WYOMING RULES OF CIVIL PROCEDURE

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I. SCOPE OF RULES; ONE FORM OF ACTION

Rule 1. Scope and purpose.

These rules govern the procedure in all civil actions and proceedings in the State of Wyoming courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.
(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 1 of the Federal Rules of Civil Procedure, modified to make it applicable to Wyoming courts and statutory proceedings.

Cross References. — For Code of Civil Procedure generally, see title 1. As to authority of Supreme Court to adopt, modify and repeal rules and forms governing pleading, practice and procedure in all courts, see §§ 5-2-114 through 5-2-117. As to adoption of rules and regulations relative to the practice of law by the Supreme Court, see § 5-2-118.

The distinction between actions at law and suits in equity has been abolished. Thickman v. Schunk, 391 P.2d 939 (Wyo. 1964).

And careful adherence to all provisions required. — The Supreme Court adopted the Wyoming counterpart of the Federal Rules of Civil Procedure at the instance of the Wyoming State Bar and, being cognizant of the difficulty in adjusting to new rules, has been extremely lenient in applying them, hoping that all might become conversant with them before any litigants were injured by reason of counsel's failure of compliance. However, the time has now passed when this view will be further justified and hereafter there must be careful adherence to all of the provisions of the Wyoming Rules of Civil Procedure. Ruby v. Schuett, 360 P.2d 170 (Wyo. 1961).

But just and speedy determination most important. — There is no more important provision in rules of procedure than the provision for a just and speedy determination, and courts have been true to this purpose. Weiss v. State ex rel. Danigan, 434 P.2d 761 (Wyo. 1967).

These rules govern procedure but do not change substantive rights. Strahan v. Strahan, 400 P.2d 542 (Wyo. 1965).

The rules by their own pronouncement, as well as by the enabling statutes, §§ 5-2-115 and 5-2-116, govern procedure but do not abridge, enlarge, or modify the substantive rights of persons or the jurisdiction of a court. State ex rel. Frederick v. District Court, 399 P.2d 583 (Wyo. 1965).

As to application of these rules to other than courts of record, see Hoffmeister v. McIntosh, 361 P.2d 678 (Wyo. 1961).

As to procedure for handling appeals from justice of the peace courts, see State v. Heberling, 553 P.2d 1043 (Wyo. 1976).

District court may not decide case upon briefs submitted by parties when those briefs are not accompanied by either a motion for judgment or a stipulation of facts. Koontz v. Town of South Superior, 716 P.2d 358 (Wyo. 1986).

Application to Avoid Remand. — Based on Wyo. Stat. Ann. § 1-14-126(b), a former member of an LLC was entitled to attorney's fees of $77,470, which was a reasonable amount for a trial, three evidentiary hearings, and four appeals; pursuant to Wyo. R. Civ. P. 1, the court

did not remand the action for a determination of fees but made the determination itself based on the unnecessary protraction of the litigation by plaintiff and the LLC. Thorkildsen v. Belden, 247 P.3d 60 (Wyo. 2011).

Applied in Butler v. McGee, 363 P.2d 791 (Wyo. 1961); Tschirgi v. Meyer, 536 P.2d 558 (Wyo. 1975); Nation v. Nation, 715 P.2d 198 (Wyo. 1986).

Quoted in Jackson State Bank v. Homar, 837 P.2d 1081 (Wyo. 1992); Thunderbasin Land, Livestock & Inv. Co. v. County of Laramie, 5 P.3d 774 (Wyo. 2000).

Stated in Marvel v. Neuman Transit Co., 414 P.2d 98 (Wyo. 1966).

Cited in Drummer v. State, 366 P.2d 20 (Wyo. 1961).

Law reviews. — For article, "Wyoming Practice," see 12 Wyo. L.J. 202 (1958).

See article, "The 1994 Amendments to the Wyoming Rules of Civil Procedure," XXX Land & Water L. Rev. 151 (1995).

Am. Jur. 2d, ALR and C.J.S. references. — 1 Am. Jur. 2d Actions § 1 et seq.

Application of civil or criminal procedural rules in federal court proceeding on motion in nature of writ of error coram nobis, 53 ALR Fed 762.

1A C.J.S. Actions § 1 et seq.

Rule 2. One form of action.

There is one form of action — the civil action.
(Added February 2, 2017, effective March 1, 2017.)

Source. — Similar to Rule 2 of the Federal Rules of Civil Procedure.

Distinction between actions at law and suits in equity has been abolished. Thickman v. Schunk, 391 P.2d 939 (Wyo. 1964).

Applied in State v. Board of County Comm'rs, 642 P.2d 456 (Wyo. 1982); McNeill Family Trust v. Centura Bank, 60 P.3d 1277 (Wyo. 2003).

Law reviews. — For comment, "How to Enforce a Money Judgment in Wyoming," see XX Land & Water L. Rev. 645 (1985).

Am. Jur. 2d, ALR and C.J.S. references. — 1 Am. Jur. 2d Actions §§ 5 to 30.

1A C.J.S. Actions §§ 66 to 134.

II. COMMENCEMENT OF ACTION; SERVICE OF PROCESS: PLEADINGS, MOTIONS, AND ORDERS

Rule 3. Commencement of Action.

A civil action is commenced by filing a complaint with the court.
(Added February 2, 2017, effective March 1, 2017.)

Source. — Subdivision (a) is similar to Rule 3 of the Federal Rules of Civil Procedure.

Federal law. — There was no direct conflict between state and federal procedural rules regarding commencement of actions, and therefore state rule applied in diversity action brought in federal district court. Habermehl v. Potter, 153 F.3d 1137 (10th Cir. 1998).

Defect in proceedings caused by absence of notice is cured by voluntary appearance and the subsequent proceedings of the court. In re Estate of Sowerwine, 413 P.2d 48 (Wyo. 1966).

Untimely service. — Since plaintiffs failed to serve their complaint within sixty days of filing it, their diversity action was deemed to have commenced on date of service, which was 106 days beyond statute of limitations period, and their action was therefore barred. Habermehl v. Potter, 153 F.3d 1137 (10th Cir. 1998).

Where a corporation was served approximately 114 days after the complaint was filed, under Wyo. R. Civ. P. 3(b), the service was not timely, and the saving statute, Wyo. Stat. Ann. § 1-3-118 did not apply because the complaint was filed after the 4-year Wyo. Stat. Ann. § 1-3-105 statute of limitations had run. Furthermore, Wyo. R. Civ. P. 6(a) does not enlarge the time provided in a statute of limitations. Hoke v. Motel 6 Jackson & Accor N. Am., Inc., 131 P.3d 369 (Wyo. 2006).

Failure to timely serve. — Where a corporation was served approximately 114 days after the complaint was filed, under Wyo. R. Civ. P. 3(b), the service was not timely, and the saving statute, Wyo. Stat. Ann. § 1-3-118 did not apply because the complaint was filed after the 4-year Wyo. Stat. Ann. § 1-3-105 statute of limitations had run. Furthermore, Wyo. R. Civ. P. 6(a) does not enlarge the time provided in a statute of limitations. Hoke v. Motel 6 Jackson & Accor N. Am., Inc., 131 P.3d 369 (Wyo. 2006).

Two and one-half years is not as matter

of law reasonable time to obtain service and commence action, particularly where no excuse whatsoever is offered. Quin Blair Enters., Inc. v. Julien Constr. Co., 597 P.2d 945 (Wyo. 1979).

Rule 41(b)(1) protects against dilatory plaintiffs. — Subdivision (a) is in the form it is, without a requirement of service of process as part of the commencement of a lawsuit, because it was felt that adequate protection against dilatory plaintiffs was afforded by Rule 41(b)(1), by dismissal for want of prosecution. Quin Blair Enters., Inc. v. Julien Constr. Co., 597 P.2d 945 (Wyo. 1979).

Contract terms may limit action. — Subdivision (b) is inapplicable where an action is limited by terms of a contract and there is no statute of limitations involved. Quin Blair Enters., Inc. v. Julien Constr. Co., 597 P.2d 945 (Wyo. 1979).

Claim time-barred. — While the detainee's filing occurred within the one-year limitation period of Wyo. Stat. Ann. § 1-39-114, the deputy was not served with the copy of the complaint until much later; pursuant to Wyo. R. Civ. P. 3(b), the suit was not "commenced" until that date, which was outside the one-year statutory period, and as a result, the detainee's state law tort claims against the deputy under the Wyoming Governmental Claims Act were time-barred. Boyer-Gladden v. Hill, 224 P.3d 21 (Wyo. 2010).

Suit commenced by filing complaint with intent to prosecute. — A suit is deemed commenced for purposes of a statute of limitations by the filing of a complaint with the bona fide intent to prosecute the suit diligently, provided there was no unreasonable delay in the issuance or service of summons. Quin Blair Enters., Inc. v. Julien Constr. Co., 597 P.2d 945 (Wyo. 1979).

Applied in Bon v. Lemp, 444 P.2d 333 (Wyo. 1968); Rosa v. Cantrell, 508 F. Supp. 330 (D. Wyo. 1981); Rosa v. Cantrell, 705 F.2d 1208 (10th Cir. 1982).

Quoted in Grabowski v. United States, 294 F. Supp. 421 (D. Wyo. 1968); Tarter v. Insco, 550 P.2d 905 (Wyo. 1976); Diamond Hill Inv. Co. v. Shelden, 767 P.2d 1005 (Wyo. 1989); Northern Utils. Div. of KN Energy, Inc. v. Town of Evansville, 822 P.2d 829 (Wyo. 1991); James v. Montoya, 963 P.2d 993 (Wyo. 1998); Bradley v. Bradley, 118 P.3d 984 (Wyo. 2005).

Stated in Weiss v. State ex rel. Leimback, 435 P.2d 280 (Wyo. 1967); Lafferty v. Nickel, 663 P.2d 168 (Wyo. 1983).

Cited in Oil Workers, Local 2-230 v. Great Lakes Carbon Corp., 376 P.2d 640 (Wyo. 1962); Linde v. Bentley, 482 P.2d 121 (Wyo. 1971); Gookin v. State Farm Fire & Cas. Ins. Co., 826 P.2d 229 (Wyo. 1992).

Law reviews. — For article, "Wyoming Practice," see 12 Wyo. L.J. 202 (1958).

Am. Jur. 2d, ALR and C.J.S. references. — 1 Am. Jur. 2d Abatement, Survival, and Revival § 12; 1 Am. Jur. 2d Actions §§ 70 to 80; 62B Am. Jur. 2d Process §§ 8 to 11.

Defendant's state of mind necessary or sufficient to warrant award of punitive damages in action for malicious prosecution, 94 ALR3d 791.

1A C.J.S. Actions §§ 237 to 242; 71 C.J.S. Pleading §§ 570 to 583; 72 C.J.S. Process § 1 et seq.

Rule 3.1. Civil cover sheet.

(a) *Civil Cover Sheet Required.* — Every complaint or other document initiating a civil action shall be accompanied by a completed civil cover sheet form available on the Wyoming Judicial Branch website or from the Clerk of Court.

(b) *No Legal Effect.* — This requirement is solely for administrative purposes and has no legal effect in the action.

(c) *Absence of Cover Sheet.* — If the complaint or other document is filed without a completed civil cover sheet, the Clerk of Court or the court shall at the time of filing give notice of the omission to the party filing the document. If, after notice of the omission the coversheet is not filed within 14 calendar days, the court may impose an appropriate sanction upon the attorney or party filing the complaint or other document.
(Added February 2, 2017, effective March 1, 2017.)

Rule 4. Summons.

(a) *Contents.* — A summons must:

(1) name the court and the parties;

(2) be directed to the defendant;

(3) state the name and address of the plaintiff's attorney or — if unrepresented — of the plaintiff;

(4) state the time within which the defendant must appear and defend;

(5) notify the defendant that a failure to appear and defend may result in a default judgment against the defendant for the relief demanded in the complaint;

(6) be signed by the clerk; and

(7) bear the court's seal.

(b) *Issuance.* — On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons — or a copy of a summons that is addressed to multiple defendants — must be issued for each defendant to be served.

(c) *By Whom Served.* — Except as otherwise ordered by the court, process may be served:

(1) By any person who is at least 18 years old and not a party to the action;

(2) At the request of the party causing it to be issued, by the sheriff of the county where the service is made or sheriff's designee, or by a United States marshal or marshal's designee;

(3) In the event service is made by a person other than a sheriff or U.S. marshal, the amount of costs assessed therefor, if any, against any adverse party shall be within the discretion of the court.

(d) *Personal Service.* — The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary.

(e) *Serving an Individual Within the United States.* — An individual other than a person under 14 years of age or an incompetent person may be served within the United States:

(1) by delivering a copy of the summons and of the complaint to the individual personally,

(2) by leaving copies thereof at the individual's dwelling house or usual place of abode with some person over the age of 14 years then residing therein,

(3) at the defendant's usual place of business with an employee of the defendant then in charge of such place of business, or

(4) by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

(f) *Serving an Individual in a Foreign Country.* — An individual — other than a person under 14 years of age or an incompetent person — may be served at a place not within the United States:

(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:

(A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;

(B) as the foreign authority directs in response to a letter rogatory or letter of request; or

(C) unless prohibited by the foreign country's law, by:

(i) delivering a copy of the summons and of the complaint to the individual personally; or

(ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or

(3) by other means not prohibited by international agreement, as the court orders.

(g) *Serving a Person Under 14 years of Age or an Incompetent Person.* — An individual under 14 years of age or an incompetent person may be served within the

United States by serving a copy of the summons and of the complaint upon the guardian or, if no guardian has been appointed in this state, then upon the person having legal custody and control or upon a guardian ad litem. An individual under 14 years of age or an incompetent person who is not within the United States must be served in the manner prescribed by Rule 4(f)(2)(A), (f)(2)(B), or (f)(3).

(h) *Serving a Corporation, Partnership, or Association.* —

(1) Service upon a partnership, or other unincorporated association, within the United States shall be made:

(A) by delivery of copies to one or more of the partners or associates, or a managing or general agent thereof, or agent for process, or

(B) by leaving same at the usual place of business of such defendant with any employee then in charge thereof.

(2) Service upon a corporation within the United States shall be made:

(A) by delivery of copies to any officer, manager, general agent, or agent for process, or

(B) If no such officer, manager or agent can be found in the county in which the action is brought such copies may be delivered to any agent or employee found in such county.

(C) If such delivery be to a person other than an officer, manager, general agent or agent for process, the clerk, at least 20 days before default is entered, shall mail copies to the corporation by registered or certified mail and marked 'restricted delivery' with return receipt requested, at its last known address.

(3) Service upon a partnership, other unincorporated association, or corporation not within the United States shall be made in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i).

(i) *Serving a Department or Agency of the State, or a Municipal or Other Public Corporation.* — Service upon a department or agency of the state, a municipal or other public corporation shall be made by delivering a copy of the summons and of the complaint to the chief executive officer thereof, or to its secretary, clerk, person in charge of its principal office or place of business, or any member of its governing body, or as otherwise provided by statute.

(j) *Serving the Secretary of State.* — Service upon the secretary of state, as agent for a party shall be made when and in the manner authorized by statute.

(k) *Service by Publication.* — Service by publication may be had where specifically provided for by statute, and in the following cases:

(1) When the defendant resides out of the state, or the defendant's residence cannot be ascertained, and the action is:

(A) For the recovery of real property or of an estate or interest therein;

(B) For the partition of real property;

(C) For the sale of real property under a mortgage, lien or other encumbrance or charge;

(D) To compel specific performance of a contract of sale of real estate;

(2) In actions to establish or set aside a will, where the defendant resides out of the state, or the defendant's residence cannot be ascertained;

(3) In actions in which it is sought by a provisional remedy to take, or appropriate in any way, the property of the defendant, when:

(A) the defendant is a foreign corporation, or

(B) a nonresident of this state, or

(C) the defendant's place of residence cannot be ascertained,

(D) and in actions against a corporation incorporated under the laws of this state, which has failed to elect officers, or to appoint an agent, upon whom service of summons can be made as provided by these rules and which has no place of doing business in this state;

(4) In actions which relate to, or the subject of which is real or personal property in this state, when

(A) a defendant has or claims a lien thereon, or an actual or contingent interest therein or the relief demanded consists wholly or partly in excluding the defendant from any interest therein, and

(B) the defendant is a nonresident of the state, or a dissolved domestic corporation which has no trustee for creditors and stockholders, who resides at a known address in Wyoming, or

(C) the defendant is a domestic corporation which has failed to elect officers or appoint other representatives upon whom service of summons can be made as provided by these rules, or to appoint an agent as provided by statute, and which has no place of doing business in this state, or

(D) the defendant is a domestic corporation, the certificate of incorporation of which has been forfeited pursuant to law and which has no trustee for creditors and stockholders who resides at a known address in Wyoming, or

(E) the defendant is a foreign corporation, or

(F) the defendant's place of residence cannot be ascertained;

(5) In actions against personal representatives, conservators, or guardians, when the defendant has given bond as such in this state, but at the time of the commencement of the action is a nonresident of the state, or the defendant's place of residence cannot be ascertained;

(6) In actions where the defendant is a resident of this state, but has departed from the county of residence with the intent to delay or defraud the defendant's creditors, or to avoid the service of process, or keeps concealed with like intent;

(7) When an appellee has no attorney of record in this state, and is a nonresident of and is absent from the state, or has left the state to avoid the service of notice or process, or the appellee keeps concealed so that notice or process cannot be served;

(8) In an action or proceeding under Rule 60, to modify or vacate a judgment after term of court, or to impeach a judgment or order for fraud, or to obtain an order of satisfaction thereof, when a defendant is a nonresident of the state or the defendant's residence cannot be ascertained;

(9) In suits for divorce, alimony, custody, visitation, support, to affirm or declare a marriage void, or the modification of any decree therefor entered in such suit, when the defendant is a nonresident of the state, or the defendant's residence cannot be ascertained, or the defendant keeps concealed in order to avoid service of process;

(10) In actions for adoption or for the termination of parental rights;

(11) In all actions or proceedings which involve or relate to the waters, or right to appropriate the waters of the natural streams, springs, lakes, or other collections of still water within the boundaries of the state, or which involve or relate to the priority of appropriations of such waters including appeals from the determination of the state board of control, and in all actions or proceedings which involve or relate to the ownership of means of conveying or transporting water situated wholly or partly within this state, when the defendant or any of the defendants are nonresidents of the state or the defendant's residence or their residence cannot be ascertained.

(l) *Requirements for Service by Publication.* —

(1) *Affidavit Required.* — Before service by publication can be made, an affidavit of the party, or the party's agent or attorney, must be filed stating:

(A) that service of a summons cannot be made within this state, on the defendant to be served by publication, and

(B) stating the defendant's address, if known, or that the defendant's address is unknown and cannot with reasonable diligence be ascertained, and

(C) detailing the efforts made to obtain an address, and

(D) that the case is one of those mentioned in subdivision (k), and

(E) when such affidavit is filed, the party may proceed to make service by publication.

(2) Publication and Notice to Clerk.

(A) *Address in publication.* — In any case in which service by publication is made when the address of a defendant is known, it must be stated in the publication.

(B) *Notice to and from clerk.* — Immediately after the first publication the party making the service shall deliver to the clerk copies of the publication, and the clerk shall mail a copy to each defendant whose name and address is known by registered or certified mail and marked 'Restricted Delivery' with return receipt requested, directed to the defendant's address named therein, and make an entry thereof on the appearance docket.

(C) *Affidavit at time of hearing.* — In all cases in which a defendant is served by publication of notice and there has been no delivery of the notice mailed to the defendant by the clerk, the party who makes the service, or the party's agent or attorney, at the time of the hearing and prior to entry of judgment, shall make and file an affidavit stating

(i) the address of such defendant as then known to the affiant, or if unknown,

(ii) that the affiant has been unable to ascertain the same with the exercise of reasonable diligence, and

(iii) detailing the efforts made to obtain an address.

Such additional notice, if any, shall then be given as may be directed by the court.

(m) *Publication of Notice.* — The publication must be made by the clerk for four consecutive weeks in a newspaper published:

(1) in the county where the complaint is filed; or

(2) if there is no newspaper published in the county, then in a newspaper published in this state, and of general circulation in such county; and

(3) if publication is made in a daily newspaper, one insertion a week shall be sufficient; and

(4) publication must contain

(A) a summary statement of the object and prayer of the complaint,

(B) mention the court wherein it is filed,

(C) notify the person or persons to be served when they are required to answer, and

(D) notify the person or persons to be served that judgment by default may be rendered against them if they fail to appear.

(n) *When Service by Publication is Complete; Proof.* —

(1) *Completion.* — Service by publication shall be deemed complete at the date of the last publication, when made in the manner and for the time prescribed in the preceding sections; and

(2) *Proof.* — Service by publication shall be proved by affidavit.

(3) For purposes of Rule 4(u), when service is made by publication, a defendant shall be deemed served on the date of the first publication.

(o) *Service by Publication upon Unknown Persons.* — When an heir, devisee, or legatee of a deceased person, or a bondholder, lienholder or other person claiming an interest in the subject matter of the action is a necessary party, and it appears by affidavit that the person's name and address are unknown to the party making service, proceedings against the person may be had by designating the person as an unknown heir, devisee or legatee of a named decedent or defendant, or in other cases as an

unknown claimant, and service by publication may be had as provided in these rules for cases in which the names of the defendants are known.

(p) *Publication in Another County.* — When it is provided by rule or statute that a notice shall be published in a newspaper, and no such paper is published in the county, or if such paper is published there and the publisher refuses, on tender of the publisher's usual charge for a similar notice, to insert the same in the publisher's newspaper, then a publication in a newspaper of general circulation in the county shall be sufficient.

(q) *Costs of Publication.* — The lawful rates for any legal notice published in any qualified newspaper in this state in connection with or incidental to any cause or proceeding in any court of record in this state shall become a part of the court costs in such action or proceeding, which shall be paid to the clerk of the court in which such action or proceeding is pending by the party causing such notice to be published and finally assessed as the court may direct.

(r) *Personal Service Outside the State; Service by Registered or Certified Mail.* — In all cases where service by publication can be made under these rules, or where a Wyoming statute permits service outside the state, the plaintiff may obtain service without publication by:

(1) *Personal Service Outside the State.* — By delivery to the defendant within the United States of copies of the summons and complaint.

(2) *Service by Registered or Certified Mail.* — The clerk shall send by registered or certified mail:

(A) Upon the request of any party

(B) a copy of the complaint and summons

(C) addressed to the party to be served at the address within the United States given in the affidavit required under subdivision (l) of this rule.

(D) The mail shall be sent marked "Restricted Delivery," requesting a return receipt signed by the addressee or the addressee's agent who has been specifically authorized in writing by a form acceptable to, and deposited with, the postal authorities.

(E) When such return receipt is received signed by the addressee or the addressee's agent the clerk shall file the same and enter a certificate in the cause showing the making of such service.

(s) *Proof of Service.* —

(1) *In General.* — The person serving the process shall make proof of service thereof to the court promptly and within the time during which the person served must respond to the process.

(2) *Proof of Service Within the United States.* — Proof of service of process within the United States shall be made as follows:

(A) If served by a Wyoming sheriff, undersheriff or deputy, by a certificate with a statement as to date, place and manner of service, except that a special deputy appointed for the sole purpose of making service shall make proof by the special deputy's affidavit containing such statement;

(B) If by any other person, by the person's affidavit of proof of service with a statement as to date, place and manner of service;

(C) If by registered or certified mail, by the certificate of the clerk showing the date of the mailing and the date the clerk received the return receipt;

(D) If by publication, by the affidavit of publication together with the certificate of the clerk as to the mailing of copies where required;

(E) By the written admission, acceptance or waiver of service by the person to be served, duly acknowledged.

(3) *Proof of Service Outside the United States.* — Proof of service of process outside the United States shall be made as follows:

(A) if made under Rule 4(f)(1), as provided in the applicable treaty or convention; or

(B) if made under Rule 4(f)(2) or (f)(3), by a receipt signed by the addressee, or by other evidence satisfying the court that the summons and complaint were delivered to the addressee.

(4) *Failure to Prove Service.* — Failure to make proof of service does not affect the validity of the service.

(t) *Amendment.* — At any time in its discretion and upon such terms as it deems just, the court may permit a summons or proof of service to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

(u) *Waiving Service.* —

(1) *Requesting a Waiver.* — An individual, corporation, partnership or other unincorporated association that is subject to service under subdivision 4(e), (f), or (h) has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons. The notice and request must:

(A) be in writing and shall be addressed directly to the defendant, if an individual, or else to an officer, manager, general agent, or agent for process, if a corporation, or else to one or more of the partners or associates, or a managing or general agent, or agent for process, if a partnership or other unincorporated association;

(B) be sent through first-class mail or other reliable means;

(C) be accompanied by a copy of the complaint and shall identify the court in which it has been filed;

(D) inform the defendant of the consequences of compliance and of a failure to comply with the request;

(E) set forth the date on which the request is sent;

(F) allow the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent, or 60 days from that date if the defendant is addressed outside the United States; and

(G) provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing.

(2) *Failure to Waive.* — If a defendant located within the United States fails to comply with a request for waiver made by a plaintiff located within the United States, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure is shown.

(3) *Time to Answer After a Waiver.* — A defendant that, before being served with process, timely returns a waiver so requested is not required to serve an answer to the complaint until 60 days after the date on which the request for waiver of service was sent, or 90 days after that date if the defendant was addressed outside the United States.

(4) *Results of Filing a Waiver.* — When the plaintiff files a waiver of service with the court, the action shall proceed, except as provided in paragraph (3), as if a summons and complaint had been served at the time of signing the waiver, and no proof of service shall be required.

(5) *Jurisdiction and Venue Not Waived.* — A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant.

(6) *Costs.* — The costs to be imposed on a defendant under paragraph (2) for failure to comply with a request to waive service of a summons shall include the costs subsequently incurred in effecting service, together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service.

(v) *Acceptance of Service.* —

(1) A defendant who accepts service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant.

(2) The acceptance of service shall:

(A) Be in writing;

(B) Be notarized and executed directly by the defendant or defendant's counsel;

(C) Inform the defendant of the duty to file with the clerk and serve upon the plaintiff's attorney an answer to the complaint, or a motion under Rule 12, within 20 days after the time of signing the acceptance; and

(D) Be filed by the party requesting the acceptance of service.

(3) When an acceptance of service is filed with the court, the action shall proceed as if a summons and complaint had been served at the time of signing the acceptance, and no proof of service shall be required.

(4) Nothing in this Rule 4(v) shall compel any defendant to accept service of a summons under this Rule 4(v).

(w) *Time Limit for Service.* — If a defendant is not served within 90 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (w) does not apply to service in a foreign country under Rule 4(f).

(x) *Costs.* — Any cost of publication or mailing under this rule shall be borne by the party seeking it.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 4 of the Federal Rules of Civil Procedure.

Cross References. — As to duty of foreign railroad or telegraph line to have agents upon whom process may be served, see art. 10, § 18, Wyo. Const.

As to substitution of certified mail for registered mail, see § 1-6-111. As to service of process on nonresident motorists, see § 1-6-301. As to service of notice to the renter of abandoned personal property that the property will be disposed of if not claimed within seven days, see § 1-21-1210. As to service by publication in adoption proceedings, see § 1-22-107. As to service of process on guardian and waiver of right of guardian, see § 2-2-312. As to designation by foreign building and loan association of agent for service of process, see § 13-8-104. As to age of majority, see § 14-1-101. As to service of process on cooperative marketing associations, see § 17-10-108. As to duty of corporation to maintain registered office and registered agent, see § 17-16-501. As to service of process on nonresident real estate brokers or salesmen, see § 33-28-110. As to process in proceedings before public service commission to be served as process in civil actions served, see § 37-2-220. As to service of notice in organization of power districts, see § 37-7-105. As to service of notice to fix assessments and damages in organization of power districts, see §§ 37-7-114 and 37-7-115.

Editor's notes. — For notice of lawsuit and request for waiver of service of summons form and waiver of service of summons form, see Forms 1-A and 1-B following these rules.

I. GENERAL CONSIDERATION.

Consent to jurisdiction. — Complaint against an individual defendant was improperly dismissed for lack of proper service because the defendant, by not questioning the district court's personal jurisdiction when the defendant filed a motion to dismiss, waived the defendant's objection and submitted to the jurisdiction of the court. Lundahl v. Gregg, — P.3d —, 2014 Wyo. LEXIS 126 (September 5, 2014).

Representative's action against the driver's estate was commenced within the time allowed by the wrongful death statute of limitations where although service of process on the estate was defective, the estate had accepted service,

entered its appearance in the action, consented to the court's trial of the matter, and thus, the service defects did not affect the court's personal jurisdiction. Knight v. Estate of McCoy, 341 P.3d 412 (Wyo. 2015).

This rule seems to set forth the fundamental requisites of process which are essential in giving a court jurisdiction. Robertson v. State Hwy. Comm'n, 450 P.2d 1003 (Wyo. 1969); Bryant v. Wybro Fed. Credit Union, 544 P.2d 1010 (Wyo. 1976).

Each step of this rule prescribed is jurisdictional and a condition precedent to completion of service of process upon a nonresident defendant. In re Estate of Lonquest, 526 P.2d 994 (Wyo. 1974).

Summons defined. — A summons is the means of compelling a defendant to subject his person to the jurisdiction of the court from which the summons issues. Pease Bros. v. American Pipe & Supply Co., 522 P.2d 996 (Wyo. 1974).

Any omission of statements which are required under this rule is fatal. Emery v. Emery, 404 P.2d 745 (Wyo. 1965); Oedekoven v. Oedekoven, 475 P.2d 307 (Wyo. 1970).

Such omission prevents the trial court from securing jurisdiction of defendant. Emery v. Emery, 404 P.2d 745 (Wyo. 1965).

Obtaining jurisdiction. — This rule would indicate that ordinarily jurisdiction is obtained by the proper filing of a complaint and by the issuance and service of a sufficient summons. Robertson v. State Hwy. Comm'n, 450 P.2d 1003 (Wyo. 1969); Weber v. Johnston Fuel Liners, Inc., 519 P.2d 972 (Wyo. 1974).

Ordinarily courts gain jurisdiction of a civil suit by the filing of a complaint along with the issuance and service of summons. Bryant v. Wybro Fed. Credit Union, 544 P.2d 1010 (Wyo. 1976).

Court has no authority to proceed against defendant until notice given. — Until notice is given, that is, such notice as compels the defendant to take cognizance of it, the court has no authority to proceed against the defendant, even though the court may have jurisdiction of the subject matter of the action. Pease Bros. v. American Pipe & Supply Co., 522 P.2d 996 (Wyo. 1974).

Voluntary appearance of defendant is equivalent to service of process. Pease Bros. v. American Pipe & Supply Co., 522 P.2d 996 (Wyo. 1974).

Insufficient process is waived if defendants proceed without objection. Weber v. Johnston Fuel Liners, Inc., 519 P.2d 972 (Wyo. 1974).

When defect in service not waived. — A defect in service of process is not waived by failing to raise the issue on a subsequent motion to vacate a default judgment. Pease Bros. v. American Pipe & Supply Co., 522 P.2d 996 (Wyo. 1974).

Judgment entered without proper service of summons or appearance is void, and if service is made in a manner not authorized by law, the judgment is void and subject to attack, either directly or collaterally. Bryant v. Wybro Fed. Credit Union, 544 P.2d 1010 (Wyo. 1976).

For a court to acquire jurisdiction there must be a proper service of summons or an entry of appearance, and a judgment rendered without proper service or entry of appearance is a nullity and void. Pease Bros. v. American Pipe & Supply Co., 522 P.2d 996 (Wyo. 1974).

If service of process is made in a manner not authorized by law, the judgment is subject to direct or collateral attack. Crotteau v. Irvine, 656 P.2d 1166 (Wyo. 1983).

Applied in Rosa v. Cantrell, 508 F. Supp. 330 (D. Wyo. 1981); U.S. Aviation, Inc. v. Wyoming Avionics, Inc., 664 P.2d 121 (Wyo. 1983); Anderson v. Sno-King Village Ass'n, 745 P.2d 540 (Wyo. 1987); Cotton v. Brow, 903 P.2d 530 (Wyo. 1995).

Quoted in Keller v. Anderson, 554 P.2d 1253 (Wyo. 1976).

Stated in Weiss v. State ex rel. Leimback, 435 P.2d 280 (Wyo. 1967).

Cited in Swan Land & Cattle Co. v. Frank, 148 U.S. 603, 13 S. Ct. 691, 37 L. Ed. 577 (1893); Harrison v. Carbon Timber Co., 14 Wyo. 246, 83 P. 215 (1905); Clause v. Columbia Sav. & Loan Ass'n, 16 Wyo. 450, 95 P. 54 (1908); Emelle v. Spinner, 20 Wyo. 507, 126 P. 397 (1912); Whitaker v. First Nat'l Bank, 32 Wyo. 288, 231 P. 691 (1925); Leff v. Berger, 383 F. Supp. 441 (D. Wyo. 1974); Tschirgi v. Meyer, 536 P.2d 558 (Wyo. 1975); Booth v. Magee Carpet Co., 548 P.2d 1252 (Wyo. 1976); True v. Hi-Plains Elevator Mach., Inc., 577 P.2d 991 (Wyo. 1978); Barrett v. Town of Guernsey, 652 P.2d 395 (Wyo. 1982); Osborn v. Emporium Videos, 848 P.2d 237 (Wyo. 1993); Lee v. Sage Creek Refining Co., 947 P.2d 791 (Wyo. 1997); Blittersdorf v. Eikenberry, 964 P.2d 413 (Wyo. 1998).

Law reviews. — For article "Legislation," see 1 Wyo. L.J. 126.

For note, "Due Diligence Required for Service by Publication," see 9 Wyo. L.J. 69.

For note, "Alimony in an Ex Parte Proceeding," see 12 Wyo. L.J. 72 (1957).

For article, "Wyoming Practice," see 12 Wyo. L.J. 202 (1958).

For comment, "The 'Long-Arm' Statute: Wyoming Expands Jurisdiction of the State Courts over Nonresidents," see IV Land & Water L. Rev. 235 (1969).

For article, "An Analysis of Wyoming Marriage Statutes, with Some Suggestions for Reform — Part IV," see VII Land & Water L. Rev. 127 (1972).

Am. Jur. 2d, ALR and C.J.S. references. — 62B Am. Jur. 2d Process § 1 et seq.

Validity of service of summons or complaint on Sunday or holiday, 63 ALR3d 423.

Modern status of the Massachusetts or business trust, 88 ALR3d 704.

Who is "person of suitable age and discretion" under statutes or rules relating to substituted service of process, 91 ALR3d 827.

Necessity and permissibility of raising claim for abuse of process by reply or counterclaim in same proceeding in which abuse occurred — state cases, 82 ALR4th 1115.

Effect of American citizenship or residency of libelant who has alternate forum abroad on applicability of doctrine of forum non conveniens in admiralty action brought in United States district court, 70 ALR Fed 875.

72 C.J.S. Process § 1 et seq.

II. SUMMONS; FORM.

Summons was defective and void. — Where the summons in a negligence action did not comply with Wyo. R. Civ. P. 4(b), in that was not signed by the court clerk or sealed and did not have the complaint attached, and was served after the four-year Wyo. Stat. Ann. § 1-3-105 statute of limitations had run, dismissal was proper because the summons was void, not just voidable. The defect in the summons was so deficient that any judgment against it was susceptible to collateral attack. Hoke v. Motel 6 Jackson & Accor N. Am., Inc., 131 P.3d 369 (Wyo. 2006).

Am. Jur. 2d, ALR and C.J.S. references. — Mistake or error in middle initial or middle name of party as vitiating or invalidating civil process, summons or the like, 6 ALR3d 1179.

Sufficiency of notice of claim against local political entity as regards time when accident occurred., 57 ALR5th 689.

III. BY WHOM SERVED.

Appointment of sheriff not required. — Subdivision (c)(2) does not require the appointment by the clerk of a "sheriff of the county where the service is made, or … his undersheriff or deputy, or … a United States marshal, or his deputy." First Wyo. Bank v. Trans Mt. Sales & Leasing, Inc., 602 P.2d 1219 (Wyo. 1979).

Service by private investigator illegal. — Service of process was without legal effect where the plaintiff used a private investigator not specifically appointed by the clerk of the court to deliver the complaint. Gookin v. State Farm Fire & Cas. Ins. Co., 826 P.2d 229 (Wyo. 1992).

IV. PERSONAL SERVICE.

Burden of proof of change of "place of abode". — Even after an individual has departed his "usual place of abode," it continues to be his usual place of abode. Merely saying that it is no longer his abode is not enough. It must be shown that there has been the establishing of a new abode and the individual has the burden of proving this. Rosa v. Cantrell, 705 F.2d 1208 (10th Cir. 1982), cert. denied, 464 U.S. 821, 104 S. Ct. 85, 78 L. Ed. 2d 94 (1983).

Under subdivision (d)(l) and § 5-1-107 out-of-state personal service upon nonresident defendant is proper. First Wyo. Bank v. Trans Mt. Sales & Leasing, Inc., 602 P.2d 1219 (Wyo. 1979).

Out-of-state personal service can effect in personam jurisdiction over nonresident. First Wyo. Bank v. Trans Mt. Sales & Leasing, Inc., 602 P.2d 1219 (Wyo. 1979).

Affidavit not necessary for out-of-state service. — To effect out-of-state service by personal delivery, it is not necessary to execute an affidavit stating that service cannot be accomplished within the state, as subdivision (f) is not applicable to personal service either within or without the state. First Wyo. Bank v. Trans Mt. Sales & Leasing, Inc., 602 P.2d 1219 (Wyo. 1979).

For purposes of service, subdivision (d)(3) treats partnership as entity which may be summoned to appear by service upon a single partner. Nutri-West v. Gibson, 764 P.2d 693 (Wyo. 1988).

Due process requires only that the representative served be a responsible representative of the foreign corporation. Ford Motor Co. v. Arguello, 382 P.2d 886 (Wyo. 1963).

Subdivision (d)(4) substantially departs from Rule 4 (d) of the federal rules. Ford Motor Co. v. Arguello, 382 P.2d 886 (Wyo. 1963).

Subdivision (d)(4) is cumulative to certain statutes. — Subdivision (d)(4) is cumulative to statutes pertaining to service upon and acquisition of personal jurisdiction over foreign corporations that have done business in the state of Wyoming without qualification and designation of an agent for service. Pease Bros. v. American Pipe & Supply Co., 522 P.2d 996 (Wyo. 1974).

Service on general field agent is proper where no general agent or agent for process found in state. — It was proper, since no officer, manager, general agent or agent for process was found in the state, to serve process upon a general field agent of the defendant, when he was found within the state, even though he was not authorized by the defendant to accept service, since his position of responsibility was such that the process served upon him reasonably afforded an opportunity for the defendant to defend in the action. Ford Motor Co. v. Arguello, 382 P.2d 886 (Wyo. 1963).

Fact that improperly served process is forwarded to proper corporate officials does not validate the service. Pease Bros. v. American Pipe & Supply Co., 522 P.2d 996 (Wyo. 1974).

Service on receptionist. — In normal business and professional activities the receptionist in an office is an "employee then in charge of such place of business." Oxley v. Mine & Smelter Supply Co., 439 P.2d 661 (Wyo. 1968).

When service on employee not in conformity with rule. — Even though the record indicates that the individual served was an employee of the corporation, where he was not

"found in the county in which the action was brought," service of process was not made in conformity with this rule. Pease Bros. v. American Pipe & Supply Co., 522 P.2d 996 (Wyo. 1974).

Service on employer defective. — Where process was issued on defendant's employer at defendant's place of business, this was not an authorized method of serving process and was therefore, defective. MN v. CS, 908 P.2d 414 (Wyo. 1995).

Attempted service on corporation at post-office box not "actual service". — Under subdivision (d)(4), attempted local service on a corporation was not adequate or adequately proved, where at a minimum the corporation's last known address or the designated agent's in-county street address was not listed for the information of the sheriff. Attempted service at a post-office box number listed on the summons hardly constituted "actual service." Midway Oil Corp. v. Guess, 714 P.2d 339 (Wyo. 1986).

Service on secretary of state insufficient where summons mailed to wrong address. — The mailing of alias summons to an address not listed for the agent for service and which also was not the last known address for the corporation was not adequate. Consequently, the attempted substitute service by service on the secretary of state was insufficient to confer jurisdiction. Midway Oil Corp. v. Guess, 714 P.2d 339 (Wyo. 1986).

Avoidance of service. — Personal service on respondent was sufficient where, in response to respondent's refusal to open his apartment door, process server placed summons and complaint in respondent's mailbox and informed him that he had been served. CRB v. Department of Family Servs., 974 P.2d 931 (Wyo. 1999).

Am. Jur. 2d, ALR and C.J.S. references. — Attorney representing foreign corporation in litigation as its agent for service of process in unconnected actions or proceedings, 9 ALR3d 738.

Construction of phrase "usual place of abode," or similar terms referring to abode, residence or domicile, as used in statutes relating to service of process, 32 ALR3d 112.

V. SERVICE BY PUBLICATION.

Publication not preferred over personal service. — While an alternative method of service, publication, may be utilized in certain cases, this rule does not contain any direction that service by publication is ever required as opposed to personal service. First Wyo. Bank v. Trans Mt. Sales & Leasing, Inc., 602 P.2d 1219 (Wyo. 1979).

Reasonable diligence not exercised. — Final decree of adoption was vacated for adoptive father's failure to exercise the necessary diligence in attempting to locate the natural father prior to serving by publication. MKG v. CM, 861 P.2d 1102 (Wyo. 1993).

Am. Jur. 2d, ALR and C.J.S. references. — Jurisdiction on constructive or substituted service in suit for divorce or alimony to reach property within state, 10 ALR3d 212.

VI. REQUIREMENTS FOR SERVICE BY PUBLICATION.

Service by publication is limited to instances where personal service is not reasonable or practical. In re Estate of Lonquest, 526 P.2d 994 (Wyo. 1974); First Wyo. Bank v. Trans Mt. Sales & Leasing, Inc., 602 P.2d 1219 (Wyo. 1979).

And there must be strict compliance with the statutory method. In re Estate of Lonquest, 526 P.2d 994 (Wyo. 1974).

Requirements of this rule pertaining to service by publication are minimum. Emery v. Emery, 404 P.2d 745 (Wyo. 1965); Oedekoven v. Oedekoven, 475 P.2d 307 (Wyo. 1970).

But material violation of mandatory prerequisite of constructive service is fatal to jurisdiction of the court. National Supply Co. v. Chittim, 387 P.2d 1010 (Wyo. 1964).

No jurisdiction where substantial compliance lacking. — Court never obtained jurisdiction to determine termination of parental rights petition where department of family services did not substantially comply with requirements for substitution of service by publication as set forth in rule. See TK v. Lee, 826 P.2d 237 (Wyo. 1992).

And defective affidavit prevents entry of legal judgment. — A court may not enter a legal judgment where the requirements for affidavit by publication are not met. National Supply Co. v. Chittim, 387 P.2d 1010 (Wyo. 1964).

Omission of statement required by subdivision (f) is fatal. — The requirements of subdivision (f) of this rule are admittedly minimum and any omission of statements which are requisite under it is fatal. National Supply Co. v. Chittim, 387 P.2d 1010 (Wyo. 1964).

Such as failure to aver defendant's address or that he could not be found. — Failure to include in the affidavit, required by subdivision (f), either a statement as to defendant's present address or that his address was unknown and could not with reasonable diligence be ascertained, was fatal and therefore prevented the trial court from securing jurisdiction of the defendant. National Supply Co. v. Chittim, 387 P.2d 1010 (Wyo. 1964).

Even where an affidavit states the last-known address of the defendant, it is deficient if it does not also state a present address or that the present address cannot be ascertained through due diligence. Such a deficiency deprives the district court of jurisdiction over the person to be served and prevents it from entering a valid and binding judgment. Goss v. Goss, 780 P.2d 306 (Wyo. 1989).

Affidavit merely stating last known address of defendant falls short of stating a present known address. Emery v. Emery, 404 P.2d 745 (Wyo. 1965).

And deficiencies in affidavit are not cured by proving another set of circumstances than those alleged by affiant. National Supply Co. v. Chittim, 387 P.2d 1010 (Wyo. 1964).

Likewise, failure of notice to state date for answering is fatal. — Failure to comply with subdivision (g), by not stating in the notice of publication the proper date by which the defendant was required to answer service, was fatal, regardless of the fact that Rule 12(a) required an answer within 30 days after the last day of publication. National Supply Co. v. Chittim, 387 P.2d 1010 (Wyo. 1964).

Affidavit required under last paragraph of subdivision (f) can be made by plaintiff. Emery v. Emery, 404 P.2d 745 (Wyo. 1965).

Or it can be made by his attorney. Emery v. Emery, 404 P.2d 745 (Wyo. 1965).

It cannot, however, be made by one for the other. Emery v. Emery, 404 P.2d 745 (Wyo. 1965); Duncan v. Duncan, 776 P.2d 758 (Wyo. 1989).

VII. PUBLICATION OF NOTICE.

Attorney for litigant is responsible for strict compliance with subdivision (g) and cannot transfer any blame for noncompliance to either the publisher, who is in his employ, or the clerk, who is under the court's regulation. National Supply Co. v. Chittim, 387 P.2d 1010 (Wyo. 1964).

VIII. OTHER SERVICE.

There is nothing in § 1-6-111 which eliminates the requirement for requesting return receipt signed by addressee only. Oedekoven v. Oedekoven, 475 P.2d 307 (Wyo. 1970).

"Constructive service" in parental termination proceeding. — "Constructive service," as applied in § 14-2-313(b) in parental termination proceedings, includes service by publication under subdivision (e) of this rule, and service for out-of-state residents under subdivision (l). A petitioner has the right to use Rule 4 service of process, however, only if procedural requirements delineated in the rule are accurately followed. Therefore, a petitioner's failure to properly conform to subdivision (l)(2) when serving an out-of-state mother by registered mail in a termination proceeding constituted inadequate service of process. WR v. Lee, 825 P.2d 369 (Wyo. 1992).

IX. RETURN; PROOF OF SERVICE.

No presumption attaches to sheriff's return to shift burden of proof. — The party asserting the validity of a service of process bears the burden of proof, and no presumption attaches to a sheriff's return of process in the case of substituted service, to shift the burden. Crotteau v. Irvine, 656 P.2d 1166 (Wyo. 1983).

Am. Jur. 2d, ALR and C.J.S. references. — Civil liability of one making false or fraudulent return of process, 31 ALR3d 1393.

Rule 5. Serving and filing pleadings and other papers.

(a) *Service: When required.* —

(1) *In General.* — Unless these rules provide otherwise, each of the following papers must be served on every party:

(A) an order stating that service is required;

(B) a pleading filed after the original complaint, unless the court orders otherwise under Rule 5(c) because there are numerous defendants;

(C) a discovery paper required to be served on a party, unless the court orders otherwise;

(D) a written motion, except one that may be heard ex parte; and

(E) a written notice, appearance, demand, or offer of judgment, or any similar paper.

(2) *If a Party Fails to Appear.* — No service is required on a party who is in default for failing to appear. But a pleading that asserts a new claim for relief against such a party must be served on that party under Rule 4.

(3) *Seizing Property.* — If an action is begun by seizing property and no person is or need be named as a defendant, any service required before the filing of an appearance, answer, or claim must be made on the person who had custody or possession of the property when it was seized.

(b) *Service: How made.* —

(1) *Serving an Attorney.* — If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) *Service in General.* — A paper is served under this rule by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address-in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person has no known address;

(E) sending it by electronic means if the person consented in writing-in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or

(F) delivering it by any other means that the person consented to in writing-in which event service is complete when the person making service delivers it to the agency designated to make delivery.

(c) *Serving numerous defendants.* —

(1) *In General.* — If an action involves an unusually large number of defendants, the court may, on motion or on its own, order that:

(A) defendants' pleadings and replies to them need not be served on other defendants;

(B) any crossclaim, counterclaim, avoidance, or affirmative defense in those pleadings and replies to them will be treated as denied or avoided by all other parties; and

(C) filing any such pleading and serving it on the plaintiff constitutes notice of the pleading to all parties.

(2) *Notifying Parties.* — A copy of every such order must be served on the parties as the court directs.

(d) *Filing.* —

(1) *Required Filings; Certificate of Service.* — Any paper after the complaint that is required to be served —together with a certificate of service — must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission. A notice of discovery proceedings may be filed concurrently with service of discovery papers to demonstrate substantial and bona fide action of record to avoid dismissal for lack of prosecution.

(2) *How Filing Is Made — In General.* — A paper is filed by delivering it:

(A) to the clerk of court; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) *Acceptance by the Clerk.* — The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local practice, except the clerk may refuse to file a paper that obviously does not comply with the Rules Governing Redactions from Court Records. See Rule 7, Rules Governing Redactions from Court Records.

(e) *Filing with the court defined.* — Papers may be filed, signed, or verified by electronic means (including but not limited to email) if the necessary equipment is available to the clerk. No documents shall be transmitted to the court by facsimile or electronic means for filing without prior telephonic notification to the clerk of court. Only under emergency circumstances shall documents be filed by electronic means (including but not limited to email) or facsimile transmission. Any paper filed by

electronic means must be followed by an identical signed or otherwise duly executed original, or copy of any electronic transmission other than facsimile transmission, together with the fee as set forth in the Rules For Fees and Costs For District Court or the Rules For Fees and Costs For Circuit Court, mailed within 24 hours of the electronic transmission. The clerk upon receiving the original or copy shall note its date of actual delivery, and shall replace the facsimile or other electronic transmission in the court file. A paper filed by electronic means in compliance with this rule constitutes a written paper for the purpose of applying these rules. No document which exceeds ten (10) pages in length may be filed by facsimile or electronic means. All format requirements contained in applicable rules must be followed. The court may reject any paper filed not in compliance with this rule.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 5 of the Federal Rules of Civil Procedure.

The 2005 amendment rewrote (e).

Liberality in service intentional. — Any liberality in service permitted by subdivision (b) was effected intentionally. Patterson v. Maher, 450 P.2d 1005 (Wyo. 1969).

Filing does not effect service. — While service required by the rules can be made under subdivision (b) by delivery of the requisite copy to the clerk for service, the filing of such a paper with the court does not, without more, effect service. Patterson v. Maher, 450 P.2d 1005 (Wyo. 1969).

Violation of due process. — In a divorce case, a wife's due process rights under Wyo. Const. art. I, § 6 and the Fourteenth Amendment were violated when a district court entered a default divorce decree based on a supplemental pleading that was not served on the wife; a wife's motion to modify the decree should have been granted because the supplemental affidavit contained claims for relief that were not in the original complaint. Bradley v. Bradley, 118 P.3d 984 (Wyo. 2005).

There is no valid reason why service cannot be made concurrently with filing. — There may be some exception but it should not exist except in rare instances. First Nat'l Bank v. Bonham, 559 P.2d 42 (Wyo. 1977).

Time for response to motion. — Pursuant to subdivision (b), service by mail is complete when a motion has been put in the mail; thus, service of the wife's motion was complete on November 25, 1991, when she placed copies of the notice, her affidavit, and the motion into the mail to the husband's attorney of record. The husband had 23 days thereafter to serve a response. Since the day of mailing is excluded pursuant to Rule 6(a), W.R.C.P., the response time began to run on November 26, 1991, and the husband should have responded to the motion no later than December 18, 1991. Smith v. Robinson, 912 P.2d 527 (Wyo. 1996).

Subdivision (b) is the federal rule, modified by permitting service upon the clerk in all cases. Patterson v. Maher, 450 P.2d 1005 (Wyo. 1969).

And clerk to mail or deliver service. — This rule is unique in requiring that copies deposited with the clerk shall be promptly mailed or delivered by him to the attorney of the party entitled thereto, or to the party if he has no attorney of record. Patterson v. Maher, 450 P.2d 1005 (Wyo. 1969).

Notice served upon party, not attorney, unconstitutional. — A trial-setting notice in a divorce action served upon a party, but not upon the party's attorney, violates this rule and does not satisfy the requirements of constitutional due process. Loghry v. Loghry, 920 P.2d 664 (Wyo. 1996).

Landowner not in default if he fails to file pleadings in condemnation proceedings. — By the very nature of the condemnation proceedings, the parties whose property is taken may expect a proper award even though they made no appearance, and they cannot fairly be said to be in default because they file no pleadings. State ex rel. Frederick v. District Court, 399 P.2d 583 (Wyo. 1965).

Sufficient to present affidavits to court at commencement of summary judgment hearing. — In the absence of local written rules providing otherwise, when affidavits have been served in compliance with the general rule requirement, concurrent presentation to the court at the commencement of the scheduled hearing on a motion for summary judgment under the purview of Rule 56 is sufficient, so that the text of the affidavits will be considered by the trial court in order to determine whether there are specific facts showing that there is a genuine issue for trial. Nation v. Nation, 715 P.2d 198 (Wyo. 1986).

Motion "filed" where forwarded to trial judge well before hearing and opponents informed. — Where a motion is forwarded to the trial judge well before the hearing on the motion and the opponents are informed of and prepared to contest the motion, the required "filing" has taken place, even though the judge has not sent the motion to the clerk for filing. Eddy v. First Wyo. Bank, 713 P.2d 228 (Wyo. 1986).

Failure of attorney to withdraw. — Since provision for special appearance to contest jurisdiction no longer exists under Wyoming

Rules of Civil Procedure, once respondent's attorney filed written appearance he appeared for all purposes and could not withdraw without court approval, and since respondent was still represented, service of notice upon that attorney was proper. CRB v. Department of Family Servs., 974 P.2d 931 (Wyo. 1999).

Applied in Tschirgi v. Meyer, 536 P.2d 558 (Wyo. 1975); Miller v. State, 560 P.2d 739 (Wyo. 1977); LP v. Natrona County Dep't of Pub. Assistance & Social Servs., 679 P.2d 976 (Wyo. 1984); Teton v. Teton, 933 P.2d 1130 (Wyo. 1997).

Stated in Clenin v. State, 573 P.2d 844 (Wyo. 1978).

Cited in Reese v. Bruegger Ranches, Inc., 463 P.2d 23 (Wyo. 1969); Linde v. Bentley, 482 P.2d 121 (Wyo. 1971); Boller v. Key Bank, 829 P.2d 260 (Wyo. 1992); Pawlowski v. Pawlowski, 925 P.2d 240 (Wyo. 1996); Beaulieu v. Florquist, 20 P.3d 521 (Wyo. 2001); Humphrey v. State, 185 P.3d 1236 (Wyo. 2008).

Law reviews. — For article, "Wyoming Practice," see 12 Wyo. L.J. 202 (1958).

For case note, "Appeal and Error—The Omnipotent Wyoming Supreme Court: New Allegations and Evidence Will Be Heard for the First Time on Appeal. Boller v. Western Law Associates, 828 P.2d 1184 (Wyo. 1992)," see XXVIII Land & Water L. Rev. 677 (1993).

Am. Jur. 2d, ALR and C.J.S. references. — 56 Am. Jur. 2d Motions, Rules, and Orders § 1 et seq.; 61A Am. Jur. 2d Pleading § 1 et seq.

Construction of phrase "usual place of abode," or similar terms referring to abode, residence, or domicile, as used in statutes relating to service of process, 32 ALR3d 112.

60 C.J.S. Motions and Orders §§ 11, 13 to 19; 71 C.J.S. Pleading §§ 576 to 583.

Rule 5.1. Constitutional challenge to a statute.

When the constitutionality of a Wyoming statute is drawn in question in any action to which the state or an officer, agency, or employee thereof is not a party, the party raising the constitutional issue shall serve the attorney general with a copy of the pleading or motion raising the issue.

(Added February 2, 2017, effective March 1, 2017.)

Rule 5.2. Privacy protection for filings made with the court.

Unless otherwise ordered by the court, all documents filed with the court shall comply with the Rules Governing Redactions from Court Records and Rules Governing Access to Court Records.

(Added February 2, 2017, effective March 1, 2017.)

Rule 6. Time.

(a) *Computation.* — In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statutes, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper, a day on which weather or other conditions have made the office of the clerk of the court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. As used in this rule, "legal holiday" includes any day officially recognized as a legal holiday in this state by designation of the legislature, appointment as a holiday by the governor or the chief justice of the Wyoming Supreme Court, or any day designated as such by local officials.

(b) *Extending Time.* —

(1) *In General.* — When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court, or a commissioner thereof, may for good cause and in its discretion:

(A) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or

(B) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect;

(2) *Exceptions.* — A court may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.

(3) *By Clerk of Court.* — A motion served before the expiration of the time limitations set forth by these rules for an extension of time of not more than 15 days within which to answer or move to dismiss the complaint, or answer, respond or object to discovery under Rules 33, 34, and 36, if accompanied by a statement setting forth:

(A) the specific reasons for the request,

(B) that the motion is timely filed,

(C) that the extension will not conflict with any scheduling or other order of the court, and

(D) that there has been no prior extension of time granted with respect to the matter in question may be granted once by the clerk of court, ex parte and routinely, subject to the right of the opposing party to move to set aside the order so extending time. Motions for further extensions of time with respect to matters extended by the clerk shall be presented to the court, or a commissioner thereof, for determination.

(c) *Motions and motion practice.* —

(1) *In General.* — Unless these rules or an order of the court establish time limitations other than those contained herein, all motions shall be served at least 14 days before the hearing on the motion, with the following exceptions:

(A) motions for enlargement of time;

(B) motions made during hearing or trial;

(C) motions which may be heard ex parte; and

(D) motions described in subdivisions (5) and (6) below, together with supporting affidavits, if any.

(2) *Responses.* — Except as otherwise provided in Rule 59(c), or unless the court by order permits service at some other time, a party affected by the motion may serve a response, together with affidavits, if any, at least three days prior to the hearing on the motion or within 20 days after service of the motion, whichever is earlier.

(3) *Replies.* — Unless the court by order permits service at some other time, the moving party may serve a reply, if any, at least one day prior to the hearing on the motion or within 15 days after service of the response, whichever is earlier. Unless the court otherwise orders, any party may serve supplemental memoranda or rebuttal affidavits at least one day prior to the hearing on the motion.

(4) *Request for Hearing.* — A request for hearing may be served by the moving party or any party affected by the motion within 20 days after service of the motion. The court may, in its discretion, determine such motions without a hearing. Any motion, under Rules 50(b) and (c)(2), 52(b), 59 and 60(b), not determined within 90 days after filing shall be deemed denied unless, within that period, the determination is continued by order of the court, which continuation may not exceed 60 days, at which time, if the motion has not been determined, it shall be deemed denied.

(5) *Protective Orders and Motions to Compel.* — A party moving for a protective order under Rule 26(c) or to compel discovery under Rule 37(a) may request an immediate hearing thereon. An immediate hearing may be held if the court finds that a delay in determining the motion will cause undue prejudice, expense or inconvenience.

(6) *Motions in Limine.* — A motion relating to the exclusion of evidence may be filed at any time. Absent a request for hearing by a moving party or any party affected by the motion, the court may, in its discretion, determine the motion without a hearing.

(d) *Additional time after service by mail.* — Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party, and the notice or paper is served upon the party by mail or by delivery to the clerk for service, three days shall be added to the prescribed period, provided however, this rule shall not apply to service of process by registered or certified mail under Rule 4(r).
(Added February 2, 2017, effective March 1, 2017.)

