RULE 12. Defenses and Objections-when and How Presented-by Pleading or Motion-motion for Judgment on Pleadings

(a) **When Presented.**

(1) A defendant shall file his answer or other response within 21 days after the service of the summons and complaint. The filing of a motion permitted under this Rule alters these periods of time, as follows:

(A) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleadings shall be filed within 14 days after notice of the court's action;

(B) if the court grants a motion for a more definite statement, or for a statement in separate counts or defenses, the responsive pleadings shall be filed within 14 days after the service of the more definite statement or amended pleading.

(2) If, pursuant to special order, a copy of the complaint is not served with the summons, or if the summons is served outside of Colorado or by publication, the time limit for filings under subsections (a)(1) and (e) of this Rule shall be within 35 days after the service thereof.

(3) A party served with a pleading stating a cross-claim against that party shall file an answer thereto within 21 days after the service thereof.

(4) The plaintiff shall file a reply to a counterclaim in the answer within 21 days after the service of the answer.

(5) If a reply is made to any affirmative defense, such reply shall be filed within 21 days after service of the pleading containing such affirmative defense.

(6) If a pleading is ordered by the court, it shall be filed within 21 days after the entry of the order, unless the order otherwise directs.

(b) **How Presented.** Every defense, in law or in fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by separate motion filed on or before the date the answer or reply to a pleading under C.R.C.P. 12(a) is due:

(1) lack of jurisdiction over the subject matter;

(2) lack of jurisdiction over the person;

(3) insufficiency of process;

(4) insufficiency of service of process;

(5) failure to state a claim upon which relief can be granted; or

(6) failure to join a party under C.R.C.P. 19.

No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or with any other motion permitted under this Rule or C.R.C.P. 98. If a pleading sets forth a claim for relief to which the adverse party is not required to file a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (5) 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 C.R.C.P. 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by C.R.C.P. 56.

(c) **Motion for Judgment on the Pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings 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 Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) **Preliminary Hearings.** The defenses specifically enumerated in subsections (1)-(6) of section (b) of this Rule, whether made in a pleading or by motion, and the motion for judgment mentioned in section (c) of this Rule, shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) **Motion for Separate Statement, or for More Definite Statement.** Within the time limits for filings under subsections (a)(1) and (a)(2) of this Rule, the party may file a motion for a statement in separate counts or defenses, or for a more definite statement of any matter that is not averred with sufficient definiteness or particularity to enable the party properly to prepare a responsive pleading. If the motion is granted and the order of the court is not obeyed within 14 days after notice of the order or within such other time as the court may fix, the court may strike the

pleading to which the motion was directed or make such order as it deems just.

(f) **Motion to Strike.** Upon motion filed by a party within the time for responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion filed by a party within 21 days after the service of any pleading, motion, or other paper, or upon the court's own initiative at any time, the court may order any redundant, immaterial, impertinent, or scandalous matter stricken from any pleading, motion, or other paper. The objection that a responsive pleading or separate defense therein fails to state a legal defense may be raised by motion filed under this section (f).

(g) **Consolidation of Defenses in Motion.** A party who makes a motion under this Rule may join with it any other motions herein provided for and then available to that party. If a party makes a motion under this Rule but omits therefrom any defense or objection then available to that party which this Rule permits to be raised by motion, that party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in section (h)(2) of this Rule on any of the grounds there stated.

(h) **Waiver or Preservation of Certain Defenses.**

(1) A defense of lack of jurisdiction over the person, insufficiency of process, or insufficiency of service of process is waived:

(A) If omitted from a motion in the circumstances described in section (g); or

(B) if it is neither made by motion under this Rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

History:

Source: (a), (e), and (f) 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

2015

(1) The practice of pleading every affirmative defense listed in C.R.C.P. 8(c), irrespective of a factual basis for the defense, is improper underC.R.C.P. 11(a). The pleading of affirmative defenses is subject not only to C.R.C.P. 8(b), which requires a party to "state in short and plain terms his defense to each claim asserted," but also to C.R.C.P. 11(a): "The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Some affirmative defenses are also subject to the special pleading requirements of C.R.C.P. 9. To the extent a defendant does not have sufficient information under Rule 11(a) to plead a particular affirmative defense when the answer must be filed but later discovers an adequate basis to do so, the defendant should move to amend the answer to add the affirmative defense.

Case Note:

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, "Pleadings, Rules 7 to 25 ", see 28 Dicta 368 (1951). For article, "Pleadings and Motions: Rules 7-16 ", see 23 Rocky Mt. L. Rev. 542 (1951). For article, "One Year Review of Civil Procedure", see 34 Dicta 69 (1957). 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 40 Den. L. Ctr. J. 66 (1963). For article, "Plaintiff's Advantageous Use of Discovery, Pre-Trial and Summary Judgment", see 40 Den. L. Ctr. J. 192 (1963). For note, "One Year Review of Civil Procedure", see 41 Den. L. Ctr. J. 67 (1964).

For article, "A Litigator's Guide to Summary Judgments", see 14 Colo. Law. 216 (1985). For article, "Recent Developments in Governmental Immunity: Post-Trinity Broadcasting", see 25 Colo. Law. 43 (June 1996).

If the plaintiff fails to establish that the trial court has subject matter jurisdiction, the court must dismiss the matter. Any other order or judgment entered by the court would be void and unenforceable. *Adams County Dept. of Soc. Serv. v. Huynh*, 883 P.2d 573 (Colo. App. 1994); *City of Boulder v. Pub. Serv. Co. of Colo.*, 996 P.2d 198 (Colo. App. 1999).

Applied in *Posey v. Intermountain Rural Elec. Ass'n*, 41 Colo. App. 7, 583 P.2d 303 (1978); *Kraft v. District Court*, 197 Colo. 10, 593 P.2d 321 (1979); *Burrows v. Greene*, 198 Colo. 167, 599 P.2d 258 (1979); *SaBell's, Inc. v. Flens*, 42 Colo. App. 421, 599 P.2d 950 (1979); *City of Sheridan v. City of Englewood*, 199 Colo. 348, 609 P.2d 108 (1980); *Ricci v. Davis*, 627 P.2d 1111 (Colo. 1981); *State Dept. of Hwys. v. District Court*, 635 P.2d 889 (Colo. 1981); *Christensen v. Hoover*, 643 P.2d 525 (Colo. 1982); In re George, 650 P.2d 1353 (Colo. App. 1982); *Creditor's Serv., Inc. v. Shaffer*, 659 P.2d 694 (Colo. App. 1982); *People ex rel. MacFarlane v. Alpert Corp.*, 660 P.2d 1295 (Colo. App. 1982); *Anchorage Joint Venture v. Anchorage Condo. Ass'n*, 670 P.2d 1249 (Colo. App. 1983); *Seigneur v. Motor Vehicle Div.*, 674 P.2d 967 (Colo. App. 1983); *Wing v. JMB Prop. Mgmt. Corp.*, 714 P.2d 916 (Colo. App. 1985); *Nat'l Sur. Corp. v. Citizens State Bank*, 734 P.2d 663 (Colo. App. 1986).

II. When Presented.

Law reviews. For article, "Mandamus and Other Writs", see 18 Dicta 333 (1941).

Court has discretion to grant dismissal motion where pleadings not timely filed. Where a motion to dismiss is made because a reply is not filed in time, it is within the sound discretion of the court to grant it. *Munro v. Eshe*, 113 Colo. 19, 156 P.2d 700 (1944).

The court lacks authority to enter a final judgment prior to the expiration of the time fixed in the summons and by this rule for defendant to appear, and where such a judgment is entered, it is void. *Erickson v. Groomer*, 139 Colo. 32, 336 P.2d 296 (1959).

A judgment by default entered before the expiration of the time allowed to plead or answer is premature, and in a direct proceeding to review a judgment shown to have been so entered prematurely, a reversal for error must be granted. *Netland v. Baughman*, 114 Colo. 148, 162 P.2d 601 (1945).

Party's right to notice prior to entry of default, under C.R.C.P. 55(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 section (a) of this rule. *Carls Constr., Inc. v. Gigliotti*, 40 Colo. App. 535, 577 P.2d 1107 (1978).

Issues concerning subject matter jurisdiction may be raised at any time. *Sanchez v. State*, 730 P.2d 328 (Colo. 1986); People in Interest of Clinton, 742 P.2d 946 (Colo. App. 1987).

A defendant may seek dismissal for failure to state a claim at any stage in the proceedings prior to the entry of judgment. *Colo. Land & Res., Inc. v. Credithrift of Am., Inc.*, 778 P.2d 320 (Colo. App. 1989).

Court order extending time must conform to this rule. Order of court extending the time within which the defendant might answer or plead, which is entered pursuant to authority expressly granted to the court by C.R.C.P. 6(b), does not derogate from the requirements of section (a) of this rule. *Oldland v. Gray*, 179 F.2d 408 (10th Cir.), cert. denied, 339 U.S. 948, 70 S. Ct. 803, 94 L. Ed. 1362 (1950).

Where defendants did not interpose a motion to dismiss until nearly one year after the filing of the complaint, there was no abuse of discretion in denying the motion. *Hoy v. Leonard*, 13 Colo. App. 449, 59 P. 229 (1899) (decided under former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

Applied in *Carls Constr., Inc. v. Gigliotti*, 40 Colo. App. 535, 577 P.2d 1107 (1978).

III. How Presented.

A. In General.

Law reviews. For article, "Use of Summary Judgments and the Discovery Procedure", see 24 Dicta 193 (1947). For note, "Comments on Last Clear Chance-Procedure and Substance", see 32 Dicta 275 (1955). For article, "Another Decade of Colorado Conflicts", see 33 Rocky Mt. L. Rev. 139 (1961). For article, "'Trinity' Hearings: Understanding Colorado Governmental Immunity Act Motions to Dismiss", see 33 Colo. Law. 91 (December 2004).

This rule is patterned after F.R.C.P. 12(b). *Treadwell v. District Court*, 133 Colo. 520, 297 P.2d 891 (1956); *Bd. of County Comm'rs v. District Court*, 172 Colo. 311, 472 P.2d 128 (1970).

Like its federal counterpart, this rule is based on the theory that the quick presentation of defenses and objections should be encouraged and that

successive motions which prolong such presentation should be carefully limited. *Bd. of County Comm'rs v. District Court*, 172 Colo. 311, 472 P.2d 128 (1970).

In this rule there is no provision for a "special" appearance. *Treadwell v. District Court*, 133 Colo. 520, 297 P.2d 891 (1956).

Section (b) of this rule did away with "general" and "special" appearances. *At Home Magazine v. District Court*, 194 Colo. 331, 572 P.2d 476 (1977).

The trial court must determine if under any theory of law plaintiff would be entitled to relief, for if relief could be granted under such circumstances, then the complaint is sufficient. *Denver & R. G. W. R. R. v. Wood*, 28 Colo. App. 534, 476 P.2d 299 (1970).

A trial court is not required to make findings of fact or conclusions of law when ruling on a motion to dismiss under section (b) of this rule. *Jamison v. People*, 988 P.2d 177 (Colo. App. 1999).

Although there exists no procedural rule specifically designed to address dismissal or transfer of a case on the basis of a forum selection clause, subsections (b)(1) and (b)(5) are not appropriate mechanisms for addressing such clause. *Edge Telecom, Inc. v. Sterling Bank*, 143 P.3d 1155 (Colo. App. 2006).

For a discussion of the appropriate method of evaluation of a motion to dismiss based on a forum selection clause, *see Edge Telecom, Inc. v. Sterling Bank*, 143 P.3d 1155 (Colo. App. 2006).

Plaintiff must have remedial interest which is recognized and can be enforced. In order to withstand a challenge, the plaintiff must have, in the claim asserted, a remedial interest which the law of the forum can recognize and enforce. *Nelson v. Nelson*, 31 Colo. App. 63, 497 P.2d 1284 (1972).

Plaintiff has the burden to prove jurisdiction. *Reynolds v. State Bd. for Cmty. Colls.*, 937 P.2d 774 (Colo. App. 1996).

A plaintiff has the burden of proving that the trial court has jurisdiction to hear the case. *Pfenninger v. Exempla, Inc.*, 12 P.3d 830 (Colo. App. 2000).

Where claims contain allegations which, if established upon trial, would entitle one to relief, a motion to dismiss would be erroneous to grant. *Colo. Nat'l Bank v. F. E. Biegert Co.*, 165 Colo. 78, 438 P.2d 506 (1968).

When one pleads ultimate facts which, if supported by adequate proof, would justify a recovery, then he is entitled to his day in court to attempt to

prove his allegations. *McDonald v. Lakewood Country Club*, 170 Colo. 355, 461 P.2d 437 (1969).

The supreme court will not consider waived defenses in an original proceeding. The supreme court will not subvert the theory underlying section (b) of this rule and the clear language of sections (g) and (h)(1) of this rule by considering the matter of defenses in an original proceeding for writ of prohibition when those defenses were clearly waived. *Bd. of County Comm'rs v. District Court*, 172 Colo. 311, 472 P.2d 128 (1970).

A trial judge, in denying a motion under this rule, did not grant relief from the waiver imposed by section (h)(1) of this rule, by granting 20 days "to answer or otherwise plead", as this language cannot be stretched into permission to file another motion under section (b) of this rule, since such a motion is not a pleading. *Bd. of County Comm'rs v. District Court*, 172 Colo. 311, 472 P.2d 128 (1970).

Dismissal of judgment debtor's action to enforce settlement agreement error. Judgment debtor's action to enforce settlement agreement against judgment creditor's wife was not collateral attack on judgment and therefore could be enforced by separate action for specific performance. *Tripp v. Parga*, 764 P.2d 369 (Colo. App. 1988).

Applied in *Wright v. Creative Corp.*, 30 Colo. App. 575, 498 P.2d 1179 (1972); *Commercial Indus. Const., Inc. v. Anderson*, 683 P.2d 378 (Colo. App. 1984).

B. Lack of Jurisdiction.

In testing the jurisdictional limit of courts the body of the complaint must be looked to to determine the amount in controversy and not the "ad damnum" clause. If the allegations of the complaint showed that the amount that could have been recovered was within the jurisdiction of the court, the fact that plaintiff's damage was alleged in a greater amount would not defeat the jurisdiction. *Sams Automatic Car Coupler Co. v. League*, 25 Colo. 129, 54 P. 642 (1898) (decided under section 56 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

With respect to a motion to dismiss for lack of subject matter jurisdiction, the plaintiff has the burden to prove jurisdiction, and an appellate court reviewing a trial court's decision uses a mixed standard of review under which the trial court's evidentiary findings are reviewed under the clear error standard, and the trial court's legal conclusions are reviewed de novo. *Bazemore v. Colo. State Lottery Div.*, 64 P.3d 876 (Colo. App. 2002).

Trial court erred in treating plaintiff's alleged lack of capacity to sue as a lack of subject matter jurisdiction. *Ashton Props., Ltd. v. Overton*, 107 P.3d 1014 (Colo. App. 2004).

The defenses of insufficiency of process and lack of jurisdiction over the person are defenses which may be made by motion under section (b) of this rule. *Bd. of County Comm'rs v. District Court*, 172 Colo. 311, 472 P.2d 128 (1970).

Although the lack of jurisdiction is not raised by the parties, an appellate court may take note of this lack of jurisdiction on its own motion. *Moschetti v. Liquor Licensing Auth.*, 176 Colo. 281, 490 P.2d 299 (1971).

A motion to quash is a proper method of raising the question of jurisdiction over the person of the defendant where the statutory requirements providing for service of process on nonresident motorists were not met, and where, in any event, such service was improper because defendant was not a nonresident at the time of the accident out of which the action arose. *Carlson v. District Court*, 116 Colo. 330, 180 P.2d 525 (1947).

A party may appear generally and still raise objections to jurisdiction of the person. *Treadwell v. District Court*, 133 Colo. 520, 297 P.2d 891 (1956).

Such a motion must be filed in apt time, and the question cannot be raised after answers and other motions as to the merits have been filed. *Treadwell v. District Court*, 133 Colo. 520, 297 P.2d 891 (1956).

If a motion to quash for lack of jurisdiction of a person is made before answer, then the jurisdiction of the court over the person is properly raised and stands in question until the motion is disposed of. *Treadwell v. District Court*, 133 Colo. 520, 297 P.2d 891 (1956).

In determining proper jurisdiction as between district court and probate court, the court must look at the facts alleged, the claims asserted, and the relief requested. Here, where the complaints were premised upon defendant's alleged legal malpractice in the drafting of the estate instruments, the estate planning, and the implementation of the estate plan, the complaints were not considered probate claims, and, therefore, jurisdiction lay with the district court not the probate court. *Levine v. Katz*, 192 P.3d 1008 (Colo. App. 2006).

Probate court lacks subject matter jurisdiction over claims of legal malpractice where plaintiff does not seek to recover assets of the estate. *Levine v. Katz*, 167 P.3d 141 (Colo. App. 2006).

Generally, the issue of immunity under the Governmental Immunity Act is a question of subject matter jurisdiction to be decided pursuant to subsection (b)(1). *Kittinger v. City of Colo. Springs*, 872 P.2d 1265 (Colo. App. 1993); *Fogg v. Macaluso*, 892 P.2d 271 (Colo. 1995); *Armstead v. Memorial Hosp.*, 892 P.2d 450 (Colo. App. 1995); *DiPaolo v. Boulder Valley Sch. Dist.*, 902 P.2d 439 (Colo. App. 1995); *Sanchez v. Sch. Dist. 9-R*, 902 P.2d 450 (Colo. App. 1995); *Hallam v. City of Colo. Springs*, 914 P.2d 479 (Colo. App. 1995); *Norsby v. Jensen*, 916 P.2d 555 (Colo. App. 1995); *Johnson v. Reg'l Transp. Dist.*, 916 P.2d 619 (Colo. App. 1995); *Reynolds v. State Bd. for Cmty. Colls.*, 937 P.2d 774 (Colo. App. 1996); *Harris v. Reg'l Transp. Dist.*, 15 P.3d 782 (Colo. App. 2000); *Wark v. Bd. of County Comm'rs*, 47 P.3d 711 (Colo. App. 2002).

Standing treated as a question of subject matter jurisdiction under subsection (b)(1). *Grand Valley Citizens' Alliance v. Colo. Oil & Gas Conservation Comm'n*, ___ P.3d ___ (Colo. App. 2010).

The trial court is the fact finder and may hold an evidentiary hearing to resolve any factual dispute upon which the existence of its subject matter jurisdiction under the Governmental Immunity Act may turn. *Lyons v. City of Aurora*, 987 P.2d 900 (Colo. App. 1999).

Where a plaintiff has sued a governmental entity and that entity interposes a motion to dismiss for lack of subject matter jurisdiction, the plaintiff has the burden of demonstrating that governmental immunity has been waived. However, because there is no presumption against state court jurisdiction and because the court must construe statutes that grant governmental immunity narrowly, the plaintiff should be afforded the reasonable inferences of this evidence. When the alleged jurisdictional facts are in dispute, the trial court should conduct an evidentiary hearing and enter findings of fact. When there is no evidentiary dispute, the trial court may rule without a hearing. *Tidwell v. City & County of Denver*, 83 P.3d 75 (Colo. 2003).

Motion brought under subsection (b)(1) is not the proper vehicle to decide questions of first amendment immunity. A defendant's claim that he has immunity under the first amendment invokes the court's authority to adjudicate the case; the court is considering whether the defendant is immune from an improperly instigated suit, not whether it has the authority to decide the case. Accordingly, summary judgment is the appropriate procedure to employ in this context. *Krystkowiak v. W.O. Brisben Cos.*, 90 P.3d 859 (Colo. 2004).

State court lacked subject matter jurisdiction to issue writ of mandamus to federal officer. *Hansen v. Long*, 166 P.3d 248 (Colo. App. 2007).

Tribal sovereign immunity is properly raised in a motion to dismiss. The state bears the burden of establishing by a preponderance of the evidence that the trial court has subject matter jurisdiction over defendants. *Cash Advance & Pref. Cash Loans v. State*, 242 P.3d 1099 (Colo. 2010).

Trial court erred in attempting to resolve the various material questions of fact presented to it without holding an evidentiary hearing to resolve those issues. *Werth v. Heritage Int'l Holdings, PTO*, 70 P.3d 627 (Colo. App. 2003).

Trial court may determine jurisdictional issue without an evidentiary hearing if it accepts all of plaintiffs assertions of fact as true. In such cases, the jurisdictional issue may be determined as a matter of law, and the appellate court reviews the trial court's ruling de novo. *Hansen v. Long*, 166 P.3d 248 (Colo. App. 2007); *Asphalt Specialties, Co. v. City of Commerce City*, 218 P.3d 741 (Colo. App. 2009).

Notice issues arising under the Governmental Immunity Act must be decided pursuant to subsection (b)(1), rather than by summary judgment and, depending on the case, the trial court may allow limited discovery and conduct an evidentiary hearing before deciding the notice issue. *Capra v. Tucker*, 857 P.2d 1346 (Colo. App. 1993); *Norsby v. Jensen*, 916 P.2d 555 (Colo. App. 1995).

Sovereign immunity issues concern subject matter jurisdiction and are determined in accordance with this section. Any factual dispute upon which the existence of jurisdiction may turn is for the district court to resolve, and an appellate court will not disturb the factual findings of the district court unless they are clearly erroneous. *Swieckowski v. City of Fort Collins*, 934 P.2d 1380 (Colo. 1997); *Mason v. Adams*, 961 P.2d 540 (Colo. App. 1997).

A C.R.C.P. 12(b)(1) motion to dismiss on grounds of immunity under the Colorado Governmental Immunity Act raises a jurisdictional issue. The plaintiff has the burden of demonstrating jurisdiction. When the alleged jurisdictional facts are in dispute, trial court should conduct an evidentiary hearing before ruling on the jurisdictional issue. Where there is no evidentiary dispute, governmental immunity or waiver of immunity is a matter of law, and trial court may rule on the jurisdictional issue without a hearing. *Padilla ex rel. Padilla v. Sch. Dist. No. 1*, 25 P.3d 1176 (Colo. 2001).

A motion to compel arbitration is a motion to dismiss for lack of subject matter jurisdiction which cannot be resolved by the presumptive truthfulness of the complaint but which must be determined in a factual hearing. *Eychner v. Van Vleet*, 870 P.2d 486 (Colo. App. 1993).

If the defendant answers as to the merits of the allegations of the complaint without embodying the motion to quash, then the jurisdictional question is thereby waived. *Treadwell v. District Court*, 133 Colo. 520, 297 P.2d 891 (1956).

Two-pronged test for standing. First, the plaintiff must have suffered an injury in fact, and second, this harm must have been to a legally protected interest. *Grand Valley Citizens' Alliance v. Colo. Oil & Gas Conservation Comm'n*, ___ P.3d ___ (Colo. App. 2010).

Procedural injury, as well as substantive injury, may confer standing. Procedural injury consists of harm to an intangible or noneconomic interest such as a citizen's interest in ensuring that governmental units conform to the state constitution. Such injuries may exist solely by virtue of statutes creating legal rights. *Grand Valley Citizens' Alliance v. Colo. Oil & Gas Conservation Comm'n*, ___ P.3d ___ (Colo. App. 2010).

For purposes of standing, substantive injury may consist of the risk of environmental injuries to places used by plaintiff. Therefore, persons who owned or used land three miles from potential natural gas drilling activity were entitled to challenge a denial of their right to a hearing on the issuance of permits. *Grand Valley Citizens' Alliance v. Colo. Oil & Gas Conservation Comm'n*, ___ P.3d ___ (Colo. App. 2010).

Allegation of harm to a protected interest is sufficient to confer standing. A civil plaintiff claiming to have been injured by a defendant's actions has standing to sue even if a court, upon reaching the merits, ultimately determines that the defendant committed no wrong. *Grand Valley Citizens' Alliance v. Colo. Oil & Gas Conservation Comm'n*, ___ P.3d ___ (Colo. App. 2010).

A party may move to dismiss an action under this rule by asserting the applicability of the doctrine of "forum non conveniens" as a ground for refusal by the court to exercise jurisdiction over a transitory cause of action which arose outside the state. *Allison Drilling Co. v. Kaiser Steel Corp.*, 31 Colo. App. 355, 502 P.2d 967 (1972).

The doctrine of "forum non conveniens" must be applied with restraint and only after a proper showing has been made. What constitutes a proper showing must, of necessity, turn on the particular facts of each case. *Allison Drilling Co. v. Kaiser Steel Corp.*, 31 Colo. App. 355, 502 P.2d 967 (1972).

The doctrine of "forum non conveniens" is founded upon the equitable power of a court to refuse, in its sound discretion, to exercise jurisdiction over a transitory cause of action when, after a consideration of all relevant

factors, the ends of justice strongly indicate that the action may be more appropriately tried in a different forum. *Allison Drilling Co. v. Kaiser Steel Corp.*, 31 Colo. App. 355, 502 P.2d 967 (1972).

Among the relevant factors which a court should consider in reaching its determination of "forum non conveniens" are: The relative availability of sources of evidence and the burden of defense and prosecution in one forum rather than another, the relative availability and accessibility of an alternative forum, the availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining attendance of willing witnesses, the interest of the state in providing a forum for its residents, and the interest of the state in the litigation measured by the extent to which the defendant's activities within the state gave rise to the cause of action, as well as factors of public interest. *Allison Drilling Co. v. Kaiser Steel Corp.*, 31 Colo. App. 355, 502 P.2d 967 (1972).

The thrust of "forum non conveniens" is not to determine the perfect forum but to provide a vehicle for choice between two or more alternative forums to avoid the hardship and expense of the one that is clearly inconvenient. *Allison Drilling Co. v. Kaiser Steel Corp.*, 31 Colo. App. 355, 502 P.2d 967 (1972).

A plaintiff need only make a prima facie showing of threshold jurisdiction, which may be determined from the allegations of the complaint, to withstand defendant's motion to dismiss under subsection (b)(2) of this rule. *Pioneer Astro Indus., Inc. v. District Court*, 193 Colo. 409, 566 P.2d 1067 (1977).

If a subsection (b)(2) jurisdictional challenge is decided on documentary evidence alone, the trial court's role is to determine whether the plaintiff successfully asserted a prima facie case of personal jurisdiction over each defendant. In making that assessment, any disputed issues of material jurisdictional fact must be resolved in favor of the plaintiff. *Archangel Diamond Corp. v. Lukoil*, 123 P.3d 1187 (Colo. 2005); *Goettman v. North Fork Valley Rest.*, 176 P.3d 60 (Colo. 2007).

If the court determines that plaintiff made a prima facie showing of personal jurisdiction over each defendant, the trial court may still hold an evidentiary hearing to resolve the issue fully prior to trial or proceed to trial. *Archangel Diamond Corp. v. Lukoil*, 123 P.3d 1187 (Colo. 2005); *Goettman v. North Fork Valley Rest.*, 176 P.3d 60 (Colo. 2007).

A trial court must not weigh and resolve disputed facts raised in subsection (b)(2) motion unless it conducts an evidentiary hearing. *Archangel Diamond Corp. v. Lukoil*, 123 P.3d 1187 (Colo. 2005); *First Horizon Merch.*

Servs., Inc. v. Wellspring Capital Mgmt., LLC, 166 P.3d 166 (Colo. App. 2007); *Goettman v. North Fork Valley Rest.*, 176 P.3d 60 (Colo. 2007).

Defenses not raised by motion are waived. Subsections (g) and (h)(1) of this rule make it expressly clear that if a party makes a motion under section (b) of this rule and, in doing so, omits the defense of lack of jurisdiction over the person or insufficiency of process, and such defenses were available to him at the time the motion was made, then the omitted defenses are waived, and the defendant may not raise them by subsequent motion or in his answer. *Bd. of County Comm'rs v. District Court*, 172 Colo. 311, 472 P.2d 128 (1970).

Clearly erroneous standard must be followed in appellate review of trial court determination regarding subject matter jurisdiction. *DiPaolo v. Boulder Valley Sch. Dist.*, 902 P.2d 439 (Colo. App. 1995); *Norsby v. Jensen*, 916 P.2d 555 (Colo. App. 1995); *Lyon v. Amoco Prod. Co.*, 923 P.2d 350 (Colo. App. 1996); *Reynolds v. State Bd. for Cmty. Colls.*, 937 P.2d 774 (Colo. App. 1996); *Lyons v. City of Aurora*, 987 P.2d 900 (Colo. App. 1999).

A reviewing court may apply subsection (b)(1) to the record without a remand if the court is satisfied that all relevant evidence has been presented to the trial court. *DiPaolo v. Boulder Valley Sch. Dist.*, 902 P.2d 439 (Colo. App. 1995); *Norsby v. Jensen*, 916 P.2d 555 (Colo. App. 1995).

If the court is satisfied that all the relevant evidence has been presented to the trial court, it may apply subsection (b)(1) to the record before it without remanding the case for an evidentiary hearing. *Capra v. Tucker*, 857 P.2d 1346 (Colo. App. 1993); *Norsby v. Jensen*, 916 P.2d 555 (Colo. App. 1995).

The statements that gave rise to plaintiff's claims of slander were issued within the constitutionally protected context of the first amendment of the U.S. Constitution because they occurred during a church meeting concerning whether to terminate the plaintiff as the church's pastor. The Colorado supreme court has recognized that the courts have no authority to determine claims that directly concern a church's choice of minister and, therefore, the trial court properly refused to exercise jurisdiction. *Seefried v. Hummel*, 148 P.3d 184 (Colo. App. 2005).

Court lacks subject matter jurisdiction over minister's claim against church for compensation not paid where resolution of the claim would require the court to determine whether the minister adequately performed his ecclesiastical duties. *Jones v. Crestview S. Baptist Church*, 192 P.3d 571 (Colo. App. 2008).

Colorado state courts have jurisdiction over private actions under the Telephone Consumer Protection Act (TCPA), 47 U.S.C. §227, under the

supremacy clause of the United States Constitution, and the TCPA does not limit this jurisdiction, even assuming congress could do so. When congress created a private right of action that could be prosecuted in state courts, it was acknowledging that the states could apply their own rules of procedure to such an action, but it did not intend to require that any state adopt a further law or rule of court to allow the prosecution of such actions in its courts. The supremacy clause requires the exercise of such jurisdiction as the state court possesses. *Consumer Crusade, Inc. v. Affordable Health Care Solutions, Inc.* v. 121 P.3d 350 (Colo. App. 2005).

"If otherwise permitted" phrase under TCPA provisions creating a private right of action is merely an acknowledgment by congress that states have the right to structure their own court systems and that state courts are not obligated to change their procedural rules to accommodate TCPA claims. Under this view, no state can refuse to entertain a private TCPA action, but a state is not compelled to adopt a special procedural rule for such actions. *Consumer Crusade, Inc. v. Affordable Health Care Solutions, Inc.*, 121 P.3d 350 (Colo. App. 2005).

C. Insufficiency of Process.

The defenses of insufficiency of process and lack of jurisdiction over the person are defenses which may be made by motion under section (b) of this rule. *Bd. of County Comm'rs v. District Court*, 172 Colo. 311, 472 P.2d 128 (1970).

Denial of motion to quash service of process is error. Denial of a party's motion to quash service of process under this rule is error if party has not been properly served under C.R.C.P. 4(e)(5) and (f)(2). *Pioneer Astro Indus., Inc. v. District Court*, 193 Colo. 409, 566 P.2d 1067 (1977).

There was no waiver of defense of insufficiency of service of process, raised by motion to quash, where the court did not rule on the question on previous motion to quash. *Pioneer Astro Indus., Inc. v. District Court*, 193 Colo. 409, 566 P.2d 1067 (1977).

A party who seeks to set aside a 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).

D. Failure to State a Claim upon which Relief can be Granted.

Federal jurisprudence under Fed. R. Civ. P. 12(b)(6) is persuasive, since the federal rule is identical to subsection (b)(5) of this rule. *Yadon v. Lowry*, 126

P.3d 332 (Colo. App. 2005); *Walker v. Van Laningham*, 148 P.3d 391 (Colo. App. 2006).

A subsection (b)(5) motion to dismiss tests the sufficiency of the complaint. In assessing such a motion a court must accept all matters of material fact in the complaint as true and view the allegations in the light most favorable to the plaintiff and may grant the motion only if the plaintiff's factual allegations cannot support a claim as a matter of law. *Asphalt Specialties, Co. v. City of Commerce City*, 218 P.3d 741 (Colo. App. 2009).

The primary difference between subsection (b)(1) and subsection (b)(5) is that under subsection (b)(1) the trial court is permitted to make findings of fact. Under subsection (b)(5) it is not; it must take the allegation of the complaint as true and draw all inferences in favor of the plaintiff. *Medina v. State*, 35 P.3d 443 (Colo. 2001); *Schwindt v. Hershey Food Corp.*, 81 P.3d 1144 (Colo. App. 2003).

To the extent that the trial court's conclusion that a tow truck was merely an extension of the vehicle being pushed by it was a finding of fact, such a finding could not be made in the context of a motion under subsection (b)(5). *Titan Indem. Co. v. Sch. Dist. No. 1*, 129 P.3d 1075 (Colo. App. 2005).

Generally, the issue of immunity under the Governmental Immunity Act is a question of subject matter jurisdiction to be decided pursuant to subsection (b)(1). *Kittinger v. City of Colo. Springs*, 872 P.2d 1265 (Colo. App. 1993); *Fogg v. Macaluso*, 892 P.2d 271 (Colo. 1995); *Armstead v. Memorial Hosp.*, 892 P.2d 450 (Colo. App. 1995); *DiPaolo v. Boulder Valley Sch. Dist.*, 902 P.2d 439 (Colo. App. 1995); *Sanchez v. Sch. Dist. 9-R*, 902 P.2d 450 (Colo. App. 1995); *Norsby v. Jensen*, 916 P.2d 555 (Colo. App. 1995); *Reynolds v. State Bd. for Cmty. Colls.*, 937 P.2d 774 (Colo. App. 1996); *Medina v. State*, 17 P.3d 178 (Colo. App. 2000), aff'd, 35 P.3d 443 (Colo. 2001).

A motion to dismiss pursuant to subsection (b)(5) tests the sufficiency of a plaintiff's complaint. Such a motion is looked on with disfavor and should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him or her to relief. The court must accept all averments of material fact as true, and all the allegations in the complaint must be viewed in the light most favorable to the plaintiff. The court reviews the trial court's ruling de novo. *Verrier v. Colo. Dept. of Corr.*, 77 P.3d 873 (Colo. App. 2003); *Sweeney v. United Artists Theater Circuit, Inc.*, 119 P.3d 538 (Colo. App. 2005); *Allen v. Steele*, 252 P.3d 476 (Colo. 2011).

Motions to dismiss for failure to state a claim are viewed with disfavor and are rarely granted under "notice pleadings". *Davidson v. Dill*, 180 Colo. 123, 503 P.2d 157 (1972); *Dunlap v. Colo. Springs Cablevision, Inc.*, 829 P.2d

1286 (Colo. 1992); *Story v. Bly*, 217 P.3d 872 (Colo. App. 2008), aff'd, 241 P.3d 529 (Colo. 2010); *Denver Post Corp. v. Ritter*, 255 P.3d 1083 (Colo. 2011).

A motion to dismiss for failure to state a claim is viewed with disfavor, and should be granted only if it clearly appears that the plaintiff would not be entitled to any relief under the facts pleaded. *Nat'l Sur. Corp. v. Citizens State Bank*, 41 Colo. App. 580, 593 P.2d 362 (1978), aff'd, 199 Colo. 497, 612 P.2d 70 (1980).

Whether a claim is stated must be determined solely from the complaint. In passing on a motion to dismiss a complaint for failure to state a claim, the court must consider only those matters stated within the four corners thereof. *Dillinger v. North Sterling Irrigation Dist.*, 135 Colo. 100, 308 P.2d 608 (1957); *McDonald v. Lakewood Country Club*, 170 Colo. 355, 461 P.2d 437 (1969); *Dunlap v. Colo. Springs Cablevision, Inc.*, 829 P.2d 1286 (Colo. 1992); *Fluid Tech., Inc. v. CVJ Axles, Inc.*, 964 P.2d 614 (Colo. App. 1998); *Kratzer v. Colo. Intergovernmental Risk Share Agency*, 18 P.3d 766 (Colo. App. 2000).

A motion to dismiss for failure to state a claim must be decided solely on the basis of allegations stated in the complaint. *Foster Lumber Co. v. Weston Constructors, Inc.*, 33 Colo. App. 436, 521 P.2d 1294 (1974); *Nat'l Camera, Inc. v. Sanchez.*832 P.2d 960 (Colo. App. 1991).

Upon review of a grant of a motion to dismiss under subsection (b)(5) of this rule, it must be assumed that the material allegations of the complaint are true. *Schmaltz v. St. Luke's Hosp.*, 33 Colo. App. 351, 521 P.2d 787 (1974), modified, 188 Colo. 353, 534 P.2d 781 (1975).

A motion to dismiss for failure to state a claim must be considered on its merits like a motion for summary judgment and cannot be deemed confessed by a failure to respond. Therefore, trial court erred in failing to consider the merits of plaintiffs' claims for relief as required by section (b)(5) in resolving defendant's motion to dismiss. *Hemmann Mgmt. Servs. v. Mediacell, Inc.*, 176 P.3d 856 (Colo. App. 2007).

"Matters outside the pleadings", consideration of which requires the court to convert a motion for dismissal into a motion for summary judgment, does not include a document referred to in the complaint, notwithstanding that the document is not formally incorporated by reference or attached to the complaint. *Yadon v. Lowry*, 126 P.3d 332 (Colo. App. 2005); *Walker v. Van Laningham*, 148 P.3d 391 (Colo. App. 2006).

The same is true of counterclaims and cross claims. Whether or not counterclaims and cross claims state a claim upon which relief could be granted, the court must look to the four corners of the pleading in question to determine whether a claim is stated. *Colo. Nat'l Bank v. F. E. Biegert Co.*, 165 Colo. 78, 438 P.2d 506 (1968).

Although a court primarily considers the pleadings, certain matters of public record may also be taken into account, and matters that are properly the subject of judicial notice may be considered without converting the motion for dismissal into a motion for summary judgment. *Walker v. Van Laningham*, 148 P.3d 391 (Colo. App. 2006).

When deciding a motion to dismiss for failure to state a claim on the basis of issue preclusion or claim preclusion, a court may judicially notice prior pleadings, orders, judgments, and other items appearing in the court records of the prior litigation. *Bristol Bay Prods., LLC v. Lampack*, __ P.3d __ (Colo. App. 2011).

Upon a motion to dismiss for failure to state a claim, the facts of the complaint should be taken as true. *Denver & R. G. W. R. R. v. Wood*, 28 Colo. App. 534, 476 P.2d 299 (1970).

In ruling on a motion to dismiss for failure to state a claim, the trial court must accept the facts of the complaint as true and determine whether, under any theory of law, plaintiff is entitled to relief. If relief could be granted under such circumstances, the complaint is sufficient. *Schlitters v. State*, 787 P.2d 656 (Colo. App. 1989); *Chidester v. Eastern Gas & Fuel Assoc.*, 859 P.2d 222 (Colo. App. 1992); *Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095 (Colo. 1995); *Flatiron Linen, Inc. v. First Amer. State Bank*, 1 P.2d 244 (Colo. App. 1999), rev'd on other grounds, 23 P.3d 1209 (Colo. 2001); *W.O. Brisben Co., Inc. v. Krystkowiak*, 66 P.3d 133 (Colo. App. 2002), aff'd on other grounds, 90 P.3d 859 (Colo. 2004); *Dotson v. Dell L. Bernstein, P.C.*, 207 P.3d 911 (Colo. App. 2009).

Material allegations must be taken as admitted. When deciding whether a complaint is sufficient to state a claim upon which relief can be granted, the material allegations of the complaint must be taken as admitted. *Nelson v. Nelson*, 31 Colo. App. 63, 497 P.2d 1284 (1972); *Saunders v. Bankston*, 31 Colo. App. 551, 506 P.2d 1253 (1972).

On appeal from the dismissal of a complaint for failure to state a claim upon which relief could be granted, the material allegations of the complaint must be taken as admitted. *Fort v. Holt*, 508 P.2d 792 (Colo. App. 1973).

When reviewing a motion to dismiss, the court must accept the material allegations of the complaint as true and the complaint cannot be dismissed unless it appears that the non-moving party is entitled to no relief under any statement of facts which may be proved in support of the claims. *Douglas County Nat. Bank v. Pfeiff*, 809 P.2d 1100 (Colo. App. 1991).

Trial court is not required to accept complaint's legal conclusions or factual claims at variance with the express terms of documents attached to the complaint. When documents are attached to a complaint, the legal effect of the documents is determined by their contents rather than by allegations in the complaint. Thus, trial court need not consider the allegations of the complaint as true and in the light most favorable to plaintiffs, if such consideration would conflict with the attached documents. *Stauffer v. Stegemann*, 165 P.3d 719 (Colo. App. 2006).

Court is not required to accept as true legal conclusions that are couched as factual allegations. *Denver Post Corp. v. Ritter*, 255 P.3d 1083 (Colo. 2011).

Since under the present rules a motion to dismiss is treated as a demurrer, it must be assumed that the allegations of a petition are true. *Nielsen v. Nielsen*, 111 Colo. 344, 141 P.2d 415 (1943).

A motion for failure to state a claim is not identical to a demurrer. While motion under section (b) of this rule, for "failure to state a claim upon which relief can be granted", may in some cases serve the purpose of a demurrer and is analogous to it in some respects, it is not an identical attack. *People ex rel. Bauer v. McCloskey*, 112 Colo. 488, 150 P.2d 861 (1944).

A party's capacity to sue may not be raised by motion to dismiss. A party who wishes to raise the issue of capacity must do so by specific negative averment. *Ashton Props., Ltd. v. Overton*, 107 P.3d 1014 (Colo. App. 2004).

In a complaint, a plaintiff need not set forth the underlying facts giving rise to the claim with precise particularity, especially as to those matters reasonably unknown to him and within the cognizance of the defendants. *Shockley v. Georgetown Valley Water & San. Dist.*, 37 Colo. App. 434, 548 P.2d 928 (1976).

When it appears on the face of the complaint, or is admitted, that the complaint does not state a claim upon which relief can be granted, the claim is barred, the court has no jurisdiction of the subject matter, and the court can, for that reason, grant a motion to dismiss on this ground. *Fort Collins-Loveland Water Dist. v. City of Fort Collins*, 174 Colo. 79, 482 P.2d 986 (1971).

Want of merit may consist of an absence of substantive law to support a claim of the type alleged. *Nelson v. Nelson*, 31 Colo. App. 63, 497 P.2d 1284 (1972).

A complaint will not be dismissed unless it appears to a certainty that plaintiff would be entitled to no relief under any state of facts which could be proved in support of claim. *People ex rel. Bauer v. McCloskey*, 112 Colo. 488, 150 P.2d 861 (1944); *Nelson v. Nelson*, 31 Colo. App. 63, 497 P.2d 1284 (1972).

Where complaint against a partner in a limited liability partnership lacks any factual allegations explaining how limited partner could be individually liable for alleged retaliatory discharge, the complaint is deficient in stating a claim. *Middlemist v. BDO Seidman, LLP*, 958 P.2d 486 (Colo. App. 1997).

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Davidson v. Dill*, 180 Colo. 123, 503 P.2d 157 (1972); *Kratzer v. Colo. Intergovernmental Risk Share Agency*, 18 P.3d 766 (Colo. App. 2000).

It is error to dismiss a complaint if plaintiff can be granted relief under any state of facts which may be proved in support of the claim. *Fort v. Holt*, 508 P.2d 792 (Colo. App. 1973).

Where a plaintiff in his complaint states a case entitling him to some relief, a motion to dismiss the action should not be granted. *Stapp v. Carb-Ice Corp.*, 122 Colo. 526, 224 P.2d 935 (1950); *Dillinger v. North Sterling Irrigation Dist.*, 135 Colo. 100, 308 P.2d 608 (1957).

It is error to grant a motion to dismiss for failure to state a claim upon which relief can be granted if in fact a "relievable" claim is stated. *Gold Uranium Mining Co. v. Chain O'Mines Operators, Inc.*, 128 Colo. 399, 262 P.2d 927 (1953).

Where payee of checks and its insurer pled that bank paid checks payable to corporation upon forged endorsements, the plaintiffs properly stated a cause of action for conversion against the bank, and the trial court therefore erred in granting the bank's motion to dismiss under section (b)(5). *Citizens State Bank v. Nat'l Sur. Corp.*, 199 Colo. 497, 612 P.2d 70 (1980).

A court errs in granting a defendant's motion to dismiss under subsection (b)(5) of this rule, when claims are sufficient statements of a cause of action for which relief may be granted. *Wright v. Creative Corp.*, 30 Colo. App. 575, 498 P.2d 1179 (1972).

Only where a complaint fails to give defendants notice of the claims asserted is dismissal under subsection (b)(5) proper. *Shockley v. Georgetown Valley Water & San. Dist.*, 37 Colo. App. 434, 548 P.2d 928 (1976).

Denial of a motion to dismiss for failure to state a claim is not prejudicial to movant where claim was included in a stipulated trial management order, giving movant sufficient notice that the claim would be tried. *People ex rel. Suthers v. Mandatory Poster*, 260 P.3d 9 (Colo. App. 2009).

Failure to specifically request relief under a particular claim, where complaint included a general request for relief, is not sufficient grounds to dismiss claim on a motion to dismiss for failure to state a claim. *People ex rel. Suthers v. Mandatory Poster*, 260 P.3d 9 (Colo. App. 2009).

Failure to state claim where special damages in libel "per quod" action are not pleaded results in dismissal of complaint. Since special damages are an essential element of an action for libel "per quod", plaintiff is required to specifically plead them, and if the plaintiff fails to do so, the trial court can then dismiss the plaintiff's complaint under subsection (b)(5) of this rule for failure to state a claim upon which relief could be granted. *Bernstein v. Dun & Bradstreet, Inc.*, 149 Colo. 150, 368 P.2d 780 (1962).

Where it is clear that plaintiffs have no standing to assert a claim upon which relief can be granted, the action is properly dismissed under subsection (b)(5) of this rule. *Clark v. City of Colo. Springs*, 162 Colo. 593, 428 P.2d 359 (1967).

Individual shareholders were not entitled to relief where no injury suffered. Where the complaint alleged only that the individual plaintiffs were shareholders of the corporation and that the corporation sustained damages as a result of defendants' actions, plaintiffs, as individual shareholders, suffered no individually redressable injury thereby, and their complaint was properly dismissed because it stated no claim upon which they were entitled to relief. *Northwest Dev., Inc. v. Dunn*, 29 Colo. App. 364, 483 P.2d 1361 (1971).

Permission to amend should be given where there is possibility of adequate statement of claim. While a judgment of dismissal for failure to state a claim upon which the relief can be granted may be entered upon a motion for summary judgment, such judgment must specifically disclose the inadequacy of the complaint as the ground therefor, and 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).

When a person has been acquitted of a crime and denied the return of the arrest record without justification, a suit by the person alleging violation of the right to privacy is not to be dismissed for failure to state a claim upon which relief could be granted. *Davidson v. Dill*, 180 Colo. 123, 503 P.2d 157 (1972).

Discovery not required. If a challenged complaint sufficiently states a claim for relief, the trial court may not require the plaintiff to undertake discovery merely to withstand a motion to dismiss. *Shockley v. Georgetown Valley Water & San. Dist.*, 37 Colo. App. 434, 548 P.2d 928 (1976).

It is appropriate for a trial court to treat a motion for failure to state a claim upon which relief can be granted as a motion for summary judgment when it is necessary to consider the factual circumstances and the party against whom the motion is filed is accorded an opportunity to respond with evidence and counter-affidavits. *Brannan Sand & Gravel v. F.D.I.C.*, 928 P.2d 1337 (Colo. App. 1996), rev'd on other grounds, 940 P.2d 393 (Colo. 1997).

Order granting summary judgment where a motion to dismiss for failure to state a claim upon which relief can be granted must be affirmed if the pleadings, together with any affidavits filed in support of the motion, 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. *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); *Fort Collins Motor Homes, Inc. v. City of Ft. Collins*, 30 Colo. App. 445, 496 P.2d 1074 (1972).

Where statute provided defendant with only qualified immunity, and plaintiff's allegations, if accepted as true, adequately asserted "willful and wanton" misconduct abrogating such immunity, dismissal was not proper. *Holland v. Bd. of County Comm'rs*, 883 P.2d 500 (Colo. App. 1994).

Employee's allegation that his demotion was in violation of the policies and procedures of the employer and therefore constituted a breach of contract was sufficient to survive a motion to dismiss, but the employee's allegation that the demotion constituted extreme and outrageous conduct failed to state a cognizable claim. *Salimi v. Farmers Ins. Group*, 684 P.2d 264 (Colo. App. 1984).

Employee's mere allegation of termination from employment because of compliance with the employer's safety policy, rather than any allegation of breach of contract for failure of the employer to comply with its own discharge procedures or a termination for cause provision specified in any handbook distributed to the employee, was insufficient to state a claim upon

which relief could be granted. *Corbin v. Sinclair Marketing, Inc.*, 684 P.2d 265 (Colo. App. 1984).

In considering a motion to dismiss a damages claim by an employee against a co-employee based upon a defense or immunity provided by §8-41-104, the county court erred in not considering matters outside the pleadings where issues regarding the defense were absent from the pleadings and in not treating the motion as one for summary judgment under C.R.C.P. 56. *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991).

In reviewing a motion to dismiss a complaint, the appellate court can consider only matters stated therein and must not go beyond the confines of the pleading, for in reviewing the action of the trial court in dismissing a complaint for failure to state a claim, the appellate court is in the same position as the trial judge. *McDonald v. Lakewood Country Club*, 170 Colo. 355, 461 P.2d 437 (1969).

In evaluating such motions, trial courts and appellate courts apply the same standards. *Van Wyk v. Pub. Serv. Co. of Colo.*, 996 P.2d 193 (Colo. App. 1999), aff'd in part and rev'd in part on other grounds, 27 P.3d 377 (Colo. 2001).

The appellate court reviews a trial court's determination on a motion to dismiss de novo, and, like the trial court, must accept all averments of material fact contained in the complaint as true. *Fluid Tech., Inc. v. CVJ Axles, Inc.*, 964 P.2d 614 (Colo. App. 1998).

Because the substance, rather than the name or denomination of a pleading determines its character and sufficiency, a ruling on a motion made in limine that sought to dismiss a claim for failure of pleading was properly reviewed de novo, not under an abuse of discretion standard. *People ex rel. Suthers v. Mandatory Poster*, 260 P.3d 9 (Colo. App. 2009).

Both courts must view complaint's allegations favorable to plaintiff. When ruling upon a motion to dismiss a complaint for failure to state a claim, a trial court and a reviewing court must view the allegations of the complaint in a light most favorable to the plaintiff. *Bell v. Arnold*, 175 Colo. 277, 487 P.2d 545 (1971); *Halverson v. Pikes Peak Fam. Counseling*, 795 P.2d 1352 (Colo. 1990); *Nat'l Camera, Inc. v. Sanchez*, 832 P.2d 960 (Colo. App. 1991); *Story v. Bly*, 217 P.3d 872 (Colo. App. 2008), aff'd, 241 P.3d 529 (Colo. 2010).

In so testing all matters well pleaded will be assumed to be true. *Colo. Nat'l Bank v. F. E. Biegert Co.*, 165 Colo. 78, 438 P.2d 506 (1968).

In determining whether a motion to dismiss for failure to state a claim is to be granted, all matters well pleaded must be considered to be true, and the trial court can consider only those matters stated in the complaint. *Abts v. Bd. of Educ.*, 622 P.2d 518 (Colo. 1980).

A motion to dismiss based on the exclusivity provisions of the Workers' Compensation Act does not go to the subject matter jurisdiction of the court, therefore, an evidentiary hearing is neither required nor appropriate. The trial court did not err in ruling on employer's motion without such a hearing. *Schwindt v. Hershey Food Corp.*, 81 P.3d 1144 (Colo. App. 2003).

Colorado state courts have jurisdiction over private actions under the Telephone Consumer Protection Act (TCPA), 47 U.S.C. §227, under the supremacy clause of the United States Constitution, and the TCPA does not limit this jurisdiction, even assuming congress could do so. When congress created a private right of action that could be prosecuted in state courts, it was acknowledging that the states could apply their own rules of procedure to such an action, but it did not intend to require that any state adopt a further law or rule of court to allow the prosecution of such actions in its courts. The supremacy clause requires the exercise of such jurisdiction as the state court possesses. *Consumer Crusade, Inc. v. Affordable Health Care Solutions, Inc.*, 121 P.3d 350 (Colo. App. 2005).

"If otherwise permitted" phrase under TCPA provisions creating a private right of action is merely an acknowledgment by congress that states have the right to structure their own court systems and that state courts are not obligated to change their procedural rules to accommodate TCPA claims. Under this view, no state can refuse to entertain a private TCPA action, but a state is not compelled to adopt a special procedural rule for such actions. *Consumer Crusade, Inc. v. Affordable Health Care Solutions, Inc.*, 121 P.3d 350 (Colo. App. 2005).

Trial court properly granted dismissal of state law claims under subsection (b)(5) on grounds that such claims were preempted by federal Employee Retirement Income Security Act of 1974 (ERISA) legislation. Fact that former employees were not entitled to bring a cause of action under ERISA did not mean that state law claims could not be preempted. *Houdek v. Mobil Oil Corp.*, 879 P.2d 417 (Colo. App. 1994).

Question not before district court was not before supreme court. Where the question as to whether the complaint failed to state facts on which a claim of relief could be based was not placed before the district court by motion under this rule, a fortiori, it was not before the supreme court. *Allen v. Evans*, 193 Colo. 61, 562 P.2d 752 (1977).

Party was properly dismissed based upon holding that an employer or business may not recover against a third party for economic losses it suffered as a result of the third party's tortious injury to its employee. *Gonzalez v. Yancey*, 939 P.2d 525 (Colo. App. 1997).

Motion to dismiss was properly granted where there was no evidence that petitioner could have proffered regarding the importance of assisted suicide to his belief system that would exempt him, or his designated third persons, on first amendment grounds from the provisions of §18-3-104 . *Sanderson v. People*, 12 P.3d 851 (Colo. App. 2000).

Defendant's actions do not constitute either a taking or a damaging of plaintiffs' property, and, therefore, the complaint, even when viewed in the light most favorable to the plaintiffs, cannot sustain a claim for inverse condemnation. Therefore, the district court properly dismissed plaintiffs' inverse condemnation claim pursuant to defendant's subsection (b)(5) motion. *Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377 (Colo. 2001).

Plaintiff's takings claim was improperly dismissed based on a ruling that claim was not ripe. Even though final condemnation proceedings had not been instituted, plaintiffs alleged that they had already been harmed, and those allegations must be viewed in the light most favorable to the plaintiffs. Therefore, the claim was ripe. *G & A Land, LLC v. City of Brighton*, 233 P.3d 701 (Colo. App. 2010).

With regard to plaintiffs' claim for trespass, the complaint does not allege specific physical damage to their property resulting from the intangible intrusions of which they complained. Because plaintiffs have not alleged physical damage, plaintiffs cannot prove trespass based on the alleged intangible intrusions. Nor have plaintiffs alleged any tangible intrusions upon their property to support a claim of trespass. Therefore, the complaint, when viewed in the light most favorable to the plaintiffs, cannot support a cause of action for trespass and was properly dismissed by the district court. *Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377 (Colo. 2001).

Respondent failed to state a claim for intentional interference with contractual relations against petitioner. Under the Nonprofit Corporation Act, neighborhood association could not individually bind its members, including petitioner, to a contract its president signed. At all times, individual members of the neighborhood association, including petitioner, were free to disassociate from the association and to express their own views about the proposed development. Respondent's complaint failed to allege petitioner's first amendment rights were limited by the settlement agreement. The complaint essentially pointed to the fact petitioner exercised his or her first amendment rights without alleging that the exercise of such

rights was improper. Further, there is no allegation that petitioner's exercise of his constitutional rights persuaded, intimated, or intentionally made it impossible for the association to perform its contract. *Krystkowiak v. W.O. Brisben Cos.*, 90 P.3d 859 (Colo. 2004).

Plaintiffs' complaint satisfies both of the requirements necessary to allege a nuisance. Thus, the nuisance section of plaintiffs' complaint sufficiently states a nuisance claim, and the district court improperly dismissed the nuisance claim. *Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377 (Colo. 2001).

Motion to dismiss should have been denied on the basis that a joint venturer cannot shield itself from liability on the grounds that the joint venture was prohibited by the Colorado rules of professional conduct. *Bebo Constr. Co. v. Mattox & O'Brien*, 998 P.2d 475 (Colo. App. 2000).

Motion to dismiss is properly granted when plaintiffs lack standing because the complaint does not show actual injury to a legally protected right. *Kreft v. Adolph Coors Co.*, 170 P.3d 854 (Colo. App. 2007).

Motion to dismiss was properly granted under subsection (b)(5) where plaintiff claimed undercharges resulted in defendant's unjust enrichment. There is nothing unjust about retaining a benefit conferred gratuitously. *Berenergy Corp. v. Zab, Inc.*, 94 P.3d 1232 (Colo. App. 2004), aff'd on other grounds, 136 P.3d 252 (Colo. 2006).

Motion to dismiss was properly granted as a matter of law when the allegations in the complaint were too vague, insubstantial, and attenuated to support plaintiff's legal malpractice claims. *Bristol Co., LP v. Osman*, 190 P.3d 752 (Colo. App. 2007).

Trial court properly dismissed complaint under subsection (b)(5) alleging city council's use of anonymous ballot procedure to fill city council vacancies and to appoint municipal judge was prohibited under Colorado open meetings law (COML). COML does not impose specific voting procedures on local public bodies let alone one that prohibits the use of anonymous ballots. COML is silent as to whether the votes taken need to be recorded in a way that identifies which elected official voted for which candidate. Rather, COML only requires that the public have access to meetings of local public bodies and be able to observe the decision-making process. *Henderson v. City of Fort Morgan*, ___ P.3d ___ (Colo. App.2011).

E. Failure to Join Parties.

Where defendants contended that the failure to join all the children of a deceased as his heirs constituted a failure to join indispensable parties under subsection (b)(6) of this rule in a creditor's action on a deed of trust executed to deceased and defendant, the deceased's children were held not indispensable parties, inasmuch as, when deceased died, there was no estate probated, no personal representative appointed, and no determination of heirship. *Greco v. Pullara*, 166 Colo. 465, 444 P.2d 383 (1968).

Failure to name all stockholders as parties plaintiff does not render the complaint fatally defective for failure to join an indispensable party, since the stockholders are neither necessary nor proper parties in an action filed by a corporation. *Northwest Dev., Inc. v. Dunn*, 29 Colo. App. 364, 483 P.2d 1361 (1971).

Pleading a defense of failure to state a claim upon which relief can be granted is sufficient to raise the issue of failure of plaintiff to join an indispensable party. *Cold Springs Ranch v. Dept. of Nat. Res.*, 765 P.2d 1035 (Colo. App. 1988).

Trial court did not abuse its discretion by denying county's motion to dismiss under subsections (b)(5) and (b)(6) of this rule and C.R.C.P. 19(a) for failure to join landowners as indispensable parties. A finding that county land use department abused its discretion by refusing to perform ministerial task of accepting application of fire protection district in no way implicated landowner's interests as to make them indispensable parties. Nor did fire protection district's request for a declaration that project could proceed absent an amendment to the planned unit development (PUD). At root, question presented involved which process the district was required to employ in order to build a fire station. This determination did not impair the landowners' ability to protect their interests because, whether the court required a location and extent review, as the district sought, or an amendment to the PUD, which the county believed to be required, the landowners would have had the opportunity to be heard and protect their interests through the applicable statutory processes. *Hygiene Fire Prot. Dist. v. Bd. of County Comm'rs*, 205 P.3d 487 (Colo. App. 2008), aff'd on other grounds, 221 P.3d 1063 (Colo. 2009).

F. Statute of Limitations.

Laches and the statute of limitations cannot be raised by motion to dismiss or strike. *McPherson v. McPherson*, 145 Colo. 170, 358 P.2d 478 (1960).

The statute of limitations is not ground for a motion to dismiss for failure to state a claim upon which relief can be granted. *McPherson v. McPherson*, 145 Colo. 170, 358 P.2d 478 (1960).

The statute of limitations is not ground for motion to dismiss for failure to state a claim upon which relief can be granted under section (b) of this rule, since under C.R.C.P. 8(c), that is a defense which must be set forth affirmatively by answer. *Smith v. Kent Oil Co.*, 128 Colo. 80, 261 P.2d 149 (1953); *Davis v. Bonebrake*, 135 Colo. 506, 313 P.2d 982 (1957); *Fort Collins-Loveland Water Dist. v. City of Fort Collins*, 174 Colo. 79, 482 P.2d 986 (1971).

The statute of limitations is not a basis for dismissal on motion on the ground that it appears from the complaint that the claim is barred for failure to timely file suit, for the reason that in the absence of an affirmative defense based on the statute such defense is waived, and the assertion or waiver of the defense can only be determined from the answer. Furthermore, even if pleaded, the running of the statute may have been tolled, and plaintiff in his complaint is not required to anticipate the defense. *Smith v. Kent Oil Co.*, 128 Colo. 80, 261 P.2d 149 (1953).

Statute of limitations may be raised by motion to dismiss. The statute authorizing forfeiture for a public nuisance is penal in nature. In an action premised on a penal statute as opposed to a civil claim, the statute of limitations is jurisdictional in nature, in that it specifies the time period during which a cause of action exists. Since the statute of limitations is jurisdictional, it may be raised at any stage of the proceeding, including a motion to dismiss. *People v. Steinberg*, 672 P.2d 543 (Colo. App. 1983).

Appellate review of order granting motion to dismiss on statute of limitations grounds is de novo. *Meyerstein v. City of Aspen*, ___ P.3d ___ (Colo. App. 2011).

G. Other Grounds.

The constitutionality of an act may be raised and considered on motion to dismiss. *Flank Oil Co. v. Tennessee Gas Transmission Co.*, 141 Colo. 554, 349 P.2d 1005 (1960) (unfair practices act).

Courts should be wary of dismissing a case where the pleadings show that an alleged violation of a constitutional right is at issue, since fundamental rights and important public policy questions are necessarily involved. *Davidson v. Dill*, 180 Colo. 123, 503 P.2d 157 (1972).

In an order denying the motion to dismiss where the issues involved are purely questions of law and no good purpose would be served in requiring the filing of individual claims before an administrative agency, whose presumed expertise would not be helpful in resolving legal as distinguished

from factual issues, a dismissal is not appropriate. *Hamilton v. City & County of Denver*, 176 Colo. 6, 490 P.2d 1289 (1971).

A complaint may be dismissed on motion if it is clearly without any merit. *Nelson v. Nelson*, 31 Colo. App. 63, 497 P.2d 1284 (1972).

To sustain the defense of "res judicata" facts in support of it must be affirmatively shown either by the evidence adduced at the trial under C.R.C.P. 8(c), or by way of uncontroverted facts properly presented in a motion for summary judgment, or by a motion to dismiss under section (b) of this rule 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 C.R.C.P. 56. *Ruth v. Dept. of Hwys.*, 153 Colo. 226, 385 P.2d 410 (1963).

Where prior case is decided in same court where a second case is filed and records of prior case are before court for consideration, that court may properly treat a motion to dismiss as one for summary judgment and consider defense of "res judicata" on its merits. *Saunders v. Bankston*, 31 Colo. App. 551, 506 P.2d 1253 (1972).

Affirmative defenses may be considered on motion for summary judgment. *Lin Ron, Inc. v. Mann's World of Arts & Crafts, Inc.*, 624 P.2d 1343 (Colo. App. 1981).

Venue motions shall be filed together. C.R.C.P. 98(e)(1), when read together with this rule, requires that all venue motions except those based on C.R.C.P. 98(c)(3), (f)(2), and (g) must be filed together. *Bd. of Land Comm'rs v. District Court*, 191 Colo. 185, 551 P.2d 700 (1976).

The granting of a motion to dismiss a complaint is not in and of itself a final and reviewable order of judgment to which a writ of error will lie. *District 50 Metro. Recreation Dist. v. Burnside*, 157 Colo. 183, 401 P.2d 833 (1965).

Motion to dismiss converted to motion for summary judgment. Following a hearing on plaintiffs' motion for preliminary injunction, the court heard and granted defendants' motion to dismiss. With consent of all parties, the evidence presented in the injunction hearing was considered by the court in ruling on the dismissal motion. Under section (b) of this rule this consideration of matters outside the pleadings made the motion one for summary judgment. *Kolwicz v. City of Boulder*, 36 Colo. App. 142, 538 P.2d 482 (1975).

IV. Motion for Judgment on the Pleadings.

Law reviews. For article, "Again-How Many Times?", see 21 Dicta 62 (1944).

Judgment on the pleadings is appropriate if, from the pleadings, the moving party is entitled to judgment as a matter of law. *Trip v. Parga*, 847 P.2d 165 (Colo. App. 1992); *City & County of Denver v. Qwest Corp.*, 18 P.3d 748 (Colo. 2001).

Motion to dismiss for failure to state a claim upon which relief can be granted treated as motion for summary judgment. *Enger v. Walker Field, Colo. Pub. Airport Auth.*, 181 Colo. 253, 508 P.2d 1245 (1973).

Where the trial court, in ruling upon a motion to dismiss for failure to state a claim, considered affidavit submitted by the parties, the motion should have been treated as one for summary judgment. *Foster Lumber Co. v. Weston Constructors, Inc.*, 33 Colo. App. 436, 521 P.2d 1294 (1974).

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. *Van Schaack v. Phipps*, 38 Colo. App. 140, 558 P.2d 581 (1976).

Where the record before the trial court, which it considered in ruling on the motion to dismiss, contained substantial material in the form of depositions and deposition exhibits and in argument on the motion, counsel quoted from the said depositions and deposition exhibits, and the court considered all relevant material contained in the exhibits or depositions, the action taken by the court must be considered a ruling on the motion for summary judgment under section (c) of this rule, which can be made at any time. *Van Schaack v. Phipps*, 38 Colo. App. 140, 558 P.2d 581 (1976).

Judgment must disclose no genuine issue as to material fact regarding complaint's adequacy. A judgment of dismissal for failure to state a claim upon which relief can be granted must specifically disclose that there is no genuine issue as to any material fact relating to the adequacy of the complaint. *Van Schaack v. Phipps*, 38 Colo. App. 140, 558 P.2d 581 (1976).

Allegations construed strictly against movant. In considering a motion for judgment on the pleadings, the court must construe the allegations of the pleadings strictly against the movant. *Strout Realty, Inc. v. Snead*, 35 Colo. App. 204, 530 P.2d 969 (1975).

In considering on appeal a motion for judgment on the pleadings, the court must construe the allegations of the pleadings strictly against the movant and must consider the allegations of the opposing party's pleadings as true. *Abts v. Bd. of Educ.*, 622 P.2d 518 (Colo. 1980).

Allegations of opposing parties' pleadings considered true. In considering a motion for judgment on the pleadings, the court must consider the

allegations of the opposing parties' pleadings as true. *Strout Realty, Inc. v. Snead*, 35 Colo. App. 204, 530 P.2d 969 (1975).

A motion for judgment on the pleadings should not be sustained unless it appears that pleadings are such that no amendment could be made. *Lammon v. Zamp*, 81 Colo. 90, 253 P. 1056 (1927); *Kingsbury v. Vreeland*, 58 Colo. 212, 144 P. 887 (1914); *McLaughlin v. Niles Co.*, 88 Colo. 202, 294 P. 954 (1930).

Where, after the pleadings in a case are settled, there is no issue of law or fact left for determination, judgment on the pleadings is properly entered. *Atterbury v. Nat'l Union Fire Ins. Co.*, 94 Colo. 518, 31 P.2d 489 (1934).

It is immaterial whether the court considers the judgment of dismissal proper under this rule or as a summary judgment under C.R.C.P. 56 if the defendant is entitled to judgment under either thereof. *Haigler v. Ingle*, 119 Colo. 145, 200 P.2d 913 (1948).

Second amended complaint sufficient. A second amended complaint plainly asserting an allegation not contained in earlier amended complaint was sufficient to survive a motion for dismissal notwithstanding similarity of wording to earlier amended complaint. *Chappell v. Bonds*, 677 P.2d 955 (Colo. App. 1983).

A motion to dismiss based on the fact that the complaint facially established a jurisdictional defect because of a violation of the statute of limitations has the effect of a motion for judgment on the pleadings, as averments of time will be considered in determining the sufficiency of the pleadings. *People v. Steinberg*, 672 P.2d 543 (Colo. App. 1983).

Criteria for determining reversible error in granting motion applied. Where a ruling on a motion to dismiss is considered a ruling on a motion for summary judgment, whether the court committed reversible error in granting the motion for dismissal must be tested against the legal criteria for granting a motion for summary judgment. *Van Schaack v. Phipps*, 38 Colo. App. 140, 558 P.2d 581 (1976).

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. *McNeece v. McNeece*, 39 Colo. App. 160, 562 P.2d 767 (1977).

Appellate court shall review complaint as trial court does. In reviewing the action of a trial court in dismissing a complaint for failure to state a claim,

an appellate court is in the same position as the trial judge and must consider only matters stated within the four corners of the pleading. *Espinoza v. O'Dell*, 633 P.2d 455 (Colo. 1981).

V. Motion for Separate, or More Definite, Statement.

Law reviews. For article, "Use of Summary Judgments and the Discovery Procedure", see 24 Dicta 193 (1947).

Granting of motion for bill of particulars is in court's discretion. Whether to grant or deny a motion for a bill of particulars in accordance with section (e) of this rule calls into play the sound discretion of the court. *Morgan v. Brinkhoff*, 145 Colo. 78, 358 P.2d 43 (1960).

Even prior to the adoption of this rule a motion to require a complaint to be made more specific was addressed to the sound legal discretion of the trial court. *Mulligan v. Smith*, 32 Colo. 404, 76 P. 1063 (1904); *Hall v. Cudahy*, 46 Colo. 324, 104 P. 415 (1909); *Louden Irrigating Canal & Reservoir Co. v. Neville*, 75 Colo. 536, 227 P. 562 (1924) (decided under section 69 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

Bills of particulars ordinarily should not be utilized to unduly expand the pleadings where discovery is the proper method for obtaining information falling outside the category of ultimate facts. *Morgan v. Brinkhoff*, 145 Colo. 78, 358 P.2d 43 (1960).

After denial of a motion to dismiss, the trial court has the discretion to allow the plaintiff an opportunity to supply an essential allegation by a more definite statement and is not bound to dismiss the complaint in the first instance for failure to plead such. *Bernstein v. Dun & Bradstreet, Inc.*, 149 Colo. 150, 368 P.2d 780 (1962).

Plaintiff allowed to supply essential allegation of special damages by a more definite statement. In an action for damages for libel "per quod", the trial court had discretion to allow the plaintiff the opportunity of supplying the essential allegation of special damages by a more definite statement; it was not bound to dismiss the complaint entirely under the circumstances. *Bernstein v. Dun & Bradstreet, Inc.*, 149 Colo. 150, 368 P.2d 780 (1962).

VI. Motion to Strike.

Law reviews. For article, "The Federal Rules from the Standpoint of the Colorado Code", see 17 Dicta 170 (1940). For article, "Comments on the Rules of Civil Procedure", see 22 Dicta 154 (1945). For article, "Litigating

Disputes Involving the Medical Marijuana Industry", see 41 Colo. Law. 103 (August 2012).

Annotator's note. Since section (f) of this rule is similar to §66 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.

Where a complaint contains redundant matter, advantage cannot be taken thereof on motion to require the complaint to be made more specific; rather, the proper remedy is by motion to strike. *Commonwealth Co. v. Nunn*, 17 Colo. App. 117, 67 P. 342 (1902).

It is not error to refuse to strike out pleas which are merely cumulative and which tender the same issue as an objectionable plea subsequently filed. *Glenn v. Brush*, 3 Colo. 26 (1876).

It is not error to strike out allegations that are simply a recital of the motives of defendant in doing the acts complained of by plaintiff, which add nothing to the cause of action stated. *Equitable Sec. Co. v. Montrose & Delta Canal Co.*, 20 Colo. App. 465, 79 P. 747 (1905).

On a motion to strike on the ground that a pleading is a sham, it is not the province of the court to determine the veracity of the respective parties, for that is a question of fact to be determined on the trial; rather, the duty of the court is to determine whether an issue of fact is presented, not to try that issue. *Midwest Fuel & Timber Co. v. Steele*, 111 Colo. 458, 142 P.2d 1011 (1943); *Kullgren v. Navy Gas & Supply Co.*, 112 Colo. 331, 149 P.2d 653 (1944).

Once a pleading is accepted for filing, the striking of a pleading is not a proper sanction for failure to pay a docket fee. *Miller v. Charnes*, 694 P.2d 348 (Colo. App. 1984).

The court can on its own motion amend by striking out. *Elzroth v. Murphy*, 75 Colo. 5, 223 P. 760 (1923).

VII. Consolidation of Defenses.

This rule makes it expressly clear that if a party makes a motion under section (b) of this rule and, in doing so, omits the defense of lack of jurisdiction over the person or insufficiency of process, and such defenses were available to him at the time the motion was made, then the omitted defenses are waived, and defendant may not raise them by subsequent motion or in his answer. *Bd. of County Comm'rs v. District Court*, 172 Colo. 311, 472 P.2d 128 (1970).

The supreme court will not consider waived defenses in an original proceeding. The supreme court will not subvert the theory underlying section (b) of this rule and the clear language of sections (g) and (h)(1) of this rule by considering the matter of defenses in an original proceeding for writ of prohibition when those defenses were clearly waived. *Bd. of County Comm'rs v. District Court*, 172 Colo. 311, 472 P.2d 128 (1970).

VIII. Waiver or Preservation of Certain Defenses.

Law reviews. For article, "Comments on the Rules of Civil Procedure", see 22 Dicta 154 (1945).

Section (h)(1) of this rule makes it expressly clear that if a party makes a motion under section (b) of this rule, and in doing so omits the defense of lack of jurisdiction over the person or insufficiency of process, and such defenses were available to him at the time the motion was made, then the omitted defenses are waived, and the defendant may not raise them by subsequent motion or in his answer. *Bd. of County Comm'rs v. District Court*, 172 Colo. 311, 472 P.2d 128 (1970).

The supreme court will not consider waived defenses in an original proceeding. The supreme court will not subvert the theory underlying section (b) of this rule and the clear language of sections (g) and (h)(1) of this rule by considering the matter of defenses in an original proceeding for writ of prohibition when those defenses were clearly waived. *Bd. of County Comm'rs v. District Court*, 172 Colo. 311, 472 P.2d 128 (1970).

A trial judge did not grant relief from the waiver imposed by this rule, in denying a motion under section (b) of this rule by granting 20 days "to answer or otherwise plead", as this language cannot be stretched into permission to file another motion under section (b) of this rule, since such a motion is not a pleading. *Bd. of County Comm'rs v. District Court*, 172 Colo. 311, 472 P.2d 128 (1970).

A party may, by its actions, waive the court's lack of in personam jurisdiction, and, even when jurisdiction over the person is raised as an issue, it must be preserved and brought to the attention of the trial court at a reasonable time. *Nations Enters., Inc. v. Process Equip. Co.*, 40 Colo. App. 390, 579 P.2d 655 (1978).

Subsection (h)(2) of this rule cannot be interpreted to mean that a party with the necessary information to make a motion for joinder of an indispensable party at his disposal can sit back and raise it at any point in the proceedings, when the only effect of the motion under the circumstances would be to protect himself and not the person alleged to be indispensable.

Such an interpretation would violate the direction of C.R.C.P. 1, that the rules shall be liberally construed to secure the just, speedy, and inexpensive determination of every action. *Greco v. Pullara*, 166 Colo. 465, 444 P.2d 383 (1968).

The question of jurisdiction may be raised at any stage of an action, and that, too, without an assignment of error on the subject. *Peaker v. Southeastern Colo. Water Conservancy Dist.*, 174 Colo. 210, 483 P.2d 232 (1971).

Failure to raise subject matter jurisdiction objection in court in which action is filed does not waive right to raise the objection in court to which action is transferred. *Luebke v. Luebke*, 143 P.3d 1088 (Colo. App. 2006).

Defenses and objections not presented as required by the rules of civil procedure are deemed waived. *Maxly v. Jefferson County Sch. Dist. No. R-1*, 158 Colo. 583, 408 P.2d 970 (1965).

Under C.R.C.P. 8(c) and section (h) of this rule, a party waives all defenses and objections which he does not present in his answer. *Duke v. Pickett*, 168 Colo. 215, 451 P.2d 288 (1969).

Laches and waiver must be affirmatively set forth in the answer under C.R.C.P. 8(c) and section (h) of this rule. *Duke v. Pickett*, 168 Colo. 215, 451 P.2d 288 (1969).

Failure of consideration is an affirmative defense which, if not pleaded, is waived under C.R.C.P. 8(c) and section (h) of this rule. *Bernklau v. Stevens*, 150 Colo. 187, 371 P.2d 765 (1962).

An affirmative defense cannot be urged for the first time on appeal. Where such a defense is neither pleaded nor raised at any stage of the proceedings in the trial court, it cannot be urged for the first time on appeal. *Bernklau v. Stevens*, 150 Colo. 187, 371 P.2d 765 (1962); *Davis v. Gourdin*, 831 P.2d 497 (Colo. App. (1992).

A motion to dismiss which has been previously denied can be renewed before the same judge, and there is no good reason for adopting a contrary view merely because the case is transferred to another judge. *Denver Elec. & Neon Serv. Corp. v. Gerald H. Phipps, Inc.*, 143 Colo. 530, 354 P.2d 618 (1960).

Where a court does not have jurisdiction, the remedy is not change of venue but rather dismissal of the action. *Larrick v. District Court*, 177 Colo. 237, 493 P.2d 647 (1972).

IX. 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. 56. *United Bank of Denver v. Ferris*, 847 P.2d 146 (Colo. App. 1992).

Findings of fact and conclusions of law are unnecessary on decisions under the rule, except those granting involuntary dismissal pursuant to C.R.C.P. 41(b) for failure to prosecute with diligence. *Henderson v. Romer*, 910 P.2d 48 (Colo. App. 1995).

Cross Reference Note:

For pleadings allowed and form of motions, see C.R.C.P. 7; for pleadings genereally, see C.R.C.P. 8; for joinder of persons needed for just adjudication, see C.R.C.P. 19; for summary judgments, see C.R.C.P. 56; for motions relating to venue, see C.R.C.P. 98.