, 2017

Rule 61. Harmless Error

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Cite as Colo. R. Civ. P. 61

Case Notes:

Annotation

Law reviews. For article, "Judgment: Rules 54-63 ", see 23 Rocky Mt. L. Rev. 581 (1951). For article, "The Applicability of the Rules of Evidence in Non-Jury Trials", 24 Rocky Mt. L. Rev. 480 (1952).

A substantial right is one which relates to the subject matter and not to a matter of procedure and form. *Sowder v. Inhelder*, 119 Colo. 196, 201 P.2d 533 (1948); *Corbin by Corbin v. City and County of Denver*, 735 P.2d 214 (Colo. App. 1987).

Lack of adherence to formalities which do not result in prejudice should not interfere with the determination of the issues on the merits. *Swan v. Zwahlen*, 131 Colo. 184, 280 P.2d 439 (1955).

A new trial will not be granted for error which did not prejudice or harm the party seeking a new trial, or where the trial resulted in substantial justice. *Francis v. O'Neal*, 127 Colo. 432, 257 P.2d 973 (1953); *Tincombe v. Colo. Const. & Supply Corp.*, 681 P.2d 533 (Colo. App. 1984).

To the extent there was any error in judge's comments that defendant was "playing games" by filing motions for recusal, such error was harmless where defendant filed a subsequent motion for recusal which included the arguments made in the previous recusal motions and the subsequent motion was decided. *Moody v. Corsentino*, 843

P.2d 1355 (Colo. 1993).

Error in admission of immaterial evidence is not prejudicial where the findings are not based on, nor related to, any of the immaterial matter. *Lloyd A. Fry Roofing Co. v. State*, 179 Colo. 223, 499 P.2d 1176 (1972).

Violation of rule provisions allowing for a response from the party opposing a motion for summary judgment found to be harmless error under the circumstances. *Union Ins. Co. v. Hottenstein*, 83 P.3d 1196 (Colo. App. 2003).

It was harmless error for the court to enter summary judgment on an issue which was not raised by the parties when the party against whom judgment is entered has the opportunity to respond to the new issue raised by the trial court. *Ferrera v. Nielsen*, 799 P.2d 458 (Colo. App. 1990); *Davis v. Lira*, 817 P.2d 539 (Colo. App. 1991).

Where testimony is hearsay, its admission is harmless when the essential and operative facts upon which an award rests are established by competent evidence in the record. *San Isabel Elec. Ass'n v. Bramer*, 31 Colo. App. 134, 500 P.2d 821 (1972), aff'd, 182 Colo. 15, 510 P.2d 438 (1973).

The admission of part of the deposition of a party in court and able to testify is harmless error where the evidence contained therein is merely cumulative to the evidence already before the court. Its admission neither adds to nor detracts from evidence previously admitted. Therefore, the admission of the deposition is not reversible error. *Sentinel Petroleum Corp. v. Bernat*, 29 Colo. App. 109, 478 P.2d 688 (1970).

It was harmless error to admit evidence that deposition was taken at Texas state penitentiary, since defendants failed to prove that its admission affected substantial rights. *Cheney v. Hailey*, 686 P.2d 808 (Colo. App. 1984).

Where a trial judge drives past the premises in question in a zoning case to gain familiarity with its location and topography so he could better understand references in the record to the property, he does not commit reversible error so long as there is no indication that when the trial judge viewed the property it was not in substantially the same condition as when the ordinance in question was passed nor is there any indication that the trial court was influenced by or based its decision upon any evidence not a part of the record. *Trans-Robles Corp. v. City of Cherry Hills Village*, 30 Colo. 511, 497 P.2d 335 (1972), aff'd, 181 Colo. 356, 509 P.2d 797 (1973).

Where the stated reason for a transcript record's use is to show the scope of a previous judgment, which it fails to include, its admission is error, but harmless error. *Wasinger v. Miller*, 154 Colo. 61, 388 P.2d 250 (1964).

Errors and deficiencies of counsel will be disregarded where not to do so would result in palpable injury. *Griffith v. Anderson*, 109 Colo. 265, 124 P.2d 599 (1942).