Editor's note. — This rule is set out to correct a previous error in subdivision (c)(2).

Source. — This rule is similar to Rule 6 of the Federal Rules of Civil Procedure.

Cross References. — As to legal holidays, see § 8-4-101.

Subdivision (a) merely creates uniform rule for running of time periods. — An application of subdivision (a) does not enlarge the time periods provided for in § 1-3-107 but merely creates a uniform rule for determining when the time limit begins to run and when it ends. Olson v. Campbell County Mem. Hosp., 652 P.2d 1365 (Wyo. 1982).

Time for response to motion. — Pursuant to Rule 5(b), service by mail is complete when a motion has been put in the mail; thus, service of the wife's motion was complete on November 25, 1991, when she placed copies of the notice, her affidavit, and the motion into the mail to the husband's attorney of record. The husband had 23 days thereafter to serve a response. Since the day of mailing is excluded pursuant to subdivision (a), the response time began to run on November 26, 1991, and the husband should have responded to the motion no later than December 18, 1991. Smith v. Robinson, 912 P.2d 527 (Wyo. 1996).

The buyers' papers resisting the motion for summary judgment in the seller's replevin action were not filed in a timely manner under W.R.C.P. 56 and 6; therefore, the trial court properly struck the pleading and properly proceeded to hear argument on the seller's motion, leaving out of consideration the buyers' evidentiary materials and only considering the seller's evidentiary materials. Johnson v. Creager, 76 P.3d 799 (Wyo. 2003).

Motion for change of district judge. — Subdivision (a) makes no exception to cover the situation where a party moves for change of district judge. Meyer v. Meyer, 538 P.2d 293 (Wyo. 1975).

When subdivision (b) inapplicable. — Subdivision (b) is inapplicable where request is not made for extension before the period of expiration under Rule 25(a)(1), and there is no showing that failure to act was the result of excusable neglect. Marvel v. Neuman Transit Co., 414 P.2d 98 (Wyo. 1966).

Subsection (b) does not toll statute of limitations. — Where a corporation was served approximately 114 days after the complaint was filed, under Wyo. R. Civ. P. 3(b), the service was not timely, and the saving statute, Wyo. Stat. Ann. § 1-3-118 did not apply because the complaint was filed after the 4-year Wyo. Stat. Ann. § 1-3-105 statute of limitations had run. Furthermore, Wyo. R. Civ. P. 6(a) does not enlarge the time provided in a statute of limitations. Hoke v. Motel 6 Jackson & Accor N. Am., Inc., 131 P.3d 369 (Wyo. 2006).

Enlargement of time justified. — Enlargement of time for appeal was allowed, where summary judgment was entered against nonmovant after the passage of time when the motion was to be deemed denied, and clerical error on the part of the court resulted in failure to notify nonmovant of entry of the summary judgment order. Harris v. Taylor, 969 P.2d 142 (Wyo. 1998).

The plaintiff had more than enough time to provide responsive materials in opposition to defendant's motion for summary judgment, and the plaintiff failed to show either cause or excusable neglect sufficient to justify enlargement of time under subsection (b) for filing responsive materials. Weber v. McCoy, 950 P.2d 548 (Wyo. 1997).

District court properly denied patient's motion for enlargement of time pursuant to Wyo. R. Civ. P. 6(b), 56(f) in a medical malpractice action against a doctor, where the patient had over ten months in which to commence discovery and simply failed to take any action during the pendency of the matter to commence or complete discovery. Jacobson v. Cobbs, 160 P.3d 654 (Wyo. 2007).

Motion for continuance to complete discovery. — In negligence case, a court erred by denying plaintiffs' motion for a continuance of the summary judgment hearing and granting defendants' motion for summary judgment because the court scheduled the hearing before the deadline for discovery had passed, and therefore plaintiffs were deprived of due process. All of the proposed discovery materials clearly had a bearing on whether there were genuine issues of material fact and needed to be examined by plaintiffs' expert in order to rebut defendants' assertions with respect to spoliation of evidence. Abraham v. Great Western Energy, LLC, 101 P.3d 446 (Wyo. 2004).

Motion decided without a hearing. — Where a wife filed a complaint for divorce, where the husband in his answer stated that he did not object to the divorcing being awarded to the wife, where the wife moved for an emergency hearing six days later because she was in the hospital in critical condition and wanted the divorce finalized before she died, and where the district court entered a divorce decree

awarding a divorce to the wife and retaining jurisdiction to equitably divide the marital estate after efforts to schedule a hearing with the husband's attorney were unsuccessful, the district court did not err under Wyo. R. Civ. P. 6(c)(2), Wyo. R. Civ. P. 12, or Wyo. R. Civ. P. 56 and did not violate the husband's due process rights under U.S. Const. amend. XIV and Wyo. Const. art. 1, § 6, because the motion for an emergency hearing to award a divorce in a proceeding in which both parties had agreed that a divorce was appropriate was not a motion that would determine the final rights of either party. The final rights of the parties were left to be determined at a later date, and the husband would be afforded a full hearing prior to a determination of his final rights. Kelly v. Kilts, 243 P.3d 947 (Wyo. 2010).

Implicit in the order of forfeiture was the district court's denial of the property claimant's pending motions, as this rule authorized the court to rule on motions filed under Wyo. R. Civ. P. 12 without a hearing. Libretti v. State (In re United States Currency Totaling $7,209.00), 278 P.3d 234 (Wyo. 2012).

"Deemed denied" rule. — Appellate court assumed jurisdiction over an appeal of denial of postconviction relief although the district court declined to rule on the motion for over a year; the appeals court acknowledged that this rule provides for application of civil procedure rules where there is no rule of criminal procedure on point, but declined to apply the "deemed denied rule" of W.R.C.P. 6(c)(2). Patrick v. State, 108 P.3d 838 (Wyo. 2005).

Although a partition agreement differed from the statutory scheme of Wyo. Stat. Ann. § 1-32-104, the agreement was properly enforced under Wyo. R. Civ. P. 70 and Wyo. Stat. Ann. § 1-32-108 when a co-tenant failed to abide by agreement. The "deemed denied" rule of Wyo. R. Civ. P. 6(c)(2) did not divest district court of subject matter jurisdiction to enter partition order because no showing of error was made and the motion at issue was interlocutory so that the court retained jurisdiction to enter the order enforcing partition after the original motion was deemed denied. Bixler v. Oro Mgmt., L.L.C., 145 P.3d 1260 (Wyo. 2006).

Record did not contain the motion for findings, but the district court apparently did not rule on it and it was deemed denied, and the general standard of review was used. Gould v. Ochsner, — P.3d —, 2015 Wyo. LEXIS 117 (Wyo. 2015).

Dismissal of a former spouse's appeals of the denials of the spouse's motion for rehearing and motion to vacate a contempt order was appropriate because the appeals were not timely as the former spouse did not file notices of appeal within thirty days after the motions were deemed denied. Golden v. Guion, — P.3d —, 2016 Wyo. LEXIS 58 (Wyo. 2016).

Substantive claim waives procedural delay. — Where the record demonstrates that the defendant was entitled to judgment as a matter of law, his one-day delay to serve proper notice for a summary judgment motion was not cause for a trial remand because the matter would still have been decided in defendant's favor under a JNOV and would have resulted in a waste of adjudicative resources. Contreras ex rel. Contreras v. Carbon County Sch. Dist., 843 P.2d 589 (Wyo. 1992).

Timeliness of filings. — An order which rescheduled a hearing and was entered after the responsive documents were due does not extend the response period imposed by subsection (c)(1). Weber v. McCoy, 950 P.2d 548 (Wyo. 1997).

In a dispute over joint venture cattle operation, under Wyo. R. Civ. P. 56 and this provision, a trustee was required to serve a response to summary judgment motion within 20 days or to file a motion to enlarge the time, and an informal agreement between the parties did not constitute "excusable neglect" to allow enlargement of time without required motion. Platt v. Creighton, 150 P.3d 1194 (Wyo. 2007).

Failure to show prejudice. — Defendant failed to show any prejudice resulting from trial court's refusal to strike plaintiff's response to a motion to intervene filed later than 20 days after service of the motion; trial court may permit a response at a time other than that specified in this Rule, and has discretion in deciding whether or not to strike a party's response. American Family Ins. Co. v. Bowen, 959 P.2d 1199 (Wyo. 1998).

Answer not required after motion to dismiss deemed denied. — Subdivision (c)(2) does not demand the filing of an answer within 10 days after a motion to dismiss is deemed to have been denied to avoid the entry of a default. First S.W. Fin. Servs. v. Laird, 882 P.2d 1211 (Wyo. 1994).

Rule superseded by regulations. — The applicable statutes and regulations relating to actions against Department of Employment supersede W.R.C.P.6(d). Fullmer v. Wyoming Emp. Sec. Comm'n, 858 P.2d 1122 (Wyo. 1993).

Nonmoving party must receive notice of conversion. — Rule 56, W.R.C.P., in combination with Rule 6(c), W.R.C.P., establishes a general requirement that the nonmoving party receive 10 days' notice of conversion in order to file opposing matters (or seek a continuance under Rule 56(f), W.R.C.P). Alm v. Sowell, 899 P.2d 888 (Wyo. 1995).

Motion to dismiss was properly converted to a motion for summary judgment and the plaintiff received reasonable notice of the conversion where all issues in the present case were fully joined in a prior proceeding such that plaintiff was on notice of defendant's position. Alm v. Sowell, 899 P.2d 888 (Wyo. 1995).

Applied in Thomas v. Roth, 386 P.2d 926 (Wyo. 1963); Bowman v. Worland School Dist., 531 P.2d 889 (Wyo. 1975); Board of Trustees v. Spiegel, 549 P.2d 1161 (Wyo. 1976); Ferriter v.

Estate of Blaney, 607 P.2d 354 (Wyo. 1980); Randolph v. Hays, 665 P.2d 500 (Wyo. 1983); Dudley v. East Ridge Dev. Co., 694 P.2d 113 (Wyo. 1985); Harden v. Gregory Motors, 697 P.2d 283 (Wyo. 1985); Torrey v. Twiford, 713 P.2d 1160 (Wyo. 1986); Miller v. Murdock, 788 P.2d 614 (Wyo. 1990); Sandstrom v. Sandstrom, 880 P.2d 103 (Wyo. 1994); Ruwart v. Wagner, 880 P.2d 586 (Wyo. 1994); Rawlinson v. Wallerich, 132 P.3d 204 (Wyo. 2006).

Quoted in Urich v. Fox, 687 P.2d 893 (Wyo. 1984); Storseth v. Brown, Raymond & Rissler, 805 P.2d 284 (Wyo. 1991); N. Arapaho Tribe v. State (In re SNK), 108 P.3d 836 (Wyo. 2005).

Stated in Steiger v. Happy Valley Homeowners Ass'n, 245 P.3d 269 (Wyo. 2010).

Cited in In re Estate of Brennan, 433 P.2d 512 (Wyo. 1967); Gladstone Hotel, Inc. v. Smith, 487 P.2d 329 (Wyo. 1971); Sellers v. Employment Sec. Comm'n, 760 P.2d 394 (Wyo. 1988); Barron v. Barron, 834 P.2d 685 (Wyo. 1992); Moore v. Lubnau, 855 P.2d 1245 (Wyo. 1993); Sandstrom v. Sandstrom, 884 P.2d 968 (Wyo. 1994); Pawlowski v. Pawlowski, 925 P.2d 240 (Wyo. 1996); Bird v. Rozier, 948 P.2d 888 (Wyo. 1997); Wesaw v. Quality Maintenance, 19 P.3d 500 (Wyo. 2001); DH v. Wyo. Dep't of Family Servs. (In re 'H' Children), 79 P.3d 997 (Wyo. 2003); Paxton Res., L.L.C. v. Brannaman, 95 P.3d 796 (Wyo. 2004); Befumo v. Johnson, 119 P.3d 936 (Wyo. 2005); Merchant v. Gray, 173 P.3d 410 (Wyo. 2007).

Law reviews. — For article, "Wyoming Practice," see 12 Wyo. L.J. 202 (1958).

Am. Jur. 2d, ALR and C.J.S. references. — 56 Am. Jur. 2d Motions, Rules, and Orders §§ 8, 16; 58 Am. Jur. 2d Notice §§ 34 to 36, 46; 62B Am. Jur. 2d Process §§ 114 to 125, 227 to 229; 74 Am. Jur. 2d Time § 1 et seq.

Vacating judgment or granting new trial in civil case, consent as ground of after expiration of term or time prescribed by statute or rules of court, 3 ALR3d 1191.

Necessity and propriety of counter-affidavits in opposition to motion for new trial in civil case, 7 ALR3d 1000.

When medical expense incurred under policy providing for payment of expenses incurred within fixed period of time from date of injury, 10 ALR3d 468.

Attorney's inaction as excuse for failure to timely prosecute action, 15 ALR3d 674.

What circumstances excuse failure to submit will for probate within time limit set by statute, 17 ALR3d 1361.

Construction and effect of contractual or statutory provisions fixing time within which arbitration award must be made, 56 ALR3d 815.

Extension of time within which spouse may elect to accept or renounce will, 59 ALR3d 767.

Validity of service of summons or complaint on Sunday or holiday, 63 ALR3d 423.

When is office of clerk of court inaccessible due to weather or other conditions for purpose of computing time period for filing papers under Rule 6(a) of Federal Rules of Civil Procedure, 135 ALR Fed 259.

60 C.J.S. Motions and Orders §§ 8, 18, 28; 66 C.J.S. Notice § 27; 71 C.J.S. Pleading §§ 109, 168 to 172, 240 to 242; 72 C.J.S. Process §§ 41, 55; 86 C.J.S. Time § 1 et seq.

III. PLEADINGS AND MOTIONS

Rule 7. Pleadings allowed; form of motions and other papers.

(a) *Pleadings.* — Only these pleadings are allowed:

(1) a complaint;

(2) an answer to a complaint;

(3) an answer to a counterclaim designated as a counterclaim;

(4) an answer to a crossclaim;

(5) a third-party complaint;

(6) an answer to a third-party complaint; and

(7) if the court orders one, a reply to an answer.

(b) *Motions and Other Papers.* —

(1) *In General.* — A request for a court order must be made by motion. The motion must:

(A) be in writing unless made during a hearing or trial;

(B) state with particularity the grounds for seeking the order; and

(C) state the relief sought.

(2) The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion. All motions filed pursuant to Rules 12 and 56 shall, and all other motions may, contain or be accompanied by a memorandum of points and authority.

(3) *Form.* — The rules governing captions and other matters of form in pleadings apply to motions and other papers.

(4) All motions shall be signed in accordance with Rule 11.

(c) *Demurrers, pleas, etc. abolished.* — Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 7 of the Federal Rules of Civil Procedure.

Cross References. — As to amended and supplemental pleadings, see Rule 15. As to inadmissibility of evidence on withdrawn pleadings, see Rule 410, W.R.E. As to petition in action to recover realty, see § 1-32-202.

Purpose of rule. — The philosophy that parties who are given the capacity to present their entire controversies should in fact do so is embodied in Rules 7, 8 and 13. Lane Co. v. Busch Dev., Inc., 662 P.2d 419 (Wyo. 1983).

Motion for summary judgment. — In considering subdivision (a), which requires an answer, together with Rule 56(c), a cause need not be at issue before summary judgment may be granted, since Rule 56(b) clearly provides that a party against whom a claim is asserted may, at any time, move for a summary judgment in his favor. Ford v. Madia, 480 P.2d 101 (Wyo. 1971).

Supporting affidavit in lieu of answer. — A defendant's supporting affidavit of a motion for summary judgment may be considered in place of an answer required by subdivision (a). Ford v. Madia, 480 P.2d 101 (Wyo. 1971).

Gross negligence or willful and wanton misconduct. — The plaintiff is not required to plead gross negligence or willful and wanton misconduct unless required by the court to reply. Knudson v. Hilzer, 551 P.2d 680 (Wyo. 1976).

Failure to file motion for court appointed attorney. — The father's failure to file a motion for a court appointed attorney was not the result of his inability to understand the procedural requirement where he filed several other motions in the case. In interest of KMM, 957 P.2d 296 (Wyo. 1998).

Stated in Koontz v. Town of South Superior, 716 P.2d 358 (Wyo. 1986).

Cited in Langdon v. Aetna Life Ins. Co., 640 P.2d 1092 (Wyo. 1982); DB v. State, Dep't of Family Servs., 860 P.2d 1140 (Wyo. 1993).

Law reviews. — For article, "Pleading Under the Federal Rules," see 12 Wyo. L.J. 177 (1958).

Am. Jur. 2d, ALR and C.J.S. references. — 61 Am. Jur. 2d Pleading § 1 et seq.

Independent venue requirements as to cross-complaint or similar action by defendant seeking relief against a codefendant or third party, 100 ALR2d 693.

Proceeding for summary judgment as affected by presentation of counterclaim, 8 ALR3d 1361.

Right to voluntary dismissal of civil action as affected by opponent's motion for summary judgment, judgment on the pleadings or directed verdict, 36 ALR3d 1113.

Appealability of order dismissing counterclaim, 86 ALR3d 944.

Dismissal of state court action for plaintiff's failure or refusal to obey court order relating to pleadings or parties, 3 ALR5th 237.

60 C.J.S. Motions and Orders § 10; 71 C.J.S. Pleading §§ 94 to 229, 591 to 762.

Rule 8. General rules of pleading.

(a) *Claims for Relief.* — A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

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

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

(b) *Defenses; Admissions and Denials.* —

(1) *In General.* — In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

(2) *Denials — Responding to the Substance.* — A denial must fairly respond to the substance of the allegation.

(3) *General and Specific Denials.* — A party that intends in good faith to deny all the allegations of a pleading — including the jurisdictional grounds — may do so by

a general denial subject to the obligations set forth in Rule 11. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.

(4) *Denying Part of an Allegation.* — A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

(5) *Lacking Knowledge or Information.* — A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.

(6) *Effect of Failing to Deny.* — An allegation — other than one relating to the amount of damages — is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(c) *Affirmative Defenses.* —

(1) *In General.* — In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

accord and satisfaction;
arbitration and award;
assumption of risk;
contributory negligence;
duress;
discharge in bankruptcy;
estoppel;
failure of consideration;
fraud;
illegality;
injury by fellow servant;
laches;
license;
payment;
release;
res judicata;
statute of frauds;
statute of limitations; and
waiver.

(2) *Mistaken Designation.* — If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

(d) *Pleading to be Concise and Direct; Alternative Statements; Inconsistency.* —

(1) *In General.* — Each allegation must be simple, concise, and direct. No technical form is required.

(2) *Alternative Statements of a Claim or Defense.* — A party may set out two or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) *Inconsistent Claims or Defenses.* — A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) *Construing Pleadings.* — Pleadings must be construed so as to do justice.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 8 of the Federal Rules of Civil Procedure.

Cross References. — As to admissions gen-

erally, see Rule 36. As to binding of partnership by admission of partner, see § 17-21-301.

I. GENERAL CONSIDERATION.

Purpose of rule. — The philosophy that parties who are given the capacity to present their entire controversies should in fact do so is embodied in Rules 7, 8 and 13. Lane Co. v. Busch Dev., Inc., 662 P.2d 419 (Wyo. 1983).

Defense not waived by filing answer. — In a parental termination proceeding, a parent did not waive her defense to the agency's inadequate service of process by filing an answer where she had already appropriately attacked the inadequate service with a defensive motion to dismiss under Rule 12(b). WR v. Lee, 825 P.2d 369 (Wyo. 1992).

Five-step procedure for sua sponte motion to dismiss. — In order for a court to dismiss a complaint sua sponte, the following five-step procedure must be followed: (1) allow service of the complaint upon the defendant; (2) notify all parties of the court's intent to dismiss the complaint; (3) give the plaintiff a chance to either amend his complaint or respond to the reasons stated by the district court in its notice of intended sua sponte dismissal; (4) give the defendant a chance to respond or file an answer or motions; and (5) if the claim is dismissed, state the court's reasons for the dismissal. Osborn v. Emporium Videos, 848 P.2d 237 (Wyo. 1993), aff'd 870 P.2d 382 (Wyo. 1994).

Rules 8 and 9 to be read in conjunction. — The particularity requirement of Rule 9(b), W.R.C.P., does not render the general principles of Rule 8, W.R.C.P., inapplicable; instead, the two rules are read in conjunction to create a proper balance. Osborn v. Emporium Videos, 848 P.2d 237 (Wyo. 1993), aff'd 870 P.2d 382 (Wyo. 1994).

Applied in Pangarova v. Nichols, 419 P.2d 688 (Wyo. 1966); Weber v. Johnston Fuel Liners, Inc., 540 P.2d 535 (Wyo. 1975); Knudson v. Hilzer, 551 P.2d 680 (Wyo. 1976); Williams v. Weber Mesa Ditch Extension Co., 572 P.2d 412 (Wyo. 1977); Central Contractors Co. v. Paradise Valley Util. Co., 634 P.2d 346 (Wyo. 1981); Osborn v. Warner, 694 P.2d 730 (Wyo. 1985); Fiscus v. Atlantic Richfield Co., 742 P.2d 198 (Wyo. 1987); Osborn v. Manning, 812 P.2d 545 (Wyo. 1991); Morris v. Kadrmas, 812 P.2d 549 (Wyo. 1991); Triton Coal Co. v. Husman, Inc., 846 P.2d 664 (Wyo. 1993); Foianini v. Brinton, 855 P.2d 1238 (Wyo. 1993); Darrar v. Bourke, 910 P.2d 572 (Wyo. 1996).

Quoted in Boller v. Western Law Assocs., 828 P.2d 1184 (Wyo. 1992).

Stated in Duke v. Housen, 589 P.2d 334 (Wyo. 1979); Young v. Hawks, 624 P.2d 235 (Wyo. 1981); Western Nat'l Bank v. Moncur, 624 P.2d 765 (Wyo. 1981); Warren v. Hart, 747 P.2d 511 (Wyo. 1987).

Cited in Carter v. Davison, 359 P.2d 990 (Wyo. 1961); Oil Workers, Local 2-230 v. Great Lakes Carbon Corp., 376 P.2d 640 (Wyo. 1962); State ex rel. Pearson v. Hansen, 401 P.2d 954 (Wyo. 1965); Richardson Assocs. v. Lincoln-Devore, Inc., 806 P.2d 790 (Wyo. 1991); Jackson State Bank v. Homar, 837 P.2d 1081 (Wyo. 1992); Bredthauer v. TSP, 864 P.2d 442 (Wyo. 1993); RKS v. SDM ex rel. TY, 882 P.2d 1217 (Wyo. 1994); Martinez v. Associates Fin. Servs. Co., 891 P.2d 785 (Wyo. 1995); Cheyenne Publ., LLC v. Starostka, 94 P.3d 463 (Wyo. 2004); BB v. RSR, 149 P.3d 727 (Wyo. 2007); William F. West Ranch, LLC v. Tyrrell, 206 P.3d 722 (Wyo. 2009); Braunstein v. Robinson Family Ltd. P'ship LLP, 226 P.3d 826 (Wyo. 2010).

Law reviews. — For article, "Pleading Under the Federal Rules," see 12 Wyo. L.J. 177 (1958).

For note, "Pleading Negligence," see 12 Wyo. L.J. 257 (1958).

For comment, "Procedural Considerations in the Judicial Determination of Water Disputes," see VIII Land & Water L. Rev. 513 (1974).

For comment, "Comparative Negligence in Wyoming," see VIII Land & Water L. Rev. 597 (1974).

For article, "An Essay on Wyoming Constitutional Interpretation," see XXI Land & Water L. Rev. 527 (1986).

For article, "Lender Liability in Wyoming," see XXVI Land & Water L. Rev. 707 (1991).

For case note, "Appeal and Error—The Omnipotent Wyoming Supreme Court: New Allegations and Evidence Will Be Heard for the First Time on Appeal. Boller v. Western Law Associates, 828 P.2d 1184 (Wyo. 1992)," see XXVIII Land & Water L. Rev. 677 (1993).

For article, "Collecting Debt in Wyoming: The Fair Debt Collection Practices Act as a Trap for the Unwary," see XXXI Land & Water L. Rev. 731 (1996).

Am. Jur. 2d, ALR and C.J.S. references. — 61A Am. Jur. 2d Pleading § 1 et seq.; 61B Am. Jur. 2d Pleading § 789 et seq.

Right to voluntary dismissal of civil action as affected by opponent's motion for summary judgment, judgment on the pleadings, or directed verdict, 36 ALR3d 1113.

Power of court sitting as trier of fact to dismiss at close of plaintiff's evidence notwithstanding plaintiff has made out prima facie case, 55 ALR3d 272.

Right to amend pending personal injury action by including action for wrongful death after statute of limitations has run against independent death action, 71 ALR3d 933.

Validity of release of prospective right to wrongful death action, 92 ALR3d 1232.

Judgment in death action as precluding sub-

sequent personal injury action by potential beneficiary of death action, or vice versa, 94 ALR3d 676.

Simultaneous injury to person and property as giving rise to single cause of action — modern cases, 24 ALR4th 646.

71 C.J.S. Pleading §§ 1 to 93.

II. CLAIMS FOR RELIEF.

Pleader need only interpose a short and plain statement of the claim showing that the pleader is entitled to relief. Guggenmos v. Tom Searl-Frank McCue, Inc., 481 P.2d 48 (Wyo. 1971).

Pleading should give notice of what an adverse party may expect. Watts v. Holmes, 386 P.2d 718 (Wyo. 1963).

Plaintiff need only plead the operative facts involved in the litigation so as to give fair notice of the claim to the defendant. Johnson v. Aetna Cas. & Sur. Co., 608 P.2d 1299 (Wyo. 1980), appeal dismissed and cert. denied, 454 U.S. 1118, 102 S. Ct. 961, 71 L. Ed. 2d 105 (1981).

May plead facts or legal conclusions. — It is clear from an examination of the official forms of pleading that this rule does not prohibit the pleading of facts or legal conclusions as long as fair notice is given to the parties. Guggenmos v. Tom Searl-Frank McCue, Inc., 481 P.2d 48 (Wyo. 1971).

Alternative pleading permissible. — A complaint may include alternative, independent claims, as long as the factual allegations articulate the essential elements of the claims. Roussalis v. Apollo Elec. Co., 979 P.2d 503 (Wyo. 1999).

Allegation that the defendant acted maliciously and without probable cause is sufficient in a complaint for malicious prosecution, without alleging facts constituting want of probable cause. Torrey v. Twiford, 713 P.2d 1160 (Wyo. 1986).

Fair notice basis of specificity standard. — Whether the specificity standard has been satisfied has to be determined in terms of whether the pleadings give fair notice to the opposing party and not whether it contains conclusions. Harris v. Grizzle, 599 P.2d 580 (Wyo. 1979); Washakie County Sch. Dist. No. One v. Herschler, 606 P.2d 310 (Wyo.), cert. denied, 449 U.S. 824, 101 S. Ct. 86, 66 L. Ed. 2d 28 (1980).

In a father's action for modification of custody, the father's general allegation that the conditions surrounding the child and the parties had materially changed was sufficient under this section to apprise the mother of the nature of the claim against her. BB v. RSR, 149 P.3d 727 (Wyo. 2007).

But complaint must show more than suspicion of right to relief. — A complaint must state something more than facts which, at most, would create only suspicion the plaintiff has a right to relief. Sump v. City of Sheridan, 358 P.2d 637, rehearing denied, 359 P.2d 1008 (Wyo. 1961).

As must plead nature and basis of relief. — The simplification of pleadings under the rules, specifically subdivision (a), cannot be taken to eliminate the necessity of stating in clear terms the nature and basis of the relief sought. Kearney Lake, Land & Reservoir Co. v. Lake DeSmet Reservoir Co., 475 P.2d 548 (Wyo. 1970).

Liberality does not go so far as to excuse omission of that which is material and necessary in order to entitle relief. Sump v. City of Sheridan, 358 P.2d 637, rehearing denied, 359 P.2d 1008 (Wyo. 1961).

Irrespective of any views that may be taken for procedural reform, a complaint still must show that the pleader has a claim on which he is entitled to relief. Watts v. Holmes, 386 P.2d 718 (Wyo. 1963).

Or subject to motion to dismiss. — If plaintiff should fail to allege by issuable facts a claim for relief under this rule, the complaint is subject to a motion to dismiss on that ground. Bondurant v. Board of Trustees, 354 P.2d 219 (Wyo. 1960).

And issues should be formulated through deposition-discovery processes and pretrial hearings. Watts v. Holmes, 386 P.2d 718 (Wyo. 1963).

Pleading may fairly give notice of strict liability claim without containing key phrases like "strict liability," or "Restatement, Second, Torts, § 402A" to give such notice. Ogle v. Caterpillar Tractor Co., 716 P.2d 334 (Wyo. 1986).

That particulars of negligence need not be set forth is especially true where the facts lie more properly in the knowledge of the adverse party. Harris v. Grizzle, 599 P.2d 580 (Wyo. 1979).

Conclusory allegations as to negligence are permissible. Harris v. Grizzle, 599 P.2d 580 (Wyo. 1979).

Court will not separate complaint into separate causes of action. — Where a complaint purports to set forth as a basis for damages separate causes of action, but throws together a galaxy of acts without any effort to isolate them as to each cause and party, the court will not try and run such a pleading through a separation process to translate it into the simplified form contemplated by the rule. Kimbley v. City of Green River, 663 P.2d 871 (Wyo. 1983).

Essentials of wrongful death complaint are: (1) the plaintiff's capacity to sue as personal representative of the deceased; (2) that the plaintiffs are the persons entitled by statute to damages; (3) that plaintiffs allege sufficient facts to show in what particular the defendant or defendants were negligent; (4) that the defendants' negligence was the proximate cause of death; and (5) damages. Harris v. Grizzle, 599 P.2d 580 (Wyo. 1979).

Complaint that corporate directors diverted funds raises issue as to reasonableness of salaries. — In a stockholder's derivative action, the fact that the defendants-directors had voted themselves salary increases, as well as the reasonableness of such compensation, lay properly within the knowledge of the directors. The plaintiff-stockholder complained that the directors had breached their fiduciary obligations by diverting funds from the corporation to its detriment. This allegation sufficed to inform the defendants that an issue existed as to the reasonableness of the executive salaries. Lynch v. Patterson, 701 P.2d 1126 (Wyo. 1985).

Pleading must set out definite amount of damages. — In order to allege facts sufficient to constitute a cause of action a pleading normally must set out the amount of damages sustained in a definite amount or afford a basis on which they may be estimated. White v. Fisher, 689 P.2d 102 (Wyo. 1984).

Unless special damages. — There is no requirement that a personal injury and wrongful death complaint must state a dollar amount as alleged special damages or demand special damages in a sum certain as judgment. Melehes v. Wilson, 774 P.2d 573 (Wyo. 1989).

Counterclaim alleging misrepresentation sufficient to provide notice to opposing party of claim. — See Blanton v. FDIC, 706 P.2d 1111 (Wyo. 1985).

Am. Jur. 2d, ALR and C.J.S. references. — Presenting of counterclaim as affecting summary judgment, 8 ALR3d 1361.

Pleading liability for injury to customer from object projecting into aisle or passageway in store, 40 ALR5th 135.

III. DEFENSES; FORM OF DENIALS.

IV. AFFIRMATIVE DEFENSES.

Vulnerability of complaint containing built-in defense. — Subdivision (c) provides that "injury by fellow servant" is an affirmative defense, and it is generally recognized that a complaint containing a built-in defense is vulnerable to a motion to dismiss. Vossler v. Peterson, 480 P.2d 393 (Wyo. 1971).

An identifying criterion of an affirmative defense is one in avoidance, or stated alternatively, a direct or implicit admission of plaintiff's claim and assertion of other facts which would defeat a right to recovery. Texas Gulf Sulphur Co. v. Robles, 511 P.2d 963 (Wyo. 1973).

As burden of proof is upon one asserting an affirmative defense. Texas Gulf Sulphur Co. v. Robles, 511 P.2d 963 (Wyo. 1973); Younglove v. Graham & Hill, 526 P.2d 689 (Wyo. 1974).

Failure to object to proffered evidence on matter not in issue constitutes waiver of defect. — When defendant in his answer fails to plead contributory negligence as an affirmative defense in accordance with this rule, plaintiff must still remember that a failure to object to defendant's proffered evidence on the issue at trial constitutes a waiver of the defect. Porter v. Wilson, 357 P.2d 309 (Wyo. 1960).

Accord and satisfaction is an affirmative defense with the burden of proof upon the party asserting it. Texas Gulf Sulphur Co. v. Robles, 511 P.2d 963 (Wyo. 1973).

Arbitration and award. — It is only when arbitration has been pursued to award that "arbitration and award," referred to as an affirmative defense in subdivision (c), is available as a defense in bar, and a right to arbitration, alone, is not an affirmative defense under the rule. American Nat'l Bank v. Cheyenne Hous. Auth., 562 P.2d 1017 (Wyo. 1977).

Assumption of risk is an affirmative defense with a burden of proof upon the defendant. Anderson v. Schulz, 527 P.2d 151 (Wyo. 1974).

Must plead or not raise on appeal. — Assumption of risk is an affirmative defense, which was not pleaded by defendant; hence, he cannot raise such question on appeal. Waters v. Brand, 497 P.2d 875 (Wyo. 1972).

Contributory negligence is an affirmative defense with a burden of proof upon the defendant. Anderson v. Schulz, 527 P.2d 151 (Wyo. 1974); Gish v. Colson, 475 P.2d 717 (Wyo. 1970).

Laches and estoppel. — Laches and estoppel are affirmative defenses that must be pleaded. Sannerud v. Brantz, 928 P.2d 477 (Wyo. 1996).

Waiver and estoppel are affirmative defenses and must be pleaded and raised in the lower court. Title Guar. Co. v. Midland Mtg. Co., 451 P.2d 798 (Wyo. 1969); Badley v. Birchby, 487 P.2d 798 (Wyo. 1971); Jankovsky v. Halladay Motors, 482 P.2d 129 (Wyo. 1971); Ranger Ins. Co. v. Cates, 501 P.2d 1255 (Wyo. 1972).

And burden of proof on party asserting estoppel. — The burden of showing an estoppel to prevent the running of a limitation period rests upon the party asserting the estoppel. Hawkeye-Security Ins. Co. v. Apodaca, 524 P.2d 874 (Wyo. 1974).

Estoppel in pais must be strictly pleaded with precision and certainty. Ranger Ins. Co. v. Cates, 501 P.2d 1255 (Wyo. 1972).

However, if the allegations amount to an estoppel it is sufficient, although the estoppel is not pleaded in so many words. Ranger Ins. Co. v. Cates, 501 P.2d 1255 (Wyo. 1972); Jankovsky v. Halladay Motors, 482 P.2d 129 (Wyo. 1971).

The remedy of estoppel is available only for protection and not as a weapon of assault, and it is available only where actions of the plaintiff have operated to the prejudice of the defendant. Gay Johnson's Wyo. Automotive Serv. Co. v. City of Cheyenne, 367 P.2d 787

(Wyo. 1961), rehearing denied, 369 P.2d 863 (Wyo. 1962).

Where estoppel not raised, not considered on appeal. — Where there is no pleading of estoppel, nor are there allegations amounting to estoppel, the issue will not be considered on appeal. Fuss v. Franks, 610 P.2d 17 (Wyo. 1980).

Waiver, as distinguished from estoppel, is the intentional relinquishment of a known right and must be manifested in some unequivocal manner; but the dividing line between waivers implied from conduct and estoppels oftentimes becomes so shadowy that in the law of insurance the two terms have come to be quite commonly used interchangeably. When the term "waiver" is so used the elements of an estoppel almost invariably appear, and it is quite apparent that it is employed to designate not a pure waiver, but one which has come into an existence of effectiveness through the application of the principles underlying estoppels. Ranger Ins. Co. v. Cates, 501 P.2d 1255 (Wyo. 1972).

Injury by negligence of fellow employee. — If a plaintiff's allegations show that an injury was caused by the negligence of a fellow employee, it is not sufficient, assuming the existence in the jurisdiction of the fellow servant rule, unless they show further that such fellow employee was the representative of the employer — a vice principal — and not a fellow servant or that the employer failed to exercise care and prudence in the employment of an incompetent fellow servant, or the retention of him in service after the employer knew or should have known of his incompetence. Vossler v. Peterson, 480 P.2d 393 (Wyo. 1971).

Payment is an affirmative defense with the burden of proof upon the party asserting it. Texas Gulf Sulphur Co. v. Robles, 511 P.2d 963 (Wyo. 1973).

Defendant carried burden of proof with respect to affirmative defense of payment. — See Scott v. Fagan, 684 P.2d 805 (Wyo. 1984).

Evidence of payment may be allowed although not pleaded. — See Morad v. Whitaker, 565 P.2d 484 (Wyo. 1977).

"Res judicata" defined. — The sum and substance of the doctrine of res judicata is that a matter once judicially decided is finally decided. Barrett v. Town of Guernsey, 652 P.2d 395 (Wyo. 1982).

Use of specific term "res judicata" not required. — While subdivision (c) specifically requires that res judicata be pleaded, an answer may set out the defense without using the specific latin words "res judicata" by attaching a copy of the decree relied on. Barrett v. Town of Guernsey, 652 P.2d 395 (Wyo. 1982).

General rule of res judicata applies to repetitious suits involving the same cause of action. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Bard Ranch Co. v. Weber, 557 P.2d 722 (Wyo. 1976).

Doctrine of res judicata held to bar action. — See Barrett v. Town of Guernsey, 652 P.2d 395 (Wyo. 1982).

Any defense based on the statute of frauds must be pleaded affirmatively. Adams v. KVWO, Inc., 570 P.2d 458 (Wyo. 1977).

When defenses not pleaded examined on appeal. — Although neither party set forth the defenses of res judicata or statute of limitations to the other's claim as required by subdivision (c), where plaintiff cannot prevail on appeal on any of his theories, and since Rule 15(b) authorizes consideration by the trial court of issues not raised by the pleadings, the Supreme Court will not pass on the propriety of the procedure, but will examine the merits of these defenses. Roush v. Roush, 589 P.2d 841 (Wyo. 1979).

Defense of "unavoidable accident". — The "unavoidable accident" term means "an accident in which there is no negligence by either party." This defense may be available even though not pleaded. Krahn v. Pierce, 485 P.2d 1021 (Wyo. 1971).

Exemption from execution. — A judgment debtor who claims an exemption from execution with respect to funds in a joint bank account must assume the burden of establishing entitlement to the exemption. Hancock v. Stockmens Bank & Trust Co., 739 P.2d 760 (Wyo. 1987).

Immunity under Wyoming Governmental Claims Act (chapter 39 of title 1) is "avoidance or affirmative defense." Pickle v. Board of County Comm'rs, 764 P.2d 262 (Wyo. 1988).

And raisable by summary judgment motion. — A board of county commissioners could raise an omitted affirmative defense of governmental immunity for the first time by a motion for summary judgment, where no prejudice to the adverse party was alleged. Pickle v. Board of County Comm'rs, 764 P.2d 262 (Wyo. 1988).

Defense of immunity from suit. — Company's claim that it was statutory employer under workers' compensation provisions, and that it was entitled to immunity from suit, was not pleaded as an affirmative defense, and although this is not specifically enumerated as being an affirmative defense, it clearly fits the description of "any other matter constituting an avoidance of affirmative defense." Texas Gulf Sulphur Co. v. Robles, 511 P.2d 963 (Wyo. 1973) For present provisions dealing with worker's compensation, see §§ 27-14-101 through 27-14-805.

Am. Jur. 2d, ALR and C.J.S. references. — Infant's misrepresentation as to his age as

estopping him from disaffirming his voidable transaction, 29 ALR3d 1270.

V. PLEADING TO BE CONCISE AND DIRECT; CONSISTENCY.

Technical forms of pleading have no place in Wyoming practice. — Subdivision (e)(1) makes it clear that technical forms of pleading no longer have a place in Wyoming practice, and that each averment of a pleading shall be simple, concise and direct. Guggenmos v. Tom Searl-Frank McCue, Inc., 481 P.2d 48 (Wyo. 1971); Harris v. Grizzle, 599 P.2d 580 (Wyo. 1979).

Alternate pleading, not changing of facts, authorized. — The plaintiff was not estopped from asserting that the defendant acted outside the "scope of his duties" because of the allegation in his claim that he had been injured due to the defendant's actions, who "was acting within the scope and course of his employment." Alternative pleading is authorized by subdivision (e) and is not the same as the changing of statements of fact in separate proceedings. Milton v. Mitchell, 762 P.2d 372 (Wyo. 1988).

Alternative and inconsistent property claims permitted. — In an action to quiet title the trial court erred in dismissing the plaintiffs' adverse possession claim on the grounds that it was inconsistent with their alternative claim that they had record title to the property in question. This rule permits the presentation of alternative and inconsistent claims. Glover v. Giraldo, 824 P.2d 552 (Wyo. 1992).

Failure to provide notice of intent to pierce corporate veil. — Trial court did not err under subdivision (a)(2) in dismissing buyers' action; the buyers failed to present any facts or allegations that would put appellees on notice that they were seeking to pierce the corporate veil in an attempt to hold an owner of a corporation personally liable for the claims against the corporation. Ridgerunner, LLC v. Meisinger, 297 P.3d 110 (Wyo. 2013).

VI. CONSTRUCTION OF PLEADING.

Pleadings construed liberally. — This rule is generally interpreted to mean pleadings are to be construed liberally. Sump v. City of Sheridan, 358 P.2d 637, rehearing denied, 359 P.2d 1008 (Wyo. 1961).

Pleadings must be liberally construed in order to do justice to the parties, and motions to dismiss must be sparingly granted. Johnson v. Aetna Cas. & Sur. Co., 608 P.2d 1299 (Wyo. 1980), appeal dismissed and cert. denied, 454 U.S. 1118, 102 S. Ct. 961, 71 L. Ed. 2d 105 (1981).

Rule 9. Pleading special matters.

(a) *Capacity or Authority to Sue; Legal Existence.* —

(1) *In General.* — Except when required to show that the court has jurisdiction, a pleading need not allege:

(A) a party's capacity to sue or be sued;

(B) a party's authority to sue or be sued in a representative capacity; or

(C) the legal existence of an organized association of persons that is made a party.

(2) *Raising Those Issues.* — To raise any of those issues, a party must do so by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge.

(b) *Fraud or Mistake; Conditions of Mind.* — In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

(c) *Conditions Precedent.* — In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.

(d) *Official Document or Act.* — In pleading an official document or official act, it suffices to allege that the document was legally issued or the act legally done.

(e) *Judgment.* — In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, it suffices to plead the judgment or decision without showing jurisdiction to render it.

(f) *Time and Place.* — An allegation of time or place is material when testing the sufficiency of a pleading.

(g) *Special Damages.* — If an item of special damage is claimed, it must be specifically stated.

(h) *Municipal ordinance.* — In pleading a municipal ordinance or a right derived therefrom, it shall be sufficient to refer to such ordinance by its title or other applicable designation and the name of the municipality which adopted the same.
(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 9 of the Federal Rules of Civil Procedure.

Rules 8 and 9 to be read in conjunction. — The particularity requirement of Rule 9(b), W.R.C.P., does not render the general principles of Rule 8, W.R.C.P., inapplicable; instead, the two rules are read in conjunction to create a proper balance. Osborn v. Emporium Videos, 848 P.2d 237 (Wyo. 1993), aff'd 870 P.2d 382 (Wyo. 1994).

Long-standing precedent. — Subdivision (b) of this rule is merely a summary of long-standing precedent in the state concerning the pleading of fraud. In re Estate of Sullivan, 506 P.2d 813 (Wyo. 1973).

Alleging fraud. — One who alleges fraud must do so clearly and distinctly and prove the same so as to satisfy the mind and conscience of its existence. Reed v. Owen, 523 P.2d 869 (Wyo. 1974).

Fraud is established when a plaintiff demonstrates, by clear and convincing evidence, that (1) defendant made a false representation intended to induce action by plaintiff; (2) plaintiff reasonably believed the representation to be true; and (3) plaintiff relied on the false representation and suffered damages. Marchant v. Cook, 967 P.2d 551 (Wyo. 1998).

Or failure to state claim. — In the event of the failure to meet the fundamental requirements of allegations which constitute fraud, there is a failure to state a claim by virtue of subdivision (b). Weber v. Johnston Fuel Liners, Inc., 540 P.2d 535 (Wyo. 1975).

Complaint must allege circumstances of alleged fraud. — In order to comply with the requirement of this rule, a complaint must allege the circumstances that constitute the alleged fraud. Johnson v. Aetna Cas. & Sur. Co., 608 P.2d 1299 (Wyo. 1980), appeal dismissed and cert. denied, 454 U.S. 1118, 102 S. Ct. 961, 71 L. Ed. 2d 105 (1981).

Wyo. R. Civ. P. 9(b), in mandating that all the circumstances constituting fraud or mistake had to be averred with particularity, required reference to matters such as the time, place, and contents of the allegedly false representations; the identity of the person making the representations; and what the person obtained thereby. Lee v. LPP Mortg. Ltd., 74 P.3d 152 (Wyo. 2003).

Legal conclusions insufficient. — Mere legal conclusions cast in a form to somewhat resemble factual allegations do not meet the fundamental requirements of allegations which constitute fraud, and are insufficient to state a claim for which relief can be granted under the requirements of subdivision (b), which provides that all averments of fraud must be stated with particularity. Sullivan v. Sullivan, 506 P.2d 813 (Wyo. 1973).

Fraud not imputed. — Fraud will not be imputed to any party when the facts and circumstances out of which it is supposed to arise are consistent with honesty and purity of intention. Reed v. Owen, 523 P.2d 869 (Wyo. 1974).

Plaintiff not required to specifically plead occurrence of conditions precedent. — The purpose of this rule is to prevent dismissals of meritorious cases if the plaintiff fails specifically to plead the occurrence of conditions precedent. Johnson v. Aetna Cas. & Sur. Co., 608 P.2d 1299 (Wyo. 1980), appeal dismissed and cert. denied, 454 U.S. 1118, 102 S. Ct. 961, 71 L. Ed. 2d 105 (1981).

While it may be better practice to use the exact wording of the rules in pleadings, a pleader is not required to state "that all conditions precedent have been performed or have occurred" to comply with the requirements of this rule. Johnson v. Aetna Cas. & Sur. Co., 608 P.2d 1299 (Wyo. 1980), appeal dismissed and cert. denied, 454 U.S. 1118, 102 S. Ct. 961, 71 L. Ed. 2d 105 (1981).

Lack of specific date. — Where the statutory definition of the offense does not require a specific date, such a date need not be given in the information. Stewart v. State, 724 P.2d 439 (Wyo. 1986).

Special damage demand need not be definite. — There is no requirement that a personal injury and wrongful death complaint must state a dollar amount as alleged special damages or demand special damages in a sum certain as judgment. Melehes v. Wilson, 774 P.2d 573 (Wyo. 1989).

Whether plaintiffs are real parties in interest should be submitted as affirmative defense, pursuant to Rules 9 and 17, and particularly so considering the rights of ratification, joinder or substitution provided in Rule 17, and should not be presented for the first time on appeal. Cockreham v. Wyoming Prod. Credit Ass'n, 743 P.2d 869 (Wyo. 1987).

Objection to capacity of party to invoke jurisdiction of the court was waived. — Any objection concerning whether respondent bail bond "company" was a real party in interest with capacity to invoke the appellate court's jurisdiction on the grounds that it was solely a trade name, or because it was acting solely as an agent for an insurance company, was waived by the State where: (1) the State had accepted the company as a proper party to contract with as a surety on both bonds, (2) the company was directly ordered by the court to forfeit partial amounts of both surety bonds involved, (3) both notices of appeal in the consolidated cases

stated clearly that the company was the party appealing and that it had posted both bonds involved, giving the company a clear stake in the outcome of the action, and (4) the State had raised the issue for the first time on appeal. Action Bailbonds v. State, 49 P.3d 1002 (Wyo. 2002).

Conditions precedent to filing suit against governmental entity. — When plaintiff injured motorist filed suit against defendant city after his vehicle was struck by a vehicle driven by a police officer, the district court had subject matter jurisdiction to determine whether plaintiff complied with the requirements of Wyo. Stat. Ann. § 1-39-114 and Wyo. Const. art. 16, § 7 for filing suit against a governmental entity. Upon presentation of proof that plaintiff had complied with those provisions by providing a notice of claim to the city, the district court also had subject matter jurisdiction to allow him to amend his complaint to so allege that he met the conditions precedent to filing suit in accordance with this rule. Brown v. City of Casper, 248 P.3d 1136 (Wyo. 2011).

Applied in Bon v. Lemp, 444 P.2d 333 (Wyo. 1968); Torrey v. Twiford, 713 P.2d 1160 (Wyo. 1986); Brooks v. Zebre, 792 P.2d 196 (Wyo. 1990); Shriners Hosps. for Crippled Children v. First Sec. Bank, 835 P.2d 350 (Wyo. 1992); Darrar v. Bourke, 910 P.2d 572 (Wyo. 1996); Ahearn v. Anderson-Bishop Partnership, 946 P.2d 417 (Wyo. 1997); Sundown, Inc. v. Pearson Real Estate Co., 8 P.3d 324 (Wyo. 2000).

Stated in White v. Fisher, 689 P.2d 102 (Wyo. 1984); Robinson v. Pacificorp, 10 P.3d 1133 (Wyo. 2000).

Cited in Carter v. Davison, 359 P.2d 990 (Wyo. 1961); Gookin v. State Farm Fire & Cas. Ins. Co., 826 P.2d 229 (Wyo. 1992); Osborn v. Emporium Videos, 870 P.2d 382 (Wyo. 1994); Cross v. Berg Lumber Co., 7 P.3d 922 (Wyo. 2000).

Law reviews. — For article, "Lender Liability in Wyoming," see XXVI Land & Water L. Rev. 707 (1991).

Am. Jur. 2d, ALR and C.J.S. references. — 22 Am. Jur. 2d Damages §§ 826 to 850; 37 Am. Jur. 2d Fraud and Deceit §§ 424 to 427; 51 Am. Jur. 2d Limitation of Actions § 405; 61A Am. Jur. 2d Pleading §§ 204 to 219.

25 C.J.S. Damages § 131; 54 C.J.S. Limitations of Actions § 282; 71 C.J.S. Pleading §§ 9 to 65.

Rule 10. Form of pleadings.

(a) *Caption; Names of Parties.* — Every pleading must have a caption with the court's name, a title, a file number, and a Rule 7(a) designation. The title of the complaint must name all the parties; the title of other pleadings, after naming the first party on each side, may refer generally to other parties.

(b) *Paragraphs; Separate Statements.* — A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. If doing so would promote clarity, each claim founded on a separate transaction or occurrence — and each defense other than a denial — must be stated in a separate count or defense.

(c) *Adoption by Reference; Exhibits.* — A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 10 of the Federal Rules of Civil Procedure.

Defendants estopped from asserting defect in caption. — Even if there was a defect in the caption or a misconstruction between the parties, the conduct of the defendants, from their acceptance of service, through the utilization of their status in the state litigation to obtain an injunctive delay through federal court bankruptcy, was determinative, as a matter of judicial estoppel, for interpretation of the caption. Anderson v. Sno-King Village Ass'n, 745 P.2d 540 (Wyo. 1987), appeal dismissed and cert. denied, 488 U.S. 801, 109 S. Ct. 29, 102 L. Ed. 2d 9 (1988).

Attached exhibits. — Copy of contract and addendum attached to the plaintiff's complaint were considered as part of the pleading, and were sufficient to establish a prima facie showing of personal jurisdiction over the nonresident defendant. Chamberlain v. Ruby Drilling Co., 986 P.2d 846 (Wyo. 1999).

Applied in Chopping v. First Nat'l Bank, 419 P.2d 710 (Wyo. 1966).

Cited in Bales v. Ankney, 382 P.2d 386 (Wyo. 1963); Stundon v. Stadnik, 469 P.2d 16 (Wyo. 1970); Dee v. Laramie County, 666 P.2d 957 (Wyo. 1983).

Am. Jur. 2d, ALR and C.J.S. references. — 61A Am. Jur. 2d Pleading §§ 31 to 79.

Propriety and effect of use of fictitious name of plaintiff in federal court, 97 ALR Fed 369.

71 C.J.S. Pleading §§ 66 to 79.

Rule 11. Signing pleadings, motions, and other papers; representations to the court; sanctions.

(a) *Signature.* — Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name — or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, telephone number, and attorney number, if any. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) *Representations to the Court.* — By presenting to the court a pleading, written motion, or other paper — whether by signing, filing, submitting, or later advocating it — an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) *Sanctions.* —

(1) *In General.* — If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) *Motion for Sanctions.* — A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) *On the Court's Initiative.* — On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) *Nature of a Sanction.* — A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) *Limitations on Monetary Sanctions.* — The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) *Requirements for an Order.* — An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) *Inapplicability to Discovery.* — This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

(Added February 2, 2017, effective March 1, 2017.)

Source. — Subdivision (a) of this rule is similar to Rule 11 of the Federal Rules of Civil Procedure.

Cross References. — For rules requiring verifications, see Rules 27(a) and 65(b), statutes requiring verifications, see §§ 1-25-101 and 1-27-102.

As to power of environmental quality council to adopt and enforce provisions of this rule in a contested hearing, see § 35-11-112.

Strict procedural compliance required. — A motion for judgment on the pleadings is not a substitute for serving a separate Rule 11 motion on the opposing party; the filings do not meet the strict procedural requirements of Rule 11, nor are Rule 11 sanctions intended to be used as a fee-shifting device. Caldwell v. Cummings, 33 P.3d 1138 (Wyo. 2001).

Court did not err in admitting unexecuted settlement document into evidence. — The document was not submitted as a pleading or part of a pleading to formulate issues. It was submitted as evidence of the testimony already offered and received. Wyoming Sawmills, Inc. v. Morris, 756 P.2d 774 (Wyo. 1988).

No abuse of discretion in court's denial of attorney fees. — See LC v. TL, 870 P.2d 374, cert. denied, 513 U.S. 871, 115 S. Ct. 195, 130 L. Ed. 2d 127 (1994).

No abuse of discretion in court's denial of sanctions. — After dismissing appellee's private road action, appellants' motion for sanctions under this section against appellee and his attorney for costs and attorney's fees for bringing a second private road action was properly denied because, under this section, appellee and his attorney acted reasonably and in a nonfrivolous manner in filing the complaint in the district court because the drastic remedy imposed in terminating appellee's easement across appellants' property, leaving his property landlocked, created uncertainty in whether appellee could petition for a private road. Lavitt v. Stephens, — P.3d —, 2015 Wyo. LEXIS 63 (Wyo. 2015).

Abuse of discretion in court's grant of sanctions. — Trial court abused its discretion in awarding attorney's fee as a sanction where the party seeking the sanction did not follow the proper procedure when it filed its motion for sanctions directly with the district court after plaintiffs' suit was dismissed. Welch v. Hat Six Homes, 47 P.3d 199 (Wyo. 2002).

Inquiry required for legal malpractice action involving complex area of law. — Before an attorney files a legal malpractice action where the underlying case of alleged malpractice involves a complex or specialized area of the law with which the attorney is unfamiliar, that attorney should first consult with an expert in the complex or specialized legal arena about the standard of care. Meyer v. Mulligan, 889 P.2d 509 (Wyo. 1995).

Inconsistent application. — Where defendant husband's actions against plaintiff attorneys were indistinguishable, it was inconsistent for the court to find the action baseless and submitted for an improper purpose as to one attorney and reach the opposite conclusion for the other attorney. Bender v. Phillips, 8 P.3d 1074 (Wyo. 2000).

Safe harbor provision. — When the opposing party moves for Wyo. R. Civ. P. 11 sanctions, a safe harbor provision gives the party and attorneys against whom sanctions are sought the opportunity to withdraw the challenged paper; the opposing party must serve the sanctions motion according to the requirements of Wyo. R. Civ. P. 5 but may not file or present the motion to the court unless, within twenty-one days, the allegedly improper document is not corrected or withdrawn, or otherwise, the motion will be rejected. Caldwell v. Cummings, 33 P.3d 1138 (Wyo. 2001).

Sanctions sufficient to deter repetition. — Where the movant sought monetary sanctions against opposing counsel arising out of objections to opposing counsel's motion to dismiss, but the district court imposed as a sanction that opposing counsel convey an apology in connection with having filed a motion to dismiss, the district court did not abuse its discretion; W.R.C.P. 11(c)(2) requires that sanctions should be sufficient to deter repetition of the sanctionable conduct and may include sanctions of a nonmonetary nature. Goglio v. Star Valley Ranch Ass'n, 48 P.3d 1072 (Wyo. 2002).

Sanctions not sustainable. — The "Petition for Rules to Show Cause" filed by managers pursuant to a contract dispute made no reference to W.R.C.P. 11, did not comply with W.R.C.P. 11(c)(1)(A), which required a separate W.R.C.P. 11 motion describing the specific conduct alleged to violate the rule, and did not comply with W.R.C.P. 11(c)(1)(B), in that the trial court did not enter an order describing the specific conduct at issue and directing the at-

torney to show cause why he had not violated W.R.C.P. 11, and therefore the sanctions imposed against the attorney were not sustainable under W.R.C.P. 11. Horn v. Welch, 54 P.3d 754 (Wyo. 2002).

Portion of award relating to appeal reversed. — Trial court did not abuse its discretion in awarding sanctions after finding that plaintiff's breach of contract action was frivolous, but the portion of the award relating to the appeal was reversed, as this rule is sensibly understood as permitting an award only of those expenses directly caused by filing. Dewey v. Dewey, 33 P.3d 1143 (Wyo. 2001).

Jurisdiction. — Because defendant's motion for sanctions was filed after the case was dismissed, it could not have complied with the requirements of this rule. Accordingly, the district court did not have jurisdiction to consider the motion. Edsall v. Moore, — P.3d —, 2016 Wyo. LEXIS 79 (Wyo. 2016).

Applied in Chopping v. First Nat'l Bank, 419 P.2d 710 (Wyo. 1966); Rodgers v. Rodgers, 627 P.2d 1381 (Wyo. 1981); Davis v. Big Horn Basin Newspapers, Inc., 884 P.2d 979 (Wyo. 1994).

Quoted in Keller v. Anderson, 554 P.2d 1253 (Wyo. 1976).

Cited in Jessen v. State, 622 P.2d 1374 (Wyo. 1981); Hopkinson v. State, 632 P.2d 79 (Wyo. 1981); Mariano & Assocs. v. Board of County Comm'rs, 737 P.2d 323 (Wyo. 1987); WR v. Lee, 825 P.2d 369 (Wyo. 1992); State Farm Mut. Auto. Ins. Co. v. Colley, 871 P.2d 191 (Wyo. 1994); Loghry v. Loghry, 920 P.2d 664 (Wyo. 1996); Martindale v. State, 24 P.3d 1138 (Wyo. 2001).

Law reviews. — For comment, "Medical Malpractice Insurance Crisis: The Boys Who Cry 'Wolf'," see XXI Land & Water L. Rev. 203 (1986).

For comments, "Wyoming Tort Reform and the Medical Malpractice Insurance Crisis: A Second Opinion," see XXVIII Land & Water L. Rev. 593 (1993).

See article, "The 1994 Amendments to the Wyoming Rules of Civil Procedure," XXX Land & Water L. Rev. 151 (1995).

For article, "Collecting Debt in Wyoming: The Fair Debt Collection Practices Act as a Trap for the Unwary," see XXXI Land & Water L. Rev. 731 (1996).

Am. Jur. 2d, ALR and C.J.S. references. — 61B Am. Jur. 2d Pleading §§ 881 to 898.

General principles regarding imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, 95 ALR Fed 107.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in actions for defamation, 95 ALR Fed 181.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in action for wrongful discharge from employment, 96 ALR Fed 13.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in actions for securities fraud, 97 ALR Fed 107.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in actions for infliction of emotional distress, 98 ALR Fed 442.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in antitrust actions, 99 ALR Fed 573.

Procedural requirements for imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, 100 ALR Fed 556.

Federal district court's power to impose sanctions on non-parties for abusing discovery process, 149 ALR Fed 589.

71 C.J.S. Pleading §§ 478 to 518.

Rule 12. When and how presented; motion for judgment on the pleadings; consolidating motions; waiving defenses; pretrial hearing.

(a) *Time to Serve a Responsive Pleading.* —

(1) *In General.* — Unless another time is specified by this rule or a state statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 20 days after being served with the summons and complaint;

(ii) within 30 days after being served with the summons and complaint if service is made outside the State of Wyoming;

(iii) within 30 days after the last day of publication; or

(iv) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 20 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 20 days after being served with an order to reply, unless the order specifies a different time.

(2) *Effect of a Motion.* — Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) *How to Present Defenses.* — Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) *Motion for Judgment on the Pleadings.* — After the pleadings are closed — but early enough not to delay trial — a party may move for judgment on the pleadings.

(d) *Result of Presenting Matters Outside the Pleadings.* — If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) *Motion for a More Definite Statement.* — A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 10 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) *Motion to Strike.* — The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 20 days after being served with the pleading.

(g) *Joining Motions.* —

(1) *Right to Join.* — A motion under this rule may be joined with any other motion allowed by this rule.

(2) *Limitation on Further Motions.* — Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) *Waiving and Preserving Certain Defenses.* —

(1) *When Some Are Waived.* — A party waives any defense listed in Rule 12(b)(2)--(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) *When to Raise Others.* — Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(i) *Decision Before Trial.* — If a party so moves, any defense listed in Rule 12(b)(1)--(7) — whether made in a pleading or by motion — and a motion under Rule 12(c) must be decided before trial unless the court orders a deferral until trial.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 12 of the Federal Rules of Civil Procedure.

Cross References. — As to filing of motions, see Rule 301, D. Ct.

I. GENERAL CONSIDERATION.

Federal authority relative to this rule is highly persuasive since this rule is virtually identical to its federal counterpart. Kimbley v. City of Green River, 642 P.2d 443 (Wyo. 1982).

Plaintiff need only plead the operative facts involved in litigation so as to give fair notice of the claim to the defendant. Johnson v. Aetna Cas. & Sur. Co., 608 P.2d 1299 (Wyo. 1980), appeal dismissed and cert. denied, 454 U.S. 1118, 102 S. Ct. 961, 71 L. Ed. 2d 105 (1981).

Pleadings must be liberally construed in order to do justice to the parties, and motions to dismiss must be sparingly granted. Johnson v. Aetna Cas. & Sur. Co., 608 P.2d 1299 (Wyo. 1980), appeal dismissed and cert. denied, 454 U.S. 1118, 102 S. Ct. 961, 71 L. Ed. 2d 105 (1981).

Pleading's content determines its nature and effect. — It is the content of the pleading and not the label which determines its nature and effect. Joslyn v. Professional Realty, 622 P.2d 1369 (Wyo. 1981).

Courts to focus on allegations of complaint. — The Wyoming Rules of Civil Procedure demand that the contemplation of a motion to dismiss focus only upon the allegations of the complaint and whether it states a claim. Amrein v. Wyoming Livestock Bd., 851 P.2d 769 (Wyo. 1993).

Review. — In addressing on review a dismissal by the trial court pursuant to subdivision (b)(6) of this rule, the reviewing court accepts as true all of the facts alleged in the complaint, and examines those facts in the light most favorable to the plaintiffs. Feltner v. Casey Family Program, 902 P.2d 206 (Wyo. 1995).

When reviewing a dismissal under subdivision (b)(6) of this rule, the supreme court accepts all facts stated in the complaint as being true and views them in the light most favorable to the plaintiff; the dismissal will be sustained only when it is certain from the face of the complaint that the plaintiff cannot assert any facts that would entitle him to relief. Gillis v. F & A Enters., 934 P.2d 1253 (Wyo. 1997).

Supreme court will affirm an order of dismissal only when it is certain from face of complaint that plaintiff cannot assert any facts which would entitle him to relief. Duncan v. Afton, Inc., 991 P.2d 739 (Wyo. 1999); Garnett v. Hettgar, 2 P.3d 558 (Wyo. 2000).

Dismissal in error because party had standing. — Trial court erred in dismissing landowners' declaratory judgment action on the grounds that the landowners lacked standing; to the contrary, they had standing to bring the action challenging an annexation ordinance. Cox v. City of Cheyenne, 79 P.3d 500 (Wyo. 2003).

Motion to dismiss proper. — Girlfriend's motion to dismiss the boyfriend's action to quiet title of certain Wyoming properties was proper where the boyfriend was a resident of Wyoming and he had substantial real estate holdings in Wyoming; the district court had jurisdiction and venue was proper in Wyoming. Burnham v. Coffinberry, 76 P.3d 296 (Wyo. 2003).

Dismissal under W.R.C.P. 12(b)(6) is a drastic remedy, which should be granted sparingly, and is appropriate only when it is

certain the plaintiff cannot assert any facts that would entitle him to relief. Simon v. Teton Bd. of Realtors, 4 P.3d 197 (Wyo. 2000).

Court may make sua sponte motion to dismiss. — The court may make a sua sponte motion to dismiss a complaint under the circumstances where a recognizable claim has not been stated. Osborn v. Emporium Videos, 848 P.2d 237 (Wyo. 1993), aff'd, 870 P.2d 382 (Wyo. 1994).

Five-step procedure for sua sponte motion to dismiss. — In order for a court to dismiss a complaint sua sponte, the following five-step procedure must be followed: (1) allow service of the complaint upon the defendant; (2) notify all parties of the court's intent to dismiss the complaint; (3) give the plaintiff a chance to either amend his complaint or respond to the reasons stated by the district court in its notice of intended sua sponte dismissal; (4) give the defendant a chance to respond or file an answer or motions; and (5) if the claim is dismissed, state the court's reasons for the dismissal. Osborn v. Emporium Videos, 848 P.2d 237 (Wyo. 1993), aff'd, 870 P.2d 382 (Wyo. 1994).

Summary judgment motion upon pleadings functionally equivalent to subdivision (b)(6) or (c) motion. — While a motion for summary judgment may be based solely upon the pleadings, it is then functionally equivalent to a motion to dismiss for failure to state a claim under subdivision (b)(6) or a motion for judgment under subdivision (c). Landmark, Inc. v. Stockmen's Bank & Trust Co., 680 P.2d 471 (Wyo. 1984).

Nonmoving party must receive notice of conversion to summary judgment motion. — Rule 56, W.R.C.P., in combination with Rule 6(c), W.R.C.P., establishes a general requirement that the nonmoving party receive 10 days' notice of conversion in order to file opposing matters (or seek a continuance under Rule 56(f), W.R.C.P). Alm v. Sowell, 899 P.2d 888 (Wyo. 1995).

Motion to dismiss was properly converted to a motion for summary judgment and the plaintiff received reasonable notice of the conversion where all issues in the present case were fully joined in a prior proceeding such that plaintiff was on notice of defendant's position. Alm v. Sowell, 899 P.2d 888 (Wyo. 1995).

Notice of intent to treat as summary judgment motion. — Where documentation relating to a motion for summary judgment was filed in the record by both sides, indicating that the parties were prepared to have the Rule 12(b)(6) motion decided pursuant to Rule 56, the plaintiff had adequate notice of the court's intent to treat the motion as a summary judgment motion and was not prejudiced by the trial court's treatment of the defendant's motion as a motion to dismiss. Burlington N.R.R. v. Dunkelberger, 918 P.2d 987 (Wyo. 1996).

Claim dependent on plaintiff's own illegal conduct not recognized. — On the grounds that public policy forecloses the recognition of such claims, Wyoming will not recognize a claim for relief which is dependent upon a plaintiff's own illegal conduct, including any claims which are derivative of such claims. Feltner v. Casey Family Program, 902 P.2d 206 (Wyo. 1995).

Motion for disqualification filed while in default. — The fact that the defendant was in default at the time it filed its motion for peremptory disqualification does not foreclose its right to disqualify the judge; so long as that motion was filed with its pleading and within thirty days as required by W.R.C.P. 40.1(b)(1), the presiding judge was deprived of jurisdiction in the case except for the sole purpose of assigning it to another district judge who was not disqualified. Olsten Staffing Servs., Inc. v. D.A. Stinger Servs., Inc., 921 P.2d 596 (Wyo. 1996).

Applied in Reeves v. Harris, 380 P.2d 769 (Wyo. 1963); Emery v. Emery, 404 P.2d 745 (Wyo. 1965); Twitchell v. Bowman, 440 P.2d 513 (Wyo. 1968); Linde v. Bentley, 482 P.2d 121 (Wyo. 1971); Texas Gulf Sulphur Co. v. Robles, 511 P.2d 963 (Wyo. 1973); Weber v. Johnston Fuel Liners, Inc., 540 P.2d 535 (Wyo. 1975); Keller v. Anderson, 554 P.2d 1253 (Wyo. 1976); Johnson v. Aetna Cas. & Sur. Co., 608 P.2d 1299 (Wyo. 1980), appeal dismissed and cert. denied, 454 U.S. 1118, 102 S. Ct. 961, 71 L. Ed. 2d 105 (1981); Lafferty v. Nickel, 663 P.2d 168 (Wyo. 1983); Allen v. Safeway Stores, Inc., 699 P.2d 277 (Wyo. 1985); Lewis v. State Bd. of Control, 699 P.2d 822 (Wyo. 1985); Greaser v. Williams, 703 P.2d 327 (Wyo. 1985); Skurdal v. State ex rel. Stone, 708 P.2d 1241 (Wyo. 1985); Nation v. Nation, 715 P.2d 198 (Wyo. 1986); Greenwood v. Wierdsma, 741 P.2d 1079 (Wyo. 1987); Paravecchio v. Memorial Hosp., 742 P.2d 1276 (Wyo. 1987); Warren v. Hart, 747 P.2d 511 (Wyo. 1987); S.C. Ryan, Inc. v. Lowe, 753 P.2d 580 (Wyo. 1988); Robinson v. Bell, 767 P.2d 177 (Wyo. 1989); Brebaugh v. Hales, 788 P.2d 1128 (Wyo. 1990); Cooney v. Park County, 792 P.2d 1287 (Wyo. 1990); Nulle v. Gillette-Campbell County Joint Powers Fire Bd., 797 P.2d 1171 (Wyo. 1990); Apodaca v. Ommen, 807 P.2d 939 (Wyo. 1991); Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991); Herrig v. Herrig, 844 P.2d 487 (Wyo. 1992); Veile v. Board of County Comm'rs, 860 P.2d 1174 (Wyo. 1993); First S.W. Fin. Servs. v. Laird, 882 P.2d 1211 (Wyo. 1994); Hamburg v. Heilbrun, 891 P.2d 85 (Wyo. 1995); Martinez v. Associates Fin. Servs. Co., 891 P.2d 785 (Wyo. 1995); Giacchino v. Estate of Stalkup, 908 P.2d 983 (Wyo. 1995); Davis v. State, 910 P.2d 555 (Wyo. 1996); V-1 Oil Co. v. State, 934 P.2d 740 (Wyo. 1997); Diamond Surface, Inc. v. Cleveland, 963 P.2d 996 (Wyo. 1998); Robinson v. Pacificorp, 10 P.3d 1133 (Wyo. 2000); Ballinger v. Thompson, 118 P.3d 429 (Wyo. 2005); Dowlin v. Dowlin, 162 P.3d 1202 (Wyo. 2007); Sorensen v. State Farm Auto. Ins. Co., 234 P.3d 1233 (Wyo. 2010); Brown v. City of Casper, 248 P.3d 1136 (Wyo. 2011).

Quoted in Condict v. Lehman, 837 P.2d 81 (Wyo. 1992); RKS v. SDM ex rel. TY, 882 P.2d 1217 (Wyo. 1994); Rodriguez v. Casey, 50 P.3d 323 (Wyo. 2002); Natrona County v. Blake, 81 P.3d 948 (Wyo. 2003); Swinney v. Jones, 199 P.3d 512 (Wyo. 2008).

Stated in Weiss v. State ex rel. Leimback, 435 P.2d 280 (Wyo. 1967); Midway Oil Corp. v. Guess, 714 P.2d 339 (Wyo. 1986); Koontz v. Town of South Superior, 716 P.2d 358 (Wyo. 1986); Wessel v. Mapco, Inc., 752 P.2d 1363 (Wyo. 1988); Revelle v. Schultz, 759 P.2d 1255 (Wyo. 1988); Befumo v. Johnson, 119 P.3d 936 (Wyo. 2005).

Cited in Sump v. City of Sheridan, 359 P.2d 1008 (Wyo. 1961); Vipont Mining Co. v. Uranium Research & Dev. Co., 376 P.2d 868 (Wyo. 1962); State Hwy. Comm'n v. Bourne, 425 P.2d 59 (Wyo. 1967); Bland Drilling Co. v. American Indus., Inc., 435 P.2d 905 (Wyo. 1968); Miller v. Brown, 453 P.2d 884 (Wyo. 1969); Hamblin v. Arzy, 472 P.2d 933 (Wyo. 1970); Awe v. University of Wyo., 534 P.2d 97 (Wyo. 1975); Olmstead v. Cattle, Inc., 541 P.2d 49 (Wyo. 1975); Angus Hunt Ranch, Inc. v. Bowen, 571 P.2d 974 (Wyo. 1977); Town of Wheatland v. Allison, 577 P.2d 1006 (Wyo. 1978); Dickerson v. City Council, 582 P.2d 80 (Wyo. 1978); People v. Fremont Energy Corp., 651 P.2d 802 (Wyo. 1982); Kimbley v. City of Green River, 663 P.2d 871 (Wyo. 1983); White v. Fisher, 689 P.2d 102 (Wyo. 1984); Abelseth v. City of Gillette, 752 P.2d 430 (Wyo. 1988); Reed v. Reed, 768 P.2d 566 (Wyo. 1989); Duran v. Board of County Comm'rs, 787 P.2d 971 (Wyo. 1990); Zwemer v. Prod. Credit Ass'n, 792 P.2d 245 (Wyo. 1990); Osborn v. Manning, 798 P.2d 1208 (Wyo. 1990); Kautza v. City of Cody, 812 P.2d 143 (Wyo. 1991); Edler v. Rogers, 817 P.2d 886 (Wyo. 1991); Clark v. Industrial Co., 818 P.2d 626 (Wyo. 1991); Colley v. Dyer, 821 P.2d 565 (Wyo. 1991); Bredthauer v. Christian, Spring, Seilbach & Assocs., 824 P.2d 560 (Wyo. 1992); Gookin v. State Farm Fire & Cas. Ins. Co., 826 P.2d 229 (Wyo. 1992); McKennan v. Newman, 843 P.2d 602 (Wyo. 1992); Park County v. Cooney, 845 P.2d 346 (Wyo. 1992); Cooney v. White, 845 P.2d 353 (Wyo. 1992); Coones v. FDIC, 848 P.2d 783 (Wyo. 1993); Hirsch v. McNeill, 870 P.2d 1057 (Wyo. 1994); R.D. v. W.H., 875 P.2d 26 (Wyo. 1994); McGarvin-Moberly Constr. Co. v. Welden, 897 P.2d 1310 (Wyo. 1995); Robinson v. U-Haul Int'l, Inc., 929 P.2d 1236 (Wyo. 1996); Lee v. Sage Creek Refining Co., 947 P.2d 791 (Wyo. 1997); Story v. State, 15 P.3d 1066 (Wyo. 2001); Van Riper v. Odekoven, 26 P.3d 325 (Wyo. 2001); Terex Corp. v. Hough, 50 P.3d 317 (Wyo. 2002); Cathcart v. Meyer, 88 P.3d 1050 (Wyo. 2004); Vernier v. Vernier, 92 P.3d 825 (Wyo. 2004); Wilson v. Town of Alpine, 111 P.3d 290 (Wyo. 2005); Habco v. L&B Oilfield Serv., 138 P.3d 1162 (Wyo. 2006); Becker v. Mason, 145 P.3d 1268 (Wyo. 2006); Bentley v. Dir. of the Office of State Lands & Invs., 160 P.3d 1109 (Wyo. 2007); King v. State ex rel. Wyo. DOT, 161 P.3d 1086 (Wyo. 2007); Cook v. Card (In re Cook), 170 P.3d 122 (Wyo. 2007); Newport Int'l Univ., Inc. v. State, 186 P.3d 382 (Wyo. 2008); Willis v. Davis, 243 P.3d 568 (Wyo. 2010).

Law reviews. — For article, "Pleading Under the Federal Rules," see 12 Wyo. L.J. 177 (1958).

For article, "Wyoming Practice," see 12 Wyo. L.J. 202 (1958).

For note, "Procedure in Lieu of Special Appearances," see 12 Wyo. L.J. 262 (1958).

For comment, "Comparative Negligence in Wyoming," see VIII Land & Water L. Rev. 597 (1973).

For case note, "Torts — Wyoming Finds an Appropriate Case to Adopt Strict Products Liability. Ogle v. Caterpillar Tractor Co., 716 P.2d 334 (Wyo. 1986)," see XXII Land & Water L. Rev. 223 (1987).

For article, "Recreational Injuries & Inherent Risks: Wyoming's Recreation Safety Act," see XXVIII Land & Water L. Rev. 149 (1993).

For case note, "Appeal and Error—The Omnipotent Wyoming Supreme Court: New Allegations and Evidence Will Be Heard for the First Time on Appeal. Boller v. Western Law Associates, 828 P.2d 1184 (Wyo. 1992)," see XXVIII Land & Water L. Rev. 677 (1993).

For article, "Collecting Debt in Wyoming: The Fair Debt Collection Practices Act as a Trap for the Unwary," see XXXI Land & Water L. Rev. 731 (1996).

Am. Jur. 2d, ALR and C.J.S. references. — 61A Am. Jur. 2d Pleading §§ 220 to 409, 429 to 664.

Application of doctrine of forum non conveniens to actions between nonresidents based upon tort occurring within forum state, 92 ALR3d 797.

Necessity of oral argument on motion for summary judgment or judgment on pleadings in federal court, 105 ALR Fed 755.

What matters not contained in pleadings may be considered in ruling on a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure or motion for judgment on the pleadings under Rule 12(c) without conversion to motion for summary judgment, 138 ALR Fed 393.

Necessity and Sufficiency of Notice of Court's Decision to Convert Motion to Dismiss Under Rule 12 (b)(6) of Federal Rules of Civil Procedure or Motion for Judgment on Pleadings Under Rule 12(c) to Motion for Summary Judgment under Rule 56 Due to Consideration of Matters Outside Pleadings, 143 ALR Fed 455.

27 C.J.S. Dismissal and Nonsuit §§ 42 to 82; 71 C.J.S. Pleading §§ 159 to 199.

II. WHEN PRESENTED.

Defendant can raise objection by motion or answer without appearing specially. State ex rel. Sheehan v. District Court, 426 P.2d 431 (Wyo. 1967).

Time for answer cannot be altered by

litigant. — The date allowed for answer under the provisions of this rule is 30 days after the last day of publication and such time cannot be altered by a litigant. National Supply Co. v. Chittim, 387 P.2d 1010 (Wyo. 1964).

Failure to timely file answer justifies default. — Where the defendants failed to file an answer to a complaint within three months, then failed to show good cause, the court did not abuse its discretion in refusing to vacate the entry of default against them. Halberstam v. Cokeley, 872 P.2d 109 (Wyo. 1994).

III. HOW PRESENTED.

Election to raise defects in complaint by answer rather than by motion. — Election by defendant of the sixth defense of subdivision (b) to raise defects in the complaint by answer rather than by motion carries with it the possibility that subsequent pleadings and evidence admitted without objection might effect an amendment of the complaint. Lore v. Town of Douglas, 355 P.2d 367 (Wyo. 1960), rev'd on other grounds, 375 P.2d 399 (1962).

Complaint reflecting affirmative defense can be dismissed under general motion. — If the complaint itself reflects an affirmative defense, such as a statute of limitation bar, it can be dismissed under a general motion pursuant to subdivision (b)(6). Sullivan v. Sullivan, 506 P.2d 813 (Wyo. 1973).

Result of failure to comply with Rule 9(b). — Courts treat a motion under subdivision (b)(6) as a motion for a more definite statement when the pleading fails to comply with Rule 9(b). Johnson v. Aetna Cas. & Sur. Co., 608 P.2d 1299 (Wyo. 1980), appeal dismissed and cert. denied, 454 U.S. 1118, 102 S. Ct. 961, 71 L. Ed. 2d 105 (1981).

Res judicata or collateral estoppel. — If the information necessary for a decision is available to the court by judicial notice, the defendant can raise res judicata or collateral estoppel by a motion to dismiss. Texas W. Oil & Gas Corp. v. First Interstate Bank, 743 P.2d 857 (Wyo. 1987), aff'd, 749 P.2d 278 (Wyo. 1988); DLB v. DJB, 814 P.2d 1256 (Wyo. 1991).

Impossibility of proving claim necessitates dismissal. — Motions to dismiss for failure to state a claim upon which relief can be granted under subdivision (b)(6) are sparingly granted and only if the averments in the pleading attacked disclose with certainty the impossibility of proving a claim upon which relief can be granted. Fiscus v. Atlantic Richfield Co., 742 P.2d 198 (Wyo. 1987).

But time must be allowed for discovery. — In a suit alleging negligence and culpable negligence on the part of the plaintiffs' coemployees, the defendants filed motions to dismiss and for summary judgment only 40 days after the initial complaint was filed. Despite being apprised by the plaintiffs that there had been inadequate time for making discovery and gathering important facts in the case, the district court issued a decision letter allowing them only 21 additional days in which to gather information and oppose such motions. Given the great burden placed upon the plaintiffs to oppose both motions through the use of specific facts, ample time was not allowed for the development of the case through discovery. Pace v. Hadley, 742 P.2d 1283 (Wyo. 1987).

Effect of motion to dismiss for failure to state claim. — When considering a motion to dismiss a complaint on the ground that it fails to state a claim on which relief can be granted, the facts alleged in the complaint are admitted and the allegations must be viewed in the light most favorable to the plaintiffs. Moxley v. Laramie Bldrs., Inc., 600 P.2d 733 (Wyo. 1979); Gates v. Richardson, 719 P.2d 193 (Wyo. 1986).

Client's claim under Wyo. Stat. Ann. § 33-5-114 against an attorney was dismissed for failure to state a claim because her averments in her complaint made it clear that the attorney's alleged conduct did not occur when she was a party to an existing judicial action or proceeding. Bangs v. Schroth, 201 P.3d 442 (Wyo. 2009).

Court accepts alleged facts as true for subdivision (b)(6) motion. — For the purposes of acting on a motion to dismiss under subdivision (b)(6), the court must accept the facts alleged in the complaint as true. Carbon County Sch. Dist. No. 2 v. Wyoming State Hosp., 680 P.2d 773 (Wyo. 1984); Champion Well Serv., Inc. v. NL Indus., 769 P.2d 382 (Wyo. 1989); Mummery v. Polk, 770 P.2d 241 (Wyo. 1989).

A motion to dismiss under subdivision (b)(6) is based on the pleadings, and the court accepts the averments in the pleadings as true. Matthews v. Wyoming Dep't of Agric., 719 P.2d 216 (Wyo. 1986).

But facts must be alleged. — Where teenage boys who were staying on the homeowners' property became intoxicated and had a car accident resulting in the death of two of the boys and injuries to a third boy, because the injured boy's parents' complaint did not allege that the homeowners provided the alcohol nor that they knew or should have known that the boys would soon be driving, it was not an abuse of discretion for the district court to dismiss the complaint for failure to state a claim upon which relief could be granted pursuant to W.R.C.P. 12(b)(6). Daniels v. Carpenter, 62 P.3d 555 (Wyo. 2003).

Allegation that the defendant acted maliciously and without probable cause is sufficient in a complaint for malicious prosecution, without alleging facts constituting want of probable cause. Torrey v. Twiford, 713 P.2d 1160 (Wyo. 1986).

Statute of limitations subject to subdivision (b)(6) motion. — A statute of limitations defense was appropriately raised in a subdivision (b)(6) motion to dismiss for failure to state a claim where the answers, counterclaims, cross-claims and initial third-party claims filed

by the third-party plaintiffs reflected on their faces that the third-party claims were barred by the statute of limitations. Boller v. Western Law Assocs., 828 P.2d 1184 (Wyo.), cert. denied, 506 U.S. 869, 113 S. Ct. 198, 121 L. Ed. 2d 140 (1992).

A dismissal is proper where the complaint reflects that the action is barred by the applicable statute of limitations. Gillis v. F & A Enters., 934 P.2d 1253 (Wyo. 1997).

Court did not err in dismissing a claim for injunctive relief. — The complaint lacked allegations of facts justifying its conclusions that the plaintiff had no adequate remedy at law, and that failure to grant the injunction would result in irreparable injury. In particular, the complaint failed to state why an action at law for recovery of monetary damages, which is all that was pleaded, would have been an insufficient remedy. Rialto Theatre, Inc. v. Commonwealth Theatres, Inc., 714 P.2d 328 (Wyo. 1986).

When motion to dismiss treated as motion for summary judgment. — If, pursuant to a motion under subdivision (b)(6), a court reviews material in addition to the complaint, the Supreme Court will treat the motion as one of summary judgment. Wyoming Ins. Dep't v. Sierra Life Ins. Co., 599 P.2d 1360 (Wyo. 1979).

When a motion to dismiss for failure to state a claim upon which relief can be granted is made, if matters outside the pleading are presented to, and considered by the court, the motion should be treated as one for summary judgment. Kirby Bldg. Sys. v. Independence Partnership No. One, 634 P.2d 342 (Wyo. 1981).

Motion to dismiss becomes motion for summary judgment through discretion. — It is by virtue of the discretion of the trial judge that motions to dismiss become motions for summary judgment under subdivision (b). DeHerrera v. Memorial Hosp., 590 P.2d 1342 (Wyo. 1979).

No conversion to summary judgment where court ambiguous. — A motion for dismissal under subdivision (b)(6) will convert to a motion for summary judgment if the trial court considers matters other than the pleadings and, where materials other than affidavits are considered, the parties have notice of the conversion and the nonmovant has an opportunity to respond. Where the court made ambiguous statements regarding this conversion, the notice requirement was not satisfied and conversion did not take place. Cranston v. Weston County Weed & Pest Bd., 826 P.2d 251 (Wyo. 1992).

Waiver of 10-day notice rule. — Where a motion to dismiss was automatically converted into a motion for summary judgment because affidavits were submitted by both parties and considered by the court, the rule that the nonmovant must have 10 days to respond to the converted motion prior to any hearing on it was waived; a nonmoving party can waive the 10-day notice rule when he submits affidavits himself and fails to object or request additional discovery time pursuant to Rule 56(f). Stalkup v. State Dep't of Envtl. Quality, 838 P.2d 705 (Wyo. 1992).

Ten days' notice required to convert motion to dismiss to summary judgment motion. — The moving party must give 10 days' notice of the intent to convert a Rule 12(b)(6) motion to dismiss to a motion for summary judgment. Also, the judge who receives a Rule 12(b)(6) motion accompanied by an affidavit (thus accomplishing an automatic conversion) should wait 10 days before holding a hearing on the motion. Torrey v. Twiford, 713 P.2d 1160 (Wyo. 1986).

Additional notice of conversion surprise demonstrated. — When affidavits are attached to a motion to dismiss and considered by the trial court, the motion converts automatically to a motion for summary judgment. In such circumstances, the nonmoving party is not entitled to additional notice of the conversion unless the record demonstrates unfair or inappropriate surprise. Shriners Hosps. for Crippled Children v. First Sec. Bank, 835 P.2d 350 (Wyo. 1992).

Conversion from subdivision (b)(6) to summary judgment was proper. — Documents which could have been filed pursuant to a motion for summary judgment, but were filed with the motion to dismiss, indicated that the moving party expected to have the motion decided pursuant to Rule 56. While the court order did not specifically say that an automatic conversion had occurred, and in spite of the fact that no notice is necessary in instances of automatic conversion, the trial court specifically ordered that the opposing party have 10 days in which to respond; this was "reasonable" notice. Mostert v. CBL & Assocs., 741 P.2d 1090 (Wyo. 1987).

Improper not to consider material outside pleadings. — The trial court, in an apparent effort to avoid the time-of-notice requirements of Rule 56, structured its order as one for dismissal rather than summary judgment, and specifically stated that it was not necessary to consider material extraneous to the pleadings in treating the motion as one for dismissal. In light of this, and the fact that, on its face, the plaintiffs' claim stated a cause of action, the trial court's disposition of the case on a motion to dismiss was improper. Cockreham v. Wyoming Prod. Credit Ass'n, 743 P.2d 869 (Wyo. 1987).

District court properly granted a seller's motion to dismiss for failure to state a cause of action in a breach of contract case because a real estate contract unambiguously provided that a seller was only required to transfer certain fishing rights and use agreements to a purchaser if the seller was able to obtain them in litigation against an association; the seller's contrary assertions during negotiations were

not considered because of an integration clause. Rehnberg v. Hirshberg, 64 P.3d 115 (Wyo. 2003).

Motion treated as one for summary judgment. — See School Dists. Nos. 2, 3, 6, 9 & 10 v. Cook, 424 P.2d 751 (Wyo. 1967).

Objection to consideration of motion as one for summary judgment under subdivision (b). — If plaintiffs had any real objection to the consideration of the motion as one for summary judgment under subdivision (b), it should have been registered immediately and made a part of the record. Bales v. Ankney, 382 P.2d 386 (Wyo. 1963).

Subdivision (b) inapplicable when affidavits do not present matters outside of complaint. — Where none of the affidavits before the trial court presented matters outside the complaint, that portion of subdivision (b) of this rule which relates to changing a motion to dismiss to one for summary judgment, and Rule 56(c) and (e) did not apply, and defendant's motion to dismiss was not converted into a motion for summary judgment. Sump v. City of Sheridan, 358 P.2d 637, rehearing denied, 359 P.2d 1008 (Wyo. 1961).

Order as to beneficiaries under Wrongful Death Act properly treated as final judgment. — The trial judge properly determined under Rule 54(b) that the effect of its order that surviving brothers and sisters are not beneficiaries under the Wrongful Death Act was to make a complete and final disposition of the claims for damages of some but not all of the parties for the benefit of whom an action by the administrator of the estate was brought, and there was no abuse of discretion in certifying that there was no just reason for delay and providing for the entry of a final judgment. Wetering v. Eisele, 682 P.2d 1055 (Wyo. 1984).

Divorce decree res judicata as to division of property. — Parties' divorce decree was res judicata as to the husband's Air Force retirement benefits where the benefits were clearly presented in the original divorce pleadings and there was no evidence that the district court neglected to consider them when it fashioned the divorce decree, and subsequent litigation as to the benefits was barred even though the divorce decree did not allocate the Air Force retirement benefits. Harshfield v. Harshfield, 842 P.2d 535 (Wyo. 1992).

Action dismissed under Rule 12(b)(6), not Rule 41. — See LC v. TL, 870 P.2d 374, cert. denied, 513 U.S. 871, 115 S. Ct. 195, 130 L. Ed. 2d 127 (1994).

Complaint failed to state claim for relief for fraud. — See Osborn v. Emporium Videos, 870 P.2d 382 (Wyo. 1994).

Petition untimely and barred by res judicata. — Petition to intervene brought by irrigators to adjudicate water rights was properly dismissed by the district court, pursuant to Rule 12(b)(6), W.R.C.P., as the matter was barred by res judicata and the petition was untimely. The disputed reservoir certificates were previously adjudicated in 1963. In re General Adjudication of All Rights to use Water in the Big Horn River System, 85 P.3d 981 (Wyo. 2004).

Am. Jur. 2d, ALR and C.J.S. references. — What, other than affidavits, constitutes "matters outside the pleadings," which may convert motion under Federal Rule of Civil Procedure 12(b), (c), into motion for summary judgment, 2 ALR Fed 1027.

Joinder of counterclaim under Rule 13(a) or 13(b) of Federal Rules of Civil Procedure with jurisdictional defense under Rule 12(b) as waiver of such defense, 17 ALR Fed 388.

IV. MOTION FOR JUDGMENT ON THE PLEADINGS.

When defendant entitled to judgment on the pleadings. — If the undisputed facts appearing in the pleadings (in this instance the complaint), supplemented by any facts of which the trial court will take judicial notice, establish that no relief can be granted, the movant is entitled to judgment on the pleadings. Bon v. Lemp, 444 P.2d 333 (Wyo. 1968); Johnson v. Griffin, 922 P.2d 860 (Wyo. 1996), cert. denied, 519 U.S. 971, 117 S. Ct. 402, 136 L. Ed. 2d 316 (1996).

The foregoing is the rule, even though, for purposes of the motion, defendant could not profit from the averments of answer asserting the bar of the statute of limitations for the reason that such averments are deemed denied. Bon v. Lemp, 444 P.2d 333 (Wyo. 1968).

At the time defendant's motion was filed it was apparent from undisputed facts that more than five years had elapsed from the time plaintiff's claim accrued to the date summons was served on her and the action commenced. As matters then stood defendant was entitled to judgment. From that time on it was plaintiff's burden to extricate himself, if he could, from the position in which he was placed as the result of defendant's motion. If there were grounds to believe that the running of the statute had been tolled, he would have been well advised to have sought leave to amend his complaint in that respect. Bon v. Lemp, 444 P.2d 333 (Wyo. 1968).

If the undisputed facts appearing in the pleadings, supplemented by any facts of which the trial court will take judicial notice, establish that no relief can be granted, the movant is entitled to judgment on the pleadings. Fuss v. Franks, 610 P.2d 17 (Wyo. 1980).

A judgment on the pleadings is appropriate if all material allegations of fact are admitted in the pleadings and only questions of law remain. Johnson v. Griffin, 922 P.2d 860 (Wyo. 1996), cert. denied, 519 U.S. 971, 117 S. Ct. 402, 136 L. Ed. 2d 316 (1996).

A judgment on the pleadings is appropriate when the statute of limitations provides an effective bar against the plaintiff's claim and

the entire controversy may be disposed of by reference to the pleadings. Johnson v. Griffin, 922 P.2d 860 (Wyo. 1996), cert. denied, 519 U.S. 971, 117 S. Ct. 402, 136 L. Ed. 2d 316 (1996).

Judgment is proper when county acts within its rights.— Judgment on the pleadings in favor of the county was proper because the county was within its rights to enter into a public road right-of-way use agreement with a private utility company, which would allow the utility to build a proposed sewer line, because the agreement was in public's interest, it fit within scope of the easement granted by servient estates and did not increase their burden. Box L Corp. v. Teton County, 92 P.3d 811 (Wyo. 2004).

Since new home was sold "as is" and buyers failed to allege any structural failing covered by express warranty, the district court correctly granted the sellers' judgment on the pleadings on the buyers' claims for breach of implied and express warranties. Greeves v. Rosenbaum, 965 P.2d 669 (Wyo. 1998).

Order of dismissal proper where plaintiff's complaint failed to state a claim upon which relief could be granted. Bird v. Rozier, 948 P.2d 888 (Wyo. 1997).

Claim against city dismissed for individual's failure to sign. — Where an individual sued the city and a police officer for negligence, the individual's notice of claim, signed by the individual's attorney but not by the individual, did not meet the constitutional requirements for a valid claim under the Wyoming Governmental Claims Act, Wyo. Stat. Ann. § 1-39-101 et seq., because it was not signed by the individual, and it was not certified to under penalty of perjury; thus, dismissal of the individual's complaint was proper despite any imprecision as to whether the district court dismissed the complaint under W.R.C.P. 12(b)(1) or W.R.C.P. 12(c). Yoak v. Ide, 86 P.3d 872 (Wyo. 2004).

Dismissal appropriate where plaintiff landowners had not exhausted administrative remedies. — Dismissal under this section was proper where agricultural landowners had not made any effort to seek relief with the county board of commissioners, which was the administrative agency responsible for administering the county zoning resolution pertaining to mineral exploration permit requirements, and instead sought to enforce the zoning resolution through a declaratory judgment action against the mining companies under the Uniform Declaratory Judgments Act, Wyo. Stat. Ann. §§ 1-37-101 through 1-37-115. Quinn Revocable Trust v. SRW, Inc., 91 P.3d 146 (Wyo. 2004).

Judgment on pleadings properly denied. — District court properly denied a mother's motion for judgment on the pleadings in a child custody case, where the father's general allegation of a change in circumstances was sufficient to apprise the mother of the nature of the claim, and the mother could have fleshed out the specific facts during the discovery process. BB v. RSR, 149 P.3d 727 (Wyo. 2007).

Am. Jur. 2d, ALR and C.J.S. references. — Right to voluntary dismissal of civil action as affected by opponent's motion for summary judgment, judgment on the pleadings, or directed verdict, 36 ALR3d 1113.

What, other than affidavits, constitutes "matters outside the pleadings," which may convert motion under Federal Rule of Civil Procedure 12(b), (c), into motion for summary judgment, 2 ALR Fed 1027.

Necessity of oral argument in federal courts on motion for summary judgment or for judgment on the pleadings, 105 ALR Fed 755.

V. MOTION FOR MORE DEFINITE STATEMENT.

Law reviews. — For note, "The Motion to Make More Definite and the Motion to Strike," see 12 Wyo. L.J. 264 (1958).

VI. MOTION TO STRIKE.

VII. WAIVER OR PRESERVATION OF CERTAIN DEFENSES.

Right to challenge jurisdiction over subject matter cannot be waived. — The right to challenge the jurisdiction of a court over the subject matter cannot be waived, and the same rule applies to quasi-judicial bodies. Ruby v. Schuett, 360 P.2d 170 (Wyo. 1961).

Although the defense of lack of jurisdiction over the person may under certain circumstances be waived, the right to challenge jurisdiction over the subject matter cannot be waived. Steffens v. Smith, 477 P.2d 119 (Wyo. 1970).

Subject matter jurisdiction cannot be waived. Nicholaus v. Nicholaus, 756 P.2d 1338 (Wyo. 1988).

Under an exception to the Feres doctrine, Wyoming's Air National Guard and its adjutant general faced possible liability for terminating an officer without following all prescribed statutory procedures; state courts lacked subject matter jurisdiction, however, because of the officer's failure to timely seek review of the decision of the National Guard, since the Guard was, to at least some extent, a state agency. Nyberg v. State Military Dep't, 65 P.3d 1241 (Wyo. 2003).

But defense of lack of jurisdiction over person can be waived. — If a defendant makes one or more motions permitted under this rule, the defense of lack of jurisdiction over the person of defendant must be included or it will be waived. State ex rel. Sheehan v. District Court, 426 P.2d 431 (Wyo. 1967); UMW, Local 1972 v. Decker Coal Co., 774 P.2d 1274 (Wyo. 1989).

It is necessary for a defendant to question the jurisdiction of the court over his person at his earliest opportunity; otherwise, such a defense

will be considered to be waived. State ex rel. Sheehan v. District Court, 426 P.2d 431 (Wyo. 1967).

Voluntary appearance. — Natural father voluntarily appeared in an adoption proceeding and waived his right to contest the validity of service of process, thereby conferring the district court with personal jurisdiction over him, where he responded to the adoptive father's published notice by filing a letter with the court, and subsequently filed an affidavit consenting to an adoption, and neither filing contained objection to the district court's jurisdiction. LVW v. J, 965 P.2d 1158 (Wyo 1998).

Special appearances no longer recognized. — Provision for special or limited appearances to contest jurisdiction no longer exists under Wyoming Rules of Civil Procedure. CRB v. Department of Family Servs., 974 P.2d 931 (Wyo. 1999).

Jurisdiction defense not waived by filing answer. — In a parental termination proceeding, a parent did not waive her defense to the agency's inadequate service of process by filing an answer, where she had already appropriately attacked the inadequate service with a defensive motion to dismiss under subdivision (b). WR v. Lee, 825 P.2d 369 (Wyo. 1992).

Deciding cause on point not raised below. — There can be no question of the right and duty of the Supreme Court to decide the cause on a point not raised below where such matter is fundamental, e.g., lack of jurisdiction apparent on the face of the record. Steffens v. Smith, 477 P.2d 119 (Wyo. 1970).

Lack of indispensable party raised by motion of Supreme Court. — The lack of an indispensable party is of such importance that the Supreme Court may properly raise the question on its own motion. State ex rel. Christopulos v. Husky Oil Co., 575 P.2d 262 (Wyo. 1978); Central Contractors Co. v. Paradise Valley Util. Co., 634 P.2d 346 (Wyo. 1981).

Qualified immunity cases should rarely be disposed of by Rule 12(b)(6) dismissal. — Considering the requirements for qualified immunity and their definitions, cases involving the defense of qualified immunity should rarely be disposed of by a Rule 12(b)(6) dismissal. Darrar v. Bourke, 910 P.2d 572 (Wyo. 1996).

Unlike absolute immunity, a determination that qualified immunity is generally available to peace officers is not sufficient to sustain a motion to dismiss. The defense of qualified immunity presents mixed questions of fact and law. These questions are better suited for resolution at the summary judgment stage of the proceedings after the facts are sufficiently developed. Darrar v. Bourke, 910 P.2d 572 (Wyo. 1996).

Stated in Befumo v. Johnson, 119 P.3d 936 (Wyo. 2005).

Rule 13. Counterclaim and crossclaim.

(a) *Compulsory Counterclaim.* —

(1) *In General.* — A pleading must state as a counterclaim any claim that — at the time of its service — the pleader has against an opposing party if the claim:

(A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and

(B) does not require adding another party over whom the court cannot acquire jurisdiction.

(2) *Exceptions.* — The pleader need not state the claim if:

(A) when the action was commenced, the claim was the subject of another pending action; or

(B) the opposing party sued on its claim by attachment or other process that did not establish personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule.

(b) *Permissive Counterclaim.* — A pleading may state as a counterclaim against an opposing party any claim that is not compulsory.

(c) *Relief Sought in a Counterclaim.* — A counterclaim need not diminish or defeat the recovery sought by the opposing party. It may request relief that exceeds in amount or differs in kind from the relief sought by the opposing party.

(d) *Counterclaim Against the State.* — These rules do not expand the right to assert a counterclaim — or to claim a credit — against the state or against a county, municipal corporation or other political subdivision, public corporation, or any officer or agency thereof.

(e) *Counterclaim Maturing or Acquired After Pleading.* — The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading.

(f) *Omitted Counterclaim.* — When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, the pleader may by leave of court set up the counterclaim by amendment.

(g) *Crossclaim Against a Coparty.* — A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action. The crossclaim may include a claim that the coparty is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant.

(h) *Joining Additional Parties.* — Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim.

(i) *Separate Trials; Separate Judgments.* — If the court orders separate trials under Rule 42(b), it may enter judgment on a counterclaim or crossclaim under Rule 54(b) when it has jurisdiction to do so, even if the opposing party's claims have been dismissed or otherwise resolved.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 13 of the Federal Rules of Civil Procedure.

Cross References. — As to reply to counterclaim and answer to cross-claim, see Rule 7. As to entry of judgment upon counterclaim or cross-claim, see Rule 54. As to compensation of cross demands, see § 1-1-106. As to applicability of confession of judgment provisions to counterclaims or cross-claims, see § 1-10-106.

There is no general difference, for purposes of pleading, between setoff, recoupment, or independent claims in the sense that they all constitute counterclaims under this rule. Hawkeye-Security Ins. Co. v. Apodaca, 524 P.2d 874 (Wyo. 1974); Mad River Boat Trips, Inc. v. Jackson Hole Whitewater, Inc., 818 P.2d 1137 (Wyo. 1991).

Burden imposed upon counterclaimant. — While this rule provides that a counterclaim may seek relief exceeding in amount or different in kind from that sought in the pleading of the opposing party, such a claim, because it asks for affirmative relief, casts plaintiff-type burdens upon the counterclaimant. Hawkeye-Security Ins. Co. v. Apodaca, 524 P.2d 874 (Wyo. 1974).

Substantive question not affected by pleading of counterclaim. — The pleading of a counterclaim, being a procedural matter, does not affect the substantive question as to whether a limitation period bars the claim which is pleaded as a counterclaim. Hawkeye-Security Ins. Co. v. Apodaca, 524 P.2d 874 (Wyo. 1974).

And when recoupment not barred by limitation period. — A recoupment, which by definition arises out of the transactional subject of the suit, when used only to defeat the claim sued upon, is not barred by a limitation period, if the main action is timely. Hawkeye-Security Ins. Co. v. Apodaca, 524 P.2d 874 (Wyo. 1974).

Compulsory counterclaim barred if not brought. — Ordinarily, a claim which is a compulsory counterclaim under subdivision (a), but is not brought, is thereafter barred. Lane Co. v. Busch Dev., Inc., 662 P.2d 419 (Wyo. 1983).

After-acquired claim is not considered compulsory counterclaim under subdivision (a), and a failure to interpose it will not bar its assertion in a later suit. Hollon v. McComb, 636 P.2d 513 (Wyo. 1981).

Claim otherwise barred by sovereign immunity may be raised as counterclaim. — A claim which would otherwise be barred by the doctrine of sovereign immunity may be asserted as a counterclaim in a government-initiated lawsuit if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and is asserted to reduce or defeat the government's claim. Ruppenthal v. State ex rel. Economic Dev. & Stabilization Bd., 849 P.2d 1316 (Wyo. 1993).

Action by insured not barred by insurance company settlement. — A settlement by an automobile liability insurance company of a claim against its insured without his consent or against his protests of nonliability does not ordinarily bar an action by the insured against the person receiving the settlement on a claim arising out of the same set of facts. Suchta v. Robinett, 596 P.2d 1380 (Wyo. 1979).

Insurance company need not advise on counterclaim. — An automobile liability insurance company does not owe a duty to its insured to advise him with respect to his counterclaim for damages, or to protect his interests in that regard. Suchta v. Robinett, 596 P.2d 1380 (Wyo. 1979).

Motion to amend counterclaim alleging misrepresentation should have been granted under subdivision (f). — See Blanton v. FDIC, 706 P.2d 1111 (Wyo. 1985).

Absent misconduct, party's parent company not joined. — In response to a mortgage foreclosure action, the defendants filed a counterclaim, alleging that the plaintiffs had made fraudulent misrepresentations. The court did not abuse its discretion when it denied the defendants' motion to join the plaintiffs' parent

companies as parties to this action pursuant to Rules 13(h) and 19. The defendants failed to show how either of the plaintiffs defrauded them by its corporate makeup. Albrecht v. Zwaanshoek Holding En Financiering, 762 P.2d 1174 (Wyo. 1988).

Applied in Wyoming Bank & Trust Co. v. Waugh, 606 P.2d 725 (Wyo. 1980); James S. Jackson Co. v. Horseshoe Creek, Ltd., 650 P.2d 281 (Wyo. 1982); Triton Coal Co. v. Husman, Inc., 846 P.2d 664 (Wyo. 1993); Coones v. FDIC, 848 P.2d 783 (Wyo. 1993).

Cited in Meyer v. Ellis, 411 P.2d 338 (Wyo. 1966); Lukens v. Goit, 430 P.2d 607 (Wyo. 1967); Durdahl v. Bank of Casper, 718 P.2d 23 (Wyo. 1986); Barker Bros. v. Barker-Taylor, 823 P.2d 1204 (Wyo. 1992); Schneider Nat'l, Inc. v. Holland Hitch Co., 843 P.2d 561 (Wyo. 1992).

Law reviews. — For article, "Pleading Under the Federal Rules," see 12 Wyo. L.J. 177 (1958).

For note, "Counterclaims," see 12 Wyo. L.J. 268 (1958).

For article, "The Law of Indemnity in Wyoming: Unraveling the Confusion," see XXXI Land & Water L. Rev. 811 (1996).

Am. Jur. 2d, ALR and C.J.S. references. — 20 Am. Jur. 2d Counterclaim, Recoupment and Setoff § 1 et seq.; 59 Am. Jur. 2d Parties §§ 182 to 207; 61A Am. Jur. 2d Pleading §§ 410 to 417.

Independent venue requirements as to cross-complaint or similar action by defendant seeking relief against a codefendant or third party, 100 ALR2d 693.

Proceeding for summary judgment as affected by presentation of counterclaim, 8 ALR3d 1361.

Right in equity suit to jury trial of counterclaim involving legal issue, 17 ALR3d 1321.

May action for malicious prosecution be based on cross-complaint or cross-action in civil suit, 65 ALR3d 901.

Necessity and permissibility of raising claim for abuse of process by reply or counterclaim in same proceeding in which abuse occurred — state cases, 82 ALR4th 1115.

Who is an "opposing party" against whom a counterclaim can be filed under Federal Civil Procedure Rule 13(a) or (b), 1 ALR Fed 815.

Claim as to which right to demand arbitration exists as subject of compulsory counterclaim under Federal Rule of Civil Procedure 13(a), 2 ALR Fed 1051.

Joinder of counterclaim under Rule 13(a) or (b) of Federal Rules of Civil Procedure with jurisdictional defense under Rule 12(b) as waiver of such defense, 17 ALR Fed 388.

Effect of filing as separate federal action claim that would be compulsory counterclaim in pending federal action, 81 ALR Fed 240.

49 C.J.S. Judgments §§ 39 to 41; 50 C.J.S. Judgments § 684; 67A C.J.S. Parties §§ 88 to 105; 71 C.J.S. Pleading §§ 200 to 206; 80 C.J.S. Set-off and Counterclaim § 1 et seq.

Rule 14. Third-party practice.

(a) *When a Defending Party may Bring in a Third Party.* —

(1) *Timing of the Summons and Complaint.* — A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than 14 days after serving its original answer.

(2) *Third-Party Defendant's Claims and Defenses.* — The person served with the summons and third-party complaint — the "third-party defendant":

(A) must assert any defense against the third-party plaintiff's claim under Rule 12;

(B) must assert any counterclaim against the third-party plaintiff under Rule 13(a), and may assert any counterclaim against the third-party plaintiff under Rule 13(b) or any crossclaim against another third-party defendant under Rule 13(g);

(C) may assert against the plaintiff any defense that the third-party plaintiff has to the plaintiff's claim; and

(D) may also assert against the plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.

(3) *Plaintiff's Claims Against a Third-Party Defendant.* — The plaintiff may assert against the third-party defendant any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The third-party defendant must then assert any defense under Rule 12

and any counterclaim under Rule 13(a), and may assert any counterclaim under Rule 13(b) or any crossclaim under Rule 13(g).

(4) *Motion to Strike, Sever, or Try Separately.* — Any party may move to strike the third-party claim, to sever it, or to try it separately.

(5) *Third-Party Defendant's Claim Against a Nonparty.* — A third-party defendant may proceed under this rule against a nonparty who is or may be liable to the third-party defendant for all or part of any claim against it.

(b) *When a Plaintiff may Bring in a Third Party.* — When a claim is asserted against a plaintiff, the plaintiff may bring in a third party if this rule would allow a defendant to do so.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 14 of the Federal Rules of Civil Procedure.

Purpose of this rule is to accomplish in one proceeding the adjudication of the rights of all persons concerned in the controversy, to prevent the necessity of trying several related claims in different lawsuits, to avoid circuity of action and to reach consistent results. State Hwy. Comm'n v. Bourne, 425 P.2d 59 (Wyo. 1967).

This rule should be liberally construed to effectuate its intended purposes. State Hwy. Comm'n v. Bourne, 425 P.2d 59 (Wyo. 1967).

Showing required. — A third-party plaintiff must make some showing that entitles him to recover over against the third-party defendants, although it is not required that he do so to an absolute certainty. State Hwy. Comm'n v. Bourne, 425 P.2d 59 (Wyo. 1967).

Motion to dismiss third-party complaint. — For purposes of a motion to dismiss a third-party complaint, the well-pleaded facts in the third-party complaints must be taken as true. State Hwy. Comm'n v. Bourne, 425 P.2d 59 (Wyo. 1967).

The trial court is vested with a broad discretion in passing upon a motion to dismiss third-party complaint. State Hwy. Comm'n v. Bourne, 425 P.2d 59 (Wyo. 1967).

Applied in Robertson v. TWP, Inc., 656 P.2d 547 (Wyo. 1983).

Stated in Revelle v. Schultz, 759 P.2d 1255 (Wyo. 1988).

Cited in Bagley v. Watson, 478 P.2d 595 (Wyo. 1971); Schneider Nat'l, Inc. v. Holland Hitch Co., 843 P.2d 561 (Wyo. 1992).

Law reviews. — For article, "Pleading Under the Federal Rules," see 12 Wyo. L.J. 177 (1958).

For article, "The Law of Indemnity in Wyoming: Unraveling the Confusion," see XXXI Land & Water L. Rev. 811 (1996).

Am. Jur. 2d, ALR and C.J.S. references. — 18 Am. Jur. 2d Contribution §§ 109 to 120; 59 Am. Jur. 2d Parties §§ 192 to 197.

Independent venue requirements as to cross-complaint or similar action by defendant seeking relief against a codefendant or third party, 100 ALR2d 693.

Loan receipt or agreement between insured and insurer for a loan repayable to expense of recovery from other insurer or from carrier or other person causing loss, 13 ALR3d 42.

67A C.J.S. Parties §§ 88 to 99.

Rule 15. Amended and supplemental pleadings.

(a) *Amendments Before Trial.* —

(1) *Amending as a Matter of Course.* — A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) *Other Amendments.* — In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) *Time to Respond.* — Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

(b) *Amendments During and After Trial.* —

(1) *Based on an Objection at Trial.* — If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings

to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) *For Issues Tried by Consent.* — When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move — at any time, even after judgment — to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

(c) *Relation Back of Amendments.* —

(1) *When an Amendment Relates Back.* — An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out — or attempted to be set out — in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(w) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(2) *Notice to the State.* — When the State or a State officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the Attorney General of the State or to the officer or agency.

(d) *Supplemental Pleadings.* — On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 15 of the Federal Rules of Civil Procedure.

I. GENERAL CONSIDERATION.
II. AMENDMENTS.
III. AMENDMENTS TO CONFORM TO EVIDENCE.
IV. RELATION BACK OF AMENDMENTS.
V. SUPPLEMENTAL PLEADINGS.

I. GENERAL CONSIDERATION.

Applied in First Nat'l Bank v. Fay, 80 Wyo. 245, 341 P.2d 79 (1959); Simpson v. Western Nat'l Bank, 497 P.2d 878 (Wyo. 1972); Morad v. Whitaker, 565 P.2d 484 (Wyo. 1977); Robertson v. TWP, Inc., 656 P.2d 547 (Wyo. 1983); Abas v. State ex rel. Wyoming Worker's Comp. Div., 701 P.2d 1153 (Wyo. 1985); Seckman v. Wyo-Ben, Inc., 783 P.2d 161 (Wyo. 1989); Herrig v. Herrig, 844 P.2d 487 (Wyo. 1992); Halliburton Co. v. Claypoole, 868 P.2d 252 (Wyo. 1994); RKS v. SDM ex rel. TY, 882 P.2d 1217 (Wyo. 1994); Herbel v. S.K. Wood Co., 897 P.2d 478 (Wyo. 1995).

Quoted in Brasel & Sims Constr. Co. v. Neuman Transit Co., 378 P.2d 501 (Wyo. 1963); Western Nat'l Bank v. Moncur, 624 P.2d 765 (Wyo. 1981); Connors v. Connors, 769 P.2d 336 (Wyo. 1989); Walker v. Walker, 925 P.2d 1305 (Wyo. 1996); Bell v. Schell, 101 P.3d 465 (Wyo. 2004); Case v. Outback Pipe Haulers, 171 P.3d 514 (Wyo. 2007).

Stated in Lammey v. Producers Livestock Credit Corp., 463 P.2d 491 (Wyo. 1970); Cook v. Card (In re Cook), 170 P.3d 122 (Wyo. 2007).

Cited in Morad v. Brown, 549 P.2d 312 (Wyo. 1976); Weaver v. Blue Cross-Blue Shield, 609 P.2d 984 (Wyo. 1980); Daly v. Shrimplin, 610

P.2d 397 (Wyo. 1980); Durdahl v. Bank of Casper, 718 P.2d 23 (Wyo. 1986); Dunn v. Rescon Technology Corp., 884 P.2d 965 (Wyo. 1994); Doenz v. Sheridan County Bd. of County Comm'rs, 949 P.2d 464 (Wyo. 1997); Roussalis v. Apollo Elec. Co., 979 P.2d 503 (Wyo. 1999); Arnold v. Day, 158 P.3d 694 (Wyo. 2007).

Law reviews. — For article "The Obligation of an Insurer to Defend All Suits Brought Against the Insured," see 5 Wyo. L.J. 139.

For article, "Pleading Under the Federal Rules," see 12 Wyo. L.J. 177 (1958).

For comment, "Comparative Negligence in Wyoming," see VIII Land & Water L. Rev. 597 (1973).

Am. Jur. 2d, ALR and C.J.S. references. — 61A Am. Jur. 2d Pleading §§ 715 to 736, 745 to 880.

Amendment of pleading after limitation has run, so as to set up subsequent appointment as executor or administrator of plaintiff who professed to bring the action in that capacity without previous valid appointment, 27 ALR4th 198.

Rule 15(c), Federal Rules of Civil Procedure, or state law as governing relation back of amended pleading, 100 ALR Fed 880.

71 C.J.S. Pleading §§ 323 to 455.

II. AMENDMENTS.

This rule allows amendments to pleadings when the trial court in the proper exercise of its sound discretion finds that justice so requires and grants leave therefor. Breazeale v. Radich, 500 P.2d 74 (Wyo. 1972).

Subject to guided discretion of court. — The decision to allow amendment to pleadings is vested within the sound discretion of the district court, when justice requires, and therefore subject to reversal on appeal only for an abuse of that discretion. In determining the propriety of an amendment subject to this standard of review, the basic guideline to be followed is whether or not the allowance of the amendment prejudiced the adverse party. Rose v. Rose, 576 P.2d 458 (Wyo. 1978); Elder v. Jones, 608 P.2d 654 (Wyo. 1980); Hernandez v. Gilveli, 626 P.2d 74 (Wyo. 1981).

The decision to allow an amendment to the pleadings is vested within the sound discretion of the district court and, therefore, subject to reversal on appeal only for an abuse of that discretion. Johnson v. Aetna Cas. & Sur. Co., 608 P.2d 1299 (Wyo. 1980), appeal dismissed and cert. denied, 454 U.S. 1118, 102 S. Ct. 961, 71 L. Ed. 2d 105 (1981).

Second amended petition allowed. — The trial court acted within its discretion in allowing a father to file a second amended petition asserting that he was the presumptive, not putative, father in order to avoid the statute of limitations; allowing such amendment did not prejudice the mother. KC v. KM, 941 P.2d 46 (Wyo. 1997).

Denial of amendments to complaint. — Plaintiff purchaser's motion to file a second amended complaint was filed after the district court granted the purchaser specific performance against defendant seller under a real property lease with a purchase option, after the discovery cut-off deadline, and only shortly before the scheduled trial to determine damages; the purchaser should have contemplated the damages which reasonably flowed from the breach of contract claim when the original and first amended complaints were filed and failed to make a showing of good cause for his motion to amend under this rule or under W.R.C.P. 16, thus, it was not error to deny the motion to file the second amended complaint. Ekberg v. Sharp, 76 P.3d 1250 (Wyo. 2003).

Denial of the buyer's motion to amend the complaint was appropriate pursuant to Wyo. R. Civ. P. 15(a) because the motion to file a second amended complaint was filed six months after the initial complaint and the buyer proposed two new causes of action in the amendment. Foxley & Co. v. Ellis, 201 P.3d 425 (Wyo. 2009).

Amendment to be freely allowed. — In the absence of any apparent or declared reason — such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. — the leave to amend should be freely given. Beaudoin v. Taylor, 492 P.2d 966 (Wyo. 1972).

Unless a proposed amendment to a pleading will unduly prejudice the opposing party or has not been offered in good faith, or unless the party seeking to amend has had repeated opportunities to cure the defect, leave to amend should be liberally granted. Johnson v. Aetna Cas. & Sur. Co., 608 P.2d 1299 (Wyo. 1980), appeal dismissed and cert. denied, 454 U.S. 1118, 102 S. Ct. 961, 71 L. Ed. 2d 105 (1981).

Amendments to allege conditions precedent to filing suit. — Complaints alleging claims against governmental entities must also allege compliance with the statutory and constitutional provisions governing notices of claim. However, in cases where a notice of claim has been properly presented but the complaint fails to allege that fact, district courts have the discretion to allow amendment of the complaint to cure the failure. Brown v. City of Casper, 248 P.3d 1136 (Wyo. 2011).

When plaintiff injured motorist filed suit against defendant city after his vehicle was struck by a vehicle driven by a police officer, the district court had subject matter jurisdiction to determine whether plaintiff complied with the requirements of Wyo. Stat. Ann. § 1-39-114 and Wyo. Const. art. 16, § 7 for filing suit against a governmental entity. Upon presentation of proof that plaintiff had complied with those provisions by providing a notice of claim to the city, the district court also had subject matter jurisdiction to allow him to amend his com-

plaint to so allege; in accordance with this rule, the amendment related back to the date plaintiff filed his original complaint. Brown v. City of Casper, 248 P.3d 1136 (Wyo. 2011).

And issue on appeal is effect of amended petition. — If a party amends his pleadings in the trial court he cannot successfully allege error on the rulings made upon the pleadings supplanted by the amendment. Accordingly, the issue on appeal is the effect of the amended petition. Carter v. Davison, 359 P.2d 990 (Wyo. 1961).

Pleadings deemed amended by evidence adduced through summary judgment motion. — Since Wyoming courts can amend the parties' pleadings based on the issues and evidence presented at trial, there is no reason pleadings cannot be deemed amended to reflect the issues and evidence adduced through a motion for summary judgment. Loftus v. Romsa Constr., Inc., 913 P.2d 856 (Wyo. 1996).

Court did not abuse discretion in denying motion to amend, which motion was made 24 hours before trial was to begin, where there was no evidence to establish that justice would have been furthered by permitting the amendment, or that the court acted arbitrarily or capriciously. Narans v. Paulsen, 803 P.2d 358 (Wyo. 1990).

No abuse of discretion in refusing amendment. — See Boller v. Key Bank, 829 P.2d 260 (Wyo. 1992).

Where teenage boys who were staying on the homeowners' property became intoxicated and had a car accident resulting in the death of two of the boys and injuries to a third boy, the motion to amend the complaint was merely an attempt to avoid the statute of limitations while the appellant belatedly commenced a basic investigation; thus, the district court did not err in denying the motion because it resulted from the parents' own dilatory conduct and was not made for a proper purpose. Daniels v. Carpenter, 62 P.3d 555 (Wyo. 2003).

Because whatever hearing on the motion for leave to amend under this section that took place was not reported, the record contained no facts from which it could be determined that the district court abused its discretion in denying the motion; the allegation contained in the motion that limited discovery had led to the discovery of additional facts and evidence was insufficient either to identify those facts and evidence, or to explain the long delay in their discovery. Three Way, Inc. v. Burton Enters., 177 P.3d 219 (Wyo. 2008).

No abuse of discretion in refusing amendment in medical malpractice action. — In a medical malpractice case, a court did not err by denying plaintiff's motion to amend the complaint where plaintiff did not adequately distinguish between the torts of negligent misrepresentation and nondisclosure, plaintiff did not adequately advocate for the adoption of the latter tort, and plaintiff did not adequately support the contention that, under either tort, the alleged tortfeasor owes a duty to a third person not party to the transaction. Furthermore, the record supported denial of the motion on the ground that it was untimely. Armstrong v. Hrabal, 87 P.3d 1226 (Wyo. 2004).

No abuse of discretion in not ruling on motion to amend. — District court did not abuse its discretion in not ruling upon a former wife's motion to amend her complaint, which sought to set aside what she deemed a fraudulent conveyance of real property, because the wife's proposed amendment of her complaint sought to add to the complaint the occasions upon which the former husband had either transferred or conveyed his interest in the disputed real property either to or from his family trust, and the earlier transfers were irrelevant to the case because, if the wife had a valid claim, the last transfer sufficed to sustain that element of the claim. Jasper v. Brinckerhoff, 179 P.3d 857 (Wyo. 2008).

Refusing amendment deemed abuse of discretion. — Judgment creditors already had title to a parcel of land by virtue of a prior recorded warranty deed and their ownership interest was not affected by their execution against this land. The redemptioner, however, had paid something to redeem this land, as to which he had no right of redemption and to which the court subsequently quieted title in the judgment creditors. Under the circumstances, to refuse to permit the complaint to be amended so that the redemptioner could claim the amount paid for the parcel which he did not receive constituted an abuse of discretion. Bush v. Duff, 754 P.2d 159 (Wyo. 1988).

Abuse of discretion occurred in denying leave to state additional causes of action. — See Wilder v. Cody Country Chamber of Commerce, 868 P.2d 211 (Wyo. 1994).

Motion to amend counterclaim alleging misrepresentation should have been granted under Rule 13(f). — See Blanton v. FDIC, 706 P.2d 1111 (Wyo. 1985).

III. AMENDMENTS TO CONFORM TO EVIDENCE.

Pleadings deemed amended. — Where amendment was first offered and allowed at the pretrial conference, subject to a showing of prejudice by appellant which was never made and no objection was made to evidence introduced to sustain it, under this rule, the pleadings are deemed amended in that respect. Rocky Mt. Packing Co. v. Branney, 393 P.2d 131 (Wyo. 1964); Richardson v. Schaub, 796 P.2d 1304 (Wyo. 1990).

And issues treated as if in pleadings. — When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Title

Guar. Co. v. Midland Mtg. Co., 451 P.2d 798 (Wyo. 1969).

The principal cause of action must be considered on appeal as if those issues not raised by the pleadings, but tried under this rule with the implied consent of both parties, had been embodied in the pleadings. Lore v. Town of Douglas, 355 P.2d 367 (Wyo. 1960), rev'd on other grounds, 375 P.2d 399 (1962).

This rule makes it clear that issues tried by express or implied consent shall be treated as if raised in the pleadings. Jankovsky v. Halladay Motors, 482 P.2d 129 (Wyo. 1971).

So judgment not disturbed. — Where evidence received without objection supports the findings of the court, the judgment may not be disturbed on the ground that complaint was not amended to conform to the evidence. Jones v. Clark, 418 P.2d 792 (Wyo. 1966).

Pretrial orders are capable of "de facto" amendment by trial court's findings. Frontier Fibreglass Indus., Inc. v. City of Cheyenne, 435 P.2d 456 (Wyo. 1967).

And judge's treatment is not subject to review. — A judge's decision in treating the issue of modification of a custody decree in all respects as if it had been raised in the pleadings, although it had not, is not subject to review, except for abuse of discretion. Strahan v. Strahan, 400 P.2d 542 (Wyo. 1965).

Trial court considered issue although not raised by pleadings. — See Osborn v. Warner, 694 P.2d 730 (Wyo. 1985); Willard Given & Assocs. v. First Wyo. Bank-East, 706 P.2d 247 (Wyo. 1985).

Implied consent of parties to try issue not set forth in original pleadings was held to exist where one party's pretrial memorandum stated that there were issues to be resolved in addition to those before the court and considerable testimony concerning the issue was presented at trial. J Bar H, Inc. v. Johnson, 822 P.2d 849 (Wyo. 1991).

When amendment mandatory. — If the court determines that an issue was tried with the express or implied consent of the parties it has no discretion to refuse to allow the amendment. In this event the amendment is mandatory. Bragg v. Marion, 663 P.2d 505 (Wyo. 1983).

No amendment for issue not originally litigated. — The trial court amended a complaint, premised on a motion under subdivision (b), to include a claim for reformation of a performance bond because of mutual mistake. None of the parties had initially sought reformation of the bond because of mutual mistake, and that issue was not litigated; it was only urged upon the trial court in a supplemental brief filed after all the evidence had been presented. Because this issue was presented as an after-thought, without the benefit of any evidence designed to challenge or support the claim, the court's amendment was prejudicial to the adverse party and was an abuse of discretion. Hoiness-LaBar Ins. v. Julien Constr. Co., 743 P.2d 1262 (Wyo. 1987).

Failure to request continuance based upon surprise precludes prejudice contention on appeal. — Even if a party genuinely feels that he is surprised by the evidence and that such evidence is not reflected in the charges, the failure to request a continuance on the ground of surprise precludes him from contending on appeal that he was prejudiced. White v. Board of Trustees, 648 P.2d 528 (Wyo.), cert. denied, 459 U.S. 1107, 103 S. Ct. 732, 74 L. Ed. 2d 956 (1982).

When defenses not pleaded examined on appeal. — Although neither party set forth the defenses of res judicata or statute of limitations to the other's claim as required by Rule 8(c), where plaintiff cannot prevail on appeal on any of his theories, and, since subdivision (b) authorizes consideration by the trial court of issues not raised by the pleadings, the Supreme Court will not pass on the propriety of the procedure, but will examine the merits of these defenses. Roush v. Roush, 589 P.2d 841 (Wyo. 1979).

Applicability of rule on appeal where only pleading and judgment designated in appeal record. — See Thomas v. Gonzelas, 79 Wyo. 111, 331 P.2d 832 (1958).

Subdivision (b) is applicable to administrative proceedings. White v. Board of Trustees, 648 P.2d 528 (Wyo. 1982), cert. denied, 459 U.S. 1107, 103 S. Ct. 732, 74 L. Ed. 2d 956 (1983).

Defect in petition to modify divorce decree corrected upon leave to amend. — While the original petition to modify a divorce decree was technically deficient because it failed to allege any facts showing a change in circumstances, the defect was corrected when the district court granted leave to amend. The opponent did not point to any evidence showing that his defense was prejudiced when the court granted leave to amend. Without such a showing the court properly permitted amendment of the pleadings to conform to the evidence, as encouraged by subdivision (b). Lewis v. Lewis, 716 P.2d 347 (Wyo. 1986).

Application of subdivision (b) to custody hearing. — Application of subdivision (b) has become established in the judicial processes to the extent that the Supreme Court would be reluctant to ignore it — especially in a case where the inherent equitable powers of the court are present to the extent they are in matters affecting the welfare of children. Strahan v. Strahan, 400 P.2d 542 (Wyo. 1965).

Subdivision (b) merely augments and supplements former § 20-2-113 (now see § 20-2-201 et seq), by stating that certain issues in a child custody hearing shall be treated in all respects as if they had been raised in the pleadings. Strahan v. Strahan, 400 P.2d 542 (Wyo. 1965).

And modification of custody decree may be treated as if it had been requested or petitioned for by a parent, under certain

circumstances. Strahan v. Strahan, 400 P.2d 542 (Wyo. 1965).

Am. Jur. 2d, ALR and C.J.S. references. — What constitutes "prejudice" to party who objects to evidence outside issues made by pleadings so as to preclude amendment of pleadings under Rule 15 (b) of Federal Rules of Civil Procedure, 20 ALR Fed 448.

IV. RELATION BACK OF AMENDMENTS.

Running of statute of limitations. — Plaintiffs' third amended complaint, naming the manufacturer of a defective product as defendant, which was filed after the running of the statute of limitations, could not relate back to a prior defective amendment filed within the limitations period naming the manufacturer as defendant; it could relate back only to the original complaint, which did not give the manufacturer proper notice of the action. Nowotny v. L & B Contract Indus., Inc., 933 P.2d 452 (Wyo. 1997).

Substitution of true name for fictitious name. — When amendment is made of a complaint, substituting a fictitious name of an unknown defendant with the true name after the time permitted by the statute of limitations has passed, the amendment relates back for time computation purposes only when the defendant had or should have had notice of the claim against it. Northern Utils. Div. of KN Energy, Inc. v. Town of Evansville, 822 P.2d 829 (Wyo. 1991) (decided prior to 1992 amendment).

Amendment alleging presentation of proper notice of claim. — District court had subject matter jurisdiction to allow amendment of a wrongful death complaint to allege presentation of a notice of claim complying with Wyo. Stat. Ann. § 1-39-113(b) and Wyo. Const. art. 16, § 7, which had been timely presented. The amendment related back to the original filing date in accordance with this section. Hoffman v. Darnell, 252 P.3d 936 (Wyo. 2011).

Am. Jur. 2d, ALR and C.J.S. references. — Right to amend pending personal injury action by including action for wrongful death after statute of limitations has run against independent death action, 71 ALR3d 933.

Relation back of amended pleading substituting true name of defendant for fictitious name used in earlier pleading so as to avoid bar of limitations, 85 ALR3d 130.

Amendment of pleading to add, substitute or change capacity of party plaintiff as relating back to date of original pleading under Rule 15 (c) of Federal Rules of Civil Procedure so as to avoid bar of limitations, 12 ALR Fed 233; 100 ALR Fed 880.

V. SUPPLEMENTAL PLEADINGS.

Violation of due process. — In a divorce case, a wife's due process rights under Wyo. Const. art. I, § 6 and the Fourteenth Amendment were violated when a district court entered a default divorce decree based on a supplemental pleading that was not served on the wife; a wife's motion to modify the decree should have been granted because the supplemental affidavit contained claims for relief that were not in the original complaint. Bradley v. Bradley, 118 P.3d 984 (Wyo. 2005).

Rule 16. Pretrial conferences; scheduling; management.

(a) *Purposes of a Pretrial Conference.* — In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

(1) expediting disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation; and

(5) facilitating settlement

(b) *Scheduling.* —

(1) *Scheduling Order.* — The judge, or a court commissioner when authorized by the Uniform Rules for the District Courts, may, after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference, telephone, mail or other suitable means, enter a scheduling order.

(2) *Time to Issue.* — The judge must issue the scheduling order as soon as practicable.

(3) Contents of the Order.

(A) *Required Contents.* — The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) *Permitted Contents.* — The scheduling order may:

(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);

(ii) modify the extent of discovery;

(iii) provide for disclosure, discovery, or preservation of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced;

(v) direct that before moving for an order relating to discovery, the movant must request a conference with the court;

(vi) set dates for pretrial conferences and for trial; and

(vii) include other appropriate matters.

(4) *Modifying a Schedule.* — A schedule may be modified only for good cause and with the judge's consent.

(c) *Attendance and Matters for Consideration at a Pretrial Conference.* —

(1) *Attendance.* — A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.

(2) *Matters for Consideration.* — At any pretrial conference, the court may consider and take appropriate action on the following matters:

(A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;

(B) amending the pleadings if necessary or desirable;

(C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;

(D) avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under Wyoming Rule of Evidence 702;

(E) determining the appropriateness and timing of summary adjudication under Rule 56;

(F) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;

(G) identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;

(H) referring matters to a court commissioner or master;

(I) settling the case and using special procedures to assist in resolving the dispute under Rule 40(b) or other alternative dispute resolution procedures;

(J) determining the form and content of the pretrial order;

(K) disposing of pending motions;

(L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(M) ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue;

(N) ordering the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

(O) establishing a reasonable limit on the time allowed to present evidence; and

(P) facilitating in other ways the just, speedy, and inexpensive disposition of the action.

(d) *Pretrial Orders.* — After any conference under this rule, the court shall issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.

(e) *Final Pretrial Conference and Orders.* — The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify the order issued after a final pretrial conference only to prevent manifest injustice.

(f) *Sanctions.* —

(1) *In General.* — On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)--(vii), if a party or its attorney:

(A) fails to appear at a scheduling or other pretrial conference;

(B) is substantially unprepared to participate — or does not participate in good faith — in the conference; or

(C) fails to obey a scheduling or other pretrial order.

(2) *Imposing Fees and Costs.* — Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses — including attorney's fees — incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 16 of the Federal Rules of Civil Procedure.

Cross References. — As to pretrial practice, see Rule 601, D. Ct.

Conference to be arranged when requested. — When any party to an action requests a pretrial conference, this rule requires that such a conference be arranged. Wyoming Bancorporation v. Bonham, 563 P.2d 1382 (Wyo. 1977).

But denial not necessarily reversible error. — Absent a showing of prejudice, denial of a request for a pretrial conference is not reversible error. Wyoming Bancorporation v. Bonham, 563 P.2d 1382 (Wyo. 1977).

Purpose of a pretrial conference is to eliminate surprise and to simplify issues of the case, thereby facilitating the trial on the merits. Rhoads v. Gilliland, 514 P.2d 202 (Wyo. 1973); Central Contractors Co. v. Paradise Valley Util. Co., 634 P.2d 346 (Wyo. 1981).

Pretrial conference resolves incongruities between complaint and answer. — Where the complaint sounds in contract but the answer sets forth defenses to a negligence action, the question is often determined at a pretrial conference since one of the purposes of such conference is to formulate and simplify the issues. Cline v. Sawyer, 600 P.2d 725 (Wyo. 1979).

But pretrial orders must be modified to prevent manifest injustice. — Although the court should be cautious, even reluctant, to modify its pretrial orders during trial, yet when circumstances require modification to prevent manifest injustice, the court has not only the right but an obligation to relieve counsel of his pretrial stipulations. McCabe v. R.A. Manning Constr. Co., 674 P.2d 699 (Wyo. 1983).

Pretrial conference should not invade the trial function of resolving issues, as it is not a trial on the merits. Rhoads v. Gilliland, 514 P.2d 202 (Wyo. 1973).

Pretrial order controls subsequent course of action in civil case. — Whether or not the parties in a particular case are required to abide with this direction is a matter of broad discretion with the trial judge, and any claims of error in that regard are examined under that standard. Salveson v. Cubin, 791 P.2d 581 (Wyo. 1990).

Pretrial order supersedes the pleadings. Boode v. Allied Mut. Ins. Co., 458 P.2d 653 (Wyo. 1969).

A pretrial order supersedes the pleadings, and thus, controls the course of the action. Clouser v. Spaniol Ford, Inc., 522 P.2d 1360 (Wyo. 1974).

Order must be entered ahead of trial to allow preparation. — This rule, in stating that the pretrial order controls the subsequent course of the action, must be taken to mean that the order shall be entered sufficiently ahead of the trial to allow time for preparation by the litigants. Ramsay v. Boland, 364 P.2d 824 (Wyo. 1961).

A pretrial order should be entered sufficiently ahead of time to allow the litigants to prepare for the trial. Clouser v. Spaniol Ford, Inc., 522 P.2d 1360 (Wyo. 1974).

Delays in entering pretrial orders not recommended. — See Caillier v. City of Newcastle, 423 P.2d 653 (Wyo. 1967).

But not necessarily reversible error. — Where a pretrial order was dated the same day as the trial ended and was not filed until 39 days later, such precipitant handling of the trial immediately following a pretrial conference, although not contrary to the words of this rule, was, nevertheless, contrary to the basic reasons for the existence of the rule and to the best interests of procedural justice although,

absent any showing of prejudice, it was not deemed reversible error. School Dist. No. 9 v. District Boundary Bd., 351 P.2d 106 (Wyo. 1960).

Pretrial orders are capable of "de facto" amendment by the trial court's findings. Frontier Fibreglass Indus., Inc. v. City of Cheyenne, 435 P.2d 456 (Wyo. 1967).

And new issues do not come into cause by court's mere granting of permission for their introduction in a pretrial order. Butane Power & Equip. Co. v. Arnold, 415 P.2d 70 (Wyo. 1966).

Requirements of adherence to pretrial orders are within the discretion of the court, whose rulings will not be overturned except where there is an abuse of discretion. Ford Motor Co. v. Kuhbacher, 518 P.2d 1255 (Wyo. 1974).

Any requirement of adherence to a pretrial order entered in accordance with the Rules of Civil Procedure is a matter of discretion with the trial court. Claims of error in that regard are examined under an abuse of discretion standard. Oukrop v. Wasserburger, 755 P.2d 233 (Wyo. 1988).

Refusal to set aside or alter pretrial order not abuse of discretion. — Refusal to set aside or alter pretrial order where motion was based on testimony which was brought to the attention of the court three years after the order was entered was not an abuse of the court's discretion resulting in manifest injustice. Clouser v. Spaniol Ford, Inc., 522 P.2d 1360 (Wyo. 1974).

When pretrial determination of admissibility of evidence required. — A motion in limine, a motion to suppress or a motion to exclude call for a pretrial determination that certain potential evidentiary matters or items are inadmissible at the trial. The modification or rescission of such orders is permitted and is subject to the same considerations and results as those made before the trial. Hayes v. State, 599 P.2d 558 (Wyo.), supplemental opinion, 599 P.2d 569 (Wyo. 1979).

Trial court to address matters raisable at, but not known before, conference. — The fact that the court or a party first became aware of a situation at trial which might have been better addressed at a pretrial conference does not prevent consideration of the situation at trial. Central Contractors Co. v. Paradise Valley Util. Co., 634 P.2d 346 (Wyo. 1981).

Treatment of evidence. — Evidence relied upon for purposes of cross-examination or rebuttal must be treated differently for purposes of this rule, and orders entered thereunder, from evidence relied upon by a party for use in the case in chief. Chrysler Corp. v. Todorovich, 580 P.2d 1123 (Wyo. 1978).

Exclusion of evidence. — Court at medical malpractice trial erred in excluding opinion of plaintiff's expert on grounds of unfair surprise, where there was no indication plaintiff willfully failed to comply with evidentiary rules, and where expert was designated as a witness when plaintiff's previously designated expert could not continue in that capacity. Winterholler v. Zolessi, 989 P.2d 621 (Wyo. 1999).

In a negligence case, a court properly excluded plaintiff's expert testimony regarding future medical expenses where there was no specific language in the pretrial memorandum that would have alerted the contractor to the fact that the doctor's expert medical opinion had changed since the deposition was taken or since the designation of fact witnesses was filed. Fetzer v. J.D. Dayley & Sons, Inc., 91 P.3d 152 (Wyo. 2004).

Limitation of witnesses permitted. — To accept appellant's contention, that § 7-11-305 arbitrarily limited the number of witnesses permitted to give expert testimony on the main and controlling fact of the mental responsibility of the defendant, would bring into contention the section's propriety in the interest of a fair trial and due process and also question the inherent power of the court with reference to limitation of the number of witnesses — thus invalidating the section. Hayes v. State, 599 P.2d 558 (Wyo.), supplemental opinion, 599 P.2d 569 (Wyo. 1979).

Order in limine rescinded or not violated. — In ruling against appellant on his motions for mistrial, for judgment of acquittal and for judgment notwithstanding the verdict and in allowing certain testimony to stand, the court either modified or rescinded the order in limine which had prohibited such testimony or ruled that the testimony was not violative of the order. Hayes v. State, 599 P.2d 558 (Wyo.), supplemental opinion, 599 P.2d 569 (Wyo. 1979).

Denial of amendments to complaint. — Plaintiff purchaser's motion to file a second amended complaint was filed after the district court granted the purchaser specific performance against defendant seller under a real property lease with a purchase option, after the discovery cut-off deadline, and only shortly before the scheduled trial to determine damages; the purchaser should have contemplated the damages which reasonably flowed from the breach of contract claim when the original and first amended complaints were filed and failed to make a showing of good cause for his motion to amend under this rule or under W.R.C.P. 15, thus, it was not error to deny the motion to file the second amended complaint. Ekberg v. Sharp, 76 P.3d 1250 (Wyo. 2003).

Applied in Dixon v. Credit Bureau, 419 P.2d 707 (Wyo. 1966); Elder v. Jones, 608 P.2d 654 (Wyo. 1980); J Bar H, Inc. v. Johnson, 822 P.2d 849 (Wyo. 1991); Thunder Hawk v. Union Pac. R.R., 891 P.2d 773 (Wyo. 1995); Robinson v. Hamblin, 914 P.2d 152 (Wyo. 1996); Johnson v. Griffin, 922 P.2d 860 (Wyo. 1996), cert. denied, 519 U.S. 971, 117 S. Ct. 402, 136 L. Ed. 2d 316 (1996).

Stated in Koontz v. Town of South Superior, 716 P.2d 358 (Wyo. 1986).

Cited in Daly v. Shrimplin, 610 P.2d 397 (Wyo. 1980); Jackson State Bank v. Homar, 837 P.2d 1081 (Wyo. 1992).

Law reviews. — For note, "Pretrial Procedure as Affecting Subsequent Course of Action," see 3 Wyo. L.J. 78.

For article, "Pretrial Techniques of Federal Judges," see 3 Wyo. L.J. 185.

For article, "Procedure for Pretrial Conferences in the Federal Courts," see 3 Wyo. L.J. 197.

For note, "Time for Holding the Pretrial Conference," see 11 Wyo. L.J. 66.

For article, "The Federal Rules: Control of the Human Equation Through Pretrial," see 12 Wyo. L.J. 92 (1958).

For article, "The Pretrial Conference: Conceptions and Misconceptions," see 12 Wyo. L.J. 226 (1958).

For article, "How to Do Pretrial in State Courts," see 14 Wyo. L.J. 1 (1959).

For comment, "An Obstacle Course to Court: A First Look at Wyoming's Medical Review Panel Act," see XXII Land & Water L. Rev. 489 (1987).

See article, "The 1994 Amendments to the Wyoming Rules of Civil Procedure," XXX Land & Water L. Rev. 151 (1995).

Am. Jur. 2d, ALR and C.J.S. references. — 62A Am. Jur. 2d Pretrial Conference and Procedure § 1 et seq.

Failure of party or his attorney to appear at pretrial conference, 55 ALR3d 303.

Propriety of allowing state court civil litigant to call expert witness whose name or address was not disclosed during pretrial discovery proceedings, 58 ALR4th 653.

Propriety of allowing state court civil litigant to call nonexpert witness whose name or address was not disclosed during pretrial discovery proceedings, 63 ALR4th 712.

Validity and effect of local district court rules providing for use of alternative dispute resolution procedures as pretrial settlement mechanisms, 86 ALR Fed 211.

Imposition of sanctions under Rule 16(f), Federal Rules of Civil Procedure, for failing to obey scheduling or pretrial order, 90 ALR Fed 157.

Consideration at trial, under Rule 16 of federal rules of civil procedure, of issues not fixed for trial in pretrial order, 117 ALR Fed 515.

88 C.J.S. Trial § 17 (2).

IV. PARTIES

Rule 17. Plaintiff and defendant; capacity; public officers.

(a) *Real Party in Interest.* —

(1) *Designation in General.* — An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought:

(A) an executor;

(B) an administrator;

(C) a guardian;

(D) a bailee;

(E) a trustee of an express trust;

(F) a party with whom or in whose name a contract has been made for another's benefit; and

(G) a party authorized by statute.

(2) *Action in the Name of the United States for Another's Use or Benefit.* — When a federal statute so provides, an action for another's use or benefit must be brought in the name of the United States.

(3) *Joinder of the Real Party in Interest.* — The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

(b) *Capacity to sue or be sued.* —

(1) The capacity of an individual, including one acting in a representative capacity, to sue or be sued, shall be determined by the law of this State.

(2) A married person may sue or be sued in all respects as if he or she were single.

(3) The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized, unless a statute of this State provides to the contrary.

(4) A partnership or other unincorporated association may sue or be sued in its common name.

(c) *Minor or Incompetent Person.* —

(1) *With a Representative.* — The following representatives may sue or defend on behalf of a minor or an incompetent person:

(A) a general guardian;

(B) a committee;

(C) a conservator; or

(D) a like fiduciary.

(2) *Without a Representative.* — A minor or an incompetent person who does not have a duly appointed representative, or if such representative fails to act the minor or incompetent person may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem — or issue another appropriate order — to protect a minor or incompetent person who is unrepresented in an action.

(d) *Suing person by fictitious name.* — When the identity of a defendant is unknown, such defendant may be designated in any pleading or proceeding by any name and description, and when the true name is discovered the pleading or proceeding may be amended accordingly; and the plaintiff in such case must state in the complaint that the plaintiff could not discover the true name, and the summons must contain the words, 'real name unknown', and a copy thereof must be served personally upon the defendant.

(e) *Public Officer's Title and Name.* — A public officer who sues or is sued in an official capacity may be designated by official title rather than by name, but the court may order that the officer's name be added.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 17 of the Federal Rules of Civil Procedure, except for subdivision (d).

Cross References. — As to actions by and against personal administrators, see § 2-7-104. As to appointment of guardian for ward, see § 3-2-101. As to age of majority, see § 14-1-101.

I. GENERAL CONSIDERATION.
II. REAL PARTY IN INTEREST.
III. CAPACITY TO SUE OR BE SUED.
IV. INFANTS OR INCOMPETENT PERSONS.
V. SUING PERSON BY FICTITIOUS NAME.

I. GENERAL CONSIDERATION.

Applied in In re Child X, 617 P.2d 1078 (Wyo. 1980).

Stated in Associated Aviation Underwriters v. Smith, 597 P.2d 964 (Wyo. 1979); Nation v. Nation, 715 P.2d 198 (Wyo. 1986).

Cited in Augustine v. Gibson, 429 P.2d 314 (Wyo. 1967); McNeiley v. Ayres Jewelry Co., 886 P.2d 595 (Wyo. 1994); Michael v. Hertzler, 900 P.2d 1144 (Wyo. 1995).

Law reviews. — For comment, "Procedural Considerations in the Judicial Determination of Water Disputes," see VIII Land & Water L. Rev. 513 (1974).

For article, "Attorney for Child Versus Guardian Ad Litem: Wyoming Creates a Hybrid, but is it a Formula for Malpractice?," see XXXIV Land & Water L. Rev. 381 (1999).

Am. Jur. 2d, ALR and C.J.S. references. — 59 Am. Jur. 2d Parties § 1 et seq.

Necessary or proper parties to suit or proceeding to establish private boundary line, 73 ALR3d 948.

Modern status of interspousal tort immunity in personal injury and wrongful death actions, 92 ALR3d 901.

Joint venture's capacity to sue, 56 ALR4th 1234.

Dismissal of state court action for plaintiff's failure or refusal to obey court order relating to pleadings or parties, 3 ALR5th 237.

67A C.J.S. Parties § 1 et seq.

II. REAL PARTY IN INTEREST.

Purpose of subdivision (a). — The purpose of a real party in interest requirement is to assure that an action is brought by the present owner of the right sought to be enforced. Wyoming Wool Mktg. Ass'n v. Urruty, 394 P.2d 905 (Wyo. 1964).

Reason and purpose of the real party in interest requirement under Wyo. R. Civ. P. 17(a) was satisfied by the architectural committee for a subdivision bringing a lawsuit to enforce the protective covenants for the subdivision against a landowner in the subdivision,

and a homeowners association which was mentioned in the covenants was not the only party which could enforce the covenants. Vargas Ltd. P'ship v. Four 'H' Ranches Architectural Control Comm., 202 P.3d 1045 (Wyo. 2009).

The requirement of subdivision (a) is jurisdictional and for the protection of the defendant as well as the courts. Wyoming Wool Mktg. Ass'n v. Urruty, 394 P.2d 905 (Wyo. 1964).

Burden of proof. — The question of whether the action is prosecuted in the name of the real party in interest is affirmative matter to be sustained by a party claiming to the contrary. Wyoming Wool Mktg. Ass'n v. Urruty, 394 P.2d 905 (Wyo. 1964).

Waiver of objection as to real party in interest. — Where objection in the trial court that defendant was not the real party in interest was not voiced until the close of the evidence, such delay constituted a waiver of any objection on that ground. Gifford-Hill-Western, Inc. v. Anderson, 496 P.2d 501 (Wyo. 1972).

Any objection concerning whether respondent bail bond "company" was a real party in interest because it was solely a trade name, or because it was acting solely as an agent for an insurance company, was waived by the State where: (1) the State had accepted the company as a proper party to contract with as a surety on both bonds, (2) the company was directly ordered by the court to forfeit partial amounts of both surety bonds involved, (3) both notices of appeal in the consolidated cases stated clearly that the company was the party appealing and that it had posted both bonds involved, giving the company a clear stake in the outcome of the action, and (4) the State had raised the issue for the first time on appeal. Action Bailbonds v. State, 49 P.3d 1002 (Wyo. 2002).

Test for real party in interest. — To determine whether the requirement that an action be brought by the real party in interest has been satisfied, the court must look to the substantive law creating the right being sued upon to see if the action has been instituted by the party possessing the substantive right to relief. Central Contractors Co. v. Paradise Valley Util. Co., 634 P.2d 346 (Wyo. 1981).

Whether plaintiffs are real parties in interest should be submitted as affirmative defense, pursuant to Rules 9 and 17, and particularly so considering the rights of ratification, joinder, or substitution provided in Rule 17, and should not be presented for the first time on appeal. Cockreham v. Wyoming Prod. Credit Ass'n, 743 P.2d 869 (Wyo. 1987).

Assignee deemed real party in interest. — If an assignment is full and complete and all the rights have been transferred, the assignee is the real party in interest. Wyoming Wool Mktg. Ass'n v. Urruty, 394 P.2d 905 (Wyo. 1964).

But when assignor retains standing. — Where an ex-wife filed motion in divorce action seeking to have her ex-husband held in contempt for failure to make child support payments, she had standing to bring such motion even though she had executed an assignment of support rights against the ex-husband. Erb v. Erb, 573 P.2d 849 (Wyo. 1978).

Right of defendant to insist action be prosecuted by assignee. — Where defendant agreed in advance to an assignment and, on the trial of the case, it appeared for the first time that the claim had been assigned, the defendant had every right to insist that it be prosecuted against him by the present owner of the right, since it was the only way defendant could be protected against further prosecution of the chose in action. Wyoming Wool Mktg. Ass'n v. Urruty, 394 P.2d 905 (Wyo. 1964).

When insurer deemed real party in interest. — Any action to recover from a third person for a loss paid by the insurer to the insured would have to be prosecuted in the name of insurer as the real party in interest. Gardner v. Walker, 373 P.2d 598 (Wyo. 1962).

Party in interest where interest transferred. — Where a transfer of interest, such as by an assignment, takes place prior to the commencement of the action, this rule controls and requires that the action shall be prosecuted in the name of the real party in interest. But where the transfer of interest takes place during the course of the action, Rule 25(c), controls and provides that the action may be continued by or against the original party whose interest has been transferred, unless the court, upon motion, directs that the person to whom the interest has been transferred be substituted in the action, or joined with the original party. Erb v. Erb, 573 P.2d 849 (Wyo. 1978).

In a foreclosure action, where the defendant counterclaimed against the plaintiff mortgagee, but was subsequently divested of title to the subject property by reason of a divorce court order and surrogate deed, the defendant-mortgagor was no longer the real party in interest. Mari v. Rawlins Nat'l Bank, 794 P.2d 85 (Wyo. 1990).

Am. Jur. 2d, ALR and C.J.S. references. — Proper party plaintiff, under real party in interest statute, to action against tort-feasor for damage to insured property where insured has paid part of loss, 13 ALR3d 140.

Proper party plaintiff, under real party in interest statute, to action against tort-feasor for damage to insured property where loss is entirely covered by insurance, 13 ALR3d 229.

Right to private action under State Consumer Protection Act, 62 ALR3d 169.

Bailor's right of direct action against bailee's theft insurer for loss of bailed property, 64 ALR3d 1207.

Proper party plaintiff in action for injury to common areas of condominium development, 69 ALR3d 1148.

Right of bondholders to maintain action to prevent use by another corporation of corporate name, 72 ALR3d 8.

III. CAPACITY TO SUE OR BE SUED.

IV. INFANTS OR INCOMPETENT PERSONS.

State bound to protect child's right to legitimacy during minority. — A child has a right to legitimacy and that right is one the state is bound to protect during minority. A v. X, 641 P.2d 1222 (Wyo.), cert. denied, 459 U.S. 1021, 103 S. Ct. 388, 74 L. Ed. 2d 518 (1982).

Appointment of guardian begins statutory time limitation. — The time for filing the claim required by the Governmental Claims Act (chapter 39 of title 1) on behalf of a minor, whose parent fails to file a timely notice of claim, begins to run at the time of the appointment of a guardian ad litem by the court pursuant to subdivision (c). This disability for failing to file a claim disappears upon the minor reaching the age of majority. Dye ex rel. Dye v. Fremont County Sch. Dist. 24, 820 P.2d 982 (Wyo. 1991).

Am. Jur. 2d, ALR and C.J.S. references. — Power of incompetent spouse's guardian, committee or next friend to sue for granting or vacation of divorce or annulment of marriage, or to make a compromise or settlement in such suit, 6 ALR3d 681.

Illegitimate child's right to enforce promise to support or provide for him, 20 ALR3d 500.

Child's right of action against third person who causes parent to desert, or otherwise neglect his parental duty, 60 ALR3d 924.

Right in absence of express statutory authorization, of one convicted of crime and imprisoned or paroled, to prosecute civil action, 74 ALR3d 680.

V. SUING PERSON BY FICTITIOUS NAME.

Relation back when true name set forth. — When amendment is made of a complaint, substituting a fictitious name of an unknown defendant with the true name after the time permitted by the statute of limitations has passed, the amendment relates back for time computation purposes only when the defendant had or should have had notice of the claim against it. Northern Utils. Div. of KN Energy, Inc. v. Town of Evansville, 822 P.2d 829 (Wyo. 1991) (decided prior to 1992 amendment of Rule 15).

Judgment rendered without proper service, absent appearance, is a nullity and void. — The portion of the court's order dated June 1, 1987, purporting to grant summary judgment to a defendant by the name of John Doe, is null and void. Parker v. Haller, 751 P.2d 372 (Wyo. 1988).

Rule 18. Joinder of claims.

(a) *In General.* — A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party.

(b) *Joinder of Contingent Claims.* — A party may join two claims even though one of them is contingent on the disposition of the other; but the court may grant relief only in accordance with the parties' relative substantive rights. In particular, a plaintiff may state a claim for money and a claim to set aside a conveyance that is fraudulent as to that plaintiff, without first obtaining a judgment for the money.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 18 of the Federal Rules of Civil Procedure.

Original complaint, naming other parties, not admissible. — In a negligence action, a defendant should not be allowed to introduce a plaintiff's original complaint and pleadings which contain settling defendants as parties. Such pleadings do not constitute "judicial admissions" under Rule 801(d)(2)(C), W.R.E. Because, under Rule 18, W.R.C.P., a party may state as many separate claims or defenses as he has regardless of consistency, it is proper for a plaintiff to include certain parties in the original complaint and later amend the complaint to eliminate claimed negligence on their part. Haderlie v. Sondgeroth, 866 P.2d 703 (Wyo. 1993).

Joinder of divorce, lien proceeding not required. — Although similar properties were at stake in both a divorce and a lien proceeding, the fact alone did not require joinder. Evans v. Stamper, 835 P.2d 1145 (Wyo. 1992).

Cited in Giacchino v. Estate of Stalkup, 908 P.2d 983 (Wyo. 1995).

Law reviews. — For article, "Pleading Under the Federal Rules," see 12 Wyo. L.J. 177 (1958).

For comment, "Article VI of the Wyoming Rules of Evidence: Witnesses," see XIII Land & Water L. Rev. 909 (1978).

For comment, "How to Enforce a Money Judgment in Wyoming," see XX Land & Water L. Rev. 645 (1985).

Am. Jur. 2d, ALR and C.J.S. references. — 1 Am. Jur. 2d Actions §§ 81 to 109; 20 Am. Jur. 2d Counterclaim, Recoupment and Setoff § 1 et seq.

Joinder of causes of action for invasion of right of privacy, 11 ALR3d 1296.

Objection to award of damages to successful

plaintiff or relator in mandamus proceeding on ground of misjoinder of causes of action, 34 ALR4th 457.

Punitive damages: power of equity court to award, 58 ALR4th 844.

When must loss-of-consortium claim be joined with underlying personal injury claim, 60 ALR4th 1174.

Violation of automatic stay provisions of 1978 Bankruptcy Code (11 USC § 362) as contempt of court, 57 ALR Fed 927.

1A C.J.S. Actions §§ 135 to 176.

Rule 19. Required joinder of parties.

(a) *Persons Required to Be Joined if Feasible.* —

(1) *Required Party.* — A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(2) *Joinder by Court Order.* — If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) *Venue.* — If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

(b) *When Joinder Is Not Feasible.* — If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

(c) *Pleading the Reasons for Nonjoinder.* — When asserting a claim for relief, a party must state:

(1) the name, if known, of any person who is required to be joined if feasible but is not joined; and

(2) the reasons for not joining that person.

(d) *Exception for Class Actions.* — This rule is subject to Rule 23.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 19 of the Federal Rules of Civil Procedure.

Presence of all with real interest required. — This rule requires the presence of all who have a real interest in the disposition of the case. State ex rel. Christopulos v. Husky Oil Co., 575 P.2d 262 (Wyo. 1978).

Necessary parties defined. — Necessary parties are those who might be joined to save further litigation or to protect the interest of another party. It is not error for the court to refuse to join either proper or necessary parties. Only indispensable parties must be joined. Reilly v. Reilly, 671 P.2d 330 (Wyo. 1983).

Indispensable party defined. — The classic general rule is as follows: an indispensable party has been defined as one without whose presence before the court a final decree could not be made without either affecting his interest or leaving the controversy in such a condition that its final determination might be wholly inconsistent with equity and good conscience. Whether or not a person is an indispensable party cannot be determined by a prescribed formula because the facts peculiar to each case are determinative of that question. American Beryllium & Oil Corp. v. Chase, 425 P.2d 66 (Wyo. 1967).

Questions court should apply to each case once interested status determined. — The specific tests under the rule are as follows: After first determining that such party is interested in the controversy, the court must make a determination of the following questions applied to the particular case: (1) Is the interest of the absent party distinct and severable? (2) In the absence of such party, can the court render justice between the parties before it? (3) Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party? (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience? If, after the court determines that an absent party is interested in the controversy, it finds that all of the four questions outlined above are answered in the affirmative with respect to the absent party's interest, then such absent party is a necessary party. However, if any one of the four questions is answered in the negative, then the absent party is indispensable. American Beryllium & Oil Corp. v. Chase, 425 P.2d 66 (Wyo. 1967).

But there is no hard and fast rule by which it can be determined whether a party having an interest is an indispensable party. American Beryllium & Oil Corp. v. Chase, 425 P.2d 66 (Wyo. 1967).

Interlocutory review. — Where a joinder issue had not been addressed by the Wyoming Supreme Court previously, it was not error to allow review by writ; the fact that a district court's decision on the matter was discretionary did not bar review either. Grove v. Pfister, 110 P.3d 275 (Wyo. 2005).

Defect of parties must be timely raised or it is waived, unless, of course, the missing party is indispensable. Pickett v. Associates Disct. Corp., 435 P.2d 445 (Wyo. 1967).

Rule does not apply to appellate matter. — This rule does not apply to an appellate matter, but to an original action in the district court. First Nat'l Bank v. Bonham, 559 P.2d 42 (Wyo. 1977).

Agency was proper party to appeal. — Where an appeal from an agency decision was properly pursued under the Wyoming Administrative Procedure Act (§§ 16-3-101 through 16-3-115), the agency whose decision was being reviewed was a proper party to the appeal. Diefenderfer v. Budd, 563 P.2d 1355 (Wyo. 1977).

Action by refiner. — In an action by an oil refiner for declaration that its plan to impound and recycle effluent water, being the water remaining after use in its refinery process of water which it purchased from a city, was not subject to the jurisdiction and control of the state engineer and the Wyoming state board of control, and that the proposed use did not infringe on any rights of downstream water appropriators, the state board of control and the city were necessary and indispensable parties to the action, and the cause should not proceed without their joinder. State ex rel. Christopulos v. Husky Oil Co., 575 P.2d 262 (Wyo. 1978).

Absent misconduct, party's parent company not joined. — In response to a mortgage foreclosure action, the defendants filed a counterclaim, alleging that the plaintiffs had made fraudulent misrepresentations. The court did not abuse its discretion when it denied the defendants' motion to join the plaintiffs' parent companies as parties to this action pursuant to Rules 13(h) and 19. The defendants failed to show how either of the plaintiffs defrauded them by its corporate makeup. Albrecht v. Zwaanshoek Holding En Financiering, 762 P.2d 1174 (Wyo. 1988).

Out-of-state insurance commissioner, rehabilitator of insolvent insurance company, was not indispensable party to an action against the company on a performance bond. Although the commissioner was not subject to service of process in Wyoming, the action was commenced long before the company became involved in rehabilitation proceedings in the other state. Hoiness-LaBar Ins. v. Julien Constr. Co., 743 P.2d 1262 (Wyo. 1987).

EQC and DEQ were proper parties to a proceeding challenging new water quality rules. — After the Wyoming Environmental Quality Council (EQC) adopted proposed revisions to Chapter 1 of the Wyoming Water Quality Rules and Regulations, petitioner special interest groups filed a petition to challenge the new rules and named the Wyoming Department of Environmental Quality (DEQ) as respondent; the district court erred in dismissing the petition for lack of jurisdiction on the ground that the EQC was not named in the petition. The Supreme Court of Wyoming, held that both the EQC and the DEQ were both proper parties to this proceeding under the Wyoming Environmental Quality Act, Wyo. Stat. Ann. § 35-11-101 through 35-11-1904, under the joinder rules set forth in Wyo. R. Civ. P. 19 -21, the district court could have added the EQC at the time the issue arose without causing any injustice. Lauderman v. State, 232 P.3d 604 (Wyo. 2010).

Condemnation of private road. — In an action where a county, on behest of the U.S. forest service (USFS), condemned a private

road to provide access to a national forest, the USFS was not an indispensable party. L.U. Sheep Co. v. Board of County Comm'rs, 790 P.2d 663 (Wyo. 1990).

Establishment of private road. — United States was not an indispensable party to litigation over establishment of private road, since complete relief could be accorded among parties to dispute without joinder of United States, and interest of United States was not subject to being impaired in the action. Miller v. Bradley, 4 P.3d 882 (Wyo. 2000).

Adjoining landowners. — In a declaratory judgment action to determine the rights of landowners along a public access fishing easement, adjoining landowners who did not join the action as plaintiffs were properly joined as third-party defendants since the third party defendants' interests might have been impaired or impeded by a judgment rendered in their absence. Lamb v. Wyoming Game & Fish Comm'n, 985 P.2d 433 (Wyo. 1999).

Adoption proceedings. — Court could determine validity of natural parent's consent to adoption without regard to whether prospective adoptive parents were joined, but adoptive parents were indispensable parties whose joinder was required for constitutional and guardian ad litem issues raised by natural father. JK v. MK, 5 P.3d 782 (Wyo. 2000).

Negligence action. — Joinder is not required for a non-party with a tort cause of action for injuries arising out of the same incident that is the subject of a negligence action under the criteria of W.R.C.P. 19(a); therefore, a district court erred by holding that a passenger should have been joined in an action brought by two injured parties riding in the same vehicle. Grove v. Pfister, 110 P.3d 275 (Wyo. 2005).

Applied in United States v. Hunt, 513 F.2d 129 (10th Cir. 1975); Johnson v. Aetna Cas. & Sur. Co., 608 P.2d 1299 (Wyo. 1980), appeal dismissed and cert. denied, 454 U.S. 1118, 102 S. Ct. 961, 71 L. Ed. 2d 105 (1981); Revelle v. Schultz, 759 P.2d 1255 (Wyo. 1988).

Cited in Tri-County Elec. Ass'n v. City of Gillette, 584 P.2d 995 (Wyo. 1978); Roby v. State, 587 P.2d 641 (Wyo. 1978); Cates v. Daniels, 628 P.2d 862 (Wyo. 1981); Robinson v. U-Haul Int'l, Inc., 929 P.2d 1236 (Wyo. 1996).

Law reviews. — For article, "The Law of Indemnity in Wyoming: Unraveling the Confusion," see XXXI Land & Water L. Rev. 811 (1996).

Am. Jur. 2d, ALR and C.J.S. references. — 59 Am. Jur. 2d Parties §§ 92 to 123.

Statute permitting commencement of new action within specified time after failure of prior action not on merits, applicability, or affected by change in parties, 13 ALR3d 848.

Third person as proper party defendant to suit for divorce which involves property rights, 63 ALR3d 373.

67A C.J.S. Parties §§ 37 to 40, 52 to 55.

Rule 20. Permissive joinder of parties.

(a) *Persons Who May Join or Be Joined.* —

(1) *Plaintiffs.* — Persons may join in one action as plaintiffs if:

(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all plaintiffs will arise in the action.

(2) *Defendants.* — Persons may be joined in one action as defendants if:

(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all defendants will arise in the action.

(3) *Extent of Relief.* — Neither a plaintiff nor a defendant need be interested in obtaining or defending against all the relief demanded. The court may grant judgment to one or more plaintiffs according to their rights, and against one or more defendants according to their liabilities.

(b) *Protective Measures.* — The court may issue orders — including an order for separate trials — to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 20 of the Federal Rules of Civil Procedure.

Trial court is entitled to exercise considerable discretion in determining who should be joined or retained. England v. Simmons, 728 P.2d 1137 (Wyo. 1986).

No aggregation of class action claims. — In a class action lawsuit, the claim of each and every plaintiff, whether named or unnamed, must meet the minimum jurisdictional limit, and aggregation of claims for that purpose is not permitted. Mutual of Omaha Ins. Co. v. Blury-Losolla, 952 P.2d 1117 (Wyo. 1998).

EQC and DEQ were proper parties to a proceeding challenging new water quality rules. — After the Wyoming Environmental Quality Council (EQC) adopted proposed revisions to Chapter 1 of the Wyoming Water Quality Rules and Regulations, petitioner special interest groups filed a petition to challenge the new rules and named the Wyoming Department of Environmental Quality (DEQ) as respondent; the district court erred in dismissing the petition for lack of jurisdiction on the ground that the EQC was not named in the petition. The Supreme Court of Wyoming, held that both the EQC and the DEQ were both proper parties to this proceeding under the Wyoming Environmental Quality Act, Wyo. Stat. Ann. § 35-11-101 through 35-11-1904, under the joinder rules set forth in Wyo. R. Civ. P. 19 -21, the district court could have added the EQC at the time the issue arose without causing any injustice. Freudenthal v. Cheyenne Newspapers, Inc., 233 P.3d 933 (Wyo. 2010).

Applied in United States v. Hunt, 513 F.2d 129 (10th Cir. 1975).

Quoted in Grove v. Pfister, 110 P.3d 275 (Wyo. 2005).

Cited in Albrecht v. Zwaanshoek Holding En Financiering, 762 P.2d 1174 (Wyo. 1988); Lamb v. Wyoming Game & Fish Comm'n, 985 P.2d 433 (Wyo. 1999).

Am. Jur. 2d, ALR and C.J.S. references. — 59 Am. Jur. 2d Parties § 96 to 102.

Applicability, as affected by change in parties, of statute permitting commencement of new action within specified time after failure of prior action not on the merits, 13 ALR3d 848.

67A C.J.S. Parties §§ 33 to 36, 43 to 51; 88 C.J.S. Trial § 6.

Rule 21. Misjoinder and nonjoinder of parties.

Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 21 of the Federal Rules of Civil Procedure.

Jurisdiction not affected by misjoinder. — Although a county was improperly allowed to intervene in a deficiency action to challenge the Wyoming Department of Revenue's valuation methodology, jurisdiction was not affected because the contested case hearing was conducted in distinct phases. Amoco Prod. Co. v. Dep't of Revenue, 94 P.3d 430 (Wyo. 2004).

Addition of a party. — When a corporation was liable to an investor for conversion, and no grounds existed for piercing the corporate veil, business owners, with whom the investor had created a business, had no individual liability, and the corporation could be added as a party, even at a late stage in the proceedings. William F. West Ranch, LLC v. Tyrrell, 206 P.3d 722 (Wyo. 2009).

Quoted in Wyoming Health Servs., Inc. v. Deatherage, 773 P.2d 156 (Wyo. 1989).

Cited in Robinson v. U-Haul Int'l, Inc., 929 P.2d 1236 (Wyo. 1996).

Am. Jur. 2d, ALR and C.J.S. references. — 59 Am. Jur. 2d Parties §§ 236.

67A C.J.S. Parties §§ 139 to 159.

Rule 22. Interpleader.

(a) *Grounds.* —

(1) *By a Plaintiff.* — Persons with claims that may expose a plaintiff to double or multiple liability may be joined as defendants and required to interplead. Joinder for interpleader is proper even though:

(A) the claims of the several claimants, or the titles on which their claims depend, lack a common origin or are adverse and independent rather than identical; or

(B) the plaintiff denies liability in whole or in part to any or all of the claimants.

(2) *By a Defendant.* — A defendant exposed to similar liability may seek interpleader through a crossclaim or counterclaim.

(b) *Relation to Other Rules.* — This rule supplements — and does not limit — the joinder of parties allowed by Rule 20.
(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 22(1) of the Federal Rules of Civil Procedure.

Law reviews. — For note on interpleader under this rule, see 16 Wyo. L.J. 74 (1961).

Am. Jur. 2d, ALR and C.J.S. references. — 45 Am. Jur. 2d Interpleader § 1 et seq.; 59 Am. Jur. 2d Parties § 111, 125.

Amount of compensation of attorney for services as to interpleader in absence of contract or statute fixing amount, 57 ALR3d 475.

Stakeholder's liability for loss of interpleaded funds after they leave stakeholder's control, 7 ALR5th 976.

48 C.J.S. Interpleader § 1 et seq.

Rule 23. Class actions.

(a) *Prerequisites.* — One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Types of Class Actions.* — A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) *Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.* —

(1) *Certification Order.* —

(A) *Time to Issue.* — At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* — An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(f).

(C) *Altering or Amending the Order.* — An order that grants or denies class certification may be altered or amended before final judgment.

(2) *Notice.* —

(A) *For (b)(1) or (b)(2) Classes.* — For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* — For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment.* — Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) *Particular Issues.* — When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) *Subclasses.* — When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) *Conducting the Action.* —

(1) *In General.* — In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require — to protect class members and fairly conduct the action — giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) *Combining and Amending Orders.* — An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) *Settlement, Voluntary Dismissal, or Compromise.* — The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) *Class Counsel.* —

(1) *Appointing Class Counsel.* — Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(g); and

(E) may make further orders in connection with the appointment.

(2) *Standard for Appointing Class Counsel.* — When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(f)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) *Interim Counsel.* — The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) *Duty of Class Counsel.* — Class counsel must fairly and adequately represent the interests of the class.

(g) *Attorney's Fees and Nontaxable Costs.* — In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a master, as provided in Rule 54(d)(2)(D).

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 23 of the Federal Rules of Civil Procedure.

Purpose of rule. — The purpose of this rule is to prevent a multiplicity of suits, and it would defeat that purpose to fail to give it effect in a clear case of this kind where there is a common question of law and a common question of fact, and a common relief is sought. Beadle v. Daniels, 362 P.2d 128 (Wyo. 1961).

The purpose of the class suit form of action is to enable the court to determine finally the rights of a numerous class of individuals by one common final judgment. Hansen v. Smith, 395 P.2d 944 (Wyo. 1964).

No aggregation of class action claims. — In a class action lawsuit, the claim of each and every plaintiff, whether named or unnamed, must meet the minimum jurisdictional limit, and aggregation of claims for that purpose is not permitted. Mutual of Omaha Ins. Co. v. Blury-Losolla, 952 P.2d 1117 (Wyo. 1998).

Effect of judgment in "true," "hybrid," or "spurious" class action. — In a "true" class action the judgment is conclusive on absent members of the class represented. In a "hybrid" class action, it is conclusive on members of the class represented, only as to rights in a res, if any. In a "spurious" class action, the judgment is conclusive only on the parties joined and before the court. Beadle v. Daniels, 362 P.2d 128 (Wyo. 1961).

When judgment will involve money, court will require proper notice to real parties in interest. — In a suit where a class action is authorized, the Supreme Court will, nevertheless, consider the effect the judgment rendered will have, and when the judgment will involve money, but will bind only the parties joined and before the court, the Supreme Court will require proper notice to be given to all the real parties in interest, before allowing such judgment. Beadle v. Daniels, 362 P.2d 128 (Wyo. 1961).

Class entitled to have unconstitutionally collected tax refunded with interest even though defendant contended that the named plaintiffs were the only parties in interest. Hansen v. Smith, 395 P.2d 944 (Wyo. 1964).

Stated in Town of Moorcroft v. Lang, 761 P.2d 96 (Wyo. 1988).

Cited in Higby v. State, 485 P.2d 380 (Wyo. 1971); Blount v. City of Laramie, 510 P.2d 294 (Wyo. 1973); Gookin v. State Farm Fire & Cas. Ins. Co., 826 P.2d 229 (Wyo. 1992); V-1 Oil Co. v. State, 934 P.2d 740 (Wyo. 1997); BP Am. Prod. Co. v. Madsen, 53 P.3d 1088 (Wyo. 2002).

Law reviews. — For note, "Right to Control of Class Suits," see 5 Wyo L.J. 126.

For comment, "The Mumbo Jumbo of Class Actions — An Attempt to Alleviate," see 19 Wyo. L.J. 232 (1965).

Am. Jur. 2d, ALR and C.J.S. references. — 59 Am. Jur. 2d Parties §§ 43 to 91.

Propriety and prejudicial effect of suggestion or comments by judge as to compromise or settlement of civil case, 6 ALR3d 1457.

Communications by corporation as privileged in stockholders' action, 34 ALR3d 1106.

Attorneys' fees in class actions, 38 ALR3d 1384.

Amount of attorney's compensation in absence of contract or statute fixing amount, 57 ALR3d 475.

Allowance of punitive damages in stockholder's derivative action, 67 ALR3d 279.

Construction of provision in compromise and settlement agreement for payment of costs as part of settlement, 71 ALR3d 909.

Maintenance of class action against governmental entity as affected by requirement of notice of claim, 76 ALR3d 1244.

Absent or unnamed class members in class action in state court as subject to discovery, 28 ALR4th 986.

Propriety of attorney acting as both counsel and class member or representative, 37 ALR4th 751.

Inverse condemnation state court class actions, 49 ALR4th 618.

Class actions in state mass tort suits, 53 ALR4th 1220.

Propriety of notice of voluntary dismissal or compromise of class action, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, 52 ALR Fed 457.

Propriety, under Rule 23 of the Federal Rules of Civil Procedure, of class action for violation of Truth in Lending Act (15 USC § 1601 et seq.), 61 ALR Fed 603.

Association of persons as proper representative of class under Rule 23 of Federal Rules of Civil Procedure governing maintenance of class actions, 63 ALR Fed 361.

Notice to potential class members of right to "opt-in" to class action, under § 16(b) of Fair Labor Standards Act (29 USC § 216(b)), 67 ALR Fed 282.

Notice of proposed dismissal or compromise of class action to absent putative class members in uncertified class action under Rule 23(e) of Federal Rules of Civil Procedure, 68 ALR Fed 290.

Fraudulent concealment, so as to toll statute of limitations, as presenting common question of proof in antitrust class action, 70 ALR Fed 498.

Typicality requirement of Rule 23(a)(3) of Federal Rules of Civil Procedure as to class representative in class action based on unlawful discrimination, 74 ALR Fed 42.

Permissibility of action against a class of defendants under Rule 23(b)(2) of Federal Rules of Civil Procedure, 85 ALR Fed 263.

67A C.J.S. Parties §§ 21 to 32.

Rule 23.1. Derivative actions.

(a) *Prerequisites.* — This rule applies when one or more shareholders or members of a corporation or an unincorporated association bring a derivative action to enforce a right that the corporation or association may properly assert but has failed to enforce. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association.

(b) *Pleading Requirements.* — The complaint must be verified and must:

(1) allege that the plaintiff was a shareholder or member at the time of the transaction complained of, or that the plaintiff's share or membership later devolved on it by operation of law;

(2) allege that the action is not a collusive one to confer jurisdiction that the court would otherwise lack; and

(3) state with particularity:

(A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and

(B) the reasons for not obtaining the action or not making the effort.

(c) *Settlement, Dismissal, and Compromise. .* — A derivative action may be settled, voluntarily dismissed, or compromised only with the court's approval. Notice of a proposed settlement, voluntary dismissal, or compromise must be given to shareholders or members in the manner that the court orders.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 23.1 of the Federal Rules of Civil Procedure.

Stock title required for derivative action. — As a general rule, one who has transferred or lost title to his stock may not maintain a stockholder's derivative action. Centrella v. Morris, 597 P.2d 958 (Wyo. 1979).

Company could not maintain a derivative action against the corporation challenging the agreement between the corporation and a limited liability company because it did not own corporation stock at the time of the transaction, Wyo. Stat. Ann. § 17-16-741 and Wyo. R. Civ. P. 23.1, and it did not acquire its share of stock by operation of law. GOB, LLC v. Rainbow Canyon, Inc., 197 P.3d 1269 (Wyo. 2008).

When transaction prior to stock purchase may be grounds for action. — One who obtains corporate stock may not maintain a derivative action complaining of a transaction which took place prior to his becoming a stockholder, unless the mismanagement or its effects continue and are injurious to him, or it affects him specially and peculiarly in some other manner. Centrella v. Morris, 597 P.2d 958 (Wyo. 1979).

Theoretically, stockholder's derivative action is brought on behalf of corporation. Centrella v. Morris, 597 P.2d 958 (Wyo. 1979).

Antagonism with stockholder precludes alignment of corporation as plaintiff. — Where there is antagonism between management and shareholder, the courts will refuse to align the corporation as a plaintiff in a stockholder's derivative suit. Centrella v. Morris, 597 P.2d 958 (Wyo. 1979).

Derivative action by former president would not result in fair and adequate representation. — When a corporation obtained a judgment against its former president for stealing corporate funds, and the former president filed a derivative action against the corporation's other officers, summary judgment dismissing the suit was properly entered because, under Wyo. Stat. Ann. § 17-16-741(a)(ii), the former president did not fairly and adequately represent the interests of the corporation; a lawsuit filed by the corporation against the former president for the misappropriation of corporate funds was pending and the former president's history of animosity, hostility and chicanery toward the corporation and its other shareholders rendered the former president unable to fairly represent them. Woods v. Wells Fargo Bank, 90 P.3d 724 (Wyo. 2004).

Cited in Lahnston v. Second Chance Ranch Co., 968 P.2d 32 (Wyo. 1998).

Law reviews. — For comment, "Wyoming Business Corporation Act: Is it Time for a Change?," see XXII Land & Water L. Rev. 523 (1987).

Am. Jur. 2d, ALR and C.J.S. references. — 59 Am. Jur. 2d Parties §§ 43 to 91.

Propriety and prejudicial effect of suggestion or comments by judge as to compromise or settlement of civil case, 6 ALR3d 1457.

Communications by corporation as privileged in stockholders' action, 34 ALR3d 1106.

Attorneys' fees in class actions, 38 ALR3d 1384.

Amount of attorney's compensation in absence of contract or statute fixing amount, 57 ALR3d 475.

Allowance of punitive damages in stockholder's derivative action, 67 ALR3d 350.

Construction of provision in compromise and settlement agreement for payment of costs as part of settlement, 71 ALR3d 909.

Negligence, nonfeasance or ratification of wrongdoing as excusing demand on directors as prerequisite to bringing of stockholder's derivative suit on behalf of corporation, 99 ALR3d 1034.

Propriety of termination of properly initiated derivative action by "independent committee" appointed by board of directors whose actions (or inaction) are under attack, 22 ALR4th 1206.

Right to jury trial in stockholder's derivative action, 32 ALR4th 1111.

Application to derivative actions for breach of fiduciary duty, under § 36(b) of Investment Company Act of 1940 (15 USC § 80a-35(b)), of requirement, stated in Rule 23.1 of the Federal Rules of Civil Procedure, that complaint in derivative actions allege what efforts were made by shareholders to obtain desired action or reasons for failure to do so, 65 ALR Fed 542.

67A C.J.S. Parties §§ 21 to 32.

Rule 23.2. Actions relating to unincorporated associations.

This rule applies to an action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties. The action may be maintained only if it appears that those parties will fairly and adequately protect the interests of the association and its members. In conducting the action, the court may issue any appropriate orders corresponding with those in Rule 23(d), and the procedure for settlement, voluntary dismissal, or compromise must correspond with the procedure in Rule 23(e).

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 23.2 of the Federal Rules of Civil Procedure.

Am. Jur. 2d, ALR and C.J.S. references. — 59 Am. Jur. 2d Parties §§ 41 to 91.

Propriety and prejudicial effect of suggestion or comments by judge as to compromise or settlement of civil case, 6 ALR3d 1457.

Attorneys' fees in class actions, 38 ALR3d 1384.

Amount of attorney's compensation in absence of contract or statute fixing amount, 57 ALR3d 475.

Construction of provision in compromise and settlement agreement for payment of costs as part of settlement, 71 ALR3d 909.

67A C.J.S. Parties §§ 21 to 32.

Rule 24. Intervention.

(a) *Intervention of Right.* — On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) *Permissive Intervention.* —

(1) *In General.* — On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) *By a Government Officer or Agency.* — On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) *Delay or Prejudice.* — In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) *Notice and Pleading Required.* — A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule, except for subdivision (d), is similar to Rule 24 of the Federal Rules of Civil Procedure.

Purpose of rule. — The requirements of this rule are for the purpose of informing the affected parties of applicant's claim and permitting a hearing thereon as a basis for the court's determination of the right to intervene. School Dist. No. 9 v. District Boundary Bd., 351 P.2d 106 (Wyo. 1960).

Jurisdiction not affected by misjoinder in tax case. — Although a county was improperly allowed to intervene in a deficiency action to challenge the Wyoming Department of Revenue's valuation methodology, jurisdiction was not affected because the contested case hearing was conducted in distinct phases. Amoco Prod. Co. v. Dep't of Revenue, 94 P.3d 430 (Wyo. 2004).

The purpose of intervention as of right is to protect the intervenor's interest in the subject matter of the action, and not to provide a means for the proposed intervenor to assert personal jurisdiction not otherwise available to him. James S. Jackson Co. v. Horseshoe Creek, Ltd., 650 P.2d 281 (Wyo. 1982).

Intervention as of right. — Wyo. Bd. Equalization R. Prac. & Proc. ch. 2, § 14 regarding intervention is void because it does not accurately reflect the full legal requirements of intervention as of right under this section. Amoco Prod. Co. v. Dep't of Revenue, 94 P.3d 430 (Wyo. 2004).

Where an oil production challenged the Wyoming Department of Revenue's ruling changing the allocation of the company's oil production from a production unit for 1980 through 1988 between one county and intervenor county, the intervenor county's intervention was arguably proper under Wyo. R. Civ. P. 24(a), and the company did not present cogent argument nor did it cite pertinent authority that allowing intervention as a matter of right was reversible error under the circumstances of the case, especially in consideration of the circumstance that the evidence presented at hearing would likely have been identical whether the county was a party or not. BP Am. Prod. Co. v. Dep't of Revenue, 130 P.3d 438 (Wyo. 2006).

Because Wyo. Stat. Ann. § 20-2-204(a) allowed only parents to petition to modify a court order regarding custody, the non-parent couple did not have standing to intervene as of right in a divorce proceeding to modify the original custody determination; nor did they have standing for permissive intervention under Wyo. R. App. P. 24. Wild v. Adrian, 155 P.3d 1036 (Wyo. 2007).

Appellants, two nonparties, had no right to intervene under this rule in a dispute concerning the county commission's approval of a parcel boundary adjustment application for the sole purpose of pursuing an appeal. The district court appropriately considered the fact that the request to intervene occurred only after the final order had been entered and appellants learned the commission was not intending to appeal the final order. Hirshberg v. Coon, 268 P.3d 258 (Wyo. Jan. 10, 2012).

Improper application of rule. — To prosecute an appeal under the guise of an intervention is an improper application of this rule in the presence of a specific statute limiting those who may contest school reorganization. Geraud v. Schrader, 531 P.2d 872 (Wyo.), cert. denied, 423 U.S. 904, 96 S. Ct. 205, 46 L. Ed. 2d 134 (1975).

Judgment creditors of husband had no right to intervene in husband's divorce action, and therefore district court did not err in limiting their participation in property settlement negotiations incident to divorce. Nielson v. Thompson, 982 P.2d 709 (Wyo. 1999).

One seeking intervention must present significant protectable interest in suit, rather than one that is contingent. Platte County Sch. Dist. No. 1 v. Basin Elec. Power Coop., 638 P.2d 1276 (Wyo. 1982).

A county may intervene.— Because county is an agency under Wyoming Administrative Procedure Act definitions pursuant to this section, it allows for the possibility of a county intervening in a contested case if it can do so as of right. Amoco Prod. Co. v. Dep't of Revenue, 94 P.3d 430 (Wyo. 2004).

And general interest in collectibility of judgment is not the sort of interest which creates a right to intervene under subdivision (a)(2). James S. Jackson Co. v. Meyer, 677 P.2d 835 (Wyo. 1984).

Intervention as of right denied when parties' interest contingent. — Insurance company which sought to intervene in tort suit involving its insured, claiming an interest in minimizing any judgment for damages, while simultaneously maintaining that it had no obligation to defend its insured, was denied intervention as of right, because under such circum-

stances the insurance company's interest in the tort action was merely contingent. State Farm Mut. Auto. Ins. Co. v. Colley, 871 P.2d 191 (Wyo. 1994).

Question of timeliness within trial judge's discretion. — The question of timeliness, as referred to in subdivision (a), is a flexible one, and it must, of necessity, be left within the discretion of the trial judge. Platte County Sch. Dist. No. 1 v. Basin Elec. Power Coop., 638 P.2d 1276 (Wyo. 1982).

Time to appeal denial of intervention. — Denial of a motion to intervene under W.R.C.P. 24(a)(2) was a final and appealable order pursuant to W.R.A.P. 1.05, but where the notice of appeal was not filed within the 30-day period for final orders under W.R.A.P. 2.01(a), the court did not have jurisdiction to hear the appeal under W.R.A.P. 1.03. Yeager v. Forbes, 78 P.3d 241 (Wyo. 2003).

Motion to intervene not filed until after trial of case not timely. — In a divorce action, a motion by the children to intervene and to appoint a guardian ad litem, not filed until after the trial of the case, although prior to entry of the judgment and decree, was not timely and could not be considered. Curless v. Curless, 708 P.2d 426 (Wyo. 1985).

Trial court did not err in denying motion to intervene filed after judgment in principal case was entered as movant had knowledge of action and opted not to act in timely manner. American Family Ins. Co. v. Bowen, 959 P.2d 1199 (Wyo. 1998).

Motion to intervene as of right was properly denied. — District court properly denied motion to intervene pursuant to W.R.C.P. 24 (a)(2) where the record showed that the proposed intervenors had been clearly aware of the plaintiffs' claims, but delayed for over two years in filing their motion to add 30 parties, and, although with respect to their own fishing and recreational rights in certain riparian lands the proposed intervenors had a "significantly protectable interest" in the subject of the litigation and not a contingent interest or one similar to any member of the public, they were situated so that disposition of the action, as a practical matter, would not impede their ability to protect their interest, and their interest was adequately represented by an existing party. Masinter v. Markstein, 45 P.3d 237 (Wyo. 2002).

Child Support Enforcement Action. — The department of family services may bring an action in its own name to enforce a child support order, without regard to the obligee's status as a recipient or non-recipient of public assistance. State, Dep't of Family Servs. v. Peterson, 960 P.2d 1022 (Wyo. 1998).

Grandparents' visitation claims may be litigated by intervening in divorce proceedings post-decree. — Grandparents' visitation claims under former § 20-2-113(c) (now see § 20-7-101) may be litigated by independent proceedings; or, pursuant to the provisions of subdivision (b), by intervening in a divorce proceeding post-decree, in the exercise of discretion of the court, when the requisite facts under the rule exist. Nation v. Nation, 715 P.2d 198 (Wyo. 1986).

Impairment of ability to protect interest warranting intervention must be practical. — The impediment or impairment of the ability to protect one's interest which would warrant intervention under subdivision (a)(2) must be a practical one, but it need not be a legal one. The application of the doctrine of stare decisis or res judicata is a practical disadvantage. James S. Jackson Co. v. Horseshoe Creek, Ltd., 650 P.2d 281 (Wyo. 1982).

Limits on right of counties to intervene.— Wyo. Stat. Ann. § 39-11-102.1(c) does not confer upon counties the requisite interest to intervene as of right in a contested case before the Wyoming Board of Equalization brought by a taxpayer against the Wyoming Department of Revenue challenging substantive methodology decisions by the Department regarding valuation. The Department erred by allowing the county to intervene in a deficiency dispute with a taxpayer since the county's interest was represented by the Department, and the county was unable to sue itself. Amoco Prod. Co. v. Dep't of Revenue, 94 P.3d 430 (Wyo. 2004).

Order denying intervention as of right deemed final. — If, as stated in subdivision (a)(2), a party is entitled to intervention if he "is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest," an order denying intervention to such a party as of right would always result in determining that action and preventing a judgment in it relative to the person seeking intervention, thus placing such order within the definition of a final order (Rule 1.05, W.R.A.P.). James S. Jackson Co. v. Horseshoe Creek, Ltd., 650 P.2d 281 (Wyo. 1982).

Awarding costs is inappropriate when the appeal involves a discretionary ruling on an application for intervention as of right. State Farm Mut. Auto. Ins. Co. v. Colley, 871 P.2d 191 (Wyo. 1994).

Party's interests not adequately represented. — Park County Board of Commissioners (Board) did not adequately represent the nonprofit's interests during the contested case proceedings where the record revealed the Board's underlying opposition to any participation by the nonprofit throughout the entire process; the Board's attitude toward the nonprofit could be described as adversarial than as representative, and the nonprofit had particularized and protectable interests in the development. Northfork Citizens for Responsible Dev. v. Bd. of County Comm'rs, 228 P.3d 838 (Wyo. 2010).

Applied in United States v. Hunt, 513 F.2d 129 (10th Cir. 1975).

Quoted in State, Dep't of Family Servs. v. Peterson, 960 P.2d 1022 (Wyo. 1998).

Law reviews. — For case notes, "Constitutional Law—Family Law—Grandparent Visitation Rights—Constitutional Considerations and the Need to Define the 'Best Interest of the Child' Standard. Goff v. Goff, 844 P.2d 1087 (Wyo. 1993)," see XXIX Land & Water L. Rev. 593 (1994).

Am. Jur. 2d, ALR and C.J.S. references. — 15 Am. Jur. 2d Civil Rights § 135; 45C Am. Jur. 2d Job Discrimination §§ 2493 to 3501; 59 Am. Jur. 2d Parties §§ 124 to 178.

Loan receipt or agreement between insured and insurer for a loan repayable to extent of recovery from other insurer or carrier or other person causing loss, 13 ALR3d 42.

Similar frauds practiced on various persons as basis of representative suit, 53 ALR3d 534.

Bringing in or intervention of third person in suit for divorce which involves property rights, 63 ALR3d 373.

Corporation having name similar to proposed name as entitled to intervene in proceeding by other corporation for change of name, 72 ALR3d 8.

Right of insurer issuing "uninsured motorist" coverage to intervene in action by insured against uninsured motorist, 35 ALR4th 757.

Timeliness of application for intervention as of right under Rule 24(a) of Federal Rules of Civil Procedure, 57 ALR Fed 150.

What is "interest" relating to property or transaction which is subject of action sufficient to satisfy that requirement for intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure, 73 ALR Fed 448.

When is interest of proposed intervenor inadequately represented by existing party so as to satisfy that requirement for intervention as of right under Rule 24(a)(2) of Federal Rules of Civil Procedure, 74 ALR Fed 327.

General considerations in determining what constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure, 74 ALR Fed 632.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in employment discrimination actions, 74 ALR Fed 895.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in actions involving disclosure of information, 75 ALR Fed 145.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in actions relating to school desegregation, 75 ALR Fed 231.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in actions relating to securities and commodities laws, 75 ALR Fed 426.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in actions involving government-supported housing and welfare programs, 75 ALR Fed 570.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in actions involving contracts, 75 ALR Fed 769.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in actions involving insurance, 75 ALR Fed 869.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in personal injury and death actions, 76 ALR Fed 174.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in zoning and other actions relating to real property, 76 ALR Fed 388.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in environmental actions, 76 ALR Fed 762.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in actions relating to patents, copyrights and trademarks, 76 ALR Fed 837.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in labor actions, 77 ALR Fed 201.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in actions involving energy, 77 ALR Fed 541.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in antitrust actions, 78 ALR Fed 385.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in actions involving ships and shipping, 78 ALR Fed 630.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in actions involving

government food and drug regulations, 80 ALR Fed 907.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in actions involving bankruptcy, 82 ALR Fed 435.

Right to intervene in federal hazardous waste enforcement action, 100 ALR Fed 35.

When is intervention as matter of right appropriate under rule 24(a)(2) of federal rules of civil procedure in civil rights action, 132 ALR Fed 147.

67A C.J.S. Parties §§ 68 to 87.

Rule 25. Substitution of parties.

(a) *Death.* —

(1) *Substitution if the Claim Is Not Extinguished.* — If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.

(2) *Continuation Among the Remaining Parties.* — After a party's death, if the right sought to be enforced survives only to or against the remaining parties, the action does not abate, but proceeds in favor of or against the remaining parties. The death should be noted on the record.

(3) *Service.* — A motion to substitute, together with a notice of hearing, must be served on the parties as provided in Rule 5 and on nonparties as provided in Rule 4. A statement noting death must be served in the same manner. Service may be made in any judicial district.

(b) *Incompetency.* — If a party becomes incompetent, the court may, on motion, permit the action to be continued by or against the party's representative. The motion must be served as provided in Rule 25(a)(3).

(c) *Transfer of Interest.* — If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party. The motion must be served as provided in Rule 25(a)(3).

(d) *Public Officers; Death or Separation from Office.* —

(1) An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party. Later proceedings should be in the substituted party's name, but any misnomer not affecting the parties' substantial rights must be disregarded.

(2) A public officer who sues or is sued in an official capacity may be described as a party by the officer's official title rather than by name; but the court may require the officer's name to be added.

(e) *Substitution at any stage.* — Substitution of parties under the provisions of this rule may be made, either before or after judgment, by the court then having jurisdiction.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 25 of the Federal Rules of Civil Procedure.

Cross References. — As to saving of action once commenced from bar of statute of limitations, see § 1-3-118.

Substitution of parties is essential to a prosecution if cause survives. Marvel v. Neuman Transit Co., 414 P.2d 98 (Wyo. 1966).

And no authority warrants a delay in filing a motion for substitution of parties where the survival of a cause of action is challenged. Marvel v. Neuman Transit Co., 414 P.2d 98 (Wyo. 1966).

The most significant feature of subdivision (c) of this rule is that it does not require that anything be done after an interest has been transferred. Erb v. Erb, 573 P.2d 849 (Wyo. 1978).

When subdivision (c) controls. — Where a transfer of interest, such as by an assignment, takes place prior to the commencement of the action, Rule 17 controls and requires that the

action shall be prosecuted in the name of the real party in interest. But where the transfer of interest takes place during the course of the action, subdivision (c) controls and provides that the action may be continued by or against the original party whose interest has been transferred, unless the court, upon motion, directs that the person to whom the interest has been transferred be substituted in the action, or joined with the original party. Erb v. Erb, 573 P.2d 849 (Wyo. 1978).

Discretion of trial court in disposing of subdivision (c) motion. — If a motion for substitution under subdivision (c) is made, the disposition of the motion depends on the sound discretion of the trial court, taking into account the exigencies of the situation. Erb v. Erb, 573 P.2d 849 (Wyo. 1978).

Substantive rights of transferor or transferee pendente lite not affected. — Whether or not substitution or joinder is ordered under subdivision (c), this does not affect the respective substantive rights of the transferor or transferee pendente lite and it is entirely a matter of convenience. Erb v. Erb, 573 P.2d 849 (Wyo. 1978).

Dismissal required upon death of party. — When plaintiff filed a lawsuit against defendant for injuries stemming from an automobile wreck, he filed his answer and passed away. Because no motion for substitution of parties was made within 90 days of the notice of the death, the subsequent settlement negotiations were moot; and dismissal of the case was required by this rule. Dunham v. Fullerton, 258 P.3d 701 (Wyo. 2011).

Where ex-wife assigned support rights against ex-husband. — Where an ex-wife filed motion in divorce action seeking to have her ex-husband held in contempt for failure to make child support payments, she had standing to bring such motion even though she had executed an assignment of support rights against the ex-husband. Erb v. Erb, 573 P.2d 849 (Wyo. 1978).

Applied in Parsley v. Wyoming Automotive Co., 395 P.2d 291 (Wyo. 1964); Tschirgi v. Meyer, 536 P.2d 558 (Wyo. 1975); Mari v. Rawlins Nat'l Bank, 794 P.2d 85 (Wyo. 1990); Alexander v. United States, 803 P.2d 61 (Wyo. 1990).

Quoted in L Slash X Cattle Co. v. Texaco, Inc., 623 P.2d 764 (Wyo. 1981); Baldwin v. Dube, 751 P.2d 388 (Wyo. 1988).

Cited in Lusk Lumber Co. v. Independent Producers Consol., 43 Wyo. 191, 299 P. 1044 (1931); Hume v. Ricketts, 69 Wyo. 222, 240 P.2d 881 (1952); Wyoming Health Servs., Inc. v. Deatherage, 773 P.2d 156 (Wyo. 1989).

Am. Jur. 2d, ALR and C.J.S. references. — 1 Am. Jur. 2d Abatement, Survival and Revival § 1 et seq.; 59 Am. Jur. 2d Parties §§ 210 to 235, 255.

Enforceability of warrant of attorney to confess judgment against assignee, guarantor, or other party obligating himself for performance of primary contract, 5 ALR3d 426.

Bank's right to apply or set off deposit against debt of depositor not due at time of his death, 7 ALR3d 908.

Validity and effect of agreement that debt or legal obligation contemporaneously or subsequently incurred shall be canceled by death of creditor or obligee, 11 ALR3d 1427.

Applicability, as affected by change in parties, of statute permitting commencement of new action within specified time after failure of prior action not on merits, 13 ALR3d 848.

Official death certificate as evidence of cause of death in civil or criminal action, 21 ALR3d 418.

Attorney's death prior to final adjudication or settlement of case as affecting compensation under contingent fee contract, 33 ALR3d 1375.

Validity, construction and effect of clause in franchise contract prohibiting transfer of franchise or contract, 59 ALR3d 244.

Modern status of rule denying a common-law recovery for wrongful death, 61 ALR3d 906.

Conservator or guardian for an incompetent, priority and preference in appointment of, 65 ALR3d 991.

Power of incompetent spouse's guardian or representative to sue for granting or vacation of divorce or annulment of marriage, or to make compromise or settlement in such suit, 32 ALR5th 673.

Substitution of judges under Rule 25 of Federal Rules of Criminal Procedure, 73 ALR Fed 833.

Sufficiency of suggestion of death of party, filed under Rule 25(a)(1) of Federal Rules of Civil Procedure, governing substitutions of party after death, 105 ALR Fed 816.

67A C.J.S. Parties §§ 58 to 64.

V. DEPOSITIONS AND DISCOVERY

Rule 26. Duty to disclose; general provisions governing discovery.

(a) *Required Disclosures.* —

(1) *Initial Disclosure.* —

(A) *In General.* — Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery

request, provide to the other parties, but not file with the court, unless otherwise ordered by the court or required by other rule:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information — along with the subjects of that information — that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy — or a description by category and location — of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party — who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) *Proceedings Exempt from Initial Disclosure.* — The following proceedings are exempt from initial disclosure:

(i) cases arising under Title 14 of the Wyoming Statutes;

(ii) cases in which the court sits in probate;

(iii) divorce actions [for which the required initial disclosures are set forth in Rules 26(a)(1.1) (A), (B), (C), (D), (E), (F), (G) and (H)] , and custody and support actions where the parties are not married [for which the required initial disclosures are set forth in Rule 26(a)(1.2) (A)];

(iv) review on an administrative record;

(v) a forfeiture action in rem arising from a Wyoming statute;

(vi) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(vii) an action brought without an attorney by a person in the custody of the State, county, or other political subdivision of the State;

(viii) an action to enforce or quash an administrative summons or subpoena;

(ix) a proceeding ancillary to a proceeding in another court; and

(x) an action to enforce an arbitration award.

(1.1) *Initial disclosures in divorce actions.* — In divorce actions the following initial disclosures are required in pre-decree proceedings, and in post-decree proceedings to the extent that they pertain to a particular claim or defense:

(A) A schedule of financial assets, owned by the party individually or jointly, which shall include savings or checking accounts, stocks, bonds, cash or cash equivalents, and shall include:

(i) the name and address of the depository;

(ii) the date such account was established;

(iii) the type of account;

(iv) the account number; and

(vi) whether acknowledged to be a marital asset or asserted to be a non-marital asset and, if asserted to be a non-marital asset, an explanation of the legal and factual basis for such assertion;

(B) A schedule of non-financial assets, owned by the party individually or jointly, which schedule shall include:

(i) the purchase price and the date of acquisition;

(ii) the present market value;

(iii) any indebtedness relating to such asset;

(iv) the state of record ownership;

(v) whether purchased from marital assets or obtained by gift or inheritance; and

(vi) whether acknowledged to be a marital asset or asserted to be a non-marital asset and, if asserted to be a non-marital asset, an explanation of the legal and factual basis for such assertion;

(C) A schedule of all debts owed individually or jointly, identifying:

(i) the date any obligation was incurred;

(ii) the spouse in whose name the debt was incurred;

(iii) the present amount of all debts and the monthly payments;

(iv) the use to which the money was put which caused the debt to arise;

(v) identification of any asset which serves as security for such debt; and

(vi) an acknowledgement of whether each debt is a marital or non-marital debt and, if asserted to be a non-marital debt, an explanation of the legal and factual basis for such assertion;

(D) As to safe deposit boxes:

(i) the name and address of the institution where the box is located;

(ii) the box number;

(iii) the name and address of the individual(s) who have access to the box;

(iv) an inventory of the contents; and

(v) the value of the assets located therein;

(E) Employment:

(i) the name and address of the employer;

(ii) gross monthly wage;

(iii) payroll deduction(s), specifically identifying the type and amount;

(iv) the amount of other benefits including transportation, employer contributions to health care, and employer contributions to retirement accounts; and

(v) outstanding bonuses;

(F) Other income: list all sources of other income as defined by Wyo.Stat.Ann. § 20-6-202(a)(ix), including the name and address of the source and the amount and date received;

(G) As to retirement accounts or benefits:

(i) the name and address of the institution holding such account or benefits;

(ii) the present value if readily ascertainable;

(iii) the initial date of any account;

(iv) the expected payment upon retirement and the specific retirement date; and

(v) the value of the account at the date of the marriage if the account existed prior to marriage;

(H) A party seeking custody or a change in custody shall set forth the facts believed to support the claim of superior entitlement to custody. In addition, as to a change of custody the party shall set forth any facts comprising a substantial change in circumstances and disclose any supporting documentation.

(1.2) *Initial disclosures in custody and support actions where the parties are not married.* — In custody and support actions where the parties are not married, the following initial disclosures are required in original proceedings and in modification proceedings to the extent that they pertain to a particular claim or defense:

(A) A party seeking custody or a change in custody shall set forth the facts believed to support the claim of superior entitlement to custody. In addition, as to a change of custody, the party shall set forth any facts comprising a substantial change in circumstances and disclose any supporting documentation.

(1.3) *Timing of disclosures; requirement to disclose.* — Unless a different time is set by stipulation in writing or by court order, these disclosures pursuant to 26(a)(1), 26(a)(1.1) and 26(a)(1.2) shall be made within 30 days after a party's answer is required to be served under Rule 12(a) or as that period may be altered as described in Rule 12(a) by the party's service of a dispositive motion as described in Rule 12(b). Any party later served or otherwise joined must make these disclosures within 30 days after being served or joined unless a different time is set by stipulation in writing or by court order. A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) *Disclosure of Expert Testimony.* —

(A) In addition to the disclosures required by paragraph (1), (1.1) or (1.2), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Wyoming Rule of Evidence 702, 703, or 705.

(B) *Witnesses Who Must Provide a Written Report.* — Unless otherwise stipulated or ordered by the court, if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony, this disclosure must be accompanied by a written report prepared and signed by the witness or a disclosure signed by counsel for the party. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Witnesses Who Do Not Provide a Written Report.* — Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Wyoming Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) *Time to Disclose Expert Testimony.* — A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) *Supplementing the Disclosure.* — The parties must supplement these disclosures when required under Rule 26(e).

(3) *Pretrial Disclosures.* —

(A) *In General.* — In addition to the disclosures required by Rule 26(a)(1), (1.1), (1.2) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness — separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence — separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) *Time for Pretrial Disclosures; Objections.* — Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made — except for one under Wyoming Rule of Evidence 402 or 403 — is waived unless excused by the court for good cause.

(4) *Form of Disclosures.* — Unless the court orders otherwise, all disclosures under Rule 26(a)(1), (1.1), (1.2), (2), or (3) must be in writing, signed, and served.

(b) *Discovery Scope and Limits.* —

(1) *Scope in General.* — Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) *Limitations on Frequency and Extent.* —

(A) *When Permitted.* — By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order, the court may also limit the number of requests under Rule 36.

(B) *Specific Limitations on Electronically Stored Information.* — A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) *When Required.* — On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by the court if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

(3) *Trial Preparation: Materials.* —

(A) *Documents and Tangible Things.* — Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure.* — If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Previous Statement.* — Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording — or a transcription of it — that recites substantially verbatim the person's oral statement.

(4) *Trial Preparation: Experts.* —

(A) *Deposition of an Expert Who May Testify.* — A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Trial-Preparation Protection for Draft Reports or Disclosures.* — Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* — Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) *Expert Employed Only for Trial Preparation.* — Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by

an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) *Payment.* — Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) *Claiming Privilege or Protecting Trial-Preparation Materials.* —

(A) *Information Withheld.* — When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) *Information Produced.* — If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) *Protective Orders.* —

(1) *In General.* — A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending — or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) *Ordering Discovery.* — If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) *Awarding Expenses.* — Rule 37(a)(5) applies to the award of expenses.

(d) *Timing and Sequence of Discovery.* —

(1) *Timing.* — Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order, a party may not seek discovery from any source before the period for initial disclosures has expired and that party has provided the disclosures required under Rule 26(a)(1), (1.1), or (1.2).

(2) *Sequence.* — Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(e) *Supplementing Disclosures and Responses.* —

(1) *In General.* — A party who has made a disclosure under Rule 26(a) — or who has responded to an interrogatory, request for production, or request for admission — must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) *Expert Witness.* — For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) *Discovery Conference.* — At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

(1) a statement of the issues as they then appear;

(2) a proposed plan and schedule of discovery;

(3) any expansion or further limitation proposed to be placed on discovery;

(4) any other proposed orders with respect to discovery; and

(5) a statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and each party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 14 days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of

discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

(g) *Signing Disclosures and Discovery Requests, Responses, and Objections.* —

(1) *Signature Required; Effect of Signature.* — Every disclosure under Rule 26(a)(1), (1.1), (1.2), or (3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name / or by the party personally, if unrepresented — and must state the signer's address, email address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) *Failure to Sign.* — Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) *Sanction for Improper Certification.* — If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

(Added February 2, 2017, effective March 1, 2017.)

Editor's notes. — Within Rule 26 (a)(1.1)(A), there is no subdivision (v).

Source. — This rule is similar to Rule 26 of the Federal Rules of Civil Procedure.

Cross References. — As to discovery in administrative proceedings, see § 16-3-107. As to audio-visual depositions, see Rule 502, D. Ct.

Full and fair disclosure of facts to be made. — Under these rules, the bar and bench of Wyoming are dedicated to a full and fair disclosure of all the facts in a case at or prior to the time of trial, with no withholding of certain matters to be used as secret weapons. Barber v. State Hwy. Comm'n, 80 Wyo. 340, 342 P.2d 723 (1959).

Disclosure of expert testimony. — Defendants' expert disclosure was sufficient because the witness was not retained or specially employed to provide expert testimony; he was a defendant, not an expert retained or employed to provide testimony. Miller v. Beyer, 329 P.3d 956 (Wyo. 2014).

Discovery motion not acted upon where no "pending action". — Since the petitioner's consolidated petition for post-conviction relief and writ of habeas corpus was dismissed, there was no "pending action" and no occasion to act upon the petitioner's motion seeking discovery of grand jury proceedings. State ex rel. Hopkinson v. District Court, 696 P.2d 54 (Wyo.), cert. denied, 474 U.S. 865, 106 S. Ct. 187, 88 L. Ed. 2d 155 (1985).

Since the petitioner's petition for writ of habeas corpus, to which a request for grand jury proceedings was ancillary, was denied, there was no "pending proceeding" pursuant to subdivision (b)(1) and no occasion to further consider action on the request. Hopkinson v. State, 709 P.2d 406 (Wyo. 1985).

Husband entitled to production of wife's mental health records. — In a divorce action, the husband was entitled to the production of the wife's medical, counseling, psychiatric, and psychological records from prior to the marriage, notwithstanding her assertion that the husband sought to go on a fishing expedition,

where (1) some of the issues in the case raised questions about the wife's mental health and the evidence at trial demonstrated that she had endured some emotionally stressful events prior to her marriage; (2) the child custody dispute involved allegations by the husband that the wife has been emotionally erratic and explosive in front of their child; and (3) in the wife's tort issues, she asserted that she suffered severe emotional distress as a result of the husband's outrageous behavior. McCulloh v. Drake, 24 P.3d 1162 (Wyo. 2001).

Father allowed to discover evidence of changed financial circumstances of ex-wife. — In refusing to allow the father, in connection with a petition for modification of child support, to discover relevant evidence relating to any changes in the financial circumstances of his ex-wife since the entry of the divorce decree, the district court abused its discretion. Cubin v. Cubin, 685 P.2d 680 (Wyo. 1984).

Father entitled to protective order in child support case. — In a child support modification proceeding, a district court did not err in granting a father's motion for protective order regarding additional discovery sought by a mother because the father provided the mother with ample evidence regarding finances, and the father complied with a district court's order to provide additional information. McCulloh v. Drake, 105 P.3d 1091 (Wyo. 2005).

Wide latitude allowed in interrogatories to party. — A proper interpretation of this rule admits of great latitude in the examination of a party by interrogatory. If the answer to a question may lead to the discovery of evidence or enlighten as to some phase of the issues, the interrogatory is permissible. Ulrich v. Ulrich, 366 P.2d 999 (Wyo. 1961).

But interrogatories are improper where they propound the ultimate questions to be decided by the court. Ulrich v. Ulrich, 366 P.2d 999 (Wyo. 1961).

And where opinions based on legal conclusions. — An interrogatory may be used to obtain admission as to a relevant fact, but this does not extend to its use to elicit an expression of opinion as to existence of what may become a fact only by virtue of a correct legal conclusion. Ulrich v. Ulrich, 366 P.2d 999 (Wyo. 1961).

Answers calling for opinions which would have been legal conclusions not within the party's knowledge and respecting matter she was not qualified to answer may not be secured by interrogatories. Ulrich v. Ulrich, 366 P.2d 999 (Wyo. 1961).

Requiring answers to interrogatories discretionary. — The district court has a broad discretion in deciding whether to require answers to interrogatories. Mauch v. Stanley Structures, Inc., 641 P.2d 1247 (Wyo. 1982).

Surmise insufficient to justify production of documents. — Although a party is entitled to production of documents that would be useful to impeach a witness, his mere surmise that he might find impeaching matter has been held not sufficient to justify production. Thomas v. Harrison, 634 P.2d 328 (Wyo. 1981).

When insured's report on claim privileged and not discoverable. — A report or other communication, made by an insured to his liability insurance company, concerning an event which may be made the basis of a claim against him covered by the policy, is a privileged communication, as being between attorney and client, if the policy requires the company to defend him through its attorney and the communication is intended for the information or assistance of the attorney in so defending him; therefore, the report or communication is not discoverable. Thomas v. Harrison, 634 P.2d 328 (Wyo. 1981).

Estimations of liability and damages deemed nondiscoverable work product. — A practice, used by many attorneys in the evaluation of their cases, is to inquire of a stenographer, an elevator operator, a barber and other contacts concerning their estimation of damages which they would award under given circumstances or their determination of the liability of parties under given circumstances; this practice is a form of work product and is not subject to discovery. Thomas v. Harrison, 634 P.2d 328 (Wyo. 1981).

Documents encompassing legal advice or evaluation privileged. — Documents sought to be produced in discovery — including letters from counsel to the client encompassing legal advice, in-house correspondence of the client discussing advice furnished by the attorney, reports of summaries of deposition testimony, and evaluations of the client's position made by counsel — were privileged or arguably privileged. Continental Ins. Co. v. First Wyo. Bank, 771 P.2d 374 (Wyo. 1989).

Procedure governing discovery of defendant's wealth in action for punitive damages. — See Campen v. Stone, 635 P.2d 1121 (Wyo. 1981).

Release of liability document. — In a case in which plaintiff sought to hold defendant mine owners liable for damages he suffered in an accident that occurred while he was working as a visitor at the mine site, the trial court did not err in ruling that defendants were not required to respond to plaintiff's discovery requests about the history of a release of liability document that plaintiff signed before beginning his work at the mine site; plaintiff did not show how answers to questions about the history of the release might have yielded or led to admissible evidence. Cramer v. Powder River Coal, LLC, 204 P.3d 974 (Wyo. 2009).

Substantial need shown for exhibits in other litigation. — Where a petitioner requested that the defendants furnish a description of all exhibits produced by them and produced by others for them in other litigation which arose out of the same events as the

present suit, which other proceedings had been settled and dismissed by stipulation of the litigants, such materials were only discoverable upon a showing that the party seeking discovery had a substantial need of the materials in the preparation of his case and that that party was unable, without undue hardship, to obtain the substantial equivalent of the materials by any other means. Paull v. Conoco, Inc., 752 P.2d 415 (Wyo. 1988).

No necessity exists to object to furnishing of privileged material, and there is no waiver of the claim of privilege because of an untimely response to discovery. Continental Ins. Co. v. First Wyo. Bank, 771 P.2d 374 (Wyo. 1989).

Abusive discovery tactics can and should be brought to attention of court, which has the power to control discovery. Coulthard v. Cossairt, 803 P.2d 86 (Wyo. 1990), overruled on other grounds, Vaughn v. State, 962 P.2d 149 (Wyo. 1998).

Untimely to move for protective order after failure to obey previous orders. — A motion for a protective order under subdivision (c) is not timely when it is filed after a party has failed to comply with previous orders of the court compelling production. Farrell v. Hursh Agency, Inc., 713 P.2d 1174 (Wyo. 1986).

Counsel may be ineffective for failure to pursue discovery. — Trial court abused its discretion in ignoring remand directive that it determine if defense counsel had been ineffective in failing to follow-up on defendant's request to provide documents that might support loan/purchase defenses and in failing to ask for continuance on the record but instead waiving defendant's right to testify at trial after health problems made it doubtful that defendant could testify effectively. Barker v. State, 106 P.3d 297 (Wyo. 2005).

Trial court justified in denying discovery. — See Hinckley v. Hinckley, 812 P.2d 907 (Wyo. 1991).

Protective order for physician-patient testimony justified. — The trial judge did not abuse his discretion in issuing a protective order against a physician's testimony against his own patient because, though the testimony was not privileged, the interests of justice were preserved where the physician was not designated a trial expert, was not specially retained in anticipation of trial, and was potentially ethically compromised by his testimony. Wardell v. McMillan, 844 P.2d 1052 (Wyo. 1992).

Failure to timely supplement discovery responses. — In a mother's action to enforce a Virginia divorce decree, the trial court was not required to exclude the mother's exhibits of the child's medical and education expenses because she did not timely supplement her responses to the father's discovery requests in accordance with this section. The mother provided the information prior to the hearing, and the father suffered no prejudice as a result of the delay. Witowski v. Roosevelt, 199 P.3d 1072 (Wyo. 2009).

Attorney misconduct in providing disclosures. — Wyoming Board of Professional Responsibility recommended as the appropriate sanctions for an attorney's violations of the Wyoming Rules of Professional Conduct a public censure and payment of the administrative fee and costs where the Board found that: (1) the attorney violated Wyo. R. Prof. Conduct 3.4(c) by knowingly failing to disclose the existence of insurance that might be liable to satisfy part or all of a judgment that might be entered in the action or to indemnify or reimburse for payments made to satisfy a judgment as required by Wyo. R. Civ. P. 26(a)(1)(D), (e); (2) the attorney violated Wyo. R. Prof. Conduct 3.1(c) by signing Rule 26 disclosures when he knew that the information contained therein was not accurate and was not well grounded in fact, as it failed to disclose existence of insurance that might be liable to satisfy part or all of a judgment that might be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment as required by Rule 26(a)(1)(D); and (3) the attorney violated Wyo. R. Prof. Conduct 8.4(a), (c), (d) by knowingly failing to disclose existence of insurance that might be liable to satisfy part or all of a judgment that might be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment as required by Rule 26(a)(1)(D), (e). In re Stith, — P.3d —, 2011 Wyo. LEXIS 72 (Wyo. Feb. 4, 2011).

Applied in Strang Telecasting, Inc. v. Ernst, 610 P.2d 1011 (Wyo. 1980).

Quoted in Inskeep v. Inskeep, 752 P.2d 434 (Wyo. 1988); Freudenthal v. Cheyenne Newspapers, Inc., 233 P.3d 933 (Wyo. 2010); Steiger v. Happy Valley Homeowners Ass'n, 245 P.3d 269 (Wyo. 2010).

Cited in Tschirgi v. Meyer, 536 P.2d 558 (Wyo. 1975); Reno Livestock Corp. v. Sun Oil Co., 638 P.2d 147 (Wyo. 1981); Strawser v. Exxon Co., 843 P.2d 613 (Wyo. 1992); Aragon v. Aragon, 104 P.3d 756 (Wyo. 2005); Befumo v. Johnson, 119 P.3d 936 (Wyo. 2005); Briefing.com v. Jones, 126 P.3d 928 (Wyo. 2006).

Law reviews. — For article, "The Discovery Procedure in the General Practice," see 12 Wyo. L.J. 231 (1958).

For article, "Rule 26 — The Procrustean Bed," see V Land & Water L. Rev. 153 (1970).

For comment, "Article VI of the Wyoming Rules of Evidence: Witnesses," see XIII Land & Water L. Rev. 909 (1978).

For article, "A Primer on Computer Simulation of Hydrocarbon Reservoirs," see XXII Land & Water L. Rev. 119 (1987).

See article, "The 1994 Amendments to the Wyoming Rules of Civil Procedure," XXX Land & Water L. Rev. 151 (1995).

Am. Jur. 2d, ALR and C.J.S. references.

— 23 Am. Jur. 2d Depositions and Discovery § 1 et seq.

Admissibility in evidence of deposition as against one not a party at time of its taking, 4 ALR3d 1075.

Right of defendant in criminal case to inspection or production of contradictory statement or document of prosecution's witness for purpose of impeaching him, 7 ALR3d 181.

Pretrial examination or discovery to ascertain from defendant in action for injury, death or damages, existence and amount of liability insurance and insurer's identity, 13 ALR3d 822.

Party's right to use as evidence, in evidence in civil trial, his own testimony given upon interrogatories or depositions taken by opponent, 13 ALR3d 1312.

Scope of defendant's duty of pretrial discovery in medical malpractice action, 15 ALR3d 1446.

Disclosure of name, identity, address, occupation or business of client as violation of attorney-client privilege, 16 ALR3d 1047.

Compelling party to disclose information in hands of affiliated or subsidiary corporation, or independent contractor, not made party to suit, 19 ALR3d 1134.

Physician-patient privilege, commencing action involving physical condition of plaintiff or decedent as waiving, as to discovery proceedings, 21 ALR3d 912.

Taking deposition or serving interrogatories in civil case as waiver of incompetency of witness, 23 ALR3d 389.

Application of privilege attending statements made in course of judicial proceedings to pretrial deposition and discovery proceedings, 23 ALR3d 1172.

Pretrial testimony or disclosure on discovery by party to personal injury action as to nature of injuries or treatment as waiver of physician-patient privilege, 25 ALR3d 1401.

Personal representative's loss of rights under dead man's statute by prior institution of discovery proceedings, 35 ALR3d 955.

Assertion of privilege in pretrial discovery proceedings as precluding waiver of privilege at trial, 36 ALR3d 1367.

Admissibility of physician's testimony as to patient's statements or declarations, other than res gestae, during medical examination, 37 ALR3d 778.

Privilege against self-incrimination as ground for refusal to produce noncorporate documents in possession of person asserting privilege but owned by another, 37 ALR3d 1373.

Liability for injury to guest in airplane, 40 ALR3d 1117.

Discovery of hospital's internal records or communications as to qualifications or evaluations of individual physician, 81 ALR3d 944.

Discovery or inspection of state bar records of complaints against or investigations of attorneys, 83 ALR3d 777.

Sanctions against defense in criminal case for failure to comply with discovery requirements, 9 ALR4th 837.

Propriety of discovery order permitting "destructive testing" of chattel in civil case, 11 ALR4th 1245.

Refusal of defendant in "public figure" libel case to identify claimed sources as raising presumption against existence of source, 19 ALR4th 919.

Photographs of civil litigant realized by opponent's surveillance as subject to pretrial discovery, 19 ALR4th 1236.

Work product privilege as applying to material prepared for terminated litigation or for claim which did not result in litigation, 27 ALR4th 568.

Abuse of process action based on misuse of discovery or deposition procedures after commencement of civil action without seizure of person or property, 33 ALR4th 650.

Protective orders limiting dissemination of financial information obtained by deposition or discovery in state civil actions, 43 ALR4th 121.

Discovery: right to ex parte interview with injured party's treating physician, 50 ALR4th 714.

Discovery of defendant's sales, earnings or profits on issue of punitive damages in tort action, 54 ALR4th 998.

Discovery of identity of blood donor, 56 ALR4th 755.

Propriety of allowing state court civil litigant to call expert witness whose name or address was not disclosed during pretrial discovery proceedings, 58 ALR4th 653.

Discovery, in civil proceeding, of records of criminal investigation by state grand jury, 69 ALR4th 298.

Discovery of trade secret in state court action, 75 ALR4th 1009.

Propriety and extent of state court protective order restricting party's right to disclose discovered information to others engaged in similar litigation, 83 ALR4th 987.

Discoverability of traffic accident reports and derivative information, 84 ALR4th 15.

Propriety of state court's grant or denial of application for pre-action production or inspection of documents, persons, or other evidence, 12 ALR5th 577.

Waiver of evidentiary privilege by inadvertent disclosure — state law, 51 ALR5th 603.

Attorney's work product privilege, under Rule 26(b)(3) of the Federal Rules of Civil Procedure, as applicable to documents prepared in anticipation of terminated litigation, 41 ALR Fed 123.

Use of Freedom of Information Act (5 USC § 552) as substitute for, or as means of, supplementing discovery procedures available to litigants in federal civil, criminal, or administrative proceedings, 57 ALR Fed 903.

Power of court under 5 USC § 552(a)(4)(B) to examine agency records in camera to determine

propriety of withholding records, 60 ALR Fed 416.

Fraud exception to work product privilege in federal courts, 64 ALR Fed 470.

Restriction on dissemination of information obtained through pretrial discovery proceedings as violating federal constitution's first amendment — federal cases, 81 ALR Fed 471.

Protection from discovery of attorney's opinion work product under Rule 26(b)(3), Federal Rules of Civil Procedure, 84 ALR Fed 779.

Modification of protective order entered pursuant to Rule 26(c), Federal Rules of Civil Procedure, 85 ALR Fed 538.

Academic peer review privilege in federal court, 85 ALR Fed 691.

Propriety and scope of protective order against disclosure of material already entered into evidence in federal court trial, 138 ALR Fed 153.

Federal district court's power to impose sanctions on non-parties for abusing discovery process, 149 ALR Fed 589.

Discovery of bank examination reports and use of bank examiner privilege or bank examination privilege in federal civil proceedings, 151 ALR Fed 643.

Crime-fraud exception to work product privilege in Federal courts, 178 ALR Fed 87.

26A C.J.S. Depositions § 1 et seq.; 27 C.J.S. Discovery § 1 et seq.

Rule 27. Depositions to perpetuate testimony.

(a) *Before an Action is Filed.* —

(1) *Petition.* — A person who wants to perpetuate testimony about any matter cognizable in any court of the state may file a verified petition in the district court for the district where any expected adverse party resides. The petition must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony. The petition must be titled in the petitioner's name and must show:

(A) that the petitioner expects to be a party to an action cognizable in a court of the state but cannot presently bring it or cause it to be brought;

(B) the subject matter of the expected action and the petitioner's interest;

(C) the facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it;

(D) the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, so far as known; and

(E) the name, address, and expected substance of the testimony of each deponent.

(2) *Notice and Service.* — At least 20 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. The notice may be served either inside or outside the state in the manner provided in Rule 4. If that service cannot be made with reasonable diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided in Rule 4 and to cross-examine the deponent if an unserved person is not otherwise represented. If any expected adverse party is a minor or is incompetent, Rule 17(c) applies.

(3) *Order and Examination.* — If satisfied that perpetuating the testimony may prevent a failure or delay of justice, the court must issue an order that designates or describes the persons whose depositions may be taken, specifies the subject matter of the examinations, and states whether the depositions will be taken orally or by written interrogatories. The depositions may then be taken under these rules, and the court may issue orders like those authorized by Rules 34 and 35. A reference in these rules to the court where an action is pending means, for purposes of this rule, the court where the petition for the deposition was filed.

(4) *Using the Deposition.* — A deposition to perpetuate testimony may be used under Rule 32(a) in any later-filed district court action involving the same subject matter if the deposition either was taken under these rules or, although not so taken, would be admissible in evidence in the courts of the state where it was taken.

(b) *Pending Appeal.* —

(1) *In General.* — The court where a judgment has been rendered may, if an appeal has been taken or may still be taken, permit a party to depose witnesses to perpetuate their testimony for use in the event of further proceedings in that court.

(2) *Motion.* — The party who wants to perpetuate testimony may move for leave to take the depositions, on the same notice and service as if the action were pending in the trial court. The motion must show:

(A) the name, address, and expected substance of the testimony of each deponent; and

(B) the reasons for perpetuating the testimony.

(3) *Court Order.* — If the court finds that perpetuating the testimony may prevent a failure or delay of justice, the court may permit the depositions to be taken and may issue orders like those authorized by Rules 34 and 35. The depositions may be taken and used as any other deposition taken in a pending district court action.

(c) *Perpetuation by an Action.* — This rule does not limit a court's power to entertain an action to perpetuate testimony.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 27 of the Federal Rules of Civil Procedure.

Cross References. — As to refusal of party to answer questions upon deposition, see Rule 37.

As to refusal to subscribe a deposition punishable as contempt, see § 1-12-106. As to liability for refusal to give deposition, see § 1-12-108. As to deposition of prisoner, see § 1-12-112. For Uniform Foreign Depositions Act, see § 1-12-115 et seq. As to depositions under Uniform Arbitration Act, see § 1-36-109. As to fee of clerk of court for taking deposition, see § 5-3-206. As to power of district court commissioner to take depositions, see § 5-3-307. As to age of majority, see § 14-1-101. As to fee of notary public for taking deposition, see § 32-1-112.

As to depositions in criminal proceedings, see Rule 15, W.R. Cr. P.

The 2000 amendment, in (a)(4) and throughout (b), substituted "court" for "district court," and made a stylistic change.

Cited in Befumo v. Johnson, 119 P.3d 936 (Wyo. 2005).

Am. Jur. 2d, ALR and C.J.S. references. — 23 Am. Jur. 2d Depositions and Discovery §§ 118 to 129.

Admissibility in evidence of deposition as against one not a party at time of its taking, 4 ALR3d 1075.

Propriety of state court's grant or denial of application for pre-action production or inspection of documents, persons, or other evidence, 12 ALR5th 577.

Right to perpetuation of testimony under Rule 27 of Federal Rules of Civil Procedure, 60 ALR Fed 924.

Right to perpetuation of testimony under Rule 27 of Federal Rules of Civil Procedure, 60 ALR Fed 924.

26A C.J.S. Depositions §§ 3 to 46, 51 to 57.

Rule 28. Persons before whom depositions may be taken.

(a) *Within the United States.* —

(1) *In General.* — Within the United States or a territory or insular possession subject to United States jurisdiction, a deposition must be taken before:

(A) an officer authorized to administer oaths either by the laws of this state or of the United States or of the place of examination; or

(B) a person appointed by the court where the action is pending to administer oaths and take testimony.

(2) Definition of "Officer." The term "officer" in Rules 30, 31, and 32 includes a person appointed by the court under this rule or designated by the parties under Rule 29(a).

(b) *In a Foreign Country.* —

(1) *In General.* — A deposition may be taken in a foreign country:

(A) under an applicable treaty or convention;

(B) under a letter of request, whether or not captioned a "letter rogatory";

(C) on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination; or

(D) before a person commissioned by the court to administer any necessary oath and take testimony.

(2) *Issuing a Letter of Request or a Commission.* — A letter of request, a commission, or both may be issued:

(A) on appropriate terms after an application and notice of it; and

(B) without a showing that taking the deposition in another manner is impracticable or inconvenient.

(3) *Form of a Request, Notice, or Commission.* — When a letter of request or any other device is used according to a treaty or convention, it must be captioned in the form prescribed by that treaty or convention. A letter of request may be addressed "To the Appropriate Authority in [name of country]." A deposition notice or a commission must designate by name or descriptive title the person before whom the deposition is to be taken.

(4) *Letter of Request — Admitting Evidence.* — Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States.

(c) *Disqualification.* — A deposition must not be taken before a person who is any party's relative, employee, or attorney; who is related to or employed by any party's attorney; or who is financially interested in the action.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 28 of the Federal Rules of Civil Procedure.

Cited in Befumo v. Johnson, 119 P.3d 936 (Wyo. 2005).

Law reviews. — See article, "The 1994 Amendments to the Wyoming Rules of Civil Procedure," XXX Land & Water L. Rev. 151 (1995).

Am. Jur. 2d, ALR and C.J.S. references. — 23 Am. Jur. 2d Depositions and Discovery §§ 15 to 18, 110.

Disqualification of attorney, otherwise qualified, to take oath or acknowledgment from client, 21 ALR3d 483.

Use, in federal criminal prosecution, of deposition of absent witness taken in foreign country, as affected by Federal Rule of Criminal Procedure 15(b) and (d) requiring presence of accused and that deposition be taken in manner provided in civil actions, 105 ALR Fed 537.

26A C.J.S. Depositions §§ 17 to 21, 28, 58.

Rule 29. Stipulations about discovery procedure.

Unless the court orders otherwise, the parties may stipulate that:

(a) a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified — in which event it may be used in the same way as any other deposition; and

(b) other procedures governing or limiting discovery be modified — but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 29 of the Federal Rules of Civil Procedure.

Cited in Befumo v. Johnson, 119 P.3d 936 (Wyo. 2005).

Law reviews. — See article, "The 1994 Amendments to the Wyoming Rules of Civil Procedure," XXX Land & Water L. Rev. 151 (1995).

Am. Jur. 2d, ALR and C.J.S. references. — Use of videotape to take deposition for presentation at civil trial in state court, 66 ALR3d 637.

26A C.J.S. Depositions § 105; 83 C.J.S. Stipulations § 10.

Rule 30. Depositions by oral examination.

(a) *When a Deposition May Be Taken.* —

(1) *Without Leave.* — A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) *With Leave.* — A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the State of Wyoming and be unavailable for examination in this State after that time; or

(B) if the deponent is confined in prison.

(b) *Notice of the Deposition; Other Formal Requirements.* —

(1) *Notice in General.* — A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

(2) *Producing Documents.* — If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition.

(3) *Method of Recording.* —

(A) *Method Stated in the Notice.* — The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.

(B) *Additional Method.* — With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

(4) *By Remote Means.* — The parties may stipulate — or the court may on motion order — that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.

(5) *Officer's Duties.* —

(A) *Before the Deposition.* — Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with an on-the-record statement that includes:

(i) the officer's name and business address;

(ii) the date, time, and place of the deposition;

(iii) the deponent's name;

(iv) the officer's administration of the oath or affirmation to the deponent; and

(v) the identity of all persons present.

(B) *Conducting the Deposition; Avoiding Distortion.* — If the deposition is recorded nonstenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)-(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.

(C) *After the Deposition.* — At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(6) *Notice or Subpoena Directed to an Organization.* — In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

(c) *Examination and cross-examination; record of examination; oath; objections.* —

(1) *Examination and Cross-Examination.* — The examination and cross-examination of a deponent proceed as they would at trial under the Wyoming Rules of Evidence, except Rules 103 and 615. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

(2) *Objections.* — An objection at the time of the examination — whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition — must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).

(3) *Participating Through Written Questions.* — Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

(d) *Duration; Sanction; Motion to Terminate or Limit.* —

(1) *Duration.* — Unless otherwise stipulated or ordered by the court, a deposition is limited to one day of seven hours. The court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) *Sanction.* — The court may impose an appropriate sanction — including the reasonable expenses and attorney's fees incurred by any party — on a person who impedes, delays, or frustrates the fair examination of the deponent.

(3) *Motion to Terminate or Limit.* —

(A) *Grounds.* — At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action

is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) *Order.* — The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.

(C) *Award of Expenses.* — Rule 37(a)(5) applies to the award of expenses.

(e) *Review by the Witness; Changes.* —

(1) *Review; Statement of Changes.* — On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) *Changes Indicated in the Officer's Certificate.* — The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

(f) *Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.* —

(1) *Certification and Delivery.* — The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) *Documents and Tangible Things.* —

(A) *Originals and Copies.* — Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may:

(i) offer copies to be marked, attached to the deposition, and then used as originals — after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(ii) give all parties a fair opportunity to inspect and copy the originals after they are marked — in which event the originals may be used as if attached to the deposition.

(B) *Order Regarding the Originals.* — Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.

(3) *Copies of the Transcript or Recording.* — Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.

(4) *Notice of Filing.* — A party who files the deposition must promptly notify all other parties of the filing.

(g) *Failure to Attend a Deposition or Serve a Subpoena; Expenses.* — A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to:

(1) attend and proceed with the deposition; or

(2) serve a subpoena on a nonparty deponent, who consequently did not attend.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 30 of the Federal Rules of Civil Procedure.

Non-attachment of exhibit not grounds for exclusion. — Fact that an exhibit was not attached to an expert witness' deposition was not grounds for excluding the exhibit at trial, under Wyo. R. Civ. P. 30(f)(1). Smyth v. Kaufman, 67 P.3d 1161 (Wyo. 2003).

Amendment issue not addressed on appeal where record insufficient. — Appellate court declined to address an argument that depositions were improperly amended in a negligence case because an insufficient record was provided; there was nothing on the record to show that the issue had been decided by the trial court. Hoy v. DRM, Inc., 114 P.3d 1268 (Wyo. 2005).

Applied in Thomas v. Roth, 386 P.2d 926 (Wyo. 1963); Woodman v. Grace Bomac Drilling, 736 P.2d 313 (Wyo. 1987).

Cited in Befumo v. Johnson, 119 P.3d 936 (Wyo. 2005).

Law reviews. — For article, "The Discovery Procedure in the General Practice," see 12 Wyo. L.J. 231 (1958).

For note, "An Examination of the Protective Orders Issued Under Rule 30 (b)," see 15 Wyo. L.J. 85 (1960).

See article, "The 1994 Amendments to the Wyoming Rules of Civil Procedure," XXX Land & Water L. Rev. 151 (1995).

Am. Jur. 2d, ALR and C.J.S. references. — 23 Am. Jur. 2d Depositions and Discovery §§ 130 to 167.

Taking deposition or serving interrogatories in civil case as waiver of incompetency, 23 ALR3d 389.

Use of videotape to take deposition for presentation at civil trial in state court, 66 ALR3d 637.

Permissibility and standards for use of audio recording to take deposition in state civil case, 13 ALR4th 775.

Dismissal of state court action for failure or refusal of plaintiff to appear or answer questions at deposition or oral examination, 32 ALR4th 212.

26A C.J.S. Depositions § 1 et seq; 27 C.J.S. Discovery §§ 30 to 54.

Rule 31. Depositions by written questions.

(a) *When a Deposition May Be Taken.* —

(1) *Without Leave.* — A party may, by written questions, depose any person, including a party, without leave of court except as provided in Rule 31(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) *With Leave.* — A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take a deposition before the time specified in Rule 26(d); or

(B) if the deponent is confined in prison.

(3) *Service; Required Notice.* — A party who wants to depose a person by written questions must serve them on every other party, with a notice stating, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and the address of the officer before whom the deposition will be taken.

(4) *Questions Directed to an Organization.* — A public or private corporation, a partnership, an association, or a governmental agency may be deposed by written questions in accordance with Rule 30(b)(6).

(5) *Questions from Other Parties.* — Any questions to the deponent from other parties must be served on all parties as follows: cross-questions, within 14 days after being served with the notice and direct questions; redirect questions, within seven days after being served with cross-questions; and recross-questions, within

seven days after being served with redirect questions. The court may, for good cause, extend or shorten these times.

(b) *Delivery to the Officer; Officer's Duties.* — The party who noticed the deposition must deliver to the officer a copy of all the questions served and of the notice. The officer must promptly proceed in the manner provided in Rule 30(c), (e), and (f) to:

(1) take the deponent's testimony in response to the questions;

(2) prepare and certify the deposition; and

(3) send it to the party, attaching a copy of the questions and of the notice.

(c) *Notice of Completion or Filing.* —

(1) *Completion.* — The party who noticed the deposition must notify all other parties when it is completed.

(2) *Filing.* — A party who files the deposition must promptly notify all other parties of the filing.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 31 of the Federal Rules of Civil Procedure.

Applied in Brown v. State, 953 P.2d 1170 (Wyo. 1998).

Stated in Blakely v. State, 474 P.2d 127 (Wyo. 1970); Nuspl v. Nuspl, 717 P.2d 341 (Wyo. 1986).

Cited in Befumo v. Johnson, 119 P.3d 936 (Wyo. 2005).

Law reviews. — For article, "The Discovery Procedure in the General Practice," see 12 Wyo. L.J. 231 (1958).

See article, "The 1994 Amendments to the Wyoming Rules of Civil Procedure," XXX Land & Water L. Rev. 151 (1995).

Am. Jur. 2d, ALR and C.J.S. references. — 23 Am. Jur. 2d Depositions and Discovery §§ 168 to 173.

Party's right to use, as evidence in civil trial, his own testimony given upon interrogatories or depositions taken by opponent, 13 ALR3d 1312.

Disqualification of attorney, otherwise qualified, to take oath or acknowledgment from client, 21 ALR3d 483.

Taking deposition or serving interrogatories in civil case as waiver of incompetency, 23 ALR3d 389.

Tort or statutory liability for failure or refusal of witness to give testimony, 61 ALR3d 1297.

Propriety, on impeaching credibility of witness in civil case by showing former conviction, of questions relating to nature and extent of punishment, 67 ALR3d 761.

26A C.J.S. Depositions §§ 47 to 57.

Rule 32. Using depositions in court proceedings.

(a) *Using Depositions.* —

(1) *In General.* — At a hearing or trial, all or part of a deposition may be used against a party on these conditions:

(A) the party was present or represented at the taking of the deposition or had reasonable notice of it;

(B) it is used to the extent it would be admissible under the Wyoming Rules of Evidence if the deponent were present and testifying; and

(C) the use is allowed by Rule 32(a)(2) through (8).

(2) *Impeachment and Other Uses.* — Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Wyoming Rules of Evidence.

(3) *Deposition of Party, Agent, or Designee.* — An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).

(4) *Unavailable Witness.* — A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:

(A) that the witness is dead;

(B) that the witness is absent from the state, unless it appears that the witness's absence was procured by the party offering the deposition;

(C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;

(D) that the party offering the deposition could not procure the witness's attendance by subpoena; or

(E) on motion and notice, that exceptional circumstances make it desirable-in the interest of justice and with due regard to the importance of live testimony in open court-to permit the deposition to be used.

(5) *Limitations on Use.* —

(A) *Deposition Taken on Short Notice.* — A deposition must not be used against a party who, having received less than 14 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place — and this motion was still pending when the deposition was taken.

(B) *Unavailable Deponent; Party Could Not Obtain an Attorney.* — A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii) must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition.

(6) *Using Part of a Deposition.* — If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.

(7) *Substituting a Party.* — Substituting a party under Rule 25 does not affect the right to use a deposition previously taken.

(8) *Deposition Taken in an Earlier Action.* — A deposition lawfully taken and, if required, filed in any federal or state court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the Wyoming Rules of Evidence.

(b) *Objections to Admissibility.* — Subject to Rules 28(b) and 32(d)(3), an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.

(c) *Form of Presentation.* — Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise.

(d) *Waiver of Objections.* —

(1) *To the Notice.* — An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.

(2) *To the Officer's Qualification.* — An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made:

(A) before the deposition begins; or

(B) promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known.

(3) To the Taking of the Deposition

(A) *Objection to Competence, Relevance, or Materiality.* — An objection to a deponent's competence — or to the competence, relevance, or materiality of testimony — is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.

(B) *Objection to an Error or Irregularity.* — An objection to an error or irregularity at an oral examination is waived if:

(i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and

(ii) it is not timely made during the deposition.

(C) *Objection to a Written Question.* — An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within seven days after being served with it.

(4) *To Completing and Returning the Deposition.* — An objection to how the officer transcribed the testimony— or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition — is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 32 of the Federal Rules of Civil Procedure.

Depositions used only when witness absent. — Subdivision (a)(2) contemplates the reading of a deposition into evidence only in circumstances where the witness is not present. Rainbow Oil Co. v. Christmann, 656 P.2d 538 (Wyo. 1982).

And due diligence exercised. — A showing that due diligence was exercised in attempting to secure the presence of the witness is required from the party seeking to introduce the deposition testimony of the witness. Waggoner v. GMC, 771 P.2d 1195 (Wyo. 1989).

Absence of the deponent at the time the deposition is offered is sufficient to allow the deposition into evidence, and the party offering the deposition need not proffer an excuse for the failure of the deponent to appear. Brown v. Pryor, 954 P.2d 1349 (Wyo. 1998).

Failure to subpoena demonstrates lack of diligence. — The failure of the defendants to attempt to subpoena a physician until the day prior to the need for his testimony and their misplaced reliance on an attempted subpoena by the plaintiff and on informal contacts with the doctor's office did not demonstrate diligence on the part of the defendants. Waggoner v. GMC, 771 P.2d 1195 (Wyo. 1989).

The word "procured" in the context of subsection (a)(3)(B), connotes that a party has collusively instigated or induced a witness to be absent from trial, and to exclude a deposition on this basis requires a showing that the party offering the deposition took steps to keep the deponent from being there. Brown v. Pryor, 954 P.2d 1349 (Wyo. 1998).

Admission of depositions within discretion of court. — Although the circumstances of a case comport with subdivisions (a)(3)(B) and (a)(3)(D), the trial court is not required to automatically admit deposition testimony; the rule that the admission of evidence is within the sound discretion of the trial court applies to the admission of depositions. MMOE v. MJE, 841 P.2d 820 (Wyo. 1992).

Admission of portion of deposition. — District court did not err when it refused to admit complete deposition into evidence at the trial after it had permitted defendant to introduce a portion of that deposition where the portion plaintiff sought to introduce was not relevant. Thunder Hawk v. Union Pac. R.R., 891 P.2d 773 (Wyo. 1995).

Waiver of objections. — Parties cannot be deemed to have waived an objection to relevance at the time of the deposition. Hatch v. State Farm Fire & Cas. Co., 930 P.2d 382 (Wyo. 1996).

When objection as to form of questions is waived. — In absence of objection at the time a deposition is taken, objection as to the form of the questions is waived. Texas Gulf Sulphur Co. v. Robles, 511 P.2d 963 (Wyo. 1973).

And criticism of opposing counsel not substitute for proper objection. — Criticism of opposing counsel to question asked in deposition in no manner substitutes for proper objection or cogent argument or authority. Texas Gulf Sulphur Co. v. Robles, 511 P.2d 963 (Wyo. 1973).

Depositions taken for discovery may be admissible at trial. — There is no distinction as to the admissibility at trial between a deposition taken solely for purposes of discovery and one which is taken for use at trial. The decision to avail oneself of depositions of witnesses involves the risk that these depositions will have an evidentiary value and may be used at trial. Reilly v. Reilly, 671 P.2d 330 (Wyo. 1983).

Independent from evidentiary rule. — While there is some overlap between W.R.E. 804(b)(1) and subsection (a) of this rule, and in many cases the same result would obtain under either rule, the two exceptions are independent bases for admitting depositions. Brown v. Pryor, 954 P.2d 1349 (Wyo. 1998).

Expert witness' designation not admissible. — An exhibit, which was an expert witness' designation prepared by counsel, was not an admissible part of a deposition, under Wyo. R. Civ. P. 32(a). Smyth v. Kaufman, 67 P.3d 1161 (Wyo. 2003).

Cited in Longtree, Ltd. v. Resource Control Int'l, Inc., 755 P.2d 195 (Wyo. 1988); Befumo v. Johnson, 119 P.3d 936 (Wyo. 2005).

Law reviews. — For article, "The Discovery Procedure in the General Practice," see 12 Wyo. L.J. 231 (1958).

For comment, "Symposium on Federal Rules of Evidence: Their Effect on Wyoming Practice

If Adopted," see XII Land & Water L. Rev. 601 (1977).

Am. Jur. 2d, ALR and C.J.S. references. — 23 Am. Jur. 2d Depositions and Discovery §§ 174 to 198.

Admissibility of deposition, under Rule 32(a)(3)(B) of Federal Rules of Civil Procedure, where court finds that witness is more than 100 miles from place of trial or hearing, 71 ALR Fed 382.

Requirement, under Rule 106 of Federal Rules of Evidence, that when writing or recorded statement or part thereof is introduced in evidence, another part or another writing or recorded statement must also be introduced in evidence, 75 ALR Fed 892.

26A C.J.S. Depositions §§ 88 to 98.

Rule 33. Interrogatories to parties.

(a) *In General.* —

(1) *Number.* — Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(1) and (2).

(2) *Scope.* — An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.

(b) *Answers and Objections.* —

(1) *Responding Party.* — The interrogatories must be answered:

(A) by the party to whom they are directed; or

(B) if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party.

(2) *Time to Respond.* — The responding party must serve its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(3) *Answering Each Interrogatory.* — Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.

(4) *Objections.* — The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure.

(5) *Signature.* — The person who makes the answers must sign them, and the attorney who objects must sign any objections.

(c) *Use.* — An answer to an interrogatory may be used to the extent allowed by the Wyoming Rules of Evidence.

(d) *Option to Produce Business Records.* — If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

(1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and

(2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 33 of the Federal Rules of Civil Procedure.

Cross References. — As to permissible and improper interrogatories, see notes to Rule 26.

Requiring answers to interrogatories discretionary. — The district court has a

broad discretion in deciding whether to require answers to interrogatories. Mauch v. Stanley Structures, Inc., 641 P.2d 1247 (Wyo. 1982).

Applied in Inskeep v. Inskeep, 752 P.2d 434 (Wyo. 1988).

Cited in Befumo v. Johnson, 119 P.3d 936 (Wyo. 2005); White v. State ex rel. Wyo. DOT, 210 P.3d 1096 (Wyo. 2009).

Law reviews. — For article, "Pleading Under the Federal Rules," see 12 Wyo. L.J. 177 (1958).

For article, "The Discovery Procedure in the General Practice," see 12 Wyo. L.J. 231 (1958).

See article, "The 1994 Amendments to the Wyoming Rules of Civil Procedure," XX Land & Water L. Rev. 151 (1995).

Am. Jur. 2d, ALR and C.J.S. references. — 23 Am. Jur. 2d Depositions and Discovery §§ 199 to 243.

Party's right to use, as evidence in civil trial, his own testimony given upon interrogatories or depositions taken by opponent, 13 ALR3d 1312.

Taking deposition or serving interrogatories in civil case as waiver of incompetency, 23 ALR3d 389.

Self-incrimination, privilege against, as ground for refusal to produce noncorporate documents in possession of person asserting privilege but owned by another, 37 ALR3d 1373.

Dismissal of state court action for failure or refusal of plaintiff to answer written interrogatories, 56 ALR3d 1109.

Admissibility in state court proceedings of police reports as business records, 77 ALR3d 115.

Answers to interrogatories as limiting answering party's proof at state trial, 86 ALR3d 1089.

Propriety of state court's grant or denial of application for pre-action production or inspection of documents, persons, or other evidence, 12 ALR5th 577.

Right to perpetuation of testimony under Rule 27 of Federal Rules of Civil Procedure, 60 ALR Fed 924.

26A C.J.S. Depositions §§ 47 to 50; 27 C.J.S. Discovery §§ 55 to 70.

Rule 34. Producing documents, electronically stored information, and tangible things, or entering onto land for inspection and other purposes.

(a) *In General.* — A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information-including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations-stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(B) any designated tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) *Procedure.* —

(1) *Contents of the Request.* — The request:

(A) must describe with reasonable particularity each item or category of items to be inspected;

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(C) may specify the form or forms in which electronically stored information is to be produced.

(2) *Responses and Objections.* —

(A) *Time to Respond.* — The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) *Responding to Each Item.* — For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

(C) *Objections.* — An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

(D) *Responding to a Request for Production of Electronically Stored Information.* — The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form — or if no form was specified in the request — the party must state the form or forms it intends to use.

(E) *Producing the Documents or Electronically Stored Information.* — Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

(c) *Nonparties.* — As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 34 of the Federal Rules of Civil Procedure.

Sanctions. — Business owners contended that a district court abused its discretion by requiring the owners to pay attorney fees and expenses to an investor that the investor allegedly incurred in obtaining discovery; however, when the trial court ordered the business owners to comply with a discovery request in July, but the business owners had still not complied by November, the district court acted within its discretion in imposing sanctions. Lieberman v. Mossbrook, 208 P.3d 1296 (Wyo. 2009).

Applied in Inskeep v. Inskeep, 752 P.2d 434 (Wyo. 1988).

Cited in Wheatland Irrigation Dist. v. Pioneer Canal Co., 464 P.2d 533 (Wyo. 1970); Tschirgi v. Meyer, 536 P.2d 558 (Wyo. 1975).

Law reviews. — For article, "Pleading Under the Federal Rules," see 12 Wyo. L.J. 177 (1958).

For article, "The Discovery Procedure in the General Practice," see 12 Wyo. L.J. 231 (1958).

For article, "A Primer on Computer Simulation of Hydrocarbon Reservoirs," see XXII Land & Water L. Rev. 119 (1987).

See article, "The 1994 Amendments to the Wyoming Rules of Civil Procedure," XXX Land & Water L. Rev. 151 (1994).

Am. Jur. 2d, ALR and C.J.S. references. — 23 Am. Jur. 2d Depositions and Discovery §§ 244 to 281.

Discovery and inspection of articles and premises in civil actions other than for personal injury or death, 4 ALR3d 762.

Insurance, pretrial examination or discovery to ascertain from defendant in action for injury, death or damages, existence and amount of liability insurance and insurer's identity, 13 ALR3d 822.

Party's right to use, as evidence in civil trial, his own testimony given upon interrogatories or depositions taken by opponent, 13 ALR3d 1312.

Scope of defendant's duty of pretrial discovery in medical malpractice action, 15 ALR3d 1446.

Disclosure of name, identity, address, occupation or business of client as violation of attorney-client privilege, 16 ALR3d 1047.

Discovery, in civil case, of material which is or may be designed for use in impeachment, 18 ALR3d 922.

Pretrial discovery of identity of witnesses whom adverse party plans to call to testify at civil trial, 19 ALR3d 1114.

Compelling party to disclose information in hands of affiliated or subsidiary corporation, or independent contractor, not made party to suit, 19 ALR3d 1134.

Discovery, in products liability case, of defendant's knowledge as to injury to or complaints by others than plaintiff, related to product, 20 ALR3d 1430.

Commencing action involving condition of plaintiff or decedent as waiving physician-patient privilege as to discovery proceedings, 21 ALR3d 912.

Application of privilege attending statements made in course of judicial proceedings to pretrial deposition and discovery procedures, 23 ALR3d 1172.

Pretrial discovery or disclosure on discovery by party to personal injury action as to nature of injuries or treatment as waiver of physician-patient privilege, 25 ALR3d 1401.

Pretrial discovery of defendant's financial worth on issue of damages, 27 ALR3d 1375.

Judgment in favor of plaintiff in state court action for defendant's failure to obey request or order for production of documents or other objects, 26 ALR4th 849.

Spouse's right to discovery of closely held corporation records during divorce proceeding, 38 ALR4th 145.

Propriety of state court's grant or denial of application for pre-action production or inspection of documents, persons, or other evidence, 12 ALR5th 577.

Power of court under 5 USC § 552(a)(4)(B) to examine agency records in camera to determine propriety of withholding records, 60 ALR Fed 416.

Right to perpetuation of testimony under Rule 27 of Federal Rules of Civil Procedure, 60 ALR Fed 924.

Independent action against nonparty for production of documents and things or permission to enter upon land (Rule 34(c) of Federal Rules of Civil Procedure), 62 ALR Fed 935.

27 C.J.S. Discovery §§ 71 to 109.

Rule 35. Physical and mental examinations.

(a) *Order for an Examination.* —

(1) *In General.* — The court where the action is pending may order a party whose mental or physical condition — including blood group — is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.

(2) *Motion and Notice; Contents of the Order.* — The order:

(A) may be made only on motion for good cause and on notice to all parties and the person to be examined; and

(B) must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.

(b) *Examiner's Report.* —

(1) *Request by the Party or Person Examined.* — The party who moved for the examination must, on request, deliver to the requester a copy of the examiner's report, together with like reports of all earlier examinations of the same condition. The request may be made by the party against whom the examination order was issued or by the person examined.

(2) *Contents.* — The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

(3) *Request by the Moving Party.* — After delivering the reports, the party who moved for the examination may request — and is entitled to receive — from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them.

(4) *Waiver of Privilege.* — By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have — in that action or any other action involving the same controversy — concerning testimony about all examinations of the same condition.

(5) *Failure to Deliver a Report.* — The court on motion may order — on just terms — that a party deliver the report of an examination. If the report is not provided, the court may exclude the examiner's testimony at trial.

(6) *Scope.* — This subdivision (b) applies also to an examination made by the parties' agreement, unless the agreement states otherwise. This subdivision does not preclude obtaining an examiner's report or deposing an examiner under other rules.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 35 of the Federal Rules of Civil Procedure.

Application in criminal cases. — There is no specific legal authority allowing a defendant to compel a witness in a criminal trial to undergo an independent psychological examination at the defendant's request. While this rule provides for a mental examination of a party when the mental condition of that party is in issue in a case, even assuming an application of this rule to criminal cases, it does not confer authority to compel an examination of a victim who is a witness but not a party. Gale v. State, 792 P.2d 570 (Wyo. 1990).

Quoted in LP v. Natrona County Dep't of Pub. Assistance & Social Servs., 679 P.2d 976 (Wyo. 1984).

Cited in Schepanovich v. United States Steel Corp., 669 P.2d 522 (Wyo. 1983).

Law reviews. — For article, "The Discovery Procedure in the General Practice," see 12 Wyo. L.J. 231 (1958).

For note, "Physical Examinations," see 12 Wyo. L.J. 273 (1958).

Am. Jur. 2d, ALR and C.J.S. references. — 23 Am. Jur. 2d Depositions and Discovery §§ 282 to 313.

Waiver of privilege as regards one physician as a waiver as to other physicians, 5 ALR3d 1244.

Right of party to have his attorney or physician, or a court reporter, present during his physical or mental examination by a court appointed expert, 7 ALR3d 881.

Timeliness of application for compulsory physical examination of injured party in personal injury action, 9 ALR3d 1146.

Commencing action involving physical condition of plaintiff or decedent as waiving physician-patient privilege as to discovery, 21 ALR3d 912.

Pretrial testimony or disclosure on discovery by party to personal injury action as to nature of injuries or treatment as waiver of physician-patient privilege, 25 ALR3d 1401.

Right of defendant in personal injury action to designate physician to conduct medical examination of plaintiff, 33 ALR3d 1012.

Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution, 45 ALR4th 310.

Right of party to have attorney or physician present during physical or mental examination at instance of opposing party, 84 ALR4th 558.

27 C.J.S. Discovery §§ 110 to 112.

Rule 36. Requests for admission.

(a) *Scope and Procedure.* —

(1) *Scope.* — A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to:

(A) facts, the application of law to fact, or opinions about either; and

(B) the genuineness of any described documents.

(2) *Form; Copy of a Document.* — Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.

(3) *Time to Respond; Effect of Not Responding.* — A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

(4) *Answer.* — If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the

information it knows or can readily obtain is insufficient to enable it to admit or deny.

(5) *Objections.* — The grounds for objecting to a request must be stated. A party must not object solely on the ground that the request presents a genuine issue for trial.

(6) *Motion Regarding the Sufficiency of an Answer or Objection.* — The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served. The court may defer its final decision until a pretrial conference or a specified time before trial. Rule 37(a)(5) applies to an award of expenses.

(b) *Effect of an Admission; Withdrawing or Amending It.* — A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. Subject to Rule 16(e), the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding.
(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 36 of the Federal Rules of Civil Procedure.

Defendant avoids problem of failing to object to instruction by utilizing this rule. — In a negligence action, the failure to object to an instruction as to the amount of medical expenses incurred by the plaintiff is tantamount to stipulating to the reasonableness of the medical expenses, or at a minimum, abandonment of a motion for a directed verdict as to medical expenses. The defendant may easily avoid the problems and hazards of this issue by utilizing this rule, or by producing evidence of necessity and reasonableness at trial. Weaver v. Mitchell, 715 P.2d 1361 (Wyo. 1986).

Admissions may not cover all litigation aspects. — Although the defendant failed to respond to request for admissions and the plaintiff contended that the trial court ignored settled material issues of fact, the evidence was sufficient to sustain the trial court's decision; the fact that certain contentions were deemed admitted by the failure of the defendant to deny did not demonstrate any trial court error where the subject of the admissions was not sufficient to cover all aspects of the inquiry required to settle the litigants' relationship. Reeves v. Boatman, 769 P.2d 917 (Wyo. 1989).

Admissions properly utilized. — Defendants' admissions were properly utilized under W.R.C.P. 36, where another defendant relied upon the admissions for purposes of a summary-judgment motion. Orcutt v. Shober Invs. Inc., 69 P.3d 386 (Wyo. 2003).

Failure to respond. — Where a homeowners association failed to respond to a request for admission under Wyo. R. Civ. P. 36 regarding its authorization to file suit to enforce a protective covenant, summary judgment was improperly granted in its favor due to a lack of capacity. Steiger v. Happy Valley Homeowners Ass'n, 149 P.3d 735 (Wyo. 2007).

Withdrawal of admission properly granted. — Order awarding judgment to a homeowners association in its action against property owners to enforce a restrictive covenant was proper because allowing the association to withdraw its admission under Wyo. R. Civ. P. 36(b) and serve its response promoted presentation of the merits of the controversy; the withdrawal simply placed the burden where it belonged on the association to prove it was authorized to bring the suit. Steiger v. Happy Valley Homeowners Ass'n, 245 P.3d 269 (Wyo. 2010).

Withdrawal of admissions improperly denied. — Trial court abused its discretion under Wyo. R. Civ. P. 36(b) in not allowing a debtor to withdraw admissions in a creditor's action to recover the balance owed on a credit card because the admissions went to matters that the debtor had denied since the case first arose over six years earlier; the creditor did not show that it would be prejudiced by allowing the debtor the opportunity to present the debtor's case to a factfinder. Rohrer v. Bureaus Inv., Group No. 7., LLC, 235 P.3d 861 (Wyo. 2010).

Applied in McDonald v. Lawson, 356 P.2d 1041 (Wyo. 1960); Alexander v. Kadolph, 562 P.2d 313 (Wyo. 1977); Daulton v. Daulton, 774 P.2d 635 (Wyo. 1989); TZ Land & Cattle Co. v. Condict, 795 P.2d 1204 (Wyo. 1990).

Law reviews. — For article, "The Discovery Procedure in the General Practice," see 12 Wyo. L.J. 231 (1958).

Am. Jur. 2d, ALR and C.J.S. references. — 23 Am. Jur. 2d Depositions and Discovery §§ 314 to 356.

Admissions to prevent continuance sought to secure testimony of absent witness in civil case, 15 ALR3d 1272.

Party's duty, under Federal Rule of Civil Procedure 36(a) and similar state statutes and rules, to respond to requests for admission of facts not within his personal knowledge, 20 ALR3d 756.

Formal sufficiency of response to request for admissions under state discovery rules, 8 ALR4th 728.

Permissible scope, respecting nature of inquiry, of demand for admissions under modern state civil rules of procedure, 42 ALR4th 489.

Withdrawal or amendment of admissions under Rule 36(b) of Federal Rules of Civil Procedure, 64 ALR Fed 746.

27 C.J.S. Discovery §§ 113 to 133.

Rule 37. Failure to make disclosures or to cooperate in discovery; sanctions.

(a) *Motion for an Order Compelling Disclosure or Discovery.* —

(1) *In General.* — On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(2) *Appropriate Court.* — A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(3) *Specific Motions.* —

(A) *To Compel Disclosure.* — If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) *To Compel a Discovery Response.* — A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under Rule 30 or 31;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

(iii) a party fails to answer an interrogatory submitted under Rule 33; or

(iv) a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34.

(C) *Related to a Deposition.* — When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) *Evasive or Incomplete Disclosure, Answer, or Response.* — For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(5) *Payment of Expenses; Protective Orders.* —

(A) *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* — If the motion is granted — or if the disclosure or requested discovery is provided after the motion was filed — the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) *If the Motion Is Denied.* — If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) *If the Motion Is Granted in Part and Denied in Part.* — If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(b) *Failure to Comply with Court Order.* —

(1) *Sanctions Sought in the District Where the Deposition Is Taken.* — If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

(2) *Sanctions Sought in the District Where the Action Is Pending.* —

(A) *For Not Obeying a Discovery Order.* — If a party or a party's officer, director, or managing agent — or a witness designated under Rule 30(b)(6) or 31(a)(4) — fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) *For Not Producing a Person for Examination.* — If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person.

(C) *Payment of Expenses.* — Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(c) *Failure to Disclose, to Supplement an Earlier Response, or to Admit.* —

(1) *Failure to Disclose or Supplement.* — If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

(2) *Failure to Admit.* — If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

(d) *Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.* —

(1) *In General.* —

(A) *Motion; Grounds for Sanctions.* — The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent — or a person designated under Rule 30(b)(6) or 31(a)(4) — fails, after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(B) *Certification.* — A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(2) *Unacceptable Excuse for Failing to Act.* — A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) *Types of Sanctions.* — Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court shall require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(e) *Failure to Preserve Electronically Stored Information.* — If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

(f) *Failure to Participate in Framing a Discovery Plan.* — If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan

as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.
(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 37 of the Federal Rules of Civil Procedure.

No constitutional violation. — Wyo. R. Civ. P. 37(b)(2)(C) specifically permitted the court to enter an order staying further proceedings until the order is obeyed, and Rule 37(b) provided that the trial court required the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court found that the failure was substantially justified or that other circumstances made an award of expenses unjust; there was no violation of Wyo. Const. art. I, § 8 when a district court ordered a trial postponed until sanctions are paid, and the action was dismissed solely because of appellants' failure to comply with appropriate court orders. White v. State ex rel. Wyo. DOT, 210 P.3d 1096 (Wyo. 2009).

Late-filed motion, seeking known information, denied. — The court did not abuse its discretion in denying a motion to compel discovery. The motion was filed nearly three months after the submission of the request, on the day before trial. It was also clear that the movant was seeking, through discovery, information already known to him. Inskeep v. Inskeep, 752 P.2d 434 (Wyo. 1988).

Court has discretion to impose or not to impose one of listed sanctions. Paul v. Paul, 616 P.2d 707 (Wyo. 1980).

Broad discretion is given to the trial court with regard to sanctions. Caterpillar Tractor Co. v. Donahue, 674 P.2d 1276 (Wyo. 1983).

Including dismissal. — Broad discretion is given to the trial court with regard to sanctions, even to the point of dismissing the action. Mora v. Husky Oil Co., 611 P.2d 842 (Wyo. 1980).

Failure to answer interrogatory. — The district court's entry of a default judgment, as a sanction for petitioners' alleged failure to answer an interrogatory, constituted an abuse of discretion, where there was no support for court's conclusion that petitioners disobeyed its discovery orders. Gooder v. Roth, 788 P.2d 611 (Wyo. 1990).

Rule is explicit in permitting entry of default judgment against one who fails to file answers to interrogatories or to excuse such failure. Zweifel v. State ex rel. Brimmer, 517 P.2d 493 (Wyo. 1974).

Where judgment of default is of no apparent prejudice to defendant, the court will decline to investigate the allegation of an abuse of discretion, as a party seeking reversal must establish that an error was prejudicial. Satterfield v. Sunny Day Resources, Inc., 581 P.2d 1386 (Wyo. 1978), cert. denied and appeal dismissed, 441 U.S. 938, 99 S. Ct. 2153, 60 L. Ed. 2d 1040 (1979).

Defendants not in default for failure to appear at deposition hearing. — Entry of a default judgment was error where judgment was entered pursuant to plaintiffs' motion for default judgment after defendants had failed to appear at a deposition hearing and a retired judge, whose designation to hear matters has not been questioned, had entered an order indefinitely continuing the taking of the depositions. The Supreme Court held that whether or not error was committed in entering the order, it was entered with jurisdiction of the matter and defendants could not be in default in failing to appear at the deposition hearing. Bromley v. Haberman, 583 P.2d 703 (Wyo. 1978).

Dismissal for failure to attend deposition improper when information sought not relevant. — A dismissal, with prejudice, of an action for eviction as a sanction for the plaintiff's failure to attend a scheduled deposition was an abuse of discretion when the information gained would not have been helpful. The proposed discovery concerning defects in the premises was not relevant to the issue remaining, whether the lessees were in default in the payments due; the defendants were not surprised nor prejudiced by their inability to depose; they were not hampered in structuring a defense. Waldrop v. Weaver, 702 P.2d 1291 (Wyo. 1985).

Dismissal of workers' compensation claim for assertion of privilege against self-incrimination. — It was an abuse of discretion for a hearing examiner to dismiss an employee's workers' compensation claim for asserting the privilege against self-incrimination in response to discovery requests because the hearing examiner only found the requested information was relevant, rather than balancing the employee's properly asserted privilege against the conflicting interests of the Workers' Compensation Division. Debyah v. State ex rel. Dep't of Workforce Servs., — P.3d —, 2015 Wyo. LEXIS 108 (Wyo. 2015).

Dismissal appropriate. — Individual plaintiffs are subject to sanctions found in this rule, which include dismissal of their complaint and entry of judgment against them. Global Shipping & Trading, Ltd. v. Verkhnesaldincky Metallurgic Co., 892 P.2d 143 (Wyo. 1995).

Film of simulated accident not admitted where opponents not provided with statistical data. — The trial court's refusal, under subdivision (b)(2)(B), to admit film of a simulated accident with a product was not an abuse of discretion where the plaintiffs would have

been surprised and prejudiced by the admission of the film because, on account of the defendant's violation of a discovery order, they had not been provided with statistical data of the conditions under which the simulation was conducted. Caterpillar Tractor Co. v. Donahue, 674 P.2d 1276 (Wyo. 1983).

Sufficient notice of default. — A motion for the sanction of judgment by default dated March 9, and the court's order of March 20, stating that unless certain documents were produced by noon on March 28, judgment would be given to the movant, constituted sufficient notice of default under Rule 55(b)(2). Farrell v. Hursh Agency, Inc., 713 P.2d 1174 (Wyo. 1986).

Insufficient notice of default. — An order granting a default judgment as to liability but leaving the determination of damages for a later hearing is not a final, appealable order until damages have been determined. Additionally, the notice requirements of Rule 55(b)(2), W.R.C.P., in the context of the entry of default judgment were not satisfied as the court's order compelling discovery did not mention sanctions. Ruwart v. Wagner, 880 P.2d 586 (Wyo. 1994).

Sanction was proper. — Trial court did not err in granting a wife's motion for the entry of default judgment as a discovery sanction in a dispute between the parties concerning an amount of money the husband owed the wife pursuant to the provisions of their divorce settlement agreement; the husband's objection that the documents were not in his possession, custody, or control was unsupported by the facts. Wunsch v. Pickering, 249 P.3d 717 (Wyo. 2011).

Under subdivision (b)(2)(C), trial court need not hold hearing before entry of default. Farrell v. Hursh Agency, Inc., 713 P.2d 1174 (Wyo. 1986).

But hearing required before divorce decree. — Although the district court properly entered a default against a husband for failure to comply with court-mandated discovery in a divorce proceeding, the court abused its discretion in entering a divorce decree, as a default judgment encompassing a property division and alimony award, absent an evidentiary hearing. Spitzer v. Spitzer, 777 P.2d 587 (Wyo. 1989).

Expenses in proving improperly disputed matter. — This rule expressly refers to and allows expenses involved in proving an improperly disputed matter. Roberts Constr. Co. v. Vondriska, 547 P.2d 1171 (Wyo. 1976).

Assessment of costs under subdivision (c) is a flexible matter and any decision on such an assessment lies wholly within the discretion of the trial court, being reviewable only for abuse. Alexander v. Kadolph, 562 P.2d 313 (Wyo. 1977).

Applied in Robinson v. Hamblin, 914 P.2d 152 (Wyo. 1996); Arychuk v. Star Valley Ass'n, 997 P.2d 472 (Wyo. 2000).

Quoted in Tschirgi v. Meyer, 536 P.2d 558 (Wyo. 1975); Orosco v. Schabron, 9 P.3d 264 (Wyo. 2000).

Cited in Welsh v. Welsh, 469 P.2d 404 (Wyo. 1970); Bowers v. Getter Trucking Co., 514 P.2d 837 (Wyo. 1973); Kipp v. Brown, 750 P.2d 1338 (Wyo. 1988); Meyer v. Norman, 780 P.2d 283 (Wyo. 1989); State Farm Mut. Auto. Ins. Co. v. Colley, 871 P.2d 191 (Wyo. 1994).

Law reviews. — See article, "The 1994 Amendments to the Wyoming Rules of Civil Procedure," XXX Land & Water L. Rev. 151 (1995).

For article, "Administrative Law: Rulemaking and Contested Case Practice in Wyoming," see XXXI Land & Water L. Rev. 685 (1996).

Am. Jur. 2d, ALR and C.J.S. references. — 23 Am. Jur. 2d Depositions and Discovery §§ 357 to 399; 24 Am. Jur. 2d Dismissal, Discontinuance and Nonsuit § 45.

Dismissal of state court action for failure or refusal of plaintiff to answer written interrogatories, 56 ALR3d 1109.

Construction and application of state statute or rule subjecting party making untrue allegations or denials to payment of costs or attorneys' fees, 68 ALR3d 209.

Accused's right to discovery or inspection of "rap sheets" or similar police records about prosecution witnesses, 95 ALR3d 832.

Attorney's conduct in delaying or obstructing discovery as basis for contempt proceeding, 8 ALR4th 1181.

Judgment in favor of plaintiff in state court action for defendant's failure to obey request or order for production of documents or other objects, 26 ALR4th 849.

Dismissal of state court action for failure or refusal of plaintiff to obey request or order for production of documents or other objects, 27 ALR4th 61.

Judgment in favor of plaintiff in state court action for defendant's failure to obey request or order to answer interrogatories or other discovery questions, 30 ALR4th 9.

Dismissal of state court action for failure or refusal of plaintiff to appear or answer questions at deposition or oral examination, 32 ALR4th 212.

Existence and nature of cause of action for equitable bill of discovery, 37 ALR5th 645.

What constitutes substantial justification of government's position so as to prohibit awards of attorneys' fees against government under Equal Access to Justice Act (28 USC § 2412(d)(1)(A)), 69 ALR Fed 130.

Lack of notice to contemnor at time of contemptuous conduct of possible criminal contempt sanctions as affecting prosecution for contempt in federal court, 76 ALR Fed 797.

Inherent power of federal district court to impose monetary sanctions on counsel in absence of contempt of court, 77 ALR Fed 789.

Sanctions for failure to make discovery under Federal Civil Procedure Rule 37 as affected by defaulting party's good faith efforts to comply, 134 ALR Fed 257.

Federal district court's power to impose sanctions on non-parties for abusing discovery process, 149 ALR Fed 589.

Propriety of exclusion of expert testimony as sanction under Federal Civil Procedure Rule 37 (b)(2)(B) for violation of discovery order, 151 ALR Fed 561.

Sanctions available under Rule 37, Federal Rules of Civil Procedure, other than exclusion of expert testimony, for failure to obey discovery order not related to expert witness, 156 ALR Fed 601.

27 C.J.S. Discovery §§ 131 to 133.

VI. TRIALS

Rule 38. Right to a jury trial; demand.

(a) *Right preserved.* — Issues of law must be tried by the court, unless referred as hereinafter provided; and issues of fact arising in actions for the recovery of money only, or specific real or personal property, must be tried by a jury unless a jury trial be waived, or a reference be ordered. All other issues of fact shall be tried by the court, subject to its power to order any issue to be tried by a jury, or referred.

(b) *Demand.* —

(1) *By Whom; Filing.* — Any party may demand a trial by jury of any issue triable of right by a jury by

(A) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 14 days after service of the last pleading directed to such issue, and

(B) filing the demand as required by Rule 5(d). Such demand may be indorsed upon a pleading of the party.

(2) *Jury Fees.* —

(A) *District Courts.* —

(i) All demands for trial by jury in district courts shall be accompanied by a deposit of $50.00, if a six person jury is demanded, or $150.00, if a twelve person jury is demanded.

(ii) The jury fees in cases where jury trials are demanded shall be paid to the clerk of the court, and paid by the clerk into the county treasury at the close of each month, and

(iii) The clerk shall tax costs in each such case, and in all other cases in which a jury trial is had, a jury fee of $50.00, if a six person jury trial is held, or $150.00, if a twelve person jury trial is held, to be recovered by the unsuccessful party, as other costs, and in case the party making such deposit is successful, that party shall recover such deposit from the opposite party, as part of the costs in the case.

(B) *Circuit Courts.* —

(i) All demands for trial by jury in circuit courts shall be accompanied by a deposit of $50.00.

(ii) The jury fees in cases where jury trials are demanded shall be paid to the clerk of the court, and paid by the clerk to the State of Wyoming Treasurer at the close of each month, and

(iii) The clerk shall tax as costs in each such case, and in all other cases in which a jury trial is had, a jury fee of $50.00, to be recovered of the unsuccessful party, as other costs, and in case the party making such deposit is successful, that party shall recover such deposit from the opposite party, as part of the costs in the case.

(c) *Specifying issues.* — In its jury demand a party may specify the issues which the party wishes to be tried by a jury; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by

jury for only some of the issues, any other party -- within 14 days after service of the demand or such lesser time as the court may order --may serve a demand for trial by jury of any other or all of the issues triable by a jury in the action.

(d) *Waiver.* — The failure of a party to properly serve and file a jury demand as required by this rule constitutes a waiver by the party of trial by jury. A proper demand for trial by jury may not be withdrawn without the consent of the parties.
(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 38 of the Federal Rules of Civil Procedure.

Cross References. — As to right to trial by jury, see art. 1, § 9, Wyo. Const. As to when causes are triable, see § 1-8-102. As to trial by jury, see chapter 11 of title 1.

With certain limited exceptions, questions of law must be tried by the court. Colorado Interstate Gas Co. v. Uinta Dev. Co., 364 P.2d 655 (Wyo. 1961).

Cases purely equitable in character are triable by the court, subject to its power to order any issue to be tried by a jury. Lellman v. Mills, 15 Wyo. 149, 87 P. 985 (1906) (decided under § 3605, R.S. 1899).; Hein v. Lee, 549 P.2d 286 (Wyo. 1976); True v. Hi-Plains Elevator Mach., Inc., 577 P.2d 991 (Wyo. 1978).

No right to jury trial. — Where a case was not one for the recovery of money only, or specific real or personal property, under this rule, there is no right to a jury trial. Hein v. Lee, 549 P.2d 286 (Wyo. 1976).

Attempt to gain the personal and real property of decedent's estate did not turn an action before the probate court into one pursuant to W.R.C.P. 38(a) for the recovery of money only, or specific real or personal property, and petitioner was not entitled to a jury trial. Cheek v. Zerbe, 53 P.3d 113 (Wyo. 2002).

Assertion of money damages not sufficient. — Where the underlying claim on behalf of each party was one for equitable relief, the mere assertion of money damages is not sufficient to require the granting of a demand for a jury trial on that issue. Ferguson v. Ferguson, 739 P.2d 754 (Wyo. 1987).

Specific performance of oral contract. — The trial court properly struck defendant's demand for a jury trial where his effort in the course of the trial was an attempt to demonstrate the existence of an oral contract with respect to which he sought specific performance. Although he also sought damages for an alleged breach of the oral contract, the plaintiff adhered to his attempt to obtain a partition of the land among the cotenants. Ferguson v. Ferguson, 739 P.2d 754 (Wyo. 1987).

Summary disposition precluded. — When a jury trial has been requested, the "fact dependent" nature of the first two elements of promissory estoppel precludes summary disposition on the basis of the third element where material questions of fact have been identified. Verschoor v. Mountain W. Farm Bureau Mut. Ins. Co., 907 P.2d 1293 (Wyo. 1995).

Lien foreclosure actions tried by court. — Even though the mechanics' lien statutes authorize the entry of personal judgments against the contractor-debtor under § 29-2-108, a lien foreclosure action, resulting in such judgments, cannot be considered an action "for the recovery of money only, or specific real or personal property," within the meaning of subdivision (a). An action for foreclosure of a mechanics' lien is an equitable proceeding and, as contemplated by this rule, should be triable by the court without a jury. It is principally an action to bind the property of the owner whose premises have been improved by the labor or materials furnished by the lien claimant for that purpose. True v. Hi-Plains Elevator Mach., Inc., 577 P.2d 991 (Wyo. 1978).

Trial court erred in striking demand for jury trial in stockholder's derivative action, where the totality of the pleadings, issues and remedies showed the substance of the action to be primarily legal in nature. Hyatt Bros. ex rel. Hyatt v. Hyatt, 769 P.2d 329 (Wyo. 1989).

Supplemental pleadings do not revive right to jury trial on issues previously raised. — Demand may be made within 10 days after service of the amended or supplemental pleading for new issues raised by that pleading but the amendment does not revive a right, previously waived, to demand jury trial on the issues already framed by the original pleadings. Nor does the late demand create a right to jury trial on issues raised by the amended or supplemental pleadings if those issues were fairly raised by the original pleadings. Scherling v. Kilgore, 599 P.2d 1352 (Wyo. 1979).

An amended or supplemental pleading which does not raise new issues not fairly raised by the original pleadings does not extend the period for making a demand for a jury trial. Cates v. Daniels, 628 P.2d 862 (Wyo. 1981).

The right to a jury trial was not revived by an amended complaint which set forth, in addition to the same claims as the original complaint, a claim for punitive damages where there were no new facts, nor any facts at all, which would justify punitive damages. Herman v. Speed King Mfg. Co., 675 P.2d 1271 (Wyo. 1984).

Question of serving demand procedural. — The question of the requirement of serving upon the other parties a demand for a trial by jury is one of procedure and is governed by this rule. State ex rel. Frederick v. District Court, 399 P.2d 583 (Wyo. 1965).

When 10-day period begins. — If there are

multiple defendants, the time each defendant files his answer starts the 10-day period running for the issues raised between him and the plaintiff, but, on an issue in which all the defendants are interested, the time runs from service of the last answer. Scherling v. Kilgore, 599 P.2d 1352 (Wyo. 1979).

Failure to serve demand is a legal waiver, whether it is inadvertent or intentional. Patterson v. Maher, 450 P.2d 1005 (Wyo. 1969).

In a proceeding for writ of prohibition, the failure to serve demand for jury precluded jury trial. Patterson v. Maher, 450 P.2d 1005 (Wyo. 1969).

Plaintiff's thesis that the mere filing of a jury demand with the clerk constituted service upon an opposing party under Rule 5(b), went beyond the wording of the rule and is contrary to the provisions of subdivision (d) that the failure "to serve a demand" constitutes a waiver. Patterson v. Maher, 450 P.2d 1005 (Wyo. 1969).

Insufficiency in service of demand waived by appearance. — Although the requirements of subdivision (b) were not met by condemnor's serving upon the condemnees a demand for jury trial in writing not later than 10 days after service of the last pleading directed to such issue (in this instance, the certificate of award), condemnees by their appearance waived that insufficiency. Routh v. State Hwy. Comm'n, 402 P.2d 706 (Wyo. 1965).

Request for jury trial not accompanied by deposit properly refused. — The district court was justified in denying plaintiff's requests for a jury trial where requests were not accompanied by the required deposit. Davidek v. Wyoming Inv. Co., 77 Wyo. 141, 308 P.2d 941 (1957) (decided under § 3-2422, C.S. 1945).; Scott v. Tobin, 642 P.2d 1287 (Wyo. 1982).

Failure to properly serve jury demand and failure to deposit fee constitutes waiver of the right to a jury trial. LP v. Natrona County Dep't of Pub. Assistance & Social Servs., 679 P.2d 976 (Wyo. 1984).

Issues tried by jury under Rule 39(a). — All issues for which a jury trial has been demanded in accordance with Rule 38, must be tried by the jury under Rule 39(a). This rule is subject to two qualifications, the most significant of which is found under Rule 39(a)(2), which states that "the court upon motion or of its own initiative finds that a right of trial by jury of some or all of the issues does not exist." True v. Hi-Plains Elevator Mach., Inc., 577 P.2d 991 (Wyo. 1978).

Failure to report arguments not grounds for reversal. — The failure of the court reporter to report the arguments of counsel on the jury-demand motion is not alone grounds for reversal if there were something in those proceedings which appellants deemed crucial to their case — they had available to them Rule 4.03, W.R.A.P., designed to reconstruct unreported proceedings into written form for appellate examination. Scherling v. Kilgore, 599 P.2d 1352 (Wyo. 1979).

Slander action severed from action alleging unlawful denial of employment and seeking reinstatement. — The trial court did not abuse its discretion in severing a slander action against an individual, in which the plaintiff prayed for damages, from an action against a city alleging unlawful denial of employment, in which the plaintiff prayed for damages and for a finding that the city be required to hire him. Tremblay v. Reid, 700 P.2d 391 (Wyo. 1985).

Jury trial for tort claims. — The trial court's decision to hear tort issues along with divorce issues improperly deprived the wife of her right to have a jury decide her tort claims; the issues should not have been joined and determined in a single nonjury proceeding. McCulloh v. Drake, 24 P.3d 1162 (Wyo. 2001).

No assessment of costs for jury services. — Subdivision (b) is authority to recover as costs the $12 (now $50) jury fee, but does not authorize the assessment of costs for jury services. Weaver v. Mitchell, 715 P.2d 1361 (Wyo. 1986).

Failure to timely file jury demand. — In a civil forfeiture proceeding, the property claimants waived their right to a jury trial when they failed to file a timely jury demand under this rule. Jones v. State, 278 P.3d 729 (Wyo. 2012).

Applied in Nixon v. Edwards, 72 Wyo. 274, 264 P.2d 287 (1953); Armstrong v. Pickett, 865 P.2d 49 (Wyo. 1993); Stroup v. Oedekoven, 995 P.2d 125 (Wyo. 1999).

Quoted in Thunderbasin Land, Livestock & Inv. Co. v. County of Laramie, 5 P.3d 774 (Wyo. 2000); MTM v. LD, 41 P.3d 522 (Wyo. 2002).

Cited in Burns v. Corn Exch. Nat'l Bank, 33 Wyo. 474, 240 P. 683 (1925); State ex rel. Poston v. District Court, 39 Wyo. 24, 269 P. 35 (1928); Chopping v. First Nat'l Bank, 419 P.2d 710 (Wyo. 1966).

Law reviews. — For note, "Jury Trial in Wyoming Cases Containing Legal and Equitable Issues," see 13 Wyo. L.J. 250 (1959).

For case note, "Appeal and Error—The Omnipotent Wyoming Supreme Court: New Allegations and Evidence Will Be Heard for the First Time on Appeal. Boller v. Western Law Associates, 828 P.2d 1184 (Wyo. 1992)," see XXVIII Land & Water L. Rev. 677 (1993).

See article, "The 1994 Amendments to the Wyoming Rules of Civil Procedure," XXX Land & Water L. Rev. 151 (1995).

Am. Jur. 2d, ALR and C.J.S. references. — 47 Am. Jur. 2d Jury §§ 3 to 95.

Constitutionality of statutes providing for custody or commitment of incorrigible children without jury trial, 100 ALR2d 1241.

How to obtain jury trial in eminent domain, waiver, 12 ALR3d 7.

Right in equity suit to jury trial of counterclaim involving legal issue, 17 ALR3d 1321.

Issues in garnishment as triable to court or to jury, 19 ALR3d 1393.

Statute creating municipal liability for mob or riot as violating right to trial by jury, 26 ALR3d 1142.

Automobile guests statutes as infringement of right to trial by jury, 66 ALR3d 532.

Authority of state court to order jury trial in civil case where jury has been waived or not demanded by parties, 9 ALR4th 1041.

Right to jury trial in stockholder's derivative action, 32 ALR4th 1111.

Right to jury trial in action for declaratory relief in state court, 33 ALR4th 146.

Jury trial waiver as binding on later state civil trial, 48 ALR4th 747.

Paternity proceedings: right to jury trial, 51 ALR4th 565.

Right to jury trial in action for retaliatory discharge from employment, 52 ALR4th 1141.

Right to jury trial in state court divorce proceedings, 56 ALR4th 955.

Validity of law or rule requiring state court party who requests jury trial in civil case to pay costs associated with jury, 68 ALR4th 343.

Right to jury trial in action under state civil rights law, 12 ALR5th 508.

Contractual jury trial waivers in state civil cases, 42 ALR5th 53.

Complexity of civil action as affecting seventh amendment right to trial by jury, 54 ALR Fed 733.

Sufficiency of demand for jury trial under Rule 38(b) of Federal Rules of Civil Procedure, 73 ALR Fed 698.

Contractual jury trial waivers in federal civil cases, 92 ALR Fed 688.

50A C.J.S. Juries §§ 7 to 179.

Rule 39. Trial by jury or by the court.

(a) *By Jury.* — When a jury trial has been demanded under Rule 38, the action must be designated on the docket as a jury action. The trial on all issues so demanded must be by jury unless:

(1) the parties or their attorneys file a stipulation to a nonjury trial or so stipulate on the record; or

(2) the court, on motion or on its own, finds that on some or all of those issues or

(3) when a party to the issue fails to appear at the trial, the parties appearing consent to trial by the court sitting without a jury.

(b) *By the Court.* — Issues on which a jury trial is not properly demanded are to be tried by the court. But the court may, on motion, order a jury trial on any issue for which a jury might have been demanded.

(c) *Advisory Jury; Jury Trial by Consent.* — In an action not triable of right by a jury, the court, on motion or on its own:

(1) may try any issue with an advisory jury; or

(2) may, with the parties' consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right, unless the action is against the State of Wyoming when a statute provides for a nonjury trial.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 39 of the Federal Rules of Civil Procedure.

Cross References. — As to voir dire, see Rule 701, D. Ct. As to interrogating jurors after trial, see Rule 701, D. Ct.

Court may limit issues for jury. — A court acting either upon motion of one of the parties or upon its own initiative, may order a case transferred from the jury calendar to the court calendar or may limit the issues to be tried by the jury if it finds no jury trial right exists as to some or all of the issues. True v. Hi-Plains Elevator Mach., Inc., 577 P.2d 991 (Wyo. 1978).

Federal courts have been extremely reluctant to use their discretionary power under Rule 39(b), F.R.C.P., often pointing out that discretion should be exercised only under an extraordinary showing. Patterson v. Maher, 450 P.2d 1005 (Wyo. 1969).

Standards for pro se litigants. — Pro se litigants are subject to the same procedural rules and standards as are attorneys, and trial court did not abuse its discretion pursuant to subdivision (b) when it refused to relieve client in an action against his attorney for partial refund of retainer fee from its waiver of the right to a jury trial when the sole reason for urging the court to invoke its Rule 39(b) discretion was that client was "unfamiliar" with the requirements of W.R.C.P. 38. Armstrong v. Pickett, 865 P.2d 49 (Wyo. 1993).

Pro se litigant failing to deposit fee and serve demand properly denied jury trial. — There is no abuse when, in the exercise of his discretion, a judge refuses to give a pro se litigant a jury trial when the reason for urging the exercise of favorable judicial discretion is that the litigant failed to deposit a jury fee and failed to serve his jury demand upon the opposing party for the reason that he was unfamiliar with the requirements in these respects. LP v. Natrona County Dep't of Pub. Assistance &

Social Servs., 679 P.2d 976 (Wyo. 1984).

Failure to report arguments not grounds for reversal. — The failure of the court reporter to report the arguments of counsel on the jury-demand motion is not alone grounds for reversal if there were something in those proceedings which appellants deemed crucial to their case — they had available to them former Rule 4.03 (now see Rule 3.03), W.R.A.P., designed to reconstruct unreported proceedings into written form for appellate examination. Scherling v. Kilgore, 599 P.2d 1352 (Wyo. 1979).

Review. — Appellant did not sustain her burden of establishing an abuse of discretion on the part of the district court in denying the motion for jury trial, where the court was provided with no transcript of the hearing on the motion. Stroup v. Oedekoven, 995 P.2d 125 (Wyo. 1999).

Applied in City of Evanston v. Whirl Inn, Inc., 647 P.2d 1378 (Wyo. 1982); Koontz v. Town of South Superior, 716 P.2d 358 (Wyo. 1986).

Cited in Robinson v. Hamblin, 914 P.2d 152 (Wyo. 1996); Thunderbasin Land, Livestock & Inv. Co. v. County of Laramie, 5 P.3d 774 (Wyo. 2000).

Am. Jur. 2d, ALR and C.J.S. references. — 75 Am. Jur. 2d Trial §§ 1 to 5.

Question of jury as to meaning of "poison," as used in insurance policy, 14 ALR3d 783.

Right to trial by jury in criminal prosecution for driving while intoxicated or similar offense, 16 ALR3d 1373.

Right in equity suit to jury trial of counterclaim involving legal issue, 17 ALR3d 1321.

Issues in garnishment as triable to court or to jury, 19 ALR3d 1393.

Contributory negligence in failing to comply with statute regulating travel by pedestrian along highway as question for jury, 45 ALR3d 658.

When jeopardy attaches in nonjury trial, 49 ALR3d 1039.

Landlord's knowledge of defect in inside steps or stairways as jury question, 67 ALR3d 587.

Jury question as to landlord's liability for injury or death due to defects in exterior stairs, passageways, areas or structures used in common by tenants, 68 ALR3d 382.

Complexity of civil action as affecting seventh amendment right to trial by jury, 54 ALR Fed 733.

Sufficiency of demand for jury trial under Rule 38(b) of Federal Rules of Civil Procedure, 73 ALR Fed 698.

88 C.J.S. Trial §§ 203 to 223; 89 C.J.S. Trial §§ 526 to 529.

Rule 39.1. Jury trial; jury note taking; juror notebooks.

(a) *Juror note taking.* — At the beginning of civil trials, the court shall instruct the jurors that they will be permitted to take notes during the trial if they wish to do so. The court shall provide each juror with appropriate materials for this purpose and shall give jurors appropriate instructions about procedures for note taking and restrictions on jurors' use of their notes. The jurors may take their notes with them for use during court recesses and deliberations, but jurors shall not be permitted to take their notes out of the courthouse. The bailiff or clerk shall collect all jurors' notes at the end of each day of trial and shall return jurors' notes when trial resumes. After the trial has concluded and the jurors have completed their deliberations, the bailiff or clerk shall collect all jurors' notes before the jurors are excused. The bailiff or clerk shall promptly destroy these notes.

(b) *Juror notebooks.* — The court may provide all jurors with identical "Juror Notebooks" to assist the jurors in organizing materials the jurors receive at trial. Typical contents of a juror notebook include blank paper for note taking, stipulations of the parties, lists or seating charts identifying counsel and their respective clients, general instructions for jurors, and pertinent case specific instructions. Notebooks may also include copies of important exhibits (which may be highlighted), glossaries of key technical terms, pictures of witnesses, and a copy of the court's juror handbook, if one is available. During the trial, the materials in the juror notebooks may be supplemented with additional materials as they become relevant and are approved by the court for inclusion. Copies of any additional jury instructions given to jurors during trial or before closing arguments should also be included in juror notebooks before the jurors retire to deliberate. The trial court should generally resolve with counsel at a pretrial conference whether juror notebooks will be used and, if so, what contents will be included. The trial court may require that counsel meet in advance of the pretrial conference to confer and attempt to agree on the contents of the notebooks. The jurors may take their notebooks with them for use during court recesses and deliberations, but

jurors shall not be permitted to take their notebooks out of the courthouse. The bailiff or clerk shall collect all jurors' notebooks at the end of each day of trial and shall return jurors' notebooks when trial resumes. After the trial has concluded and the jurors have completed their deliberations, the bailiff or clerk shall collect all jurors' notebooks before the jurors are excused. The bailiff or clerk shall promptly destroy the contents of the notebooks, except that one copy of the contents of the juror notebooks, excluding jurors' personal notes and annotations, shall be preserved and retained as part of the official trial record.
(Added February 2, 2017, effective March 1, 2017.)

Rule 39.2. Juror questionnaires.

In appropriate cases, the court may use case-specific juror questionnaires to gather information from prospective jurors in advance of jury selection. When case-specific questionnaires will be used, the court should require counsel to confer and attempt to reach agreement on the questions that will be included in the questionnaires. The court shall rule on inclusion or exclusion of any questions the court deems improper. The court shall note on the record the basis on which it overruled any objections to inclusion or exclusion of particular questions. The court shall confer with counsel concerning the timing and procedures to be used for disseminating questionnaires and collecting completed questionnaires from prospective jurors, as well as to permit counsel adequate time and opportunity to review the completed questionnaires thoroughly before jury selection will begin. In its discretion, the court may require that the costs of copying, disseminating and collecting the questionnaires be borne (1) by both parties, (2) by the party requesting use of the questionnaires, or (3) by the court. In the alternative, these expenses may be assessed against the losing party as part of the costs.
(Added February 2, 2017, effective March 1, 2017.)

Rule 39.3. Copies of instructions for jurors.

The trial court shall provide each juror with the juror's own copy of all written instructions that the court reads to the jury before, during or at the conclusion of the trial. The court may include the copies of the instructions in the juror notebook provided to each juror, if juror notebooks will be used at trial. Jurors shall be permitted to take their copies of the instructions with them for reference during recesses and during their deliberations. Jurors shall not be permitted, however, to take their copies of the jury instructions out of the courthouse.
(Added February 2, 2017, effective March 1, 2017.)

Rule 39.4. Juror questions for witnesses.

At the beginning of civil trials, the court shall instruct jurors that they will be permitted to submit written questions for witnesses if they have questions about the witnesses' testimony that have not been answered after counsel for all parties have finished examining the witnesses. The court shall also instruct the jurors that some questions they submit may not be asked, as some jurors' questions may be legally improper or otherwise inappropriate. The court shall provide jurors with paper and a pen or pencil with which they may write down questions for submission to the court.

Before each witness is excused, the court shall determine whether any jurors have questions for that witness. The court shall review jurors' written questions with counsel, out of the hearing of the jury, making the question part of the record. The court shall permit counsel to interpose objections, including objections based on litigation strategy or stipulation of the parties. The court shall rule on any objections, noting the basis of the ruling on the record. If the court determines that the question is not

improper or unfairly prejudicial, the court shall read the question to the witness or permit counsel to read the question to the witness. The question may be modified as deemed appropriate by the court in consultation with counsel. After the witness responds to the question, the court shall permit counsel for both sides to ask follow-up questions if such follow-up questions appear to be necessary or appropriate.

The court shall permit counsel to present additional rebuttal evidence at trial if necessary to prevent unfair prejudice attributable to testimony that results from questions that jurors submit.

(Added February 2, 2017, effective March 1, 2017.)

Rule 40. Assignment for trial or alternative dispute resolution.

(a) *Scheduling Actions for Trial.* — The court shall place actions upon the trial calendar:

(1) without request of the parties; or

(2) upon request of a party and notice to the other parties; or

(3) in such other manner as the court deems expedient.

Precedence shall be given to actions entitled to trial by statute.

(b) *Limited Assignment for Alternative Dispute Resolution.* —

(1) *Assignment.* — For the purpose of invoking nonbinding alternative dispute resolution methods:

(A) *Court Assignment.* — The court may, or at the request of any party, shall, assign the case to:

(i) another active judge,

(ii) a retired judge,

(iii) retired justice, or

(iv) other qualified person on limited assignment.

(B) *By Agreement.* — By agreement, the parties may select the person to conduct the settlement conference or to serve as the mediator.

(i) If the parties are unable to agree, they may advise the court of their recommendations, and

(ii) the court shall then appoint a person to conduct the settlement conference or to serve as the mediator.

(2) *Alternative Dispute Resolution Procedure.* — A settlement conference or mediation may be conducted in accordance with procedures prescribed by the person conducting the settlement conference or mediation. A mediation also may be conducted in accordance with the following recommended rules of procedure:

(A) *Written Submissions.* — Prior to the session, the mediator may require confidential ex parte written submissions from each party. Those submissions should include:

(i) each party's honest assessment of the strengths and weaknesses of the case with regard to liability, damages, and other relief,

(ii) a history of all settlement offers and counteroffers in the case,

(iii) an honest statement from plaintiff's counsel of the minimum settlement authority that plaintiff's counsel has or is able to obtain, and

(iv) an honest statement from defense counsel of the maximum settlement authority that defense counsel has or is able to obtain.

(B) *Authority to Settle.* — Prior to the session, a commitment must be obtained from the parties that their representatives at the session have full and complete authority to represent them and to settle the case. If any party's representative lacks settlement authority, the session should not proceed. The mediator may also require the presence at the session of the parties themselves.

(C) *Conduct of Alternative Dispute Resolution.* —

(i) *Commencement.* — The mediator may begin the session by stating the objective, which is to seek a workable resolution that is in the best interests of all involved and that is fair and acceptable to the parties. The parties should be informed of statutory provisions governing mediation, including provisions relating to confidentiality, privilege, and immunity.

(ii) *Opening Statements.* — Each party or attorney may then make an opening statement stating the party's case in its best light, the issues involved, supporting law, prospects for success, and the party's evaluation of the case.

(iii) *Responses.* — Each party or attorney may then respond to the other's presentation.

(iv) *Conferences.* — From time to time, the parties and their attorneys may confer privately.

(v) *Mediator's Role.* — The mediator may adjourn the session for short periods of time. After a full, open discussion, the mediator may summarize, identify the strong and weak points in each case, point out the risks of trial to each party, suggest a probable verdict or judgment range, and suggest a fair settlement of the case. This may be done in the presence of all parties or separately.

(vi) *Settlement.* — If settlement results, it should promptly be reduced to a writing executed by the settling parties or recorded by other reliable means. The mediator may suggest to the parties such reasonable additions or requirements as may be appropriate or beneficial in a particular case.

(D) *Fees and Costs.* — For those cases filed in court and assigned for settlement conference or mediation:

(i) compensation for services shall be arranged by agreement between the parties and the person conducting the settlement conference or serving as the mediator, and

(ii) that person's statement shall be paid within 30 days of receipt by the parties.

(E) *Other forms of Alternative Dispute Resolution.* — Nothing in this rule is intended to preclude the parties from agreeing to submit their dispute to other forms of alternative dispute resolution, including arbitration and summary jury trial.

(F) *Retained Jurisdiction.* — Assignment of a case to alternative dispute resolution shall not suspend any deadlines or cancel any hearings or trial. The court retains jurisdiction for any and all purposes while the case is assigned to any alternative dispute resolution.

(Added February 2, 2017, effective March 1, 2017.)

Source. — Subdivision (a) of this rule is similar to Rule 40 of the Federal Rules of Civil Procedure.

Cross References. — As to trial docket generally, see chapter 8 of title 1. As to docketing fee, see § 5-3-206. As to keeping of trial docket, see § 5-3-211.

Without valid reason for recusal, judge has duty not to recuse himself. Cline v. Sawyer, 600 P.2d 725 (Wyo. 1979).

"Prejudice" involves prejudgment with insufficient knowledge. — For purposes of disqualifying a judge, "prejudice" involves a prejudgment or forming of an opinion without sufficient knowledge or examination. Cline v. Sawyer, 600 P.2d 725 (Wyo. 1979).

"Bias," which is ground for disqualification of judge, must be personal, and it must be such a condition of the mind which sways judgment and renders the judge unable to exercise his functions impartially in a given case or which is inconsistent with a state of mind fully open to the conviction which evidence might produce. Cline v. Sawyer, 600 P.2d 725 (Wyo. 1979).

Bias not shown. — The affidavit of appellant in support of the motion for change of judge does not state sufficient facts to show the existence of bias or prejudice against appellant where it alleges that the judge and appellee attended the same university at the same time where "they may have" belonged to the same fraternities or associations, and where it further alleges that the judge and appellee have

been close personal friends throughout the greater part of their lives and have had and continue to have close political affiliations and social relationships in the community. Cline v. Sawyer, 600 P.2d 725 (Wyo. 1979).

Cited in Kendrick v. Barker, 15 P.3d 734 (Wyo. 2001).

Law reviews. — For article, "Mediation and Wyoming Domestic Relations Cases — Practical Considerations, Ethical Concerns and Proposed Standards of Practice," see XXVII Land & Water L. Rev. 435 (1992).

Am. Jur. 2d, ALR and C.J.S. references. — Alternative dispute resolution: sanctions for failure to participate in good faith in, or comply with agreement made in, mediation, 43 ALR5th 545.

88 C.J.S. Trial §§ 18 to 35.

Rule 40.1. Transfer of trial and change of judge.

(a) *Transfer of Trial.* —

(1) *Time.* — Any party may move to transfer trial within 15 days after the last pleading is filed.

(2) *Transfer.* — The court shall transfer the action to another county for trial if the court is satisfied that:

(A) there exists within the county where the action is pending such prejudice against the party or the party's cause that the party cannot obtain a fair and impartial trial, or

(B) that the convenience of witnesses would be promoted thereby.

(3) *Hearing.* — All parties shall have an opportunity to be heard at the hearing on the motion and any party may urge objections to any county.

(4) *Transfer.* — If the motion is granted the court shall order that the action be transferred to the most convenient county to which the objections of the parties do not apply or are the least applicable, whether or not such county is specified in the motion.

(5) *Additional Motions to Transfer.* — After the first motion has been ruled upon, no party may move for transfer without permission of the court.

(6) *Upon Transfer.* — When a transfer is ordered:

(A) The clerk shall transmit to the clerk of the court to which the action has been transferred all papers in the action or duplicates thereof.

(B) The party applying for the transfer shall within 14 days pay the costs of preparing and transmitting such papers and shall pay a docket fee to the clerk of court of the county to which the action is transferred.

(C) The action shall continue in the county to which it is transferred as though it had been originally filed therein.

(7) The presiding judge may at any time upon the judge's own motion order a transfer of trial when it appears that the ends of justice would be promoted thereby.

(b) *Change of Judge.* —

(1) *Peremptory Disqualification.* —

(A) *Motion.* — A district judge may be peremptorily disqualified from acting in a case by the filing of a motion requesting that the judge be so disqualified.

(B) *Time.* —

(i) *Motion by Plaintiff.* — The motion designating the judge to be disqualified shall be filed by the plaintiff within five days after the complaint is filed; provided, that in multi-judge districts, the plaintiff must file the motion to disqualify the judge within five days after the name of the assigned judge has been provided by a representative of the court to counsel for plaintiff by personal advice at the courthouse, telephone call, or a mailed notice.

(ii) *Motion by Defendant.* — The motion shall be filed by a defendant at or before the time the first responsive pleading is filed by the defendant or within 30 days after service of the complaint on the defendant, whichever first occurs, unless the assigned judge has not been designated within that

time period, in which event the defendant must file the motion within five days after the name of the assigned judge has been provided by a representative of the court to counsel for the defendant by personal advice at the courthouse, telephone call, or a mailed notice.

(iii) *Parties Added Later.* — One made a party to an action subsequent to the filing of the first responsive pleading by a defendant cannot peremptorily disqualify a judge.

(C) *One Time Challenge.* — In any matter, a party may exercise the peremptory disqualification only one time and against only one judge.

(D) *Criminal and Juvenile Proceedings.* — This rule, and the procedures set forth herein, shall not apply to criminal cases or proceedings in juvenile court.

(2) *Disqualification for Cause.* —

(A) *Grounds.* — Whenever the grounds for such motion become known, any party may move for a change of district judge on the ground that the presiding judge

(i) has been engaged as counsel in the action prior to being appointed as judge,

(ii) is interested in the action,

(iii) is related by consanguinity to a party,

(iv) is a material witness in the action, or

(v) is biased or prejudiced against the party or the party's counsel.

(B) *Motion, Affidavits and Counter-Affidavits.* — The motion shall be supported by an affidavit or affidavits of any person or persons, stating sufficient facts to show the existence of such grounds. Prior to a hearing on the motion any party may file counter-affidavits.

(C) *Hearing.* — The motion shall be heard by the presiding judge, or at the discretion of the presiding judge by another judge. If the motion is granted, the presiding judge shall immediately call in another judge to try the action.

(3) *Effect of Ruling.* — A ruling on a motion for a change of district judge shall not be an appealable order, but the ruling shall be entered on the docket and made a part of the record and may be assigned as error in an appeal of the case.

(4) *Motion by Judge.* — The presiding judge may at any time on the judge's own motion order a change of judge when it appears that the ends of justice would be promoted thereby.

(5) *Probate Matters.* — In any controverted matter arising in a probate proceeding, a change of judge, or in cases where a jury is demandable, a transfer of trial, or both, may be had for any cause authorizing such change in a civil action. The procedure for such change shall be in accordance with this rule. Except for the determination of such controverted matter, the judge having original jurisdiction of such probate proceeding shall retain jurisdiction in all other matters in connection with said proceeding.

(Added February 2, 2017, effective March 1, 2017.)

Editor's notes. — By court order dated December 4, 2012, the Wyoming Supreme Court ordered that Rule 40.1(b)(1) of the Wyoming Rules of Civil Procedure was suspended in juvenile proceedings, to the extent said rule applies in those proceedings pursuant to Wyo. Stat. Ann. § 14-3-404 and § 14-6-204. Said suspension would continue until such time as the Permanent Rules Advisory Committee, Juvenile Division, may consider this suspension and make recommendations to the Court regarding the future, if any, of peremptory disqualification of judges in juvenile proceedings.

By Court Order dated November 26, 2013, the Supreme Court suspended the rules that permit peremptory disqualifications in criminal and juvenile cases. The Court stated in relevant part:

"Wyoming is in the minority of States that permit peremptory challenges of judges. R. Flamm, Judicial Disqualification: Recusal and Disqualification of Judges, 789-822 (2d ed. 2007) (state-by-state review of statutes and court rules). The peremptory disqualification rule dates back to 1975. While no clear statement of intent was provided by the Court when

the peremptory disqualification rules were initially adopted, we conclude that its purpose was to allow attorneys to remove judges selectively when they had concerns that a certain judge may have attitudes that, while not sufficient to support a motion to remove a judge for cause, created concerns for that party that the judge may have a predisposition in that particular case. It was never intended to allow wholesale removal of a judge from all cases in which that attorney may be involved. Throughout its history, Rule 21.1(a) (and its predecessor W.R.Cr.P. 23(d)) has been the subject of intermittent misuse by individual attorneys who utilized it to remove a particular judge from many or all of their cases before that judge. That misuse resulted in this Court suspending the rule and reconsidering its efficacy. In the most recent example, a prosecutor invoked Rule 21.1(a) as a means to remove an assigned judge from eight newly filed juvenile actions and another prosecutor requested blanket disqualification of a judge in all criminal matters. When misuse has risen to an unacceptable level, district judges have objected to this Court and sought relief from the burdens that practice created for them.

This marks at least the third time the rule has been abolished or suspended. The Court previously abolished the rule in 1983, reinstated it and later suspended it in 1998. Each time we ultimately reinstated the rule and admonished attorneys to not use the rule to seek removal of a judge for all cases. In 2010, at the request of the district court judges, the Board of Judicial Policy and Administration established a task force to once again evaluate the apparent misuse of the disqualification rule. Over the objection of the district court judges on the taskforce, it recommended amendments to the rule which would have required a formal procedure for handling these motions and required the judge to respond, a process perceived by the district judges to be similar to disqualifications for cause with a lesser burden of proof. On March 10, 2011, after careful consideration of the taskforce's recommendation to revise the rule, this Court reluctantly decided to leave the rule intact without limitation, but once again admonished the officers of the bar that lawyers should refrain from improper use of the rule and reminded them the rule was not intended to allow attorneys to replace a judge in all cases. By December, 2012, the practice of blanket disqualification of a local judge returned. While these situations were not widespread, they did cause the predictable disruption of multiple district court dockets and demonstrated that compliance with the intent of the rule could not be assured in the future.

The blanket use of the disqualification rules negatively affects the orderly administration of justice. Judicial dockets are interrupted, replacement judges must be recruited, sometimes including their court reporters, and unnecessary travel expenses are incurred. Peremptory disqualifications of assigned judges affect not only the specific cases at issue, but also the caseload of judges and the cases of other litigants whose cases are pending before the removed judge and the replacement judge at the same time. Where replacement judges are from other judicial districts, the cost and efficient utilization of judicial resources is greatly impacted. These costs cause financial burdens upon district courts budgets. Each district court has a limited budget for outside judges brought in to preside over cases in which challenges have been utilized. Criminal and juvenile cases comprise a significant portion of the cases on a district court's docket and, consequently, multiple disqualifications in those types of cases have a severe impact on the operation of the district court.

In addition, when peremptory challenges are exercised, delays in the timely resolution of juvenile and criminal cases may result. Quick resolution of matters involving children is not only statutorily required, but of paramount concern to this Court. Further, any delay in criminal proceedings resulting from a judge's removal, however slight, can impact a defendant's speedy trial rights, potentially contributing to a dismissal of criminal charges.

Allowing unfettered peremptory challenges of judges encourages judge shopping. In practice, it permits parties to strike a judge who is perceived to be unfavorable because of prior rulings in a particular type of case rather than partiality in the case in question. Disqualifying a judge because of his or her judicial rulings opens the door for manipulation of outcomes. Such undermines the reputation of the judiciary and enhances the public's perception that justice varies according to the judge. It also seriously undercuts the principle of judicial independence and distorts the appearance, if not the reality, of fairness in the delivery of justice.

The inherent power of this Court encompasses the power to enact rules of practice. Included in this power is the authority to suspend or repeal those rules where appropriate. Wyo. Const. Art. V, § 2; Wyo. Stat. Ann. § 5-2-114 (LexisNexis 2013); White v. Fisher, 689 P.2d 102, 106 (Wyo. 1984). In accordance with our inherent authority, and given our duty to ensure the orderly and efficient function of Wyoming's judicial system, we find it advisable to repeal and amend the rules that permit peremptory disqualifications in criminal and juvenile cases."

Cross References. — As to objection to venue by joined party, see Rule 19(a). As to venue generally, see chapter 5 of title 1. As to liability for expenses upon change of venue, see § 1-7-101. As to change of venue in criminal proceeding, see Rule 21, W.R. Cr. P.

Evidence considered upon trial-transfer motion. — This rule contains no requirement

that the court may rely only upon sworn testimony in determining whether to transfer a trial. The court may rely upon information contained in a filed motion, witness lists on file, and arguments of counsel. Atlas Constr. Co. v. Slater, 746 P.2d 352 (Wyo. 1987).

Motion to release funds. — Appellant's assertion asserts that the district court did not have authority to rule on a motion to release funds because the presiding judge assigned the entire matter to a different judge following appellant's motion for recusal was meritless. Because appellant's motion was denied, transfer of the entire action was not required. Bratton v. Blenkinsop (In re Guardianship & Conservatorship of Bratton), 344 P.3d 255 (Wyo. 2015).

Pretrial publicity. — Publicity about physician's professional plans and accomplishments, preceding malpractice trial, had nothing to do with the case and did not prejudice the proceedings so as to require transfer of venue. McGhee v. Rork, 978 P.2d 577 (Wyo. 1999).

Relationship between juror and party. — Fact that potential jurors or their families had been patients of physician was not sufficient, standing alone, to require change of venue in malpractice action. McGhee v. Rork, 978 P.2d 577 (Wyo. 1999).

Disqualification is matter confided to conscience of judge. — Whether a judge should disqualify himself because of a relationship or connection with a party is a matter confided to the conscience of the judge. Kimbley v. City of Green River, 663 P.2d 871 (Wyo. 1983).

Standard for recusal. — Under subdivision (b)(2), a judge is obligated to recuse himself if a reasonable person, assuming the facts in the affidavit submitted pursuant to the subdivision were true, could infer that the judge had a bias or prejudice which would prevent him from dealing fairly with the party requesting recusal. Farman v. State ex rel. Wyo. Workers' Comp. Div., 841 P.2d 99 (Wyo. 1992).

Affidavit to disqualify, supported by hearsay, insufficient. — An affidavit in support of a motion to disqualify a judge is generally insufficient when it is supported merely by hearsay. Farman v. State ex rel. Wyo. Workers' Comp. Div., 841 P.2d 99 (Wyo. 1992).

Bias, prejudice, not presumed from past rulings. — Bias and prejudice on the part of a judge cannot be presumed from unfavorable rulings in the past. TZ Land & Cattle Co. v. Condict, 795 P.2d 1204 (Wyo. 1990); Richardson v. Richardson, 868 P.2d 259 (Wyo. 1994).

Trial court did not abuse its discretion in presiding over a divorce trial one week after hearing evidence concerning the parties' settlement mediation; the trial judge's comments at the close of the evidence on the wife's motion to enforce the settlement and after closing arguments in the same proceeding were not sufficient to form a basis for disqualification. Metz v. Metz, 61 P.3d 383 (Wyo. 2003).

Timely filing necessary. — There must be compliance with this rule's requirements as to timely filing because the requirement is one of substance and not merely one of form. Barbour v. Barbour, 518 P.2d 12 (Wyo. 1974).

As provisions deemed peremptory challenge to judge. — Provisions of this rule have been treated in the nature of a peremptory challenge to the judge, and, as such, there must be compliance with the rule provisions. Barbour v. Barbour, 518 P.2d 12 (Wyo. 1974).

Waiver. — Although a party may waive the right to invoke a peremptory disqualification before notice by a court of an assignment when that party allows a judge to determine substantive material issues in the case, merely accepting the judge's authority to sign ex parte orders after filing the challenge is not such a substantive material issue. Pawlowski v. Pawlowski, 925 P.2d 240 (Wyo. 1996).

Transfer before voir dire appropriate. — The trial court is not required to allow the parties to conduct voir dire before it grants a motion for a change of venue. Following receipt of questionnaire responses from prospective jurors, the trial judge did not abuse her discretion by transferring the trial when it appeared the transfer would promote the ends of justice and allow plaintiffs to obtain a fair and impartial trial. Little v. Kobos ex rel. Kobos, 877 P.2d 752 (Wyo. 1994).

Power of litigant to choose judge after start of hearing. — Although it is the view of the Supreme Court that no litigant can reasonably or equitably pick and choose his judge after the start of any hearing on a contested matter or pretrial proceeding, nevertheless, neither the statutes, which were the genesis of this rule, nor the rule itself is so restrictive. State ex rel. Johnston v. District Court, 495 P.2d 255 (Wyo. 1972).

Purpose of subdivision (b)(1) as it stood prior to 1975 amendment. — See State ex rel. Johnston v. District Court, 495 P.2d 255 (Wyo. 1972).

Failure to attach affidavit bars motion. — Failure to attach the necessary affidavit to the motion for disqualification, as required by subdivision (b)(2), will bar consideration of the motion. Norman v. City of Gillette, 658 P.2d 697 (Wyo. 1983).

Moving party in default at time of motion. — The fact that the defendant was in default at the time it filed its motion for peremptory disqualification does not foreclose its right to disqualify the judge; so long as that motion was filed with its pleading and within thirty days as required by subdivision (b)(1) of this rule, the presiding judge was deprived of jurisdiction in the case except for the sole purpose of assigning it to another district judge who was not disqualified. Olsten Staffing Servs., Inc. v. D.A. Stinger Servs., Inc., 921 P.2d 596 (Wyo. 1996).

Motion to disqualify judge properly de-

nied. — See Osborn v. Manning, 685 P.2d 1121 (Wyo. 1984).

The fact that the defendant-physician was a personal friend and treating physician of the trial judge and that the judge had stated that he held the physician's professional skill and competence in high regard was not, in community of 4,511, sufficient to substantiate the existence of bias and prejudice under subdivision (b)(2)(E). Kobos ex rel. Kobos v. Sugden, 694 P.2d 110 (Wyo. 1985).

A motion for disqualification of a judge was properly denied, where the movants produced no evidence that the judge formed an opinion about the lawsuit without sufficient knowledge, that he had a personal bias for or against any of the parties to the action, or that his decision in a previous action had been based on grounds other than the evidence placed before him. TZ Land & Cattle Co. v. Condict, 795 P.2d 1204 (Wyo. 1990).

Family relationships. — In an action in which a defendant appealed from his convictions of two counts of felony conversion of grain in violation of Wyo. Stat. Ann. § 11-11-117(b) (2003) and one count of felony check fraud in violation of Wyo. Stat. Ann. § 6-3-702(a)(b)(iii) (2003), defendant failed to meet his burden of showing the district court abused its discretion when it denied his motion to withdraw his guilty plea on the basis that the judge and prosecutor were biased and prejudiced where (1) no manifest injustice resulted from the prosecutor's representation of the State despite his familial relationship with three of the victims because the prosecutor promptly and fully disclosed the relationship; (2) a judge may not be removed for cause simply on the basis that his brother was, at one time, a customer of the defendant. Reichert v. State, 134 P.3d 268 (Wyo. 2006).

Due process rights not violated where court gave substantive consideration to argument. — In a child custody case, a judge did not violate a mother's due process rights with respect to her motion for a change of judge because the judge gave substantive consideration of the motion in a manner appropriate to the circumstances. The district court held a hearing and although the district court declined to hear the mother's testimony on the change of judge issue, choosing instead to rely solely on her affidavit, the mother's attorney did not make an offer of proof as to what her live testimony might have added to the affidavit. Mace v. Nocera, 101 P.3d 921 (Wyo. 2004).

Motion to disqualify judge not appealable. — An order denying a motion to disqualify the trial judge pursuant to subdivision (b)(3) is not an appealable order. Hamburg v. Heilbrun, 891 P.2d 85 (Wyo. 1995).

Affidavit to disqualify, supported by hearsay, insufficient. — An affidavit in support of a motion to disqualify a judge is generally insufficient when it is supported merely by hearsay. Farman v. State, Wyo. Workers' Comp. Div., 841 P.2d 99 (Wyo. 1992).

Certiorari issued because hearing not had on motion for change of judge. — Because a hearing was not had on petitioners' motion for a change of judge and in view of the time and money to be spent in the upcoming trial, the Supreme Court ordered issuance of a writ of certiorari despite the provisions of subdivision (b)(3). Kobos ex rel. Kobos v. Sugden, 694 P.2d 110 (Wyo. 1985).

Divestiture of jurisdiction. — In a divorce proceeding, once wife's counsel timely filed a motion for peremptory disqualification of the trial judge, the trial court was divested of subject matter jurisdiction. Pawlowski v. Pawlowski, 925 P.2d 240 (Wyo. 1996).

Jurisdiction not transferable to other district court. — The district court in Natrona County, in which an original divorce decree was entered, had no authority to transfer jurisdiction of the matter to the district court in Platte County without notice of the parties, and that court had no authority to accept such a transfer of jurisdiction, which meant that the order entered by the Platte County district court modifying the divorce decree was void and of no force and effect; the Natrona County district court could have, though, transferred the case to Platte County and assigned a judge in Platte County to hear the case and exercise jurisdiction of the Natrona County district court, provided that any order entered pursuant to such an arrangement was filed in Natrona County. Glandt v. Taylor, 920 P.2d 647 (Wyo. 1996).

Peremptory disqualification of judge under (b)(1) untimely. — A notation in the court file that a representative of the court distributed a Notice of Assignment of judge raises a presumption that the notice was sent and received, and plaintiff did not effectively rebut the presumption that he received the Notice of Assignment and the district court did not err in denying his motion for peremptory disqualification as untimely. Bird v. Rozier, 948 P.2d 888 (Wyo. 1997).

Applied in Rhoads v. Gilliland, 514 P.2d 202 (Wyo. 1973); S-Creek Ranch, Inc. v. Monier & Co., 518 P.2d 930 (Wyo. 1974); Osborne v. District Court, 654 P.2d 124 (Wyo. 1982); Hopkinson v. State, 679 P.2d 1008 (Wyo. 1984).

Quoted in Osborn v. Manning, 812 P.2d 545 (Wyo. 1991).

Cited in Garber v. UMW, 524 P.2d 578 (Wyo. 1974); Meyer v. Meyer, 538 P.2d 293 (Wyo. 1975); Gold v. Board of County Comm'rs, 658 P.2d 690 (Wyo. 1983); Cordova v. Gosar, 719 P.2d 625 (Wyo. 1986); Reichert v. State, 134 P.3d 268 (Wyo. 2006).

Law reviews. — For comment, "Disqualification of District Judges in Wyoming: An Assessment of the Revised Rules," see XIX Land & Water L. Rev. 655 (1984).

Am. Jur. 2d, ALR and C.J.S. references. — Disqualification of judge because of assault

or threat against him by party or person associated with party, 25 ALR4th 923.

Disqualification of judge because of political association or relation to attorney in case, 65 ALR4th 73.

Substitution of judge in state criminal trial, 45 ALR5th 591.

Power of successor judge taking office during term time to vacate, set aside, or annul judgment entered by his or her predecessor, 51 ALR5th 747.

Disqualification of judge for bias against counsel for litigant, 54 ALR5th 575.

Conduct or bias of law clerk or other judicial support personnel as warranting recusal of federal judge or magistrate, 65 ALR Fed 775.

Rule 41. Dismissal of actions.

(a) *Voluntary Dismissal.* —

(1) *By the Plaintiff.* —

(A) *Without a Court Order.* — Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) *Effect.* — Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal or state court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) *By Court Order; Effect.* — Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a counterclaim was plead by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the counterclaim shall remain pending for independent adjudication by the court to the extent permitted by the court's subject matter jurisdiction. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) *Involuntary Dismissal; Effect.* —

(1) *By Defendant.* — If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule — except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 — operates as an adjudication on the merits.

(2) *By the Court.* — Upon its own motion, after reasonable notice to the parties, the court may dismiss, without prejudice, any action not prosecuted or brought to trial with due diligence. See U.R.D.C. 203.

(c) *Dismissing a Counterclaim, Crossclaim, or Third-Party Claim.* — This rule applies to a dismissal of any counterclaim, crossclaim, or third-party claim. A claimant's voluntary dismissal under Rule 41(a)(1)(A)(i) must be made:

(1) before a responsive pleading is served; or

(2) if there is no responsive pleading, before evidence is introduced at a hearing or trial.

(d) *Costs of a Previously Dismissed Action.* — If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:

(1) may order the plaintiff to pay all or part of the costs of that previous action; and

(2) may stay the proceedings until the plaintiff has complied.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 41 of the Federal Rules of Civil Procedure.

Construction. — Rule is straightforward and the language thereof leaves little room for judicial interpretation, and in ordinary civil cases, a notice of dismissal that complies with the rule ends the proceedings; the dismissal is effective immediately and no court order is required, and the rule is designed to designate a time frame within which the resources of the court and the defendant have yet to be committed so that dismissal without consequence is appropriate, and that time frame ends when either an answer or motion for summary judgment has been filed and served. Peters v. W. Park Hosp., 76 P.3d 821 (Wyo. 2003).

Courts favor policy of disposition of cases on their merits. Gaudina v. Haberman, 644 P.2d 159 (Wyo. 1982).

This rule protects against dilatory plaintiffs. — Rule 3(a) is in the form it is, without a requirement of service of process as part of the commencement of a lawsuit, because it was felt that adequate protection against dilatory plaintiffs was afforded by subdivision (b)(1) of this rule by dismissal for want of prosecution. Quin Blair Enters., Inc. v. Julien Constr. Co., 597 P.2d 945 (Wyo. 1979).

Motion under subdivision (b)(1) similar to one for directed verdict. — The rule that the Supreme Court must assume the evidence in favor of the successful party is true and that every favorable inference which may be reasonably and fairly drawn from it must be indulged in has no application in a motion under subdivision (b)(1), which, under the federal interpretation, has been considered to be similar to one for a directed verdict, wherein the entire evidence must be viewed most favorably to plaintiff, giving him the benefit of all reasonable inferences which may be deduced therefrom. Arbenz v. Debout, 444 P.2d 317 (Wyo. 1968).

With evidence considered in light favorable to plaintiff. — On an appeal under subdivision (b), the evidence must be considered in the light most favorable to the plaintiff, and the conclusions of law are freely reviewable. Kure v. Chevrolet Motor Div., 581 P.2d 603 (Wyo. 1978); Angus Hunt Ranch, Inc. v. Reb, Inc., 577 P.2d 645 (Wyo. 1978); Amfac Mechanical Supply Co. v. Federer, 645 P.2d 73 (Wyo. 1982).

Where the plaintiff's evidence shows that the plaintiff-buyer repeatedly sought performance on a warranty and failed to receive it and has thus established a broken promise entitling him to damages, the motion to dismiss under this rule was improvidently granted. Kure v. Chevrolet Motor Div., 581 P.2d 603 (Wyo. 1978).

In a nonjury case, where the trial court has dismissed the plaintiff's suit at the end of the presentation of his evidence, the appellate court is bound to consider the evidence as it would had the court directed a jury verdict and must view the evidence most favorably to the plaintiff, giving him the benefit of all reasonable inferences which may be deduced therefrom. Fuller v. Fuller, 606 P.2d 306 (Wyo. 1980).

In reviewing a motion to dismiss granted at the end of a plaintiff's case in chief, the Supreme Court applies a directed-verdict analysis, taking the plaintiff's evidence as true and affording it all favorable and reasonable inferences. True Oil Co. v. Sinclair Oil Corp., 771 P.2d 781 (Wyo. 1989).

And evidence introduced by defendant may cure error in overruling a motion for dismissal. — Error, if any, in overruling a motion for dismissal at the close of plaintiff's case is cured where the defendant introduces evidence and where all of the evidence at the time both parties rest is sufficient to make out a case for the plaintiff. Marsh v. Butters, 361 P.2d 729 (Wyo. 1961); Peterson v. Johnson, 46 Wyo. 473, 28 P.2d 487 (1934).

Options of trial judge. — Where plaintiff's proof has failed in some aspect, the motion for dismissal under subdivision (b)(1) should be granted. Where plaintiff's proof is overwhelming, application of the rule is made easy and the motion should be denied. But where plaintiff has presented a prima facie case based on unimpeached evidence the trial judge should not grant the motion even though he is the trier of the facts and may not himself feel at that point in the trial that the plaintiff has sustained his burden of proof. In the latter situation the trial judge should follow the alternative offered by the rule wherein it is provided that he "may decline to render any judgment until the close of all the evidence," and deny the motion. Arbenz v. Debout, 444 P.2d 317 (Wyo. 1968); Kure v. Chevrolet Motor Div., 581 P.2d 645 (Wyo. 1978); Angus Hunt Ranch, Inc. v. Reb, Inc., 577 P.2d 645 (Wyo. 1978); Fuller v. Fuller, 606 P.2d 306 (Wyo. 1980); Amfac Mechanical Supply Co. v. Federer, 645 P.2d 73 (Wyo. 1982).

Court should have right to dispose of case at first opportunity. — From a practical point of view, it is apparent that a trial judge in an action tried by the court without a jury should have the right to dispose of the case at the first opportunity. Brydon v. Brydon, 365 P.2d 55 (Wyo. 1961).

Not necessary to request findings. — Subdivision (b)(1) makes it mandatory that when a motion to dismiss is granted at the end of the plaintiff's case, the trial judge is to make findings of fact and conclusions of law, and the requirement of a request that the court state its findings, in Rule 52(a), does not apply. Kure v. Chevrolet Motor Div., 581 P.2d 603 (Wyo. 1978); Amfac Mechanical Supply Co. v. Federer, 645 P.2d 73 (Wyo. 1982).

And court may set out findings and conclusions orally. — Where the court set out its findings and conclusions orally, preserving them by stenographic reporting in the transcript as part of the record, the technical re-

quirements of Rule 52(a), referred to in this rule, have been met. Kure v. Chevrolet Motor Div., 581 P.2d 603 (Wyo. 1978).

When motion to dismiss should be granted. — Where the plaintiff has failed in his proof the motion to dismiss should be granted, but where plaintiff's proof is overwhelming the motion should be denied. Shook v. Bell, 599 P.2d 1320 (Wyo. 1979).

The plaintiff's complaint was properly dismissed for failure to present some evidence on each of the essential elements of his action. Osborn v. Manning, 685 P.2d 1121 (Wyo. 1984).

And when motion should be denied. — The plaintiff may not be denied relief solely on the grounds that he may be entitled to the exact relief that he requested in his complaint. Washakie County Sch. Dist. No. One v. Herschler, 606 P.2d 310 (Wyo.), cert. denied, 449 U.S. 824, 101 S. Ct. 86, 66 L. Ed. 2d 28 (1980).

Motion not granted until all evidence presented. — Where plaintiff has presented a prima facie case based on unimpeached evidence, the trial judge should not grant the motion to dismiss, even though he is the trier of the facts and may not himself feel at that point in the trial that the plaintiff has sustained his burden of proof. He should decline to render any judgment until the close of all the evidence. Shook v. Bell, 599 P.2d 1320 (Wyo. 1979).

In considering motion to dismiss by defendant, entire evidence must be viewed most favorably on behalf of plaintiff, giving him the benefit of all reasonable inferences which may be deduced therefrom. Shook v. Bell, 599 P.2d 1320 (Wyo. 1979).

Actions properly dismissed. — Hearing examiner correctly dismissed claimant's application for benefits, where claimant refused, in contravention of a prior order, to proceed with his case, and failed to meet his burden of proof. Wilkinson v. State ex rel. Wyoming Workers' Safety & Comp. Div., 991 P.2d 1228 (Wyo. 1999).

Trial court did not abuse its discretion when it granted the State's voluntary dismissal of suit it had instituted in Laramie County against an energy company relating to certain revenues alleged due on oil and gas wells and in refusing company's claim for fees and costs, given the facts, circumstances, and ongoing litigation between the parties on the same subject matter in other counties. EOG Res., Inc. v. State, 64 P.3d 757 (Wyo. 2003).

Dismissal with prejudice improper. — Because a motion under the rule was properly filed by the patient before the hospital and employees filed an answer or summary judgment motion, although they had filed a motion to dismiss, the case was therefore rendered a nullity as if it had never been filed, and thus the trial court's role in the case had ended and the trial court's dismissal of the action with prejudice was improper. Peters v. W. Park Hosp., 76 P.3d 821 (Wyo. 2003).

Dismissal for lack of diligent prosecution. — To allow a file to lie completely dormant from September 27, 1976, until January 13, 1978, being a term of approximately 16 months, is clearly a lack of diligent prosecution and the dismissal thereof does not involve an abuse of discretion. Johnson v. Board of Comm'rs, 588 P.2d 237 (Wyo. 1978).

Judgment enforcing settlement agreement not "involuntary dismissal". — A judgment which enforces a valid settlement agreement reached by the parties in the case is proper and is not an "involuntary dismissal" under subdivision (b)(2). Wyoming Sawmills, Inc. v. Morris, 756 P.2d 774 (Wyo. 1988).

Involuntary dismissal by court for delay not with prejudice. — Where attorneys' failure to file timely pretrial memorandums, in violation of court rule and court order, resulted, in the court's view, in delay and thus a failure to proceed with due diligence, in violation of subdivision (b)(2), the dismissal under this rule could not be with prejudice, as the rule provides only that the case may be dismissed without prejudice. Glatter v. American Nat'l Bank, 675 P.2d 642 (Wyo. 1984).

Denial of motion to reinstate action held abuse of discretion. — Trial court abused its discretion in denying motion to reinstate action after it had been dismissed for lack of prosecution where there was actual discovery activity by plaintiff and defendants within the six-month period preceding the dismissal, the plaintiff was at the pretrial stage in his preparation, the plaintiff reminded the judge of approaching 60-day limit under which his motion to reinstate would be deemed denied, and there was no showing that the defendants had been prejudiced. Randolph v. Hays, 665 P.2d 500 (Wyo. 1983).

Denial of motion not inconsistent with judgment for defendant at the close of all evidence. — In a suit seeking to set aside a deed on the basis of the grantee's alleged undue influence on the grantor, the trial court did not err in rendering judgment in favor of the grantee and in finding that the grantee had not exerted undue influence because this finding did not contradict the trial court's ruling in denying the grantee's motion to dismiss at the close of plaintiffs' case. The denial of the grantee's motion was not a judicial determination that the plaintiffs' had established that the grantee exerted undue influence but, instead, was merely a finding that the plaintiffs had met their burden of establishing a prima facie case and a ruling that the grantee would then be required to come forward with evidence to rebut the prima facie case. Krafczik v. Morris, 206 P.3d 372 (Wyo. 2009).

Appealability of orders. — When a motion to dismiss under subdivision (a)(2) of this rule is denied, the case continues, and the order is

not appealable. Wilkinson v. State ex rel. Wyoming Workers' Safety & Comp. Div., 991 P.2d 1228 (Wyo. 1999).

Waiver of right to appeal. — A court's denial of a subdivision (b)(1) motion to dismiss is not reviewable when a defendant has proceeded to present evidence following the ruling; a defendant, by presenting evidence, waives his right to appeal from a denial of a motion to dismiss. Hill v. Zimmerer, 839 P.2d 977 (Wyo. 1992).

When intervenor remains party pending outcome of appeal. — Where the denial of motion to intervene as of right is in the process of being appealed with a stipulation for dismissal without prejudice is entered into by the other parties, the intervenor remains a party pending the outcome of the appeal. James S. Jackson Co. v. Horseshoe Creek, Ltd., 650 P.2d 281 (Wyo. 1982).

Res judicata applicable, following dismissal for failure to appear, absent appeal of dismissal. — Although dismissal of a first suit under subdivision (b)(1) for failure to appear at trial did not result in a trial on the merits, res judicata applied since the plaintiff was afforded the opportunity for a trial on the merits and his day in court, but the plaintiff did not avail himself of his opportunity nor appeal the dismissal with prejudice or the denial of his petition to vacate judgment. CLS v. CLJ, 693 P.2d 774 (Wyo. 1985).

Res judicata not applicable. — Res judicata did not bar buyer's instant action against the sellers to compel arbitration where the sellers were dismissed from the buyer's original action for fraud and misrepresentation without prejudice, pursuant to Wyo. R. Civ. P. 41(a)(1)(ii), and because of the voluntary dismissal, the buyer's claim for arbitration had not been adjudicated. Rawlinson v. Wallerich, 132 P.3d 204 (Wyo. 2006).

Action dismissed under Rule 12(b)(6), not Rule 41. — See LC v. TL, 870 P.2d 374 (Wyo.), cert. denied, 513 U.S. 871, 115 S. Ct. 195, 130 L. Ed. 2d 127 (1994).

Applied in McDonald v. Lawson, 356 P.2d 1041 (Wyo. 1960); Turnbough v. Campbell County Mem. Hosp., 499 P.2d 595 (Wyo. 1972).

Quoted in Charter Thrift & Loan v. Cooke, 766 P.2d 522 (Wyo. 1988); Morris v. Kadrmas, 812 P.2d 549 (Wyo. 1991); RKS v. SDM ex rel. TY, 882 P.2d 1217 (Wyo. 1994).

Stated in Travelers Ins. Co. v. Palmer, 714 P.2d 765 (Wyo. 1986); Herring v. Welltech, Inc., 715 P.2d 553 (Wyo. 1986).

Cited in Stundon v. Stadnik, 469 P.2d 16 (Wyo. 1970); White v. Fisher, 689 P.2d 102 (Wyo. 1984); Apollo Drilling v. Seevers, 720 P.2d 899 (Wyo. 1986); Morgan v. City of Rawlins, 792 F.2d 975 (10th Cir. 1986); Apodaca v. Ommen, 807 P.2d 939 (Wyo. 1991); Erdman v. State ex rel. Wyo. Workers' Safety & Comp. Div., 5 P.3d 64 (Wyo. 2000); Hall v. Park County, 238 P.3d 580 (Wyo. 2010).

Law reviews. — For note, "Plaintiff's Right to Dismiss Under the Code and the Proposed Rules," see 6 Wyo. L.J. 296.

For article, "Wyoming Practice," see 12 Wyo. L.J. 202 (1958).

For note, "The Two Dismissal Rule," see 12 Wyo. L.J. 276 (1958).

For case note, "Oil and Gas — The Burden of Proof in Implied Covenant to Develop Cases: Wyoming Rejects the 'Oklahoma Rule.' Sonat Exploration Co. v. Superior Oil Co., 710 P.2d 221 (Wyo. 1985)," see XXII Land & Water L. Rev. 141 (1987).

Am. Jur. 2d, ALR and C.J.S. references. — 24 Am. Jur. 2d Dismissal, Discontinuance and Nonsuit §§ 7 to 83.

Time when voluntary nonsuit or dismissal may be taken as of right under statute so authorizing at any time before "trial," "commencement of trial," "trial of the facts," or the like, 1 ALR3d 711.

Dismissing action or striking testimony where party to civil action asserts privilege against self-incrimination as to pertinent question, 4 ALR3d 545.

Dismissal, nonsuit, judgment or direction of verdict on opening statement of counsel in civil action, 5 ALR3d 1405.

Dismissal of action because of perjury or suppression of evidence by party, 11 ALR3d 1153.

Attorney's inaction as excuse for failure to timely prosecute action, 15 ALR3d 674.

Right of one spouse, over objection, to voluntarily dismiss claim for divorce, annulment or similar marital relief, 16 ALR3d 283.

Application to period of limitations fixed by contract, of statute permitting new action to be brought within specified time after failure of prior action for cause other than on the merits, 16 ALR3d 452.

Voluntary dismissal of replevin action by plaintiff as affecting defendant's right to judgment for the return or value of the property, 24 ALR3d 768.

What amounts to "final submission" or "retirement of jury" within statute permitting plaintiff to take voluntary dismissal or nonsuit without prejudice before submission or retirement of jury, 31 ALR3d 449.

Dismissal of plaintiff's action as entitling defendant to recover attorneys' fees or costs as "prevailing party" or "successful party," 66 ALR3d 1087.

Application of doctrine of forum non conveniens to actions between nonresidents based upon tort occurring within forum state, 92 ALR3d 797.

What constitutes bringing an action to trial or other activity in case sufficient to avoid dismissal under state statute or court rule requiring such activity within stated time, 32 ALR4th 840.

Construction, as to terms and conditions, of state statute of rule providing for voluntary

dismissal without prejudice upon such terms and conditions as state court deems proper, 34 ALR4th 778.

Incompetence of counsel as ground for relief from state court civil judgment, 64 ALR4th 323.

Dismissal of state court action for plaintiff's failure or refusal to obey court order relating to pleadings or parties, 3 ALR5th 237.

Propriety of dismissal under Federal Civil Procedure Rule 41(a) of action against less than all of several defendants, 3 ALR Fed 569.

Propriety of dismissal for failure of prosecution under Rule 41(b) of Federal Rules of Civil Procedure, 20 ALR Fed 488.

Plaintiff's right to file notice of dismissal under Rule 41(a)(1)(i) of Federal Rules of Civil Procedure, 54 ALR Fed 214.

Appealability of order imposing conditions upon grant of plaintiff's motion for dismissal without prejudice, pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure, 75 ALR Fed 505.

27 C.J.S. Dismissal and Nonsuit § 1 et seq.

Rule 42. Consolidation; separate trials.

(a) *Consolidation.* — If actions before the court involve a common question of law or fact, the court may:

(1) join for hearing or trial any or all matters at issue in the actions;

(2) consolidate the actions; or

(3) issue any other orders to avoid unnecessary cost or delay.

(b) *Separate Trials.* — For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any right to a jury trial.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 42 of the Federal Rules of Civil Procedure.

I. GENERAL CONSIDERATION.
II. CONSOLIDATION.
III. SEPARATE TRIALS.

I. GENERAL CONSIDERATION.

Cited in In re Estate of Morton, 428 P.2d 725 (Wyo. 1967); Lutheran Hosps. & Homes Soc'y of Am. v. Yepsen, 469 P.2d 409 (Wyo. 1970); Mountain Fuel Supply Co. v. Emerson, 578 P.2d 1351 (Wyo. 1978); Coones v. FDIC, 848 P.2d 783 (Wyo. 1993).

Am. Jur. 2d, ALR and C.J.S. references. — 1 Am. Jur. 2d Actions §§ 131 to 139; 20 Am. Jur. 2d Counterclaim, Recoupment and Setoff §§ 53 to 55; 75 Am. Jur. 2d Trial §§ 115 to 179.

Appealability of state court order granting or denying consolidation, severance or separate trials, 77 ALR3d 1082.

Propriety of ordering separate trials as to liability and damages, under Rule 42(b) of Federal Rules of Civil Procedure, in actions involving personal injury, death or property damage, 78 ALR Fed 890.

Propriety of ordering separate trials as to liability and damages, under Rule 42(b) of Federal Rules of Civil Procedure, in civil rights actions, 79 ALR Fed 220.

Propriety of ordering separate trials as to liability and damages, under Rule 42(b) of Federal Rules of Civil Procedure, in actions involving patents and copyrights, 79 ALR Fed 532.

Propriety of ordering separate trials as to liability and damages, under Rule 42(b) of Federal Rules of Civil Procedure, in contract actions, 79 ALR Fed 812.

Propriety of ordering consolidation under Rule 42(a) of Federal Rules of Civil Procedure in civil rights actions, 81 ALR Fed 732.

Propriety of ordering consolidation under Rule 42(a) of Federal Rules of Civil Procedure in actions involving patents, copyrights or trademarks, 82 ALR Fed 719.

Propriety of ordering consolidation under Rule 42(a) of Federal Rules of Civil Procedure in actions involving securities, 83 ALR Fed 367.

1A C.J.S. Actions §§ 204 to 228; 88 C.J.S. Trial §§ 6 to 10.

II. CONSOLIDATION.

Purpose of rule. — This rule was intended to further the general objectives of the rules and to assist in the just, speedy and inexpensive determination of litigation. State ex rel. Pac. Intermountain Express, Inc. v. District Court, 387 P.2d 550 (Wyo. 1963).

Interpretation of rule. — The provisions of Rule 54 are of importance in an interpretation of this rule. State ex rel. Pac. Intermountain Express, Inc. v. District Court, 387 P.2d 550 (Wyo. 1963).

Historical recognition of particular type of consolidation. — While both types of consolidation, i.e., the instance in which several actions are combined into one action to lose their separate identity as such, and become a single action in which a single judgment is rendered, and the instance in which several actions are tried together, but retain their separate character and require the entry of separate

judgments, are contemplated by the language of this rule, it appears that historically the courts have recognized only the latter style of consolidation. Bard Ranch, Inc. v. Weber, 538 P.2d 24, reh'g denied, In re Final Proofs of Appropriation, 541 P.2d 791 (Wyo. 1975).

Degree of merger of consolidated suits. — Although the word "consolidation" is used in different senses, the type apparently employed in this rule does not merge the suits into a single action so far as ultimate relief is concerned, but it must for the purposes of effective administration of justice consolidate them to such an extent that they may be handled as one upon the appeal where such effect has been given in the trial court. State ex rel. Pac. Intermountain Express, Inc. v. District Court, 387 P.2d 550 (Wyo. 1963).

Joinder of divorce, lien proceeding not required. — Although similar properties were at stake in both a divorce and a lien proceeding, the fact alone did not require joinder. Evans v. Stamper, 835 P.2d 1145 (Wyo. 1992).

Consolidation retained at appellate level. — If the consolidation of cases under this rule was proper for the trial, there is no reason why the policy should be changed at the appellate level, even though there may be certain individual advantages to the separate determination of matters which do not outweigh the step that was purportedly taken for the best administration of justice in consolidating the litigation. State ex rel. Pac. Intermountain Express, Inc. v. District Court, 387 P.2d 550 (Wyo. 1963).

But not required before hearings. — There is nothing in this rule to support the position in a hearing on probate of three contested wills that consolidation must be made before hearing on the condition that no prejudice results to any party litigant. In re Estate of Stringer, 80 Wyo. 389, 343 P.2d 508, reh'g denied, 80 Wyo. 426, 345 P.2d 786 (1959).

Each consolidated party entitled to interlocutory decision giving effect to verdict. — Each of the consolidated parties, at such time as the jury has disposed of his case, is entitled to have the court enter an interlocutory decision giving effect to the verdict of the jury in order to foreclose the possibility of a successor judge granting a new trial. State ex rel. Pac. Intermountain Express, Inc. v. District Court, 387 P.2d 550 (Wyo. 1963).

III. SEPARATE TRIALS.

Fair trial is often thwarted when interwoven issues are tried separately; when issues are so interwoven that their independent trial would cause confusion and uncertainty, which would amount to a denial of a fair trial, they must be tried together. Carlson v. Carlson, 836 P.2d 297 (Wyo. 1992).

Bifurcation required when settlement negotiation evidence prejudicial. — A cause of action for breach of a contract of insurance and a cause of action for breach of the implied covenant of good faith and fair dealing sounding in tort are sufficiently distinct and independent to permit bifurcation of the proceedings when the admission of evidence of settlement negotiations would be prejudicial. State Farm Mut. Auto. Ins. Co. v. Shrader, 882 P.2d 813 (Wyo. 1994).

Even when bifurcation is proper, separate phases should be heard by same jury. Carlson v. Carlson, 836 P.2d 297 (Wyo. 1992).

Natural father whose parental rights have been terminated excluded from adoption hearing. — A determination by the district court that the natural father's consent to adopt was not required effectively terminated his parental rights to his daughter; after this determination, he was, in effect, a stranger to the adoption proceedings. The court did not abuse its discretion in bifurcating the proceedings and excluding him from the hearing on the merits of the petition to adopt. PAA v. Doe, 702 P.2d 1259 (Wyo. 1985).

Slander action severed from action alleging unlawful denial of employment and seeking reinstatement. — The trial court did not abuse its discretion in severing a slander action against an individual, in which the plaintiff prayed for damages, from an action against a city alleging unlawful denial of employment, in which the plaintiff prayed for damages and for a finding that the city be required to hire him. Tremblay v. Reid, 700 P.2d 391 (Wyo. 1985).

Separate trials held proper. — It was proper to award separate trials, under this rule, to two groups of defendants, when the controversy between the plaintiff and one group of defendants concerned many transactions in which the other group was not involved. Thomas v. Roth, 386 P.2d 926 (Wyo. 1963).

The district court did not abuse its discretion in bifurcating a negligence claim against a medical assistant from a negligent hiring claim against a hospital and a negligent training/supervision claim against a physician since the question of negligence in the administration of an injection by the medical assistant presented a distinct issue for the jury, and this issue was not so interwoven with the claims of negligent training and/or supervision or negligent hiring that an independent trial resulted in a denial of a fair trial. Beavis v. Campbell County Mem. Hosp., 20 P.3d 508 (Wyo. 2001).

Bifurcation not necessary. — In a guardianship proceeding, the trial court did not err by denying the mother's motion to bifurcate the trial and considering the question of the mother's unfitness and the question of appointment of the grandparents as guardians in one proceeding, because the determination of the mother's fitness required extensive testimony from the same witnesses who would be required to testify as to the best interests of the

children in the appointment of the grandparents as guardians. White v. State ex rel. Wyo. DOT, 210 P.3d 1096 (Wyo. 2009).

When three married couples and an investor formed a limited liability company (LLC) to operate a ranch, a dispute concerning the management of the LCC led to an action for declaratory judgment to establish the members' rights and interests; the district court did not abuse its discretion by denying a motion to bifurcate the proceedings into one trial determining the parties' ownership interests and a second trial determining the parties' liabilities to the LLC and to each another. The issues were closely interrelated; bifurcation was not appropriate, because the district court's characterization of the members' contributions as loans or as capital contributions was exactly what both parties sought in their pleadings—a declaration of their comparative interests in the LLC. Powell Family of Yakima, LLC v. Dunmire (In re Kite Ranch, LLC), 234 P.3d 351 (Wyo. 2010).

Scope of limited retrials. — A limited retrial upon the issue of liability alone is permitted, consistent with subdivision (b) permitting separate trials of claims or issues in the first instance, when it is clear that such a course can be pursued without confusion, inconvenience or prejudice to the rights of any party. Wheatland Irrigation Dist. v. McGuire, 552 P.2d 1115 (Wyo. 1976); Wheatland Irrigation Dist. v. McGuire, 562 P.2d 287 (Wyo. 1977).

Am. Jur. 2d, ALR and C.J.S. references. — Propriety of separate trials of issues of tort liability and of validity and effect of release, 4 ALR3d 456.

Rule 43. Taking testimony.

(a) *In Open Court.* — At trial, the witnesses' testimony must be taken in open court unless these rules, a statute, the Wyoming Rules of Evidence, or other rules adopted by the Supreme Court of Wyoming provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

(b) *Affirmation Instead of an Oath.* — When these rules require an oath, a solemn affirmation suffices.

(c) *Evidence on a Motion.* — When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.

(d) *Interpreter.* — The court may appoint an interpreter of its choosing; fix reasonable compensation to be paid from funds provided by law or by one or more parties; and tax the compensation as costs.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 43 of the Federal Rules of Civil Procedure.

Cross References. — As to oath or affirmation generally, see § 1-2-101 and Rule 603, W.R.E. As to affirmation in lieu of oath, see § 1-2-103. As to witnesses generally, see chapter 12 of title 1. As to motions, see Rule 301, D. Ct. As to interpreters, see Rule 604, W.R.E.

Oral testimony refused at summary judgment hearing where offer of proof not made. — Where the defending party had made no offer of proof at a summary judgment hearing regarding the proposed testimony of two witnesses, the Supreme Court declined to decide permissibility of oral testimony at the hearing and held that the trial court had not abused its discretion in refusing to allow such oral testimony. Dudley v. East Ridge Dev. Co., 694 P.2d 113 (Wyo. 1985).

Telephonic testimony. — Where a district court signed an order allowing a father to present telephonic testimony in a divorce proceeding, presumably pursuant to Wyo. R. Civ. P. 43(a), the court did not abuse its discretion by rescinding it after considering the mother's objection because the court was entitled to rescind the order, and there was evidence that the father, through his counsel, had resisted following through with discovery requests. RK v. State ex rel. Natrona County Child Support Enforcement Dep't, 174 P.3d 166 (Wyo. 2008).

Cited in Apperson v. Kay, 546 P.2d 995 (Wyo. 1976).

Am. Jur. 2d, ALR and C.J.S. references. — 81 Am. Jur. 2d Witnesses § 1 et seq.

Validity of proceedings as affected by taking evidence out of court, 18 ALR3d 572.

Admissibility and weight of extrajudicial or pretrial identification where witness was unable or failed to make in-court identification, 29 ALR4th 104.

Admissibility of oral testimony at state summary judgment hearing, 53 ALR4th 527.

98 C.J.S. Witnesses § 1 et seq.

Rule 44. Determining foreign law.

A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Wyoming Rules of Evidence. The court's determination must be treated as a ruling on a question of law.
(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 44.1 of the Federal Rules of Civil Procedure.

Cross References. — As to nonapplicability of judicial notice to laws of jurisdictions outside United States, see § 1-12-306.

Am. Jur. 2d, ALR and C.J.S. references. — Raising and determining issue of foreign law under Rule 44.1 of Federal Rules of Civil Procedure, 62 ALR Fed 521.

What constitutes "adjudicative facts" within meaning of Rule 201 of Federal Rules of Evidence concerning judicial notice of adjudicative facts, 150 ALR Fed 543.

Rule 45. Subpoena.

(a) *In General.* —

(1) *Form and Contents.* —

(A) *Requirements — In General.* — Every subpoena must:

(i) state the court from which it issued;

(ii) state the title of the action and its civil action number;

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce and permit inspection, copying, testing, or sampling of designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

(iv) set out the text of Rule 45 (c), (d) and (e).

(v) A command to produce evidence or to permit inspection, copying, testing, or sampling may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(2) A subpoena must issue as follows:

(A) *Command to Attend Trial.* — For attendance at a trial or hearing, from the court for the district in which the action is pending;

(B) *Command to Attend a Deposition.* — For attendance at a deposition, from the court in which the action is pending, stating the method for recording the testimony; and

(C) *Command to Produce.* — For production, inspection, copying, testing, or sampling, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

(3) *Issued by Whom.* — The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the court may also issue and sign a subpoena on behalf of

(A) a court in which the attorney is authorized to practice; or

(B) a court for a district in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice.

(4) *Notice to Other Parties Before Service.* — If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party.

(b) *Service; place of attendance; notice before service.* —

(1) *By Whom and How; Fees.* — A subpoena may be served by the sheriff, by a deputy sheriff, or by any other person who is not a party and is not a minor, at any place within the State of Wyoming. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. The party subpoenaing any witness residing in a county other than that in which the action is pending shall pay to such witness, after the hearing or trial, the statutory per diem allowance for state employees for each day or part thereof necessarily spent by such witness in traveling to and from the court and in attendance at the hearing or trial.

(2) *Proof of Service.* — Proving service, when necessary, requires filing with the clerk of the court by which the subpoena is issued, a statement of the date and manner of service and of the names of the persons served. The statement must be certified by the person who made the service.

(3) *Place of Compliance for Trial.* — A subpoena for trial or hearing may require the person subpoenaed to appear at the trial or hearing irrespective of the person's place of residence, place of employment, or where such person regularly transacts business in person.

(4) *Place of Compliance for Deposition.* — A person commended by subpoena to appear at a deposition may be required to attend only in the county wherein that person resides or is employed or regularly transacts business in person, or at such other convenient place as is fixed by an order of court. A nonresident of the state may be required to attend only in the county wherein that nonresident is served with a subpoena or at such other convenient place as is fixed by an order of court.

(c) *Protecting a Person Subject to Subpoena; Enforcement.* —

(1) *Avoiding Undue Burden or Expense; Sanctions.* — A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) *Command to Produce Materials or Permit Inspection.* —

(A) *Appearance not Required.* — A person commanded to produce and permit inspection, copying, testing, or sampling of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless also commanded to appear for deposition, hearing or trial.

(B) *Objections.* — Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection, copying, testing, or sampling may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to producing any or all of the designated materials or inspection of the premises - or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test, or sample the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production, inspection, copying, testing, or sampling. Such an order to compel shall protect any person who is not a party or an officer of a party from

significant expense resulting from the inspection, copying, testing, or sampling commanded.

(3) *Quashing or Modifying a Subpoena.* —

(A) *When Required.* — On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel outside that person's county of residence or employment or a county where that person regularly transacts business in person except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held;

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* — If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel to attend trial. The court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) *Duties in Responding to Subpoena.* —

(1) *Producing Documents or Electronically Stored Information.* —

(A) *Documents.* — A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) *Form of Electronically Stored Information if Not Specified.* — If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(C) *Electronically Stored Information Produced in Only One Form.* — A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* — A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) *Claiming Privilege or Protection.* —

(A) *Making a Claim.* — When information or material subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial

preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) *Information Produced.* — If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

(e) *Contempt.* — Failure of any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a nonparty to attend or produce at a place not within the limits provided by subparagraph (c)(3)(A)(ii).

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 45 of the Federal Rules of Civil Procedure, prior to the 1991 amendment of the federal rule.

Cross References. — As to depositions and discovery generally, see Rules 26 through 37. As to subpoena for production of documents and things, see Rule 30(b). As to disobedience of subpoena punishable as contempt of court, see § 1-12-106. As to authority of arbitrators to issue subpoena, see § 1-36-109. As to subpoena duces tecum in county court, see § 5-5-138. As to subpoena in juvenile court, see § 14-6-217. As to subpoena in administrative proceeding, see § 16-3-107.

Am. Jur. 2d, ALR and C.J.S. references. — 23 Am. Jur. 2d Depositions and Discovery §§ 148, 149; 81 Am. Jur. 2d Witnesses §§ 1 to 49.

Limiting number of noncharacter witnesses in civil case, 5 ALR3d 169.

Propriety and prejudicial effect of limiting number of character or reputation witnesses, 17 ALR3d 327.

Privilege against self-incrimination as ground for refusal to produce noncorporate documents in possession of person asserting privilege but owned by another, 37 ALR3d 1373.

Who has possession, custody or control of corporate books or records for purposes of order to produce, 47 ALR3d 676.

Privilege of newsgatherer against disclosure of confidential sources or information, 99 ALR3d 37.

Compelling testimony of opponent's expert in state court, 66 ALR4th 213.

Admissibility of deposition, under Rule 32(a)(3)(B) of Federal Rules of Civil Procedure, where court finds that witness is more than 100 miles from place of trial or hearing, 71 ALR Fed 382.

Requirements under Rule 45(c) of Federal Rules of Civil Procedure and Rule 17(d) of Federal Rules of Criminal Procedure, relating to service of subpoena and tender of witness fees and mileage allowance, 77 ALR Fed 863.

97 C.J.S. Witnesses §§ 19 to 34.

Rule 46. Objecting to a ruling or order.

A formal exception to a ruling or order is unnecessary. When the ruling or order is requested or made, a party need only state the action that it wants the court to take or objects to, along with the grounds for the request or objection. Failing to object does not prejudice a party who had no opportunity to do so when the ruling or order was made.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 46 of the Federal Rules of Civil Procedure.

Cross References. — As to exceptions in justice of the peace courts, see § 1-21-1011. As to bill of exceptions in criminal proceeding, see §§ 7-12-101 through 7-12-104. As to exceptions deemed part of record in administrative proceeding, see § 16-3-109. As to exceptions in

criminal proceedings, see Rule 51, W.R. Cr. P.

It is basic that an appeal must be from a ruling of the court, and the only exception to this rule is when such act constitutes a fundamental error such as lack of jurisdiction. Joly v. Safeway Stores, Inc., 502 P.2d 362 (Wyo. 1972).

Objection and statement of grounds therefor required. — A party could not argue error based on the refusal of an exhibit in the absence of an objection and statement of the grounds therefor. Joly v. Safeway Stores, Inc., 502 P.2d 362 (Wyo. 1972).

Assertion of error will not be considered on appeal where it was not asserted as a basis for ground of objection at trial. Pure Gas & Chem. Co. v. Cook, 526 P.2d 986 (Wyo. 1974).

To improper argument of counsel. — It is firmly established that improper argument of counsel cannot be raised or urged for reversal in the absence of an objection. Joly v. Safeway Stores, Inc., 502 P.2d 362 (Wyo. 1972).

And to pretrial conference order. — The Supreme Court will not consider the complaint of a party seeking to raise a question regarding the filing and entry of a pretrial conference order in the absence of a request or objection. Joly v. Safeway Stores, Inc., 502 P.2d 362 (Wyo. 1972).

Rule not rigidly applied for specificity. — In a medical malpractice suit, counsel's failure to specifically cite the grounds for his objection in order to impede the seating of alternate jurors without an additional peremptory challenge did not render the objection invalid since this rule does not apply in a formal, ritualistic fashion but evaluates the sufficiency of an objection for substance. Wardell v. McMillan, 844 P.2d 1052 (Wyo. 1992).

Applied in Bates v. Donnafield, 481 P.2d 347 (Wyo. 1971).

Cited in Shoemaker v. State, 444 P.2d 309 (Wyo. 1968); Williams v. Collins Communications, Inc., 720 P.2d 880 (Wyo. 1986).

Am. Jur. 2d, ALR and C.J.S. references. — When will federal court of appeals review issue raised by party for first time on appeal where legal developments after trial affect issue, 76 ALR Fed 522.

Sufficiency in federal court of motion in limine to preserve for appeal objection to evidence absent contemporary objection at trial, 76 ALR Fed 619.

4 C.J.S. Appeal and Error §§ 202 to 231.

Rule 47. Selecting jurors for trial.

(a) *Qualifications.* — All prospective jurors must answer as to their qualifications to be jurors; such answers shall be in writing, signed under penalty of perjury and filed with the clerk of the court. The written responses of the prospective jurors shall be preserved by the clerk of the court for the longer of the following:

(1) One year after the end of the jury term; or

(2) Until all appeals from any trial held during that term of court have been finally resolved.

The judge shall inquire of the jurors in open court on the record to insure that they are qualified.

(b) *Excused Jurors.* — For good cause but within statutory limits a judge may excuse a juror for a trial, for a fixed period of time, or for the term. All excuses shall be written and filed with the clerk or granted in open court on the record.

(c) *Examination of Jurors.* — After the jury panel is qualified, the attorneys, or a pro se party, shall be entitled to conduct the examination of prospective jurors, but such examination shall be under the supervision and control of the judge, and the judge may conduct such further examination as the judge deems proper. The judge may assume the examination if counsel or a pro se party fail to follow this rule. If the judge assumes the examination, the judge may permit counsel or a pro se party to submit questions in writing.

(1) *Purpose of Examination.* — The only purpose of the examination is to select a panel of jurors who will fairly and impartially hear the evidence and render a just verdict.

(2) *Comments and Questions not Permitted.* — The court shall not permit counsel or a pro se party to attempt to precondition prospective jurors to a particular result, comment on the personal lives and families of the parties or their attorneys, or question jurors concerning the pleadings, the law, the meaning of words, or the comfort of jurors.

(3) *Voir Dire Prohibitions.* — In voir dire examination, counsel or a pro se party shall not:

(A) Ask questions of an individual juror that cannot be asked of the panel or a group of jurors collectively;

(B) Ask questions answered in a juror questionnaire except to explain an answer;

(C) Repeat a question asked and answered;

(D) Instruct the jury on the law or argue the case; or

(E) Ask a juror what the juror's verdict might be under any hypothetical circumstances.

(F) Notwithstanding the restrictions set forth in subsections 47(c)(3)(A)-(E), counsel or a pro se party shall be permitted during voir dire examination to preview portions of the evidence from the case in a non-argumentative manner when a preview of the evidence would help prospective jurors better understand the context and reasons for certain lines of voir dire questioning.

(d) *Alternate Jurors.* — The court may direct that not more than six jurors in addition to the regular jury be called and empanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged when the jury retires to consider its verdict. Each side is entitled to one peremptory challenge in addition to those otherwise allowed by law if one or two alternate jurors are to be empanelled, two peremptory challenges if three or four alternate jurors are to be empanelled, and three peremptory challenges if five or six alternate jurors are to be empanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by law shall not be used against an alternate juror.

(e) *Peremptory Challenges.* — Each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the making of challenges or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

(f) *Excusing a Juror.* — During trial or deliberation, the court may excuse a juror for good cause.

(Added February 2, 2017, effective March 1, 2017.)

Source. — Subdivision (a) of this rule is similar to Rule 47(a) of the Federal Rules of Civil Procedure.

Cross References. — As to trial by jury, see chapter 11 of title 1. As to trial jurors in criminal proceeding, see Rule 24, W.R. Cr. P. As to voir dire of jury, see Rule 701, D. Ct.

Mandatory peremptory challenge for alternate jurors. — In a medical malpractice suit the trial judge erred as a matter of law in denying plaintiff's request for an additional peremptory challenge upon the seating of alternate jurors because the plain language of this rule affords a judge invoking it no discretion to do so. Wardell v. McMillan, 844 P.2d 1052 (Wyo. 1992).

Improper allocation of challenges among multiple parties. — A jury verdict will not be reversed, due to improper allocation of peremptory challenges, unless the challenging party can point to some convincing indication in the record that if a further peremptory challenge had been allowed, the party meant to challenge one or more jurors. Cargill, Inc. v. Mountain Cement Co., 891 P.2d 57 (Wyo. 1995).

Standard of review. — The standard of review applicable to the allocation of peremptory challenges among multiple parties under Rule 47(e), W.R.C.P. is an abuse of discretion standard. Cargill, Inc. v. Mountain Cement Co., 891 P.2d 57 (Wyo. 1995).

Objection to number of peremptory challenges waived. — Where two defendants in a civil action were awarded a total of six peremptory challenges and plaintiffs were awarded four, plaintiffs' objection on appeal was not preserved, as plaintiffs did not complain that plaintiffs were given insufficient peremptory challenges at trial and did not make this point at the time the jury was impaneled or take any action at all to put the trial court on notice of plaintiffs' dissatisfaction. Smyth v. Kaufman, 67 P.3d 1161 (Wyo. 2003).

Cited in Carlson v. BMW Indus. Serv., Inc.,

744 P.2d 1383 (Wyo. 1987).

Law reviews. — For note, "Questioning of Juror on Voir Dire as to Insurance," see 3 Wyo. L.J. 82.

For article, "Wyoming Practice," see 12 Wyo. L.J. 202 (1958).

For case note, "Constitutional Law — The United States Supreme Court on Gender-Based Peremptory Jury Challenges — Constitutionally Correct but Out of Touch With Reality: Litigants Beware! J.E.B. v. Alabama ex rel. T. B., 144 S. Ct. 1419 (1994)," see XXXI Land & Water L. Rev. 195 (1996).

Am. Jur. 2d, ALR and C.J.S. references. — 47 Am. Jur. 2d Jury § 1 et seq.

Religious belief as ground for exemption or excuse from jury service, 2 ALR3d 1392.

Social or business relationship between proposed juror and nonparty witness as affecting former's qualification as juror, 11 ALR3d 859.

Claustrophobia or other neurosis of juror as subject of inquiry on voir dire or of disqualification of jury, 20 ALR3d 1420.

Number of peremptory challenges allowable in civil case where there are more than two parties involved, 32 ALR3d 747.

Effect of juror's false or erroneous answer on voir dire regarding previous claims or actions against himself or his family, 66 ALR4th 509.

Propriety, under state statute or court rule, of substituting state trial juror with alternate after case has been submitted to jury, 88 ALR4th 711.

Propriety of substituting juror in bifurcated state trial after end of first phase and before second phase is given to jury, 89 ALR4th 423.

Prospective juror's connection with insurance company as ground for challenge for cause, 9 ALR5th 102.

Use of peremptory challenges to exclude caucasian persons, as a racial group, from criminal jury — post-Batson state cases, 47 ALR5th 259.

Admissibility, after enactment of Rule 411, Federal Rules of Evidence, of evidence of liability insurance in negligence actions, 40 ALR Fed 541.

Examination and challenge of federal-case jurors on basis of attitudes toward homosexuality, 85 ALR Fed 864.

50A C.J.S. Juries §§ 264 to 308.

Rule 48. Number of jurors; verdict; polling.

(a) *Number of Jurors.* — A jury must begin with at least 6 and no more than 12 members, and each juror must participate in the verdict unless excused under Rule 47(f).

(b) *Verdict.* — Unless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least 6 members.

(c) *Polling. .* — After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity or lack of assent by the number of jurors that the parties stipulated to, the court may direct the jury to deliberate further or may order a new trial.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule, prior to 1992, was similar to Rule 48 of the Federal Rules of Civil Procedure, prior to that rule's 1991 amendment.

Am. Jur. 2d, ALR and C.J.S. references. — 75B Am. Jur. 2d Trial §§ 1753 to 1758.

50A C.J.S. Juries § 267; 89 C.J.S. Trial § 494.

Rule 49. Special verdict; general verdict and questions.

(a) *Special Verdict.* —

(1) *In General.* — The court may require a jury to return only a special verdict in the form of a special written finding on each issue of fact. The court may do so by:

(A) submitting written questions susceptible of a categorical or other brief answer;

(B) submitting written forms of the special findings that might properly be made under the pleadings and evidence; or

(C) using any other method that the court considers appropriate.

(2) *Instructions.* — The court must give the instructions and explanations necessary to enable the jury to make its findings on each submitted issue.

(3) *Issues Not Submitted.* — A party waives the right to a jury trial on any issue of fact raised by the pleadings or evidence but not submitted to the jury unless, before the jury retires, the party demands its submission to the jury. If the party does not demand submission, the court may make a finding on the issue. If the court makes no finding, it is considered to have made a finding consistent with its judgment on the special verdict.

(b) *General Verdict with Answers to Written Questions.* —

(1) *In General.* — The court may submit to the jury forms for a general verdict, together with written questions on one or more issues of fact that the jury must decide. The court must give the instructions and explanations necessary to enable the jury to render a general verdict and answer the questions in writing, and must direct the jury to do both.

(2) *Verdict and Answers Consistent.* — When the general verdict and the answers are consistent, the court must approve, for entry under Rule 58, an appropriate judgment on the verdict and answers.

(3) *Answers Inconsistent with the Verdict.* — When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may:

(A) approve, for entry under Rule 58, an appropriate judgment according to the answers, notwithstanding the general verdict;

(B) direct the jury to further consider its answers and verdict; or

(C) order a new trial.

(4) *Answers Inconsistent with Each Other and the Verdict.* — When the answers are inconsistent with each other and one or more is also inconsistent with the general verdict, judgment must not be entered; instead, the court must direct the jury to further consider its answers and verdict, or must order a new trial.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 49 of the Federal Rules of Civil Procedure.

Cross References. — As to rendition of verdict, see § 1-11-212.

Submission of special interrogatories is discretionary. — The submission or failure to submit special interrogatories is in the sound discretion of the trial court. North Cent. Gas Co. v. Bloem, 376 P.2d 382 (Wyo. 1962); Murphy v. Smith Trailer Sales, Inc., 544 P.2d 1006 (Wyo. 1976); Rissler & McMurry Co. v. Atlantic Richfield Co., 559 P.2d 25 (Wyo. 1977); Tadday v. National Aviation Underwriters, 660 P.2d 1148 (Wyo. 1983); Anderson v. Foothill Indus. Bank, 674 P.2d 232 (Wyo. 1984).

Answers to special questions or interrogatories must be supportable by evidence. — If the form of verdict is equivalent to a special verdict or a general verdict accompanied by interrogatories, the answers to the special questions or interrogatories must be supportable by the evidence. Energy Transp. Sys. v. Mackey, 674 P.2d 744 (Wyo. 1984).

When general verdict and special interrogatory inconsistent. — The trial court does not have to attempt to reconcile a general verdict and an answer to a special interrogatory which is inconsistent, so long as the answers to the special interrogatories are consistent with each other. Tadday v. National Aviation Underwriters, 660 P.2d 1148 (Wyo. 1983).

General verdict includes a finding on every material and necessary fact in issue submitted to the jury. Murphy v. Smith Trailer Sales, Inc., 544 P.2d 1006 (Wyo. 1976); Rissler & McMurry Co. v. ARCO, 559 P.2d 25 (Wyo. 1977).

General verdict form, absent objection, accepted. — The defendants, who did not object to a general verdict form, could not be heard to complain on appeal. Condict v. Whitehead, Zunker, Gage, Davidson & Shotwell, 743 P.2d 880 (Wyo. 1987).

Itemization of damages on verdict form. — Where the damages for past medical expenses were stipulated to be $ 5,997, and the district court wanted to insure that the jury would not award any amount beyond that figure, and where the trial court was in doubt as to whether plaintiff had adequately established future medical expenses, there was no abuse of discretion by the trial court in refusing to require itemization of general damages or other special damages on the verdict form. Turcq v. Shanahan, 950 P.2d 47 (Wyo. 1997).

Rule's requirements not nullified by "harmless error". — The "harmless error" rule of Rule 61 cannot be interpreted to nullify the specific requirements and provisions of the other rules, including Rule 51, requiring the necessity for an objection to the failure to give or to the giving of an instruction, and including

subdivision (a) of this rule, requiring a demand to include the submission of a desired issue of fact in a special verdict to prevent the waiver of its consideration by the jury. Davis v. Consolidated Oil & Gas, Inc., 802 P.2d 840 (Wyo. 1990).

Waiver of statute of frauds defense— In a case for termination of an alleged employment agreement that was formed through an oral agreement, the employer waived an appeal on the issue of whether or not their assertion of a statute of frauds defense was negated by the employee's substantial performance when the employer had an opportunity to submit the matter to the jury as part of a special verdict interrogatory but did not do so. WERCS v. Capshaw, 94 P.3d 421 (Wyo. 2004).

Applied in Belle Fourche Pipeline Co. v. Elmore Livestock Co., 669 P.2d 505 (Wyo. 1983).

Cited in O'Brien v. GMAC, 362 P.2d 455 (Wyo. 1961); State Farm Mut. Auto. Ins. Co. v. Shrader, 882 P.2d 813 (Wyo. 1994); Pauley v. Newman, 92 P.3d 819 (Wyo. 2004).

Law reviews. — For article, "Wyoming Practice," see 12 Wyo. L.J. 202 (1958).

For note, "Special Verdicts and Interrogatories to Jury," see 12 Wyo. L.J. 280 (1958).

For article, "Comparative Negligence Problems with the Special Verdict: Informing the Jury of the Legal Effects of Their Answers," see X Land & Water L. Rev. 199 (1975).

Am. Jur. 2d, ALR and C.J.S. references. — 75B Am. Jur. 2d Trial §§ 1835 to 1858.

Submission of special interrogatories in connection with general verdict under Federal Rule 49(b), and state counterparts, 6 ALR3d 438.

Quotient verdicts, 8 ALR3d 335.

Curing error of jury in attempting to apportion damages as between joint tort-feasor by remittitur and all but one defendant, 46 ALR3d 801.

Validity of verdict or verdicts by same jury in personal injury action awarding damages to injured spouse but denying recovery to other spouse seeking collateral damages, or vice versa, 66 ALR3d 472.

89 C.J.S. Trial §§ 526 to 573.

Rule 50. Judgment as a matter of law in jury trials; alternative motion for new trial; conditional rulings.

(a) *Judgment as a matter of law.* —

(1) *In General.* — If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) Resolve the issue against a party; and

(B) Grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) *Motion.* — A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) *Renewing the motion after trial; alternative motion for a new trial.* — If the court does not grant a motion for judgment as a matter of law made under subdivision (a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 28 days after the entry of judgment or, if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged. The movant may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) If a verdict was returned:

(A) Allow the judgment to stand,

(B) Order a new trial, or

(C) Direct entry of judgment as a matter of law; or

(2) If no verdict was returned:

(A) Order a new trial, or

(B) Direct entry of judgment as a matter of law.

(c) *Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; Motion for a New Trial.* —

(1) *In General.* — If the court grants a renewed motion for judgment as a matter of law, the court shall also conditionally rule on the motion for a new trial, if any,

by determining whether a new trial should be granted if the judgment is thereafter vacated or reversed. The court shall specify the grounds for conditionally granting or denying the motion for the new trial.

(2) *Effect of Conditional Ruling.* — If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(d) *Time for a Losing Party's New Trial Motion.* — Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered shall be filed no later than 28 days after entry of the judgment.

(e) *Denial of Motion for Judgment as a Matter of Law.* — If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 50 of the Federal Rules of Civil Procedure, prior to the 1991 amendment of the federal rule.

Cross References. — As to prohibition against extension of time for filing motion for judgment notwithstanding the verdict, see Rule 6(b).

Editor's notes. — *The annotations below referring to the former terms "motion for directed verdict" and "motion for judgment notwithstanding the verdict" retain their applicability with respect to motions for judgment as a matter of law and renewed motions for judgment as a matter of law.*

I. GENERAL CONSIDERATION.

Purpose of this rule, which is identical to the federal rule, is to provide a device to judicial control so that the trial court may enforce rules of law. Carey v. Jackson, 603 P.2d 868 (Wyo. 1979); Vassos v. Roussalis, 658 P.2d 1284 (Wyo. 1983).

The purpose of subdivision (a)(1) of this rule is to permit the trial court to take from the consideration of the jury, cases in which the facts are sufficiently clear to lead to a particular result under the law. Hatch v. State Farm Fire & Cas. Co., 930 P.2d 382 (Wyo. 1996).

Case removed from jury under this rule. — This rule allows the trial court to take away from the consideration of the jury cases in which the facts are sufficiently clear that the law requires a particular result. Carey v. Jackson, 603 P.2d 868 (Wyo. 1979).

Slight factual doubt insufficient to avert motion. — When both parties have had an opportunity to adduce all relevant, available evidence so that the trial court is no longer uncertain as to the circumstances of the case, then slight doubt as to the facts is insufficient to avert a directed verdict or a judgment notwithstanding the verdict. Carey v. Jackson, 603 P.2d 868 (Wyo. 1979).

Standard of review on appeal. — When reviewing a trial judge's denial of motions for a directed verdict and for a judgment notwithstanding the verdict, the Supreme Court presumes that all the evidence of the prevailing party is true and leaves out of consideration all the opposing party's conflicting evidence while inferring from the prevailing party's evidence those conclusions which may reasonably and fairly be drawn. Caterpillar Tractor Co. v. Donahue, 674 P.2d 1276 (Wyo. 1983).

New trial granted when directed verdict improperly denied, but no judgment n.o.v. motion. — When a party filed a motion for a directed verdict, which was improperly denied, but did not move for judgment n.o.v., the appellate court could not reverse the case and dismiss the party, even though there was a deficiency in proof. The court did, however, reverse the case and remand for a new trial. B-T Ltd. v. Blakeman, 705 P.2d 307 (Wyo. 1985).

Motion for judgment as a matter of law and directed verdict compared. — A motion for judgment as a matter of law under Rule 50,

W.R.C.P., as amended in 1992, is procedurally identical to a motion for directed verdict under the former Rule 50, W.R.C.P., and the standard of review is identical. Cargill, Inc. v. Mountain Cement Co., 891 P.2d 57 (Wyo. 1995).

Motion to reconsider a nullity. — Because the Wyoming Rules of Civil Procedure do not recognize a "motion to reconsider," trial court order purportedly denying the motion was void and the court lacked jurisdiction under W.R.A.P. 1.04(a) and 1.05. The filing by aggrieved parties of a motion that is properly designated under the rule authorizing the motion, such as W.R.C.P. 50, 52, 59, or 60 will ensure full appellate rights are preserved. Plymale v. Donnelly, 125 P.3d 1022 (Wyo. 2006).

Collateral estoppel. — Where appellants' predecessors in interest had answered a complaint, conducted discovery, and submitted pretrial memoranda, the fact that a directed verdict was entered against the predecessors did not mean that they had not been presented with the opportunity to litigate; thus, the trial court properly determined that appellants' challenge to the easement was precluded by collateral estoppel. Pokorny v. Salas, 81 P.3d 171 (Wyo. 2003).

Applied in Sun Land & Cattle Co. v. Brown, 387 P.2d 1004 (Wyo. 1964); Sinclair Ref. Co. v. Redding, 439 P.2d 20 (Wyo. 1968); Hursh Agency, Inc. v. Wigwam Homes, Inc., 664 P.2d 27 (Wyo. 1983); Williams v. Collins Communications, Inc., 720 P.2d 880 (Wyo. 1986); Dellapenta v. Dellapenta, 838 P.2d 1153 (Wyo. 1992); Jurkovich v. Tomlinson, 905 P.2d 409 (Wyo. 1995); Sundown, Inc. v. Pearson Real Estate Co., 8 P.3d 324 (Wyo. 2000); Wyoming Med. Ctr., Inc. v. Murray, 27 P.3d 266 (Wyo. 2001).

Quoted in Sayer v. Williams, 962 P.2d 165 (Wyo. 1998).

Cited in Stundon v. Stadnik, 469 P.2d 16 (Wyo. 1970); Colton v. Brann, 786 P.2d 880 (Wyo. 1990); Miller v. Murdock, 788 P.2d 614 (Wyo. 1990); Martinez v. City of Cheyenne, 791 P.2d 949 (Wyo. 1990); JBC of Wyo. Corp. v. City of Cheyenne, 843 P.2d 1190 (Wyo. 1992); Garaman, Inc. v. Williams, 912 P.2d 1121 (Wyo. 1996); TL v. CS, 975 P.2d 1065 (Wyo. 1999); Gore v. Sherard, 50 P.3d 705 (Wyo. 2002).

Law reviews. — For note, "Evidence Court Considers on Motion to Direct Verdict," see 10 Wyo. L.J. 164.

For article, "Wyoming Practice," see 12 Wyo. L.J. 202 (1958).

For note, "Motion for Judgment Notwithstanding the Verdict and for New Trial," see 12 Wyo. L.J. 284 (1958).

For article, "Basic Appellate Practice: A Guide to Perfecting an Appeal in Wyoming," see XX Land & Water L. Rev. 537 (1985).

See article, "The 1994 Amendments to the Wyoming Rules of Civil Procedure," XXX Land & Water L. Rev. 151 (1995).

Am. Jur. 2d, ALR and C.J.S. references. — 46 Am. Jur. 2d Judgments §§ 322 to 359; 75A Am. Jur. 2d Trial §§ 842 to 1076.

Dismissal, nonsuit, judgment or direction of verdict on opening statement of counsel in civil action, 5 ALR3d 1405.

Propriety and prejudicial effect of counsel's argument or comment as to trial judge's refusal to direct verdict against him, 10 ALR3d 1330.

Direction of verdict in action involving duty and liability of vehicle driver blinded by glare of lights, 64 ALR3d 551.

Direction of verdict in action against landlord for personal injury or death due to defective inside steps or stairways for use of several tenants, 67 ALR3d 587.

Propriety of direction of verdict in favor of fewer than all defendants at close of plaintiff's case, 82 ALR3d 974.

Validity of verdict awarding medical expenses to personal injury plaintiff, but failing to award damages for pain and suffering, 55 ALR4th 186.

What standards govern appellate review of trial court's conditional ruling, pursuant to Rule 50(c)(1) of Federal Rules of Civil Procedure on party's motion for new trial, 52 ALR Fed 494.

49 C.J.S. Judgments §§ 62 to 72; 88 C.J.S. Trial §§ 249 to 265.

II. MOTION FOR JUDGMENT AS A MATTER OF LAW.

Motion for directed verdict should be cautiously and sparingly granted. Carey v. Jackson, 603 P.2d 868 (Wyo. 1979); Vassos v. Roussalis, 658 P.2d 1284 (Wyo. 1983).

Since judgment as a matter of law deprives the opposing party of an opportunity to have the jury determine the facts, a court should use caution in granting such a judgment. Anderson v. Duncan, 968 P.2d 440 (Wyo. 1998).

When proper. — It is proper to direct a verdict for the plaintiff in those rare cases where there are no genuine issues of fact to be submitted to a jury. A directed verdict for the plaintiff is proper when there is no dispute as to a material fact, and when reasonable jurors cannot draw any other inferences from the facts than that propounded by the plaintiff. Cody v. Atkins, 658 P.2d 59 (Wyo. 1983).

Subdivision (a)(1) of this rule allows a court to grant a motion for a judgment as a matter of law if the evidence presented at trial is legally insufficient; thus, when the case is allowed to go to the jury and the jury renders a verdict which is not supported by legally sufficient evidence, the trial court has an obligation to direct the entry of judgment as a matter of law, and this obligation must be fulfilled despite the fact that judgment as a matter of law should be granted cautiously and sparingly. Harvey v. First Nat'l Bank, 924 P.2d 83 (Wyo. 1996).

Judgment as a matter of law, pursuant to subdivision (a)(1), was properly granted following a jury verdict awarding damages for breach

of contract for failure to provide full amount of hay, as agreed; although breach was shown, there was insufficient evidence presented for a fact finder to reasonably quantify the amount of damages. Dewey v. Wentland, 38 P.3d 402 (Wyo. 2002).

Trial court did not err in granting judgment as a matter of law to tax a preparer after the jury awarded the taxpayer $2500 in IRS penalties and interest where the amount in question had been retained by the IRS not as a penalty or interest but because the taxpayer was time barred from reclaiming it. Worman v. Carver, 87 P.3d 1246 (Wyo. 2004).

Evidence must lead to one conclusion. — The test to be applied when determining the question of the sufficiency of the evidence on a motion for a directed verdict is whether the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable men could have reached. Barnes v. Fernandez, 526 P.2d 983 (Wyo. 1974); Abeyta v. Hensley, 595 P.2d 71 (Wyo. 1979).

In considering a motion for directed verdict, the court must view the evidence in a light most favorable to the party against whom the motion is directed, and if the evidence and the inferences drawn therefrom would cause reasonable and fair-minded persons to form different conclusions of the facts in issue the motion should not be granted. Ramirez v. Metropolitan Life Ins. Co., 580 P.2d 1136 (Wyo. 1978).

And evidence taken in light favorable to party opposing motion. — In reviewing the granting of a directed verdict, consideration will be given to all evidence favorable to the party against whom the motion is directed, together with reasonable and legitimate inference which might be drawn from such evidence; but no inference can be based upon mere surmise, guess, speculation, or probability. Brennan v. Laramie Newspapers, Inc., 493 P.2d 1044 (Wyo. 1972); Ramirez v. Metropolitan Life Ins. Co., 580 P.2d 1136 (Wyo. 1978).

In determining the question of whether a verdict should have been directed, the Supreme Court upon review must consider the evidence favorable to the party against whom the motion is directed, giving to it all reasonable inferences. Barnes v. Fernandez, 526 P.2d 983 (Wyo. 1974); Holstedt v. Neighbors, 377 P.2d 181 (Wyo. 1962); Abeyta v. Hensley, 595 P.2d 71 (Wyo. 1979).

As sufficiency of evidence on motion deemed question of law. — Whether evidence is sufficient to create an issue of fact for the jury on motion for directed verdict is solely a question of law to be determined by the court, and upon appeal the reviewing court gives no deference to the view of the trial court. Barnes v. Fernandez, 526 P.2d 983 (Wyo. 1974); Ramirez v. Metropolitan Life Ins. Co., 580 P.2d 1136 (Wyo. 1978); Abeyta v. Hensley, 595 P.2d 71 (Wyo. 1979).

Scintilla of evidence is not enough to avoid grant of motion for directed verdict and the question is not whether there is no evidence supporting the party at whom the motion is directed, but rather whether there is evidence upon which the jury could properly find a verdict for that party. Carey v. Jackson, 603 P.2d 868 (Wyo. 1979).

Test of sufficiency of evidence. — The test to be applied when determining the question of sufficiency of the evidence on a motion for directed verdict is whether the evidence is such that, without weighing the credibility of the witnesses, or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable men could have reached. Carey v. Jackson, 603 P.2d 868 (Wyo. 1979).

Motion for directed verdict properly granted. — See Anderson v. Foothill Indus. Bank, 674 P.2d 232 (Wyo. 1984).

Trial court in negligence action did not err in granting judgment as a matter of law in favor of defendant homeowners, where record was devoid of evidence on what actually caused plaintiff to fall; although plaintiff suggested that lack of light and crab apples on sidewalk were potential causes of her fall, she did not present concrete evidence to establish that either condition was a substantial factor in bringing about her fall, and therefore the causation element of negligence could not be established. Anderson v. Duncan, 968 P.2d 440 (Wyo. 1998).

District court properly granted plaintiff condemnor's motion taking the case from the jury due to the failure of defendant condemnees to provide competent evidence on the value of the taking and for failure of proof for other damages. Conner v. Bd. of County Comm'rs, 54 P.3d 1274 (Wyo. 2002).

Compliance. — Where the record shows the motion for a directed verdict to have been made in the following language: "Plaintiff moves for a directed verdict, directed on the pleadings, on the grounds and for the reason that there is no issue presented here that has not been resolved," there is a compliance by plaintiff with this rule. Brown v. Sievers, 410 P.2d 574 (Wyo. 1966).

Directed verdict given full review. — Whether a verdict should be directed is a question of law and on those questions litigants are entitled to full review by the appellate court without special deference to the views of the trial court. Carey v. Jackson, 603 P.2d 868 (Wyo. 1979); Vassos v. Roussalis, 658 P.2d 1284 (Wyo. 1983).

Evidence sufficient to support verdict. — Trial court did not err in failing to grant a father's motion for judgment as a matter of law pursuant to Wyo. R. Civ. P. 50(a) in a termination of parental rights proceeding because the State of Wyoming, Department of Family Ser-

vices presented sufficient clear and convincing evidence to support the jury's verdict. KMO v. State, 280 P.3d 1216 (Wyo. 2012).

Standard on review. — In determining whether a verdict should have been directed, the appellate court applies the same standard as does the trial court in passing on the motion originally. Carey v. Jackson, 603 P.2d 868 (Wyo. 1979).

Generally, a motion for directed verdict is reviewed by determining whether the jury reached the one conclusion reasonable jurors could have reached under the circumstances. Del Rossi v. Doenz, 912 P.2d 1116 (Wyo. 1996).

The decision to grant or deny a motion for a judgment as a matter of law is reviewed de novo. Harvey v. First Nat'l Bank, 924 P.2d 83 (Wyo. 1996).

Upon review of the judgment as a matter of law, formerly directed verdict, appeals courts consider the evidence favorable to the party against whom the motion was directed, affording it all favorable inferences. Hatch v. State Farm Fire & Cas. Co., 930 P.2d 382 (Wyo. 1996).

Court reviewing a judgment as a matter of law will evaluate the record without affording deference to the trial court's views, will not weigh evidence or assess credibility of witnesses, and will regard the nonmoving party's evidence as being true and give that party the benefit of all reasonable inferences that may be drawn from the evidence. Anderson v. Duncan, 968 P.2d 440 (Wyo. 1998).

III. RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW.

Rendition of verdict is an essential prerequisite to filing of motion under subdivision (b). Chopping v. First Nat'l Bank, 419 P.2d 710 (Wyo. 1966), cert. denied, 387 U.S. 935, 87 S. Ct. 2061, 18 L. Ed. 2d 998 (1967).

Subdivision (b) does nothing more than place a limitation upon the time an unsuccessful litigant may attack a verdict by post-judgment motion. Chopping v. First Nat'l Bank, 419 P.2d 710 (Wyo. 1966), cert. denied, 387 U.S. 935, 87 S. Ct. 2061, 18 L. Ed. 2d 998 (1967).

Distinction between Wyoming and federal practice. — Although subdivision (b) of this rule is patterned after Rule 50(b) of the Federal Rules of Civil Procedure, certain changes have been made. Under federal practice (prior to 1987) the motion had to be filed "Within 10 days after the reception of a verdict." Under Wyoming practice the motion is to be filed "not later than 10 days after entry of judgment." The principal purpose of the change was to extend the time and to meet the contingency, often occurring, of delay in the preparation and entry of the judgment. Chopping v. First Nat'l Bank, 419 P.2d 710 (Wyo. 1966), cert. denied, 387 U.S. 935, 87 S. Ct. 2061, 18 L. Ed. 2d 998 (1967).

As to what constitutes "continuance" within this rule, see Blake v. Rupe, 651 P.2d 1096 (Wyo. 1982), cert. denied, 459 U.S. 1208, 103 S. Ct. 1199, 75 L. Ed. 2d 442 (1983).

When proper. — This rule allows a court to grant a motion for a judgment as a matter of law if the evidence presented at trial is legally insufficient; thus, when the case is allowed to go to the jury and the jury renders a verdict which is not supported by legally sufficient evidence, the trial court has an obligation to direct the entry of judgment as a matter of law, and this obligation must be fulfilled despite the fact that judgment as a matter of law should be granted cautiously and sparingly. Harvey v. First Nat'l Bank, 924 P.2d 83 (Wyo. 1996).

Test for granting a judgment n.o.v. — is virtually the same as that employed in determining whether a motion for directed verdict should be granted or denied. The logic behind similar standards of review is that it allows the district court another opportunity to determine the legal question of sufficiency of the evidence raised by the motion after the jury has reached a verdict and it promotes judicial economy. Cody v. Atkins, 658 P.2d 59 (Wyo. 1983).

In determining whether a motion for judgment notwithstanding the verdict is proper, the test to be applied is whether the evidence is such that without weighing the credibility of the witnesses, or otherwise considering the weight of the evidence, there can be but one conclusion reasonable persons could have reached. Erickson v. Magill, 713 P.2d 1182 (Wyo. 1986).

Evidence considered in light advantageous to verdict holder. — In determining whether to render a judgment notwithstanding the verdict the trial court is not justified in trespassing upon the province of the jury to be the judge of questions of fact in a case, and the party favored by the verdict is entitled to have the testimony read in the light most advantageous to him, being given the benefit of every inference of fact fairly deducible therefrom. Cimoli v. Greyhound Corp., 372 P.2d 170 (Wyo. 1962).

And absence of substantial evidence sole ground for judgment notwithstanding verdict. — The court has power to enter judgment notwithstanding the verdict only for one reason — the absence of any substantial evidence to support the verdict. Cimoli v. Greyhound Corp., 372 P.2d 170 (Wyo. 1962).

If substantial evidence of fraud was presented to the jury, and if the jury had reason to believe such fraud caused the defendant to part with the check, then the jury's verdict ought to be reinstated. If there was no substantial evidence of fraud by the bank which caused the drawee to part with his check, then the judgment notwithstanding, the verdict ought to be affirmed. Simpson v. Western Nat'l Bank, 497 P.2d 878 (Wyo. 1972).

Motion partially granted and partially denied. — See Mayflower Restaurant Co. v.

Griego, 741 P.2d 1106 (Wyo. 1987).

Motion is not condition precedent to appeal. — A motion for judgment notwithstanding the verdict is not a condition precedent to an appeal from a final judgment. Belle Fourche Pipeline Co. v. Elmore Livestock Co., 669 P.2d 505 (Wyo. 1983).

Joining motions for judgment notwithstanding verdict and new trial does not extend time for appeal. — The fact that the motion for judgment notwithstanding the verdict was joined with a motion for new trial could not in the proper administration of justice be allowed to effect an extension of time for appeal. This was not the Supreme Court's intention at the time the rules were adopted, and any such interpretation of the rules would permit an appellant by the addition of a motion for judgment notwithstanding the verdict to effect a delay. Brasel & Sims Constr. Co. v. Neuman Transit Co., 378 P.2d 501 (Wyo. 1963).

Section 1-11-211, insofar as it conflicts with subdivision (b) of this rule, gives way to the rule. In re Estate of Draper, 374 P.2d 425 (Wyo. 1962).

Rule 51. Instructions to the jury; objections; preserving a claim of error.

(a) *Requests.* —

(1) *Before or at the Close of the Evidence.* — At the close of the evidence or at any earlier reasonable time that the court orders, a party may file and furnish to every other party written request for the jury instructions it wants the court to give.

(2) *After the Close of the Evidence.* — After the close of the evidence, a party may:

(A) file requests for instructions on issues that could not reasonably have been anticipated by an earlier time that the court set for requests; and

(B) with the court's permission, file untimely requests for instructions on any issue.

(b) *Instructions.* — The court:

(1) must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments;

(2) must give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered; and

(3) may instruct the jury at any time before the jury is discharged.

(c) *Objections.* —

(1) *How to Make.* — A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection.

(2) *When to Make.* — An objection is timely if:

(A) a party objects at the opportunity provided under Rule 51(b)(2); or

(B) a party was not informed of an instruction or action on a request before that opportunity to object, and the party objects promptly after learning that the instruction or request will be, or has been, given or refused.

(d) *Record.* — The instructions to the jury, exclusive of rulings which are recorded by the court for inclusion in any record, shall be reduced to writing, numbered and delivered to the jury and shall be part of the record in the case.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule, prior to 1984, was similar to Rule 51 of the Federal Rules of Civil Procedure, and states the substance of § 1-11-205(a)(v) and (vi).

Cross References. — As to grounds of challenges for cause, see § 1-11-203. As for format of instructions, see Rule 403, D. Ct.

I. GENERAL CONSIDERATION.
II. INSTRUCTIONS.
III. OBJECTIONS.

I. GENERAL CONSIDERATION.

Applied in Logan v. Pacific Intermountain Express Co., 400 P.2d 488 (Wyo. 1965); Blakely v. State, 474 P.2d 127 (Wyo. 1970); Hurst v. State, 519 P.2d 971 (Wyo. 1974); Dorador v. State, 573 P.2d 839 (Wyo. 1978); Harries v. State, 650 P.2d 273 (Wyo. 1982); Tadday v. National Aviation Underwriters, 660 P.2d 1148 (Wyo. 1983); Cates v. Eddy, 669 P.2d 912 (Wyo. 1983); Story v. State, 721 P.2d 1020 (Wyo. 1986); Hashimoto v. Marathon Pipe Line Co.,

767 P.2d 158 (Wyo. 1989); Haderlie v. Sondgeroth, 866 P.2d 703 (Wyo. 1993); Alpine Climate Control, Inc. v. DJ'S, Inc., 78 P.3d 685 (Wyo. 2003); Parrish v. Groathouse Constr., Inc., 130 P.3d 502 (Wyo. 2006).

Quoted in Downs v. State, 581 P.2d 610 (Wyo. 1978); Eckert v. State, 680 P.2d 478 (Wyo. 1984); Naugher v. State, 685 P.2d 37 (Wyo. 1984); MacLaird v. State, 718 P.2d 41 (Wyo. 1986); Britt v. State, 752 P.2d 426 (Wyo. 1988); TG v. Department of Pub. Assistance & Social Servs., 783 P.2d 155 (Wyo. 1989); Carlson v. Carlson, 888 P.2d 210 (Wyo. 1995).

Stated in Sodergren v. State, 715 P.2d 170 (Wyo. 1986).

Cited in Drummer v. State, 366 P.2d 20 (Wyo. 1961); Mullin v. State, 505 P.2d 305 (Wyo. 1973); Dorador v. State, 768 P.2d 1049 (Wyo. 1989); Smith v. State, 773 P.2d 139 (Wyo. 1989); Seeley v. State, 959 P.2d 170 (Wyo. 1998); Pauley v. Newman, 92 P.3d 819 (Wyo. 2004).

Law reviews. — For article, "Wyoming Practice," see 12 Wyo. L.J. 202 (1958).

Am. Jur. 2d, ALR and C.J.S. references. — 75A Am. Jur. 2d Trial §§ 1077 to 1227.

Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written, 10 ALR3d 501.

Sufficiency of evidence, in personal injury action, to prove future pain and suffering and to warrant instructions to jury thereon, 18 ALR3d 10.

Sufficiency of evidence, in personal injury action, to prove impairment of earning capacity and to warrant instructions to jury thereon, 18 ALR3d 88.

Sufficiency of evidence, in personal injury action, to prove permanence of injuries and to warrant instructions to jury thereon, 18 ALR3d 170.

Propriety and effect of instruction to the jury as to landowner's unwillingness to sell property in eminent domain proceedings, 20 ALR3d 1081.

Mental or emotional condition as diminishing responsibility for crime, 22 ALR3d 1228.

Admissibility and probative value of admissions of fault by agent on issue of principal's secondary liability, where both are sued, 27 ALR3d 966.

Verdict-urging instructions in civil case stressing desirability and importance of agreement, 38 ALR3d 1281.

Verdict-urging instructions in civil case commenting on weight of majority view or authorizing compromise, 41 ALR3d 845.

Verdict-urging instructions in civil case admonishing jurors to refrain from intransigence or reflecting on integrity or intelligence of jurors, 41 ALR3d 1154.

Construction of statutes or rules making mandatory the use of pattern or uniform approved jury instructions, 49 ALR3d 128.

Necessity and propriety of instructing on alternative theories of negligence or breach of warranty, where instruction on strict liability in tort is given in products liability case, 52 ALR3d 101.

Instructions as to duty to dim motor vehicle lights, 63 ALR3d 824.

Counsel's appeal in civil case to self-interest or prejudice of jurors as taxpayers, as ground for mistrial, new trial or reversal, 93 ALR3d 556.

Instructions in action against drugless practitioner or healer for malpractice, 73 ALR4th 24; 77 ALR4th 273.

Instructions on "unavoidable accident," "mere accident," or the like, in motor vehicle cases—modern cases, 21 ALR5th 82.

Prejudicial effect, in civil case, of communications between judges and jurors, 33 ALR5th 205.

Federal Rules of Civil Procedure, construction and effect of provision in Rule 51, and similar state rules, that counsel be given opportunity to make objections to instructions out of hearing of jury, 1 ALR Fed 310.

When will federal court of appeals review issue raised by party for first time on appeal where legal developments after trial affect issue, 76 ALR Fed 522.

88 C.J.S. Trial §§ 266 to 448.

II. INSTRUCTIONS.

Spirit and purpose of this rule is to inform the trial judge of possible errors so he may have an opportunity to correct them. Haley v. Dreesen, 532 P.2d 399 (Wyo. 1975); ABC Bldrs., Inc. v. Phillips, 632 P.2d 925 (Wyo. 1981).

Policy of these rules is designed to apprise and inform the trial court of the purpose of the instruction and the legal reason it is offered to allow for correction before submission to the jury. Schwager v. State, 589 P.2d 1303 (Wyo. 1979); Alberts v. State, 642 P.2d 447 (Wyo. 1982).

And allow corrections to be made. — The object of this rule is to offer the trial judge an opportunity upon second thought to correct an erroneous charge or failure to instruct. Bentley v. State, 502 P.2d 203 (Wyo. 1972).

This rule was intended to insure that the trial judge was informed of the nature and grounds of the objection offered so as to more properly rule upon the same. Oeland v. Neuman Transit Co., 367 P.2d 967 (Wyo. 1962).

The reason for this rule and for the enforcement of it is that, in all fairness to the trial judge, counsel should point out with definiteness and particularity wherein the instruction is in error. Edwards v. Harris, 397 P.2d 87 (Wyo. 1964).

The purpose of this rule is to aid the trial court in the giving of proper instructions by pointing out with specificity wherein a proposed instruction is erroneous. Herberling v. State, 507 P.2d 1 (Wyo.), cert. denied, 414 U.S. 1022, 94 S. Ct. 444, 38 L. Ed. 2d 313 (1973).

This rule is made applicable to criminal proceedings by Rule 30, W.R. Cr. P. Bentley v. State, 502 P.2d 203 (Wyo. 1972); Hoskins v. State, 552 P.2d 342 (Wyo. 1976), cert. denied, 430 U.S. 956, 97 S. Ct. 1602, 51 L. Ed. 2d 806 (1977); Gore v. State, 627 P.2d 1384 (Wyo. 1981); Scheikofsky v. State, 636 P.2d 1107 (Wyo. 1981).

Communications between judge and jury. — The status of communications between judge and jury that do not involve instructions on the law can be characterized as administrative directives, and the harmless error doctrine applies to such communications. Carlson v. Carlson, 888 P.2d 210 (Wyo. 1995).

Where jurors sent the trial court a note asking, "If we cannot find solid proof of trespass, can we award damages?" and it answered "No" without the parties' counsel being present, plaintiffs were not entitled to new trial because (1) answering the question with a definitive "No" left no room for further confusion or undue emphasis on any particular instructions, (2) the jurors had been properly instructed on the burden of proof, and (3) the question did not indicate that the jury was confused about what "preponderance of the evidence" meant. Beck v. Townsend, 116 P.3d 465 (Wyo. 2005).

For application in a criminal case, see Shoemaker v. State, 444 P.2d 309 (Wyo. 1968).

Comprehension of jury required. — The jury must be informed of the essential law of the case in language it can understand and comprehend. Horn v. State, 554 P.2d 1141 (Wyo. 1976).

More than mere recitation of statutory elements required. — The mere delineation of the bare bones elements as set out in a statute is not all that is required for adequate instructions to the jury where operative terms remain to be defined. Simmons v. State, 674 P.2d 1294 (Wyo. 1984).

But no reversible error for erroneous instructions placing greater burden on state. — Erroneous instructions concerning specific intent and assault which gave defendant more than he was entitled to and placed a greater burden on the state did not constitute reversible error upon the defendant's appeal of conviction. Simmons v. State, 674 P.2d 1294 (Wyo. 1984).

Instruction given where supporting evidence exists. — Instructions given pursuant to Rule 30, W.R. Cr. P. and this rule, advancing the theory of defense, should only be given where some evidence in the record exists to support the theory. Blair v. State, 735 P.2d 440 (Wyo. 1987).

Court may properly refuse instructions which are argumentative or which unduly emphasize one aspect of a case. Evans v. State, 655 P.2d 1214 (Wyo. 1982).

Instruction substantially covered by another instruction. — It is not error to reject proffered instruction which has been substantially covered by another instruction. Dobbins v. State, 483 P.2d 255 (Wyo. 1971).

Failure to instruct. — Failure to instruct cannot be found to be reversible error unless it be "fundamental error." Mewes v. State, 517 P.2d 487 (Wyo. 1973).

In absence of request for instruction, claim of error is not preserved. Moore v. State, 542 P.2d 109 (Wyo. 1975).

Unless plain error present. — The Supreme Court cannot consider failure to give an instruction, never offered or otherwise covered by appropriate objection, unless within the plain-error doctrine. Cullin v. State, 565 P.2d 445 (Wyo. 1977), commented on in XIII Land & Water L. Rev. 613 (1978).

Refusal to instruct held not error. — Where jury instruction in products liability case, which if given would have submitted to the jury two different tests of duty, which surely would have been confusing, there was no error in the refusal to give such instruction. Maxted v. Pacific Car & Foundry Co., 527 P.2d 832 (Wyo. 1974).

Failure to instruct on search and seizure not error. — The Supreme Court will not consider appellant's assertion of error for failure to give an instruction to the jury upon the law of search and seizure where the sole authority cited for such proposition is the general statement in Rule 30, W.R. Cr. P., and this rule making it the duty of the court to instruct the jury on the law of the case. Storms v. State, 590 P.2d 1321 (Wyo. 1979).

Failure to instruct on burden of proof deemed error. — Failure to give instructions on burden of proof and preponderance of evidence in condemnation cases, where the landowners have that burden of proof, is error. Energy Transp. Sys. v. Mackey, 650 P.2d 1152 (Wyo. 1982).

Questions as to credibility of witnesses may be left to general instructions without reference to any particular witness. Dobbins v. State, 483 P.2d 255 (Wyo. 1971).

Desired instructions must be submitted in writing. — Even though counsel was informed by the court that no further instructions would be given, if plaintiffs wished to later predicate a charge of error thereon, it was nevertheless necessary that they submit in writing desired instructions. The absence of such written instructions in the record with delineation which would make them meaningful render it impossible for a reviewing court to intelligently determine whether reversible error occurred. Langdon v. Baldwin-Lima-Hamilton Corp., 494 P.2d 537 (Wyo. 1972).

Any claimed error in jury instruction was waived, where counsel for plaintiffs failed to provide court with alternative written instruction, as had been promised. Sunderman v. State Farm Fire & Cas. Co., 978 P.2d 1167 (Wyo. 1999).

Except instructions given by court fol-

lowing jury report that it is deadlocked. — There is no requirement that instructions given by the court, following a report by the jury that it is in disagreement, be reduced to writing and sent to the jury room. Such instructions given, however, must appear in the record. Hoskins v. State, 552 P.2d 342 (Wyo. 1976), cert. denied, 430 U.S. 956, 97 S. Ct. 1602, 51 L. Ed. 2d 806 (1977).

Purpose of written instructions. — The main purpose in reducing instructions to writing is to give the defendant the exact language of the court in order that he may appropriately object and avail himself of any error but failure to do so may not be made a weapon of error. Hoskins v. State, 552 P.2d 342 (Wyo. 1976), cert. denied, 430 U.S. 956, 97 S. Ct. 1602, 51 L. Ed. 2d 806 (1977).

The purpose of reducing an oral instruction to writing is to give a party the exact language so that he may appropriately object, but failure to do so may not always be made a weapon of error, as a corrective instruction may cure whatever error occurs. Hursh Agency, Inc. v. Wigwam Homes, Inc., 664 P.2d 27 (Wyo. 1983).

Written instruction requirement does not change § 7-11-201. — This rule requires the instruction to be in writing and signed by the judge but does not otherwise change, supersede or modify the provisions of § 7-11-201. Shoemaker v. State, 444 P.2d 309 (Wyo. 1968).

When giving of oral instructions not reversible error. — The giving of oral instructions, even if contrary to a rule or statute, is not reversible error if the instructions are proper and do not injure the accused, especially where taken down by the court reporter or reduced to writing for the record after they are given. Hoskins v. State, 552 P.2d 342 (Wyo. 1976), cert. denied, 430 U.S. 956, 97 S. Ct. 1602, 51 L. Ed. 2d 806 (1977).

Instruction on main defense of defendant is mandated when instruction thereon has been offered. Benson v. State, 571 P.2d 595 (Wyo. 1977).

It is not error to fail to instruct on the main theory of the defense where an instruction on such theory has not been offered by the defendant. Benson v. State, 571 P.2d 595 (Wyo. 1977).

Instruction to disregard defendant's failure to testify. — There is no clear rule of law which states that the giving of a jury instruction to disregard and draw no inference from a defendant's failure to testify is error. Quite to the contrary, there is substantial authority for the proposition that even if unrequested, the giving of such a cautionary instruction is proper. Daellenbach v. State, 562 P.2d 679 (Wyo. 1977).

Instruction that arguments and remarks of counsel are not evidence was proper to cure any error alleged in state's opening remarks. Boyd v. State, 528 P.2d 287 (Wyo. 1974), cert. denied, 423 U.S. 871, 96 S. Ct. 137, 46 L. Ed. 2d 102 (1975).

Instructions defining reasonable doubt are unnecessary and should not be given. Cosco v. State, 521 P.2d 1345 (Wyo. 1974).

Reading charging part of information to jury by way of instruction is not improper, but a defendant is entitled to an instruction that this is only a formal charge, if he requests. Hays v. State, 522 P.2d 1004 (Wyo. 1974).

Jury held properly instructed on aiding and abetting voluntary manslaughter as lesser-included offense of aiding and abetting first degree murder. See Jahnke v. State, 692 P.2d 911 (Wyo. 1984).

It was not error for court to give jury limiting instruction over defense counsel's objection, which instruction operated to limit the jury's consideration of a witness' prior conviction to the question of that witness' credibility. Jozen v. State, 746 P.2d 1279 (Wyo. 1987).

III. OBJECTIONS.

This rule requires that objections must be made before instructions are given to jury. Jackson v. Gelco Leasing Co., 488 P.2d 1052 (Wyo. 1971).

Purpose of making objections. — The process of making objections to instructions is a time when the court is afforded an opportunity to reflect upon the proposed charge to the jury in the light of objections made, and many times serves the desirable purpose of enabling the court to correct itself or modify an instruction to meet some well-taken objection. Runnion v. Kitts, 531 P.2d 1307 (Wyo. 1975).

Objections to instructions serve a useful purpