

RULE 8. General Rules of Pleading

(a) **Claims for Relief.** A pleading which sets forth a claim for a relief whether an original claim, counterclaim, cross-claim, or a third-party claim, shall contain:

(1) If the court is of limited jurisdiction, a short and plain statement of the grounds upon which the court's jurisdiction depends;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for judgment for the relief to which the pleader claims to be entitled. No dollar amount shall be stated in the prayer or demand for relief. Relief in the alternative or of several different types may be demanded. Each pleading containing an initial claim for relief in a civil action, other than a domestic relations, probate, water, juvenile, or mental health action, shall be accompanied by a completed Civil Cover Sheet in the form and content of Appendix to Chapters 1 to 17, Form 1.2 (JDF 601), at the time of filing. Failure to file the cover sheet shall not be considered a jurisdictional defect in the pleading but may result in a clerk's show cause order requiring its filing.

(b) **Defenses; Form of Denials.** A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments of the adverse party. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) **Affirmative Defenses and Mitigating Circumstances.** In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an

avoidance or affirmative defense. Any mitigating circumstances to reduce the amount of damage shall be affirmatively pleaded. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required shall be taken as denied or avoided. Averments in a pleading to which a responsive pleading is permitted but not required shall be taken as denied or avoided if no responsive pleading is filed.

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. When a pleader is without direct knowledge, allegations may be made upon information and belief. No technical forms of pleading or motions are required. Pleadings otherwise meeting the requirements of these rules shall not be considered objectionable for failure to state ultimate facts as distinguished from conclusions of law.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

History:

Source: Entire rule amended and adopted November 6, 2003, effective July 1, 2004; entire rule amended and adopted June 10, 2004, effective for District Court Civil Actions filed on or after July 1, 2004; amended March 5, 2020, effective 3/5/2020.

Case Note:

Annotation

I. General Consideration.

Law reviews. For comments on nomenclature by rules committee, see 22 Dicta 154 (1945). For article, "Use of Summary Judgments and the Discovery Procedure", see 24 Dicta 193 (1947). 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", see 35 Dicta 3 (1958). For article, "One Year Review of Civil Procedure and Appeals", see 40 Den. L. Ctr. J. 66 (1963).

Applied in *Gore Trading Co. v. Alice*, 35 Colo. App. 97, 529 P.2d 324 (1974); *Blackwell v. Del Bosco*, 35 Colo. App. 399, 536 P.2d 838 (1975); *Union Supply Co. v. Pust*, 196 Colo. 162, 583 P.2d 276 (1978); *Griffin v. Pate*, 644 P.2d 51 (Colo. App. 1981); *Nelson v. Lake Canal Co.*, 644 P.2d 55 (Colo. App. 1981); *In re Boyd*, 643 P.2d 804 (Colo. App. 1982); *Memorial Gardens, Inc. v. Olympian Sales & Mgt. Consultants, Inc.*, 661 P.2d 296 (Colo. App. 1982); *People v. Steinberg*, 672 P.2d 543 (Colo. App. 1983); *Riva Ridge Apts. v. Robert G. Fisher Co.*, 745 P.2d 1034 (Colo. App. 1987).

II. Claims for Relief.

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

This rule provides that plaintiff's complaint shall set forth a "claim for relief". *Lamborn v. Eshom*, 132 Colo. 242, 287 P.2d 43 (1955).

Complaint shall contain a short and plain statement. This rule provides that a complaint shall contain a short and plain statement of the claim showing that the pleader is entitled to relief. *Weick v. Rickenbaugh Cadillac Co.*, 134 Colo. 283, 303 P.2d 685 (1956).

This rule contemplates notice to the opposing party concerning that which he is expected to defend. *Bryant v. Hand*, 158 Colo. 56, 404 P.2d 521 (1965).

The theory of pleading is to give an adversary notice of what is to be expected at trial. *Lyons v. Hoffman*, 31 Colo. App. 306, 502 P.2d 980 (1972).

A complaint must advise defendant of relief sought and grounds thereof. A complaint under the rules of civil procedure to be sufficient as a claim against a motion to dismiss is required to advise defendant of the nature of the relief sought against him and the grounds thereof. *People ex rel. Bauer v. McCloskey*, 112 Colo. 488, 150 P.2d 861 (1944).

Under this rule the essential element of a complaint is "a short and plain statement of the claim showing that the pleader is entitled to relief".

Bernstein v. Dun & Bradstreet, Inc., 149 Colo. 150, 368 P.2d 780 (1962);
DiChellis v. Peterson Chiropractic Clinic, 630 P.2d 103 (Colo. App. 1981).

Plaintiff is not required to set out "a cause of action" under the rules of civil procedure. *Smith v. Mills*, 123 Colo. 11, 225 P.2d 483 (1950).

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. *Bridges v. Ingram*, 122 Colo. 501, 223 P.2d 1051 (1950);
Hutchinson v. Hutchinson, 149 Colo. 38, 367 P.2d 594 (1961).

One does not stand or fall on a "theory" or "cause of action", as obtained under the practice prior to adoption of the rules. *Hutchinson v. Hutchinson*, 149 Colo. 38, 367 P.2d 594 (1961).

The basic theory of plaintiff's pleading under the present rule is that the transaction or occurrence is the subject matter of a claim, rather than the legal rights arising therefrom. *Brown v. Mountain States Tel. & Tel. Co.*, 121 Colo. 502, 218 P.2d 1063 (1950).

A generalized summary of the case that affords fair notice is all that is required. *Smith v. Mills*, 123 Colo. 11, 225 P.2d 483 (1950).

Since the purpose of a complaint under the rules of civil procedure is to afford the defendant reasonable notice of the general nature of the matter presented. *Vance v. St. Charles Mesa Water Ass'n*, 170 Colo. 313, 460 P.2d 782 (1969); *DiChellis v. Peterson Chiropractic Clinic*, 630 P.2d 103 (Colo. App. 1981).

The purpose of this rule is not to require the pleader to set forth the facts with particularity, but merely to apprise the adverse party of the nature of his claim. *Bridges v. Ingram*, 122 Colo. 501, 223 P.2d 1051 (1950); *Smith v. Mills*, 123 Colo. 11, 225 P.2d 483 (1950); *Rasmussen v. Freehling*, 159 Colo. 414, 412 P.2d 217 (1966); *Discovery Land & Dev. Co. v. Colo.-Aspen Dev. Corp.*, 40 Colo. App. 292, 577 P.2d 1101; *D'Amico v. Smith*, 42 Colo. App. 369, 600 P.2d 84 (1979).

The chief function of a complaint is to give notice. *Bridges v. Ingram*, 122 Colo. 501, 223 P.2d 1051 (1950); *Jacobson v. Doan*, 136 Colo. 496, 319 P.2d 975 (1957); *Spomer v. City of Grand Junction*, 144 Colo. 207, 355 P.2d 960 (1960); *Kluge v. Wilson*, 167 Colo. 526, 448 P.2d 786 (1968); *Continental Sales Corp. v. Stookesbury*, 170 Colo. 16, 459 P.2d 566 (1969); *Brown v.*

Central City Opera House Ass'n, 36 Colo. App. 334, 542 P.2d 86 (1975),
aff'd, 191 Colo. 372, 553 P.2d 64 (1976).

Failure to specify in a complaint the precise statute on which claim is based does not prevent plaintiff from seeking attorney fees. Plaintiff is only required to put defendant on notice that damages and reasonable attorney fees are being sought for defendant's failure to pay severance as provided in employment agreement. *Fang v. Showa Entetsu Co.*, 91 P.3d 419 (Colo. App. 2003).

Plaintiff is entitled to receive relief regardless of claim in demand. While a demand for judgment is necessary, if the plaintiff is entitled to any relief under his stated claim, such relief may be granted, regardless of the specific relief contained in the demand for judgment. *DiChellis v. Peterson Chiropractic Clinic*, 630 P.2d 103 (Colo. App. 1981).

Precatory language no bar to treatment of document as complaint. Where a document is signed "plaintiff" and submitted along with a petition and unsigned order to waive the docket fee, the use of precatory language does not prevent the document from being a complaint. *DiChellis v. Peterson Chiropractic Clinic*, 630 P.2d 103 (Colo. App. 1981).