Although a trial court applies the wrong test, the failure to dismiss does not result in reversible error, where had the trial court applied the right rule, the result would have been the same. *Am. Nat'l Bank v. First Nat'l Bank*, 28 Colo. App. 486, 476 P.2d 304 (1970).

Error held harmless. Where the record is clear that adequate funds were in fact remitted on behalf of the judgment debtor, and at all times subsequent to the inaccurate change refund by the clerk, the judgment debtor was willing and

able to pay the interest to the judgment creditor, and payment was obstructed solely by the latter, substantial justice would not be served by penalizing the defendant for the minor mathematical error of the clerk of the trial court, and thus the error is harmless. *Osborn Hdwe. Co. v. Colo. Corp.*, 32 Colo. App. 254, 510 P.2d 461 (1973).

Even if the trial court erred in issuing a protective order precluding discovery by plaintiff, such error was harmless because it would not alter the court's conclusion that summary judgment was proper. *Pierce v. St. Vrain Valley Sch. Dist.*, 944 P.2d 646 (Colo. App. 1997); rev'd on other grounds, 981 P.2d 600 (Colo. 1999).

Failure to include a citation of legal authorities in trial data certificate and late filing of authorities in trial memorandum held to be harmless error. *Yoder v. Hooper*, 695 P.2d 1182 (Colo. App. 1984), aff'd, 732 P.2d 852 (Colo. 1987).

Presentation of factual requirements for entry of default judgment by means of testimony and other evidence, rather than by affidavit as required byC.R.C.P. 121 § 1-14, held to be harmless error. *Dunton v. Whitewater West Recreation, Ltd.*, 942 P.2d 1348 (Colo. App. 1997).

Applied in *Jones v. Gates Serv. Station, Inc.*, 108 Colo. 201, 115 P.2d 396 (1941); *Odell v. Pub. Serv. Co.*, 158 Colo. 404, 407 P.2d 330 (1965); McQueen v. Robbins, 28 Colo. App. 436, 476 P.2d 57 (1970); *Kerby v. Flamingo Club, Inc.* , 3 5 Colo. App. 127, 532 P.2d 975 (1974); *Lopez v. Motor Vehicle Div., Dept. of Rev.*, 189 Colo. 133, 538 P.2d 446 (1975); *Osborne v. Holford*, 40 Colo. App. 365, 575 P.2d 866 (1978); *Kaltenbach v. Julesburg Sch. Dist. Re-1*, 43 Colo. App. 150, 603 P.2d 955 (1979); *Baum v. S.S. Kresge Co.*, 646 P.2d 400 (Colo. App. 1982); In re Tatum, 653 P.2d 74 (Colo. App. 1982); *Jackson v. Harsco Corp.*, 653 P.2d 407 (Colo. App. 1982); *Banek v. Thomas*, 697 P.2d 743 (Colo. App. 1984), aff'd, 733 P.2d 1171 (Colo. 1986); *Kedar v. Pub. Serv. Co.*, 709 P.2d 15 (Colo. App. 1985); *Greenemeier by Redington v. Spencer*, 719 P.2d 710 (Colo. 1986); *Denman v. Burlington Northern R. Co.*, 76 1 P.2d 244 (Colo. App. 1988); *Clark v. Buhring*, 761 P.2d 266 (Colo. App. 1988); *Southerland v. Argonaut Ins. Co.*, 794 P.2d 1102 (Colo. App. 1990); *States v. R.D. Werner Co.*, 799 P.2d 427 (Colo. App. 1990); *Cook Inv. v. Seven-Eleven Coffee Shop*, 841 P.2d 333 (Colo. App. 1992); *Cherry Creek Sch. Dist. v. Voelker*, 859 P.2d 805 (Colo. 1993); Radcliff Props. v. City of Sheridan, 2012 COA 82, 296 P.3d 310.

Rule 62. Stay of Proceedings to Enforce a Judgment.