Under this rule pleadings need only serve notice of the claim asserted and need not express a complete recitation of all the facts which support the cause of action. *Blake v. Samuelson*, 34 Colo. App. 183, 524 P.2d 624 (1974); *Eliminator, Inc. v. 4700 Holly Corp.*, 681 P.2d 536 (Colo. App. 1984); *Bain v. Town of Avon*, 820 P.2d 1133 (Colo. App. 1991).

If sufficient notice concerning the transaction involved is afforded the adverse party, the theory of the pleader is not important. *Bridges v. Ingram*, 122 Colo. 501, 223 P.2d 1051 (1950); *Jacobson v. Doan*, 136 Colo. 496, 319 P.2d 975 (1957); *Spomer v. City of Grand Junction*, 144 Colo. 207, 355 P.2d 960 (1960); *Hutchinson v. Hutchinson*, 149 Colo. 38, 367 P.2d 594 (1961); *Vance v. St. Charles Mesa Water Ass'n*, 170 Colo. 313, 460 P.2d 782 (1969).

Substance rather than appellation controls. The substance of the claim rather than the appellation applied to the pleading by the litigant is what controls. *Brown v. Central City Opera House Ass'n*, 36 Colo. App. 334, 542 P.2d 86 (1975), aff'd, 191 Colo. 372, 553 P.2d 64 (1976).

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).

If, under the facts, the substantive law provides relief upon any "theory", the cause should proceed to judgment. *Bridges v. Ingram*, 122 Colo. 501, 223 P.2d 1051 (1950); *Jacobson v. Doan*, 136 Colo. 496, 319 P.2d 975 (1957); *Spomer v. City of Grand Junction*, 144 Colo. 207, 355 P.2d 960 (1960); *Hutchinson v. Hutchinson*, 149 Colo. 38, 367 P.2d 594 (1961).

Under this rule a complaint is sufficient if it contains a short and plain statement of the claim showing that the pleader is entitled to relief. *Hinsey v. Jones*, 159 Colo. 326, 411 P.2d 242 (1966); *Shapiro and Meinhold v. Zartman*, 823 P.2d 120 (Colo. 1992); *Elliott v. Colo. Dept. of Corr.*, 865 P.2d 859 (Colo. App. 1993).

A complaint is sufficient if the pleader clearly identifies the transaction which forms the basis of his claim. *Kluge v. Wilson*, 167 Colo. 526, 448 P.2d 786 (1968).

A complaint need not express all facts that support the claim but need only serve notice of the claim asserted. *Grizzell v. Hartman Enters., Inc.*, 68 P.3d 551 (Colo. App. 2003).

Plaintiff need not anticipate the assertion of the statute of limitations and negate its effect in his complaint, for the defendants may waive such defense. *Davis v. Bonebrake*, 135 Colo. 506, 313 P.2d 982 (1957).

An amended complaint shall state a claim. A claim alleged in an amended complaint arising out of and connected with the occurrence pleaded in the original complaint shall state a claim entitling plaintiffs to relief. *Espinoza v. Gurule*, 144 Colo. 381, 356 P.2d 891 (1960).

A plaintiff is not required to file an amended complaint repeating allegations contained in claims later dismissed, when the claims are incorporated by reference in a claim not dismissed. *Hadley v. Moffat County Sch. Dist. RE-1*, 681 P.2d 938 (Colo. 1984).

Theories of action are no longer significant. *Continental Sales Corp. v. Stookesbury*, 170 Colo. 16, 459 P.2d 566 (1969).

If a party states any claim and proves it by a preponderance of the evidence, he is entitled to relief, without regard to a specific theory or cause of action. *Spomer v. City of Grand Junction*, 144 Colo. 207, 355 P.2d 960 (1960); *Continental Sales Corp. v. Stookesbury*, 170 Colo. 16, 459 P.2d 566 (1969).

Issues joined upon matters which are immaterial to a claim are surplusage and need not be proved. *Spomer v. City of Grand Junction*, 144 Colo. 207, 355 P.2d 960 (1960).

The prayer of a complaint is not the statement of the cause of action.
Flemming v. Colo. State Bd. of Educ., 157 Colo. 45, 400 P.2d 932 (1965).

A prayer is a necessary part of a claim for relief under this rule. *Jacobson v. Doan*, 136 Colo. 496, 319 P.2d 975 (1957).

The prayer of the complaint was not formerly an essential part of the pleading, and the cause of action was not to be determined therefrom, but resort thereto could be had not only to determine what the pleader intended by the complaint itself but what his adversary might be led to believe therefrom. *Green v. Davis*, 67 Colo. 52, 185 P. 369 (1919) (decided under repealed Code of Civil Procedure which was replaced by the Rules of Civil Procedure in 1941).

Under previous code, the form of the prayer seemed to be immaterial.
Waterbury v. Fisher, 5 Colo. App. 362, 38 P. 846 (1894), *aff'd*, 23 Colo. 256, 47 P. 277 (1896); *Powell v. Nat'l Bank of Commerce*, 19 Colo. App. 57, 74 P. 536 (1903).

If the allegations of the complaint state a cause of action or show one entitled to relief, it should be granted regardless of the remedy sought.
Flemming v. Colo. State Bd. of Educ., 157 Colo. 45, 400 P.2d 932 (1965).

If one misconceives his remedy, court will not be deprived of jurisdiction. If the allegations of the petition are such as to invoke both the jurisdiction of the court and to entitle the petitioner, on the face thereof, to some relief, the mere fact that one misconceives his remedy will not deprive the court of jurisdiction to act. *In re Legislative Reapportionment*, 150 Colo. 380, 374 P.2d 66 (1962).

The court will grant the relief entitled under the facts pleaded. If the plaintiff has stated a cause of action for any relief, it is immaterial what he designates it or what he has asked for in his prayer, for 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).

A party cannot avoid facts or their legal significance by the form of his complaint; basic facts control. *Maes v. Tuttoilmondo*, 31 Colo. App. 248, 502 P.2d 427 (1972).

A complaint is not subject to a motion to dismiss if it shows that the pleader is entitled to some relief "upon any theory of the law". *Hinsey v. Jones*, 159 Colo. 326, 411 P.2d 242 (1966).

A dismissal of the action is error. If any of the allegations of the complaint, as amended, give notice to the defendants of a claim for relief and there is

some competent evidence produced at the trial upon which relief could be granted, a dismissal of the action is error. *Spomer v. City of Grand Junction*, 144 Colo. 207, 355 P.2d 960 (1960).

A motion to dismiss for failure to state a claim was improperly sustained where the complaint set out all the allegations necessary for an absolute divorce and the prayer was for a judicial separation, for the allegations plainly showed that plaintiff was entitled to relief, though not to the specific relief prayed. *Berryman v. Berryman*, 115 Colo. 281, 172 P.2d 446 (1946).

If a plaintiff declares his intention of seeking a particular form of relief and of refusing 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 seeks. *Berryman v. Berryman*, 115 Colo. 281, 172 P.2d 446 (1946).

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).

Where the prayer is for "interest and costs of suit", it is sufficient to meet the requirements of §13-21-101 entitling a plaintiff to interest on the verdict from the date of filing a complaint. *Jacobson v. Doan*, 136 Colo. 496, 319 P.2d 975 (1957).

A complaint stated a claim for relief for damages when it contained allegations of the relationship between bank and depositor and that the defendant bank had disbursed funds of the plaintiff depositor without the latter's authority and in violation of the agreement between them. *Henderson v. Greeley Nat'l Bank*, 111 Colo. 365, 142 P.2d 480 (1943); *Rivera v. Central Bank & Trust Co.*, 155 Colo. 383, 395 P.2d 11 (1964).

Claim stated where attached exhibit made part of complaint by reference. Where claims under mining agreements were at issue and a blank form of these agreements was set out in the complaint with no date stated, no allegation as to with whom made, no consideration stated, and no statements as to its terms, such did not render the complaint insufficient to state a claim, since an exhibit attached to the complaint and by reference made a part thereof listed the claims allegedly owned, the names of the owners who executed the agreements, and the book and page where these executed agreements could be found on record. *Gold Uranium Mining Co. v. Chain O'Mines Operators*, 128 Colo. 399, 262 P.2d 927 (1953).

Suit by acquitted person for return of arrest record not dismissed for failure to state a claim. 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 of 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).

Complaint held not to be a "short and plain statement". A 15-page complaint containing some 100 separately numbered paragraphs seeking damages from one or all or any combination of some nine different defendants, together with a seven-page amendment, was not considered a "short and plain statement of the claim showing that the pleader is entitled to relief" as envisioned by this rule. *Ripple & Howe, Inc. v. Fenster*, 156 Colo. 322, 399 P.2d 97 (1965).

Complaint did not comply with section (a). Where complaint is 30 pages long with an additional 10 pages of attached exhibits, consists of 178 separate paragraphs setting forth 36 separate claims for relief, and incorporates other portions of the complaint over 400 times, the plaintiffs did not comply with the requirements of section (a) of this rule. *Borwick v. Bober*, 34 Colo. App. 423, 529 P.2d 1351 (1974).

Allegations sufficient to comply with rule. *Snyder v. City Council*, 35 Colo. App. 32, 531 P.2d 643 (1974).

Plaintiff was merely required to set forth a legally cognizable injury causing harm for which she was entitled to some relief to meet the requirements of this rule. *Dotson v. Dell L. Bernstein, P.C.*, 207 P.3d 911 (Colo. App. 2009).

Applied in *Buena Vista Bank & Trust Co. v. Lee*, 191 Colo. 551, 554 P.2d 1109 (1976); *McNeece v. McNeece*, 39 Colo. App. 160, 562 P.2d 767 (1977); *Gardner v. State*, 200 Colo. 221, 614 P.2d 357 (1980); *A.R.A. Mfg. Co. v. Brady Auto Accessories, Inc.*, 622 P.2d 113 (Colo. App. 1980); *LaFond v. Basham*, 683 P.2d 367 (Colo. App. 1984).

III. Defenses.

Law reviews. For note, "Pleading a Claim Barred by Statute of Limitations by Way of Recoupment", see 7 Rocky Mt. L. Rev. 204 (1935). For article, "The Law of Libel in Colorado", see 28 Dicta 121 (1951).

This rule provides that a defendant's answer to plaintiff's claim for relief shall be denominated "defenses". *Lamborn v. Eshom*, 132 Colo. 242, 287 P.2d 43 (1955).

General plea denying existence of plaintiff's cause of action is sufficient. The time within which a plaintiff must bring his action is of the very essence of his claim, and even a general plea denying existence of his cause of action is sufficient under section (b) of this rule. *Denning v. A. D. Wilson & Co.*, 137 Colo. 372, 326 P.2d 77 (1958).

No general denial where not any foundation. This rule contemplates an answer that speaks the truth, and where none of the specific denials has any foundation in fact, a general denial should not be filed. *Lewis v. Buckskin Joe's, Inc.*, 156 Colo. 46, 396 P.2d 933 (1964).

Defense of truth in libel suit may be raised by general denial rather than special denial. Where the complaint in a libel action alleged the published articles were "false, defamatory, untrue and libelous" and defendants by answer denied generally the allegation, this allegation of plaintiff and its denial by defendants presented the issue of the truth of the published articles, and under these circumstances, a special defense of truth was not required. *Hadden v. Gateway W. Publishing Co.*, 130 Colo. 73, 273 P.2d 733 (1954).

The defense of suicide in accident policy action can be raised by general denial. In an action on an accident policy where the plaintiff alleges death of the insured as the result of an accident, the defense of suicide can be raised by a general denial, for the defendant-insurer's denial that insured met his death by accidental means is equivalent to an affirmative plea of suicide, which need not be specially pleaded. *Murray v. Travelers Ins. Co.*, 143 Colo. 258, 352 P.2d 678 (1960).

Where no responsive pleading is filed in a case, there is no issue presented for determination. *Hercules Equip. Co. v. Smith*, 138 Colo. 458, 335 P.2d 255 (1959).

Where defense of fraud was stated with sufficient particularity and supported by affidavit in defendant's response to motion for partial summary judgment, it should have been incorporated in defendant's answer for the purpose of technical compliance with subsection (c), even though the defense is more properly asserted in an answer. *Alien, Inc. v. Futterman*, 924 P.2d 1063 (Colo. App. 1995).

IV. Affirmative Defenses and Mitigating Circumstances.

A. In General.

Law reviews. As to the addition of the sentence: "Any mitigating circumstances to reduce the amount of damage shall be affirmatively

pleaded" in this rule, see "The Federal Rules from the Standpoint of the Colorado Code", 27 Dicta 170 (1950). For note, "Comments on Last Clear Change-Procedure and Substance", see 32 Dicta 275 (1955). For comment on *Carpenter v. Hill* appearing below, see 32 Dicta 393 (1955). For article, "One Year Review of Civil Procedure and Appeals", see 36 Dicta 5 (1959). For article, "*Austin v. Litvak, Colorado's Statute of Repose for Medical Malpractice Claims: An Uneasy Sleep*", see 62 Den. U. L. Rev. 825 (1985).

Section (c) entitles a party to have an affirmative defense considered by the trier of fact so long as it has been properly pleaded, evidence is presented at trial to support its consideration, and the party asserting it brings it to the court's attention. *Watson v. Cal-Three, LLC*, 254 P.3d 1189 (Colo. App. 2011).

It is fundamental that pleas in bar must be specially pleaded. *Dillinger v. North Sterling Irrigation Dist.*, 135 Colo. 100, 308 P.2d 608 (1957).

Where 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).

Matters not presented to a trial court by pleading pursuant to this rule will not be considered by the supreme court on review. *Hercules Equip. Co. v. Smith*, 138 Colo. 458, 335 P.2d 255 (1959).

Rigidity of section (c) softened by C.R.C.P. 15(b). The apparent rigidity of section (c) of this rule, which states that a party shall affirmatively plead all matters constituting an avoidance or affirmative defense, is softened by C.R.C.P. 15(b), which provides that when issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. *Great Am. Ins. Co. v. Ferndale Dev. Co.*, 185 Colo. 252, 523 P.2d 979 (1974).

The trial court errs in considering such defenses where objected to. Where such defenses are first urged upon the court orally at the trial, not having been pled as required, the trial court errs in considering such defenses, especially over the objections of opposing counsel. *Maxey v. Jefferson County Sch. Dist. No. R-1*, 158 Colo. 583, 408 P.2d 970 (1965).

Where no objection is made to evidence introduced in regard to an affirmative defense which has not been specifically set forth in the pleadings as required by section (c) of this rule, such issue may be treated as raised in the pleadings under C.R.C.P. 15(b). *Metropolitan State Bank, Inc. v. Cox*, 134 Colo. 260, 302 P.2d 188 (1956).

Issue not specifically alleged as affirmative defense may be tried by express or implied consent. *Bill Dreiling Motor Co. v. Shultz*, 168 Colo. 59, 450 P.2d 70 (1969) (consent not found).

Such issue must be "intentionally and actually tried". Where there is express or implied consent to try issues not raised by the pleadings, such issues may be tried in all respects as if they had been so raised, pursuant to C.R.C.P. 15(b); however, the record must show an "express or implied consent" to try an issue of fact which section (c) of this rule requires to be specifically alleged as an affirmative defense and the issue must be "intentionally and actually tried", it not being enough that some evidence is received germane to the issue sought to be raised. *Bill Dreiling Motor Co. v. Shultz*, 168 Colo. 59, 450 P.2d 70 (1969).

This rule provides for various affirmative defenses in civil actions. *Indus. Comm'n v. Ewing*, 160 Colo. 503, 418 P.2d 296 (1966).

This rule also provides that mitigating circumstances to reduce the amount of damages shall be affirmatively pleaded. *Indus. Comm'n v. Ewing*, 160 Colo. 503, 418 P.2d 296 (1966).

Burden of proving mitigation on defendants. Mitigation or failure to mitigate is an affirmative defense to be pleaded by the defendants, and the burden of proving the same is also on them. *Comfort Homes, Inc. v. Peterson*, 37 Colo. App. 516, 549 P.2d 1087 (1976).

It is not a plaintiff's burden to produce the evidence on which any reduction of damages is to be predicated. *Comfort Homes, Inc. v. Peterson*, 37 Colo. App. 516, 549 P.2d 1087 (1976).

Under this rule, affirmative defense may not be raised by motion but only by answer, the plaintiff thereafter having an opportunity to raise and try all issues relating to such defenses. *Markoff v. Barenberg*, 149 Colo. 311, 368 P.2d 964 (1962).

Where the inclusion of the affirmative defense of release in a summary judgment motion was treated as being incorporated in the defendant's answer for the purpose of technical compliance with section (c) of this rule, the supreme court held that the plaintiffs were not prejudiced in any way because the affirmative defense of release had not been included in the defendant's answer. *Cox v. Pearl Inv. Co.*, 168 Colo. 67, 450 P.2d 60 (1969).

Where defendant did not include the affirmative defense of acknowledgment in her answer, but included the defense in her motion for judgment on the pleadings and again in her response to plaintiff's motion for summary

judgment, defendant alleged acknowledgment in the motions and sufficiently raised the defense such that the court could treat the answer as amended in compliance with rule 8(c). *Drake v. Tyner*, 914 P.2d 519 (Colo. App. 1996).

If affirmative defense is asserted in a motion for summary judgment and responded to without objection, it is deemed incorporated into the answer. *Horodyskyj v. Karanian*, 5 P.3d 332 (Colo. App. 1999), rev'd on other grounds, 32 P.3d 470 (Colo. 2001).

Inclusion of affirmative defense in motion deemed incorporated in defendant's answer. When the events providing the basis of a defendant's summary judgment motion occur subsequent to the complaint and answer and are fully set forth in the motion, the inclusion of the affirmative defense in the motion is deemed incorporated in defendant's answer. *Bilar, Inc. v. Sherman*, 40 Colo. App. 38, 572 P.2d 489 (1977).

Even if notice requirement, in suit against city, was affirmative defense, it was deemed to be incorporated in city's answer to suit by its inclusion in city's summary judgment motion, and thus city did not waive notice requirement. *Mountain Gravel and Const. v. Cortez*, 721 P.2d 698 (Colo. App. 1986).

Failure to plead an affirmative defense as required by section (c), and failure to present any evidence or argument on the matter in the district court, preclude the reviewing court from reviewing the issue. *Crocker v. Colo. Dept. of Rev.*, 652 P.2d 1067 (Colo. 1982).

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).

Improper assertion of affirmative defense must be objected to, or it is waived. By arguing the merits of defendant's motion for summary judgment without raising objection in the trial court as to the assertion of the affirmative defense of release initially therein, plaintiffs waived any valid objection they may have had to this procedure. *Cox v. Pearl Inv. Co.*, 168 Colo. 67, 450 P.2d 60 (1969).

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); *Bain v. Town of Avon*, 820 P.2d 1133 (Colo. App. 1991).

B. Statute of Limitations and Laches.

A statute of limitations is an affirmative defense and hence must be affirmatively pleaded. *Knighton v. Howse*, 167 Colo. 530, 448 P.2d 641 (1968).

A statute of limitations defense, being affirmative in nature, must be raised by responsive pleading. *Trustees of Mtg. Trust of Am. v. District Court*, 621 P.2d 310 (Colo. 1980).

Limitations of time are matters which cannot be raised by a motion to dismiss. Where an independent action to obtain relief from a judgment is resorted to, the limitations of time are those of laches and the statute of limitations, matters which cannot be raised by a motion to dismiss under this rule. *Terry v. Terry*, 154 Colo. 41, 387 P.2d 902 (1963).

Generally a statute of limitations defense should be raised in the answer to the complaint rather than in a motion to dismiss, but this position is not universally followed. Many courts hold that the defense of limitations may be raised by a motion to dismiss where the time alleged in the complaint shows that the action was not brought within the statutory period. The adoption of F.R.C.P. 9(f) allows averments in a complaint to be tested for sufficiency in regards to time. Thus, for example, a complaint which fails to specify time so that the statutory time may be computed may properly be dismissed pursuant to a motion pursuant to C.R.C.P. 12(b)(5). *Wasinger v. Reid*, 705 P.2d 533 (Colo. App. 1985); *Reider v. Dawson*, 856 P.2d 31 (Colo. App. 1992), aff'd, 872 P.2d 212 (Colo. 1994).

The statute of limitations is not ground for motion to dismiss for failure to state a claim upon which relief can be granted under C.R.C.P. 12(b), since, under section (c) of this rule, 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 cannot be the basis for dismissal on motion on the grounds that it appears from the complaint that the claim was not timely made for the reasons that in the absence of an affirmative defense based on the statute of limitations 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 of limitations 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); *Davis v. Bonebrake*, 135 Colo. 506, 313 P.2d 982 (1957).

Under this rule, a plea in bar based upon the statute of limitations cannot be raised by motion to dismiss, it being a defense which may or may not be relied upon and, if relied upon, must be pleaded as an affirmative defense. *Fletcher v. Colo. & Wyoming Ry.*, 141 Colo. 72, 347 P.2d 156 (1959).

A statute of limitations is a defense which is waived if not affirmatively pleaded. *In re Estate of Randall v. Colo. State Hosp.*, 166 Colo. 1, 441 P.2d 153 (1968).

Defense of statute of limitations sufficiently raised. An allegation that a claim is barred by the statute of limitations of this state in such case made and provided is sufficient to raise the defense of limitations. *Denning v. A. D. Wilson & Co.*, 137 Colo. 372, 326 P.2d 77 (1958).

Limitations of time cannot be raised by a motion to strike. 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 and laches must be affirmatively pleaded in an answer. *McPherson v. McPherson*, 145 Colo. 170, 358 P.2d 478 (1960); *Terry v. Terry*, 154 Colo. 41, 387 P.2d 902 (1963).

Laches is an affirmative defense and must be pleaded. *Buss v. McKee*, 115 Colo. 159, 170 P.2d 268 (1946); *Duke v. Pickett*, 168 Colo. 215, 451 P.2d 288 (1969).

Laches is form of estoppel and contemplates an unconscionable delay in asserting one's rights which works to the defendant's prejudice or injury in relation to the subject matter of the litigation. *Lin Ron, Inc. v. Mann's World of Arts & Crafts, Inc.*, 624 P.2d 1343 (Colo. App. 1981).

Dismissal for failure to prosecute held not to be affirmative defense of laches. *Columbine Valley Mut. Imp. & Maintenance Ass'n v. Bd. of County Comm'rs*, 173 Colo. 321, 478 P.2d 312 (1970).

Prejudice necessary to claim laches may be couched in terms of detrimental change of position on the part of the defendant or it may be occasioned by loss of evidence, death of witnesses, or other circumstances arising during the period of delay which affect the defendant's ability to defend. *Lin Ron, Inc. v. Mann's World of Arts & Crafts, Inc.*, 624 P.2d 1343 (Colo. App. 1981).

Evidence insufficient for level of prejudice contemplated by doctrine of laches. While failure to litigate the issue of personal liability in either of two earlier actions against a corporate entity may have been poor judicial economy, the expense and inconvenience of further litigation, without more, did not rise to the level of prejudice contemplated by the doctrine of laches,

where the defendants (individual owners of a corporation) were not indispensable parties to the first action under C.R.C.P. 19, but rather permissive parties under C.R.C.P. 18. *Lin Ron, Inc. v. Mann's World of Arts & Crafts, Inc.*, 624 P.2d 1343 (Colo. App. 1981).

C. Res Judicata.

"Res judicata" is also an affirmative defense which must be affirmatively pled by way of answer. In re Crowley's Estate, 122 Colo. 244, 221 P.2d 378 (1950); *Ruth v. Dept. of Hwys.*, 153 Colo. 226, 385 P.2d 410 (1963); *Terry v. Terry*, 154 Colo. 41, 387 P.2d 902 (1963); *Bakery Workers Local 240 v. Am. Bakery Workers Local 240*, 165 Colo. 210, 437 P.2d 783 (1968).

The defense of res judicata is considered waived if it is not appropriately raised. In re Wright, 841 P.2d 358 (Colo. App. 1992); *Vincent v. Clean Water Action Project*, 939 P.2d 469 (Colo. App. 1997).

Although term "res judicata" not explicitly used, it is not waived where arguments raised gave adequate notice that party was defending, in part, on the basis that the parties were bound by the earlier judgment. In re Wright, 841 P.2d 358 (Colo. App. 1992); *Vincent v. Clean Water Action Project*, 939 P.2d 469 (Colo. App. 1997).

Res judicata bars relitigation not only of all issues actually decided, but of all issues that might have been decided. *Pomeroy v. Waitkus*, 183 Colo. 344, 517 P.2d 396 (1973).

However, res judicata applies only when there exists identity of subject matter, cause of action, parties, and capacity in the person for whom or against whom the claim is made. Also, the decision in the prior case must have been rendered on the merits. *People in Interest of G.K.H.*, 698 P.2d 1386 (Colo. App. 1984).

A voluntary dismissal pursuant to an invalid stipulation is not a decision to which the doctrine of res judicata applies to preclude a subsequent action in dependency or neglect. *People in Interest of G.K.H.*, 698 P.2d 1386 (Colo. App. 1984).

Res judicata holds that an existing judgment is conclusive of the rights of the parties in any subsequent suit on the same claim. *Pomeroy v. Waitkus*, 183 Colo. 344, 517 P.2d 396 (1973).

The defense of res judicata does not apply when the initial forum, the bankruptcy court, lacked the authority to award the full measure of the relief sought in the subsequent litigation, post-petition debts. In re Wright, 841 P.2d 358 (Colo. App. 1992).

Res judicata requires an identity of parties or their privies, as it would be unfair to preclude a party from litigating an issue merely because he could have litigated it against a different party. *Pomeroy v. Waitkus*, 183 Colo. 344, 517 P.2d 396 (1973).

To sustain the defense of "res judicata" under section (c) of this rule, 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 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 C.R.C.P. 56. *Ruth v. Dept. of Hwys.*, 153 Colo. 226, 385 P.2d 410 (1963); *Saunders v. Bankston*, 31 Colo. App. 551, 506 P.2d 1253 (1972).

Where facts are presented in evidence which constitute a defense of "res judicata", the court is not required to consider them when this defense was not pleaded. *Bakery Workers Local 240 v. Am. Bakery Workers Local 240*, 165 Colo. 210, 437 P.2d 783 (1968).

The question of "res judicata" cannot be raised by motion to dismiss. *Fletcher v. Colo. & Wyoming Ry.*, 141 Colo. 72, 347 P.2d 156 (1959); *Terry v. Terry*, 154 Colo. 41, 387 P.2d 902 (1963).

Defendant may assert a claim preclusion defense for the first time in a motion to dismiss where plaintiff fails to show prejudice. *Dave Peterson Elec., Inc. v. Beach Mountain Builders, Inc.*, 167 P.3d 175 (Colo. App. 2007).

It is error to sustain a motion to dismiss. Where prior adjudication is not affirmatively set up as a separate defense under this rule, but is presented by motion, it is error to sustain the motion. *Kubat v. Kubat*, 124 Colo. 491, 238 P.2d 897 (1951).

Party was not estopped from invoking doctrine of res judicata regarding small claims court judgment because of failure to raise doctrine in a pleading. The plaintiff could not seek to benefit from the small claims court judgment and simultaneously to prohibit defendant from using it. *Vincent v. Clean Water Action Project*, 939 P.2d 469 (Colo. App. 1997).

D. Estoppel, Waiver, and Mistake.

Estoppel is an affirmative defense and must be set forth as a part of the pleadings. *Kimmel v. Batty*, 168 Colo. 431, 451 P.2d 751 (1969).

Collateral estoppel is in the nature of an affirmative defense which must be specifically pleaded in an answer. *Banek v. Thomas*, 733 P.2d 1171 (Colo. 1986).

The doctrine of collateral estoppel is designed to save judicial time and resources and relieve the burden on litigants of having to litigate claims more than once. *Central Bank v. Mehaffy, Rider, Windholz*, 940 P.2d 1097 (Colo. App. 1997).

Collateral estoppel, or issue preclusion, bars relitigation of an issue determined in a prior proceeding if: (1) The issue precluded is identical to an issue actually determined in the prior proceeding; (2) the party against whom estoppel is asserted has been a party to or in privity with a party in the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom estoppel is asserted has had a full and fair opportunity to litigate the issue in the prior proceeding.

Maryland Casualty Co. v. Messina, 874 P.2d 1058 (Colo. 1994); *City and County of Denver v. Block 173 Assocs.*, 814 P.2d 824 (Colo. 1991); *Central Bank v. Mehaffy, Rider, Windholz*, 940 P.2d 1097 (Colo. App. 1997); *In re Estate of Bell*, 4 P.3d 504 (Colo. App. 2000); *Williamsen v. People*, 735 P.2d 176 (Colo. 1987); *Byrd v. People*, 58 P.3d 50 (Colo. 2002).

An order temporarily denying relief is not a final judgment; rather it is an interlocutory order. Therefore, a temporary order does not create collateral estoppel. *M & M Management Co. v. Indus. Claim Appeals Office*, 979 P.2d 574 (Colo. App. 1998).

When a party has a full and fair opportunity to litigate an issue, the mere fact that the judgment was incorrect does not affect its conclusiveness. Under such circumstances, it is not unfair to apply collateral estoppel simply because the prior judgment may be wrong. *Central Bank v. Mehaffy, Rider, Windholz*, 940 P.2d 1097 (Colo. App. 1997).

A court may refuse to apply collateral estoppel when there are prior inconsistent judgments against the same party. A case is not a prior inconsistent judgment if that prior judgment involves a case in a different context and with different parties. *Central Bank v. Mehaffy, Rider, Windholz*, 940 P.2d 1097 (Colo. App. 1997).

If a trial court judgment is based on determinations of multiple issues, any of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to any of the issues standing alone. Any one of the five elements for a new trial could have been a reason for denying the new trial in a criminal case, and consequently, none of the elements is entitled to preclusive effect in an attorney malpractice case. *Schultz v. Stanton*, 198 P.3d 1253 (Colo. App. 2008), *aff'd* on other grounds, 222 P.3d 303 (Colo. 2010).

Immunity from suit is an affirmative defense. *Brown v. Rosenbloom*, 34 Colo. App. 109, 524 P.2d 626 (1974), aff'd, 188 Colo. 83, 532 P.2d 948 (1975).

Matters raised by a motion to dismiss which are in the nature of avoidance, discharge, and waiver are affirmative defenses which under this rule cannot be raised by motion but only by answer. *Markoff v. Barenberg*, 149 Colo. 311, 368 P.2d 964 (1962).

Waiver and abandonment are special defenses in the nature of confession and avoidance which must be specially pleaded. *Seeger's Estate v. Puckett*, 115 Colo. 185, 171 P.2d 415 (1946).

A waiver of an asserted right must be affirmatively pleaded if it is to be used as a defense. *Rudd v. Rogerson*, 162 Colo. 103, 424 P.2d 776 (1967); *Duke v. Pickett*, 168 Colo. 215, 451 P.2d 288 (1969).

It is necessary for defendants to set forth a "lien waiver" if they desire to rely thereon under section (c) of this rule, as this is an affirmative defense. *Trustee Co. v. Bresnahan*, 119 Colo. 311, 203 P.2d 499 (1949).

Burden of proving estoppel, waiver, and mistake on person raising. Person who raises the affirmative defenses of estoppel, waiver, and mistake has the burden to prove the truth of the proposition asserted. *Adams County Dept. of Soc. Servs. v. Frederick*, 44 Colo. App. 378, 613 P.2d 642 (1980).

Mutuality is no longer required for collateral estoppel to apply, and a non-party to a judgment may invoke collateral estoppel to bar relitigation of an issue. Collateral estoppel requires only that the party against whom collateral estoppel asserted was a party in the initial proceedings. *Central Bank v. Mehaffy, Rider, Windholz*, 940 P.2d 1097 (Colo. App. 1997).

As a general rule, collateral estoppel has no applicability to prior rulings in the same pending case. *Central Bank v. Mehaffy, Rider, Windholz*, 940 P.2d 1097 (Colo. App. 1997).

Nonmutual defensive use of collateral estoppel is used by a defendant to bind a plaintiff to a prior judgment when that defendant was not a party to that judgment. A court's discretion to refuse to apply defensive nonmutual collateral estoppel is highly circumscribed. *Central Bank v. Mehaffy, Rider, Windholz*, 940 P.2d 1097 (Colo. App. 1997).

Offensive nonmutual collateral estoppel occurs when a plaintiff seeks to foreclose a defendant from litigating an issue the defendant previously litigated unsuccessfully in another action against another party. When the doctrine of collateral estoppel was expanded to include offensive collateral

estoppel, its application was made discretionary with the trial court because it does not promote judicial economy in the same way as defensive nonmutual collateral estoppel and because it often will be unfair to defendants. *Central Bank v. Mehaffy, Rider, Windholz*, 940 P.2d 1097 (Colo. App. 1997).

In addition to foundational factors, court applying nonmutual offensive issue preclusion must consider: (1) Whether the party asserting issue preclusion could have joined in the first action, but instead took a "wait and see" approach; (2) the extent to which the party sought to be estopped had incentive to litigate vigorously the prior case; (3) whether the decision sought to be relied upon is inconsistent with another decision involving the party sought to be estopped; and (4) whether the second case afforded the party sought to be estopped procedural protections that were unavailable in the first case. *Vanderpool v. Loftness*, 2012 COA 115M, 300 P.3d 953.

Offensive issue preclusion may be waived. Party seeking to use issue preclusion offensively must raise it at the first reasonable opportunity after the court rendered the decision that had a preclusive effect. Trial court did not abuse its discretion in denying plaintiff's motion for directed verdict where 17 months had passed since defendant entered his guilty pleas, plaintiff objected to defendant's efforts to exclude evidence of the guilty pleas, plaintiff did not assert issue preclusion in the proposed trial management order, and plaintiff did not raise the issue until the second day of trial. *Vanderpool v. Loftness*, 2012 COA 115M, 300 P.3d 953.

E. Negligence Actions.

The last clear chance doctrine is a matter constituting an affirmative defense which must be pleaded, and defendant's purpose to avail himself of such defense should be stated in his answer to plaintiff's complaint. *Markley v. Hilkey Bros.*, 113 Colo. 562, 160 P.2d 394 (1945).

Mutual denials of negligence are sufficient to raise affirmative defense of unavoidable accident. While it is the usual practice to plead unavoidable accident as an affirmative defense, the fact still remains that unavoidable accident is but a denial of negligence, and where the pleadings disclose that there were mutual denials of negligence the issue is in the case. *Union P. R. R. v. Shupe*, 131 Colo. 271, 280 P.2d 1115 (1955).

The issue of sudden emergency need not be stated in the complaint as an affirmative basis for relief, nor in the answer as a basis of defense; rather, notice of its applicability in any case is found in the evidence that may be offered in support of the claims or defenses. *Davis v. Cline*, 177 Colo. 204, 493 P.2d 362 (1972).

If negligence is a defense, defendants are deprived thereof by failing to file an affirmative pleading. *Carpenter v. Hill*, 131 Colo. 553, 283 P.2d 963 (1955).

The burden of alleging and proving contributory negligence rests upon the defendant under section (c) of this rule. *Thorpe v. City & County of Denver*, 30 Colo. App. 284, 494 P.2d 129 (1971).

Where defendant alleges in one defense of his answer that plaintiff's injuries and damages, if any, were proximately caused by plaintiff's own failure to exercise due care for his own safety, plaintiff is put on notice of defendant's contention of contributory negligence and of possibility of having to rebut showing of negligence on his part, and, therefore, it is reversible error to fail to submit issue of contributory negligence to jury. *Lyons v. Hoffman*, 31 Colo. App. 306, 502 P.2d 980 (1972).

"Seat belt defense" may not be pleaded affirmatively. An injured driver, or passenger, may recover the actual damages proximately caused by a tortfeasor's negligence, and the amount of such damages is not affected by, and may not be reduced, because the injured person failed to wear a seat belt, since the "seat belt defense" may not be pleaded affirmatively in defense of an action for negligence, and evidence that the injured party failed to wear a seat belt is not admissible to establish contributory negligence or to reduce the amount of the injured party's damages. *Moore v. Fischer*, 31 Colo. App. 425, 505 P.2d 383 (1972), *aff'd*, 183 Colo. 392, 517 P.2d 458 (1974).

F. Other Defenses.

An issue of accord and satisfaction is an affirmative defense under section (c) of this rule and must be specifically set forth in the pleadings. *Metropolitan State Bank, Inc. v. Cox*, 134 Colo. 260, 302 P.2d 188 (1956).

In an action on a foreign judgment, the defense of payment must be specially alleged in the answer. *Grandbouche v. Waisner*, 136 Colo. 374, 317 P.2d 328 (1957).

Failure of consideration is an affirmative defense under section (c) of this rule and C.R.C.P. 12(h), which, if not pleaded, is waived. *Bernklau v. Stevens*, 150 Colo. 187, 371 P.2d 765 (1962).

Statute of frauds must be pleaded. It is error to rule that an assignment is ineffective because of the statute of frauds when the statute has not been pleaded or relied upon. *Ochsner v. Langendorf*, 115 Colo. 453, 175 P.2d 392 (1946).

Assertion that claim is barred by the statute of frauds is an affirmative defense that must ordinarily be raised by answer and, if not, will be deemed waived. *Univex Int'l, Inc. v. Orix Credit Alliance, Inc.*, 902 P.2d 877 (Colo. App. 1995).

It is not necessary to identify a particular statute of frauds by section number to satisfy requirements of this rule where defendant pled the statute of frauds affirmatively as a defense in its answer and listed the statute of frauds as a defense in its disclosure certificate, where the parties had sufficient opportunity to argue the issue to the trial court, and where the defendant had brought the statute to the court's attention in the form of supplemental authority in support of its motion for summary judgment. *Univex Int'l, Inc. v. Orix Credit Alliance, Inc.*, 902 P.2d 877 (Colo. App. 1995).

Mitigation of damages must be affirmatively pleaded. *Franklin v. Nolan*, 28 Colo. App. 229, 472 P.2d 166 (1970).

Reimbursement for paid taxes is claim in mitigation of damages. Where defendants destroyed a valuable property relying upon a tax deed that was invalid and compensatory damages were allowed based on the value of replacing the improvements and the value of the personalty, their claim for reimbursement for taxes paid could only be a claim in mitigation of damages which must be affirmatively pleaded. *Carlson v. McNeill*, 114 Colo. 78, 162 P.2d 226 (1945).

Where defendant does not plead adverse possession but attempts to amend his answer at the conclusion of the trial, the court properly denies the motion, acting within its discretion. *City & County of Denver v. Just*, 175 Colo. 260, 487 P.2d 367 (1971).

Lack of maturity is not one of the defenses specified as mandatory subjects of affirmative pleading under section (c), and where it was apparent from the transcript that this issue was tried by the parties and fully considered by the trial court, the defendant was entitled to consideration of this defense. *L.C. Fulenwider, Inc. v. Ginsberg*, 36 Colo. App. 246, 539 P.2d 1320 (1975).

Reliance on advice of counsel or consultants is not an affirmative defense or mitigating circumstance, therefore defendant is not required to plead it in its answer. *Antolovich v. Brown Group Retail, Inc.*, 183 P.3d 582 (Colo. App. 2007).

Rescission of contract must be pleaded. Affirmative defense that plaintiff misrepresented facts in course of negotiating employment contract with defendant would not be construed as demand for rescission where

defendant did not give plaintiff or court any specific notice of its intent to rescind. *Ice v. Benedict Nuclear Pharmaceuticals, Inc.*, 797 P.2d 757 (Colo. App. 1990).

Set-off allowed notwithstanding defendant's denomination of defense as a counterclaim. In an action by the assignee of a carrier for shipping charges on an article of furniture, a set-off for damage in transit to such article was properly allowable, notwithstanding defendant denominated defense as a counterclaim rather than set-off. *Transport Clearings of Colo., Inc. v. Linstedt*, 151 Colo. 166, 376 P.2d 518 (1962).

Statutory limitation on judgment not affirmative defense. The statutory limitation on judgment in §24-10-114 is not an affirmative defense and is not waived if not presented in the pleadings, at trial, or in a motion for a new trial. *City of Colo. Springs v. Gladin*, 198 Colo. 333, 599 P.2d 907 (1979).

Plaintiff relying on unjust enrichment must allege that he conferred a benefit which was known to or appreciated by the defendant, and which the defendant accepted or retained, making it inequitable for him to retain the benefit without payment. *Backus v. Apishapa Land & Cattle Co.*, 44 Colo. App. 59, 615 P.2d 42 (1980).

Making an argument for collateral estoppel in a responsive brief and not affirmatively making a motion based on the defense does not negate the duty to affirmatively plead the defense. *Trujillo v. Farmers Ins. Exchange*, 862 P.2d 962 (Colo. App. 1993).

Plaintiff is entitled to recover based on unjust enrichment of defendant when the plaintiff has no alternative right on an enforceable contract. *Backus v. Apishapa Land & Cattle Co.*, 44 Colo. App. 59, 615 P.2d 42 (1980).

Filing a homestead claim was not a responsive pleading pursuant to section (c) which requires a party to affirmatively plead a previous discharge in bankruptcy. *Matter of Lombard*, 739 F.2d 499 (10th Cir. 1984).

Although inconsistent pleadings are permissible, a party may not assert one theory and induce reliance thereon and then shortly before trial reverse theories without acting contrary to the spirit of the rules. *Gaybatz v. Marquette Minerals, Inc.*, 688 P.2d 1128 (Colo. App. 1984).

Buyer's claim under §38-35-126(3) to void installment land contract was an affirmative defense and compulsory counterclaim. As such, defense and claim should have been asserted in buyer's responsive pleading (or amended responsive pleading) or they are waived. Buyer's claim was related to seller's

claim and, therefore, was a compulsory counterclaim. In addition, the primary remedy sought by buyer was rescission, which is a defense or claim which must be pleaded in accordance with section (c) of this rule. *Dinosaur Park Invs., L.L.C. v. Tello*, 192 P.3d 513 (Colo. App. 2008).

G. Election of Remedies.

Doctrine of election of remedies precludes pursuit of alternative remedies where the remedial rights sought necessarily repudiate each other. *Newland v. Holland*, 624 P.2d 933 (Colo. App. 1981).

Party is not required to make election of remedies where the remedies he invokes are consistent. *Newland v. Holland*, 624 P.2d 933 (Colo. App. 1981).

Inconsistency of demand makes election of one remedy estoppel against other remedy. It is not the fact that the causes of action are different, but the inconsistency of the demands, that makes the election of one remedial right an estoppel against the assertion of the other remedial right. *Newland v. Holland*, 624 P.2d 933 (Colo. App. 1981).

V. Effect of Failure to Deny.

Law reviews. For article, "The Plea of Want of Consideration in Colorado", see 3 Rocky Mt. L. Rev. 168 (1931).

When an issue is tried before a court without timely objection or motion, the issue shall be deemed properly before the court despite any defect in the pleading. *Butler v. Behaeghe*, 37 Colo. App. 282, 548 P.2d 934 (1976).

Where it was necessary for defendants to set forth a "lien waiver" in their answer if they desired to rely thereon under section (c) of this rule, since no reply was ordered by the court, and they did not, this affirmative defense was deemed denied under section (d) of this rule. *Trustee Co. v. Bresnahan*, 119 Colo. 311, 203 P.2d 499 (1949).

Where no reply was required under the rules, defendants were put on notice that any matter in avoidance of their defense of the statute of limitations would be deemed in issue before the court. *Davis v. Bonebrake*, 135 Colo. 506, 313 P.2d 982 (1957).

Mutual mistake theory in reply to marriage dissolution petition not waived. In a dispute over a separation agreement, a theory of mutual mistake is not waived by failure to raise the issue in the reply to the petition for dissolution of marriage, since no reply is required and averments in a pleading to which no responsive pleading is required shall be taken as denied or avoided. In re Deines, 44 Colo. App. 98, 608 P.2d 375 (1980).

Applied in *Alsbaugh v. District Court*, 190 Colo. 282, 545 P.2d 1362 (1976).

VI. Pleading to be Concise and Direct.

Law reviews. For article, "Comments on the Rules of Civil Procedure", see 22 Dicta 154 (1945). For article, "The Federal Rules from the Standpoint of the Colorado Code", see 27 Dicta 170 (1950). For article, "One Year Review of Cases on Contracts", see 33 Dicta 57 (1956). For note, "One Year Review of Colorado Law-1964", see 42 Den. L. Ctr. J. 140 (1965).

This rule provides that no technical forms of pleading are required. *Bernstein v. Dun & Bradstreet, Inc.*, 149 Colo. 150, 368 P.2d 780 (1962); *Vincent v. Clean Water Action Project*, 939 P.2d 469 (Colo. App. 1997).

Technical rules will not be permitted to render a pleading defective where the attempt of the pleader to make the pleading more accurate and complete is frustrated at the instance of an objecting party. *Boltz v. Bonner*, 95 Colo. 350, 35 P.2d 1015 (1934).

Under this rule pleadings otherwise meeting the requirements of the rules are not objectionable for failure to state ultimate facts as distinguished from conclusions of law. *Weick v. Rickenbaugh Cadillac Co.*, 134 Colo. 283, 303 P.2d 685 (1956).

Plaintiffs may state as many separate claims as they have regardless of their consistency and whether based on legal or equitable grounds or on both; the evidence will determine the appropriate relief to be granted. *Apex Inv., Inc. v. Peoples Bank*, 163 Colo. 325, 430 P.2d 613 (1967).

Where the same amount in question is involved in each of the claims, plaintiffs can only recover that amount. *Apex Inv., Inc. v. Peoples Bank*, 163 Colo. 325, 430 P.2d 613 (1967).

Where a party has alternative remedies of rescission and of damages for breach, he must elect which remedy he will base his action upon. *Holscher v. Ferry*, 131 Colo. 190, 280 P.2d 655 (1955).

Colorado's rules of civil procedure are designed to dispense with ritualistic, common-law, forms-of-action pleading. *Bernstein v. Dun & Bradstreet, Inc.*, 149 Colo. 150, 368 P.2d 780 (1962).

Colorado has a liberal policy under C.R.C.P. 2 and this rule of dispensing with the overly technical aspects of common-law pleading. *Bernstein v. Dun & Bradstreet, Inc.*, 149 Colo. 150, 368 P.2d 780 (1962).

The new practice is not concerned with meeting technical requirements of theories of causes of actions. *Bridges v. Ingram*, 122 Colo. 501, 223 P.2d 1051 (1950); *Hutchinson v. Hutchinson*, 149 Colo. 38, 367 P.2d 594 (1961).

It no longer is necessary to elect at the peril of the pleader a particular theory or "cause of action". *Weick v. Rickenbaugh Cadillac Co.*, 134 Colo. 283, 303 P.2d 685 (1956); *Hinsey v. Jones*, 159 Colo. 326, 411 P.2d 242 (1966); *Behlen Mfg. Co. v. First Nat'l Bank*, 28 Colo. App. 300, 472 P.2d 703 (1970).

The theory of pleading is to give an adversary notice of what is to be expected at trial. *Lyons v. Hoffman*, 31 Colo. App. 306, 502 P.2d 980 (1972).

The modern philosophy concerning pleadings is that they do little more than indicate generally the type of litigation involved. *Smith v. Mills*, 123 Colo. 11, 225 P.2d 483 (1950).

In most cases it is sufficient if the pleader clearly identifies the transactions which form the basis of the claim for relief, and if upon any theory of the law relief is warranted by the evidence offered and received in support of the claim, it should not be denied because of the possible selection by counsel of the wrong technical cause of action. *Weick v. Rickenbaugh Cadillac Co.*, 134 Colo. 283, 303 P.2d 685 (1956); *Hinsey v. Jones*, 159 Colo. 326, 411 P.2d 242 (1966); *Behlen Mfg. Co. v. First Nat'l Bank*, 28 Colo. App. 300, 472 P.2d 703 (1970).

A plaintiff is not limited in evidence to those examples of conduct contained in the complaint. Since the purpose of the complaint is to provide reasonable notice of the general nature of the matter presented, it need not contain specific examples of misconduct, and therefore, it need not contain all examples of misconduct that are presented at trial. *Southerland v. Argonaut Ins. Co.*, 794 P.2d 1102 (Colo. App. 1990).

Technical theory cannot defeat claim if pleader is entitled to relief under any theory. The technical theory of the old cause of action, as it existed under the common law and to a lesser extent under the former Code of Civil Procedure, can no longer be urged to defeat a litigation if upon any theory of law the claim stated entitles the pleader to relief. *Weick v. Rickenbaugh Cadillac Co.*, 134 Colo. 283, 303 P.2d 685 (1956); *Hinsey v. Jones*, 159 Colo. 326, 411 P.2d 242 (1966).

Just because a formal court order is not sought and entered, petitioner may not be despoiled of any rights in a matter; otherwise, such a holding would be highly technical and essentially unjust. *Gillespie v. District Court*, 119 Colo. 242, 202 P.2d 151 (1949).

Grounds of recovery can appear partly from both allegations of fact and legal conclusions. It is not a valid objection on a motion to dismiss a complaint as insufficient that the grounds of recovery appear partly from allegations of fact and partly from allegations of legal conclusions of the pleader. *People ex rel. Bauer v. McCloskey*, 112 Colo. 488, 150 P.2d 861 (1944).

If the conclusions of law alleged, rather than the ultimate facts from which they flow, are accepted as not objectionable to support the claim under section (e)(1) of this rule, then the complaint is sufficient as against motion to dismiss. *People ex rel. Bauer v. McCloskey*, 112 Colo. 488, 150 P.2d 861 (1944).

A trial court errs in dismissing the complaint based on the contentions of the defendant that plaintiffs' "theories" are deficient in one element or another, for this is a matter of evidence and cannot be resolved by the statement of counsel. *Kluge v. Wilson*, 167 Colo. 526, 448 P.2d 786 (1968).

Pleadings sufficient to put contributory negligence in issue, although negligence alleged. Where plaintiff contended that, although the pleadings made it clear that defendant was alleging negligence by plaintiff, the failure to designate it as contributory negligence changed the nature of preparation necessary to meet the issue at trial, the court held that, regardless of whether it was designated as "negligence" or "contributory negligence", the pleadings did put plaintiff on notice that he might have to rebut a showing of negligence on his part, and therefore, the pleadings, although not in the best form, were adequate to put contributory negligence in issue. *Lyons v. Hoffman*, 31 Colo. App. 306, 502 P.2d 980 (1972).

Statute of limitations sufficiently pleaded. An allegation in a reply to a counterclaim that the counterclaim is barred by the statute of limitations in such case made and provided is a sufficient pleading to comply with section (e) of this rule. *Denning v. A. D. Wilson & Co.*, 137 Colo. 372, 326 P.2d 77 (1958).

Where plaintiff commingles in one court several causes of action, a defendant who fails to require plaintiff to state these causes separately and files an answer by way of general denial must be prepared to meet all such causes. *Smith v. Gvirtzman*, 109 Colo. 314, 124 P.2d 926 (1942).

Issues not pleaded may properly be determined by the trial court by consent, express or implied, where evidence presenting such issues is tendered and received without objection. *First Nat'l Bank v. Jones*, 124 Colo. 451, 237 P.2d 1082 (1951).

Extraneous issues may not be tried in the absence of amendment of the pleadings where timely objection is made. *First Nat'l Bank v. Jones*, 124 Colo. 451, 237 P.2d 1082 (1951).

Complaint did not comply with section (e). Where complaint is 30 pages long with an additional 10 pages of attached exhibits, consists of 178 separate paragraphs setting forth 36 separate claims for relief, and incorporates other portions of the complaint over 400 times, the plaintiffs did not comply with the requirements of section (e) of this rule. *Borwick v. Bober*, 34 Colo. App. 423, 529 P.2d 1351 (1974).

VII. Construction.

Annotator's note. Since section (f) of this rule is similar to §83 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.

Rulings under former practice and procedure that pleadings are construed most strongly against the pleader are not in harmony with present procedure. *Spomer v. City of Grand Junction*, 144 Colo. 207, 355 P.2d 960 (1960).

The rule now is that pleadings are to be construed in favor of the pleader. *Spomer v. City of Grand Junction*, 144 Colo. 207, 355 P.2d 960 (1960); *Denver & R. G. W. R. R. v. Wood*, 28 Colo. App. 534, 476 P.2d 299 (1970).

Pleadings are to be liberally construed, and doubts are to be resolved in favor of pleader. *Lyons v. Hoffman*, 31 Colo. App. 306, 502 P.2d 980 (1972).

The trial court in its sound discretion should allow plaintiff to amend his 42 U.S.C. § 1983 complaint if justice so requires, especially in light of the liberal construction rules regarding pro se complaints under this statute. *Deason v. Lewis*, 706 P.2d 1283 (Colo. App. 1985).

Under this rule all pleadings are to be so construed as to do substantial justice, and a court is empowered to grant the relief to which the parties are entitled. *Fletcher v. District Court*, 137 Colo. 143, 322 P.2d 96 (1958); *McCoy v. People*, 165 Colo. 407, 439 P.2d 347 (1968).

Though the title by which a litigant may designate a pleading is not controlling, the substance of the claim rather than the appellation applied thereto controls. *Hutchinson v. Hutchinson*, 149 Colo. 38, 367 P.2d 594 (1961).

Although a defense is labeled as an attack on subject matter jurisdiction, the specific allegations may be sufficient to raise the issue of lack of personam jurisdiction, depending on the factual context, and regardless of the attached label. *Nations Enters., Inc. v. Process Equip. Co.*, 40 Colo. App. 390, 579 P.2d 655 (1978).

Where an alleged defect in a complaint is a mere matter of interpretation, defendant cannot interpret plaintiff out of court. *Mountain States Tel. & Tel. Co. v. Sanger*, 87 Colo. 369, 287 P. 866 (1930).

Amendment of complaint by later argument. Where 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 those 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).

Objection for insufficient facts overruled if pleading can be upheld by liberal construction. While the objection for insufficient facts is not waived by answer, but may be made at any time, making it for the first time at the trial is not encouraged by the courts and when so made will be overruled if by fair implication or most liberal construction the pleading can be held to state a cause of action. *Musgrove v. Brown*, 93 Colo. 559, 27 P.2d 590 (1933).

Judicial notice held proper aid in construing pleading. Where the complaint and summons were entitled in the county of Teller and the complainant alleged a contract to be performed "in the city of Victor", not specifying in what county it was held, on motion to change the venue, that the court might take judicial notice that the city of Victor is situate in the county of Teller and construed the complaint accordingly. *Gould v. Mathes*, 55 Colo. 384, 135 P. 780 (1913).

Supreme court endeavors to ascertain the spirit and intent of the rules. In construing the rules of civil procedure applicable to a cause of action, the supreme court endeavors to ascertain the spirit and intent of the rules as reflected by the language employed. *Hutchinson v. Hutchinson*, 149 Colo. 38, 367 P.2d 594 (1961).

Relief granted, if consistent with the pleadings liberally construed, will not be disturbed. A judgment will not be disturbed on the ground that it is not warranted by the pleadings where the cause has been remanded merely to permit the introduction of evidence on the undetermined issues, and the facts established by the evidence entitle the party to the relief granted, which

was consistent with the pleadings liberally construed. *Schiffer v. Adams*, 13 Colo. 572, 22 P. 964 (1889); *Marriott v. Clise*, 12 Colo. 561, 21 P. 909 (1889).

The admission into evidence of a copy of a revoked will was held in conformity with the pleadings under section (f) of this rule where the will had been executed when the antenuptial agreement in issue was signed and the complaint alleged that "in view of all the circumstances, the antenuptial agreement was not fair, equitable or reasonable". *Linker v. Linker*, 28 Colo. App. 131, 470 P.2d 921 (1970).

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).

Cross Reference Note:

For amended and supplemental pleadings, see C.R.C.P. 15; for one form of action, see C.R.C.P. 2; for commencement of action, see C.R.C.P. 3; for counterclaims and cross claims, see C.R.C.P. 13; for the signing of pleadings, see C.R.C.P. 11; for presentation of defenses and objections by pleading or motion, see C.R.C.P. 12.