Colorado Court Rules

Colorado Rules of Civil Procedure

Chapter 6. Judgment

As amended through Rule Change 2017(7), effective August 24, 2017

Rule 62. Stay of Proceedings to Enforce a Judgment

(a) **Automatic Stay; Exceptions; Injunctions; Receiverships.** Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 14 days after its entry; provided that an interlocutory or final judgment in an action for an injunction or in a receivership action shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. Unless otherwise ordered by the court, the provisions of section (c) of this Rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(b) **Discretionary stay.** In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of, or any proceedings to enforce, a judgment:

(1) pending the disposition of a motion for post-trial relief made pursuant to C.R.C.P. 59 ;

(2) pending a motion for relief from a judgment or order made pursuant to C.R.C.P. 60 ;

(3) during the time permitted for filing of a notice of appeal; or

(4) during the pendency of a motion for approval of a supersedeas bond.

(c) **Injunction Pending Appeal.** When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the trial court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

(d) **Stay upon Appeal.** When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay from the trial court subject to the exceptions contained in section (a) of this Rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when

the supersedeas bond is approved by the court.

(e) **Stay in Favor of the State of Colorado or Municipalities Thereof.** When an appeal is taken by the State of Colorado, or by any county or municipal corporation of this state, or of any officer or agency thereof acting in official capacity and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant unless otherwise ordered by the court.

(f) There is no section (f).

(g) **Power of Appellate Court Not Limited.** The provisions in this Rule do not limit any power of the appellate courts or of a justice or judge thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered. (See Rule 8, Colorado Appellate Rules.)

(h) **Stay of Judgment as to Multiple Claims or Multiple Parties.** When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

Cite as Colo. R. Civ. P. 62

History. Source: (b) amended and adopted, effective November 16, 1995; (a) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Note:

Committee Comment

The 1988 amendment to C.R.C.P. 62(b) is a change to make that section fully consistent with the changes made to C.R.C.P. 59. The post-trial relief features of C.R.C.P. 50 and 52(b) were brought into C.R.C.P. 59. As a result, those Rules (50) and (52) no longer bear on post-trial relief and need not be referenced in C.R.C.P. 62 .

Case Notes:

Annotation

I. General Consideration.

Law reviews. For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "Judgment: Rules 54-63 ", see 23 Rocky Mt. L. Rev. 581 (1951). For article, "Obtaining a Supersedeas Bond", see 23

Colo. Law. 607 (1994). For article, "Bonds in Colorado Courts: A Primer for Practitioners", see 34 Colo. Law. 59 (March 2005).

No power is lodged in any court to stay an order of discharge in a "habeas corpus" proceeding, as such action would defeat the very purpose of "habeas corpus". *Geer v. Alaniz*, 137 Colo. 432, 326 P.2d 71 (1958).

Generally, court may not impair creditor's right to enforce judgment. As a general rule, a court may not stay execution and thereby impair or destroy the statutory right of a judgment creditor to enforce collection of its judgment against nonexempt property of the judgment debtor. *First Nat'l Bank v. District Court*, 652 P.2d 613 (Colo. 1982).

Right to enforce may be statutorily limited. The substantive right of a judgment creditor to enforce collection of the judgment may be statutorily limited, as by § 7-60-128 . *First Nat'l Bank v. District Court*, 652 P.2d 613 (Colo. 1982).

Effect of stay on certain statutory requirements. The stay of execution provided for in this rule has no effect on the requirement that a transcript of judgment be issued on payment of the fee pursuant to § 13-32-104(1)(g). *Rocky Mt. Ass'n of Credit Mgt. v. District Court*, 193 Colo. 344, 565 P.2d 1345 (1977).

Applied in *Ireland v. Wynkoop*, 36 Colo. App 206, 539 P.2d 1349 (1975).

II. Automatic Stay.

Under section (a) of this rule, a judgment order dividing property is automatically stayed and unenforceable for a period of 10 (now 15) days following its entry. *Sarno v. Sarno*, 28 Colo. App. 598, 478 P.2d 711 (1970).

Section (a) is inapplicable to temporary custody order the mother was found to have violated. Order was not subject to fifteen-day automatic stay. In re Adams, 778 P.2d 294 (Colo. App. 1989).

A forcible medication administration order is not the type of action contemplated by section (a) and is thus not automatically stayed for 14 days after entry. People ex rel. Strodtman, __ P.3d __ (Colo. App. 2011).

III. Stay on Motion.

Unless stayed by the court, a judgment may be executed upon before a new trial motion is decided. *Oman v. Morris*, 28 Colo. App. 124, 471 P.2d 430 (1970).

IV. Injunction.

Effect of section (c) is to protect rights of parties. Section (c) of this rule authorizes the trial court to enter orders which preserve the status quo, or otherwise protect the rights of the parties pending appeal, but does not give the trial court authority to enter an order which alters the rights granted, or created by the original order. *Rivera v. Civil Serv. Comm'n*, 34 Colo. App. 152, 529 P.2d 1347 (1974).

By virtue of this rule, a trial court can, in its discretion, suspend, modify, restore, or grant an injunction, so long as an

appellate court has not granted a supersedeas. *Woitchek v. Isenberg*, 151 Colo. 544, 379 P.2d 392 (1963).

Injunctive power of the court has been long recognized. At least since 1887, it has been recognized statutorily that trial courts can more speedily, economically, and satisfactorily consider applications for injunctive relief in actions which are pending in an appellate court. *Woitchek v. Isenberg*, 151 Colo. 544, 379 P.2d 392 (1963).

An obvious reason for recognizing the court's injunctive power is that trial courts are equipped to conduct the trial process. *Woitchek v. Isenberg*, 151 Colo. 544, 379 P.2d 392 (1963).

But injunctive proceedings may not be invoked to bring about a forfeiture of a property right. Injunction and forfeiture cannot be equated; they are separate and distinct concepts. *Woitchek v. Isenberg*, 151 Colo. 544, 379 P.2d 392 (1963).

V. Stay Upon Appeal.

Annotator's note. Since section (d) of this rule is similar to § 428 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing § 428 have been included in the annotations to this rule.

A trial court retains jurisdiction in order to enforce a judgment it has rendered where defendant does not move for stay of execution or file a supersedeas bond. *Oman v. Morris*, 28 Colo. App. 124, 471 P.2d 430 (1970).

Where a defendant fails to take these affirmative steps necessary in order to prevent the trial court from making a final disposition of the case in accordance with its findings, no error is committed by a trial court in entering a final decree confirming a title after an appeal has issued. Failure of defendant to stay the execution means that the trial court retains jurisdiction, and its actions subsequent to the issuance of the notice of appeal are fully within its powers. *Oman v. Morris*, 28 Colo. App. 124, 471 P.2d 430 (1970).

Effect of trial court's failure to rule on motion. In foreclosure action, where motion for stay under section (d) of this rule and for waiver of the supersedeas bond requirement had been filed in the trial court but not determined at time of appeal, and where a request for stay under C.A.R. 8 had not been filed in the court of appeals, title to secured property vested in certificate holder and appeal was moot. *Mount Carbon Metro. Dist. v. Lake George Co.*, 847 P.2d 254 (Colo. App. 1993).

Stay may be issued before or after appeal filed. The trial court may issue a stay either before or after a notice of appeal is filed. *Odd Fellows Bldg. & Inv. Co. v. City of Englewood*, 667 P.2d 1358 (Colo. 1983).

The filing of a supersedeas bond is a prerequisite for obtaining an order staying execution of judgment pending appeal under paragraph (d) of this section. *Muck v. District Ct.*, 814 P.2d 869 (Colo. 1991).

The issuance of a writ of "supersedeas" is the consideration for the giving of a "supersedeas" bond. *Buchhalter v. Solomon*, 78 Colo. 227, 241 P. 718 (1925).

There can be no "supersedeas" where one cannot furnish bond therefor. *Riant Amusement Co. v. Bailey*, 80 Colo. 65, 249 P. 7 (1926).

A "supersedeas" writ may not be granted on an invalid bond. *Buchhalter v. Solomon*, 78 Colo. 227, 241 P. 718 (1925).

Trial court erred in entering an order staying all proceedings relative to enforcement of family support order without requiring appellant to file supersedeas bond. *Muck v. District Ct.*, 814 P.2d 869 (Colo. 1991).

Cross References:

For directed verdicts, see C.R.C.P. 50 ; for motions for post-trial relief, see C.R.C.P. 59 ; for when bond not required, see C.A.R. 8(c) ; for stays pending appeal, see C.A.R. 8 ; for judgment upon multiple claims or involving multiple parties, see C.R.C.P. 54(b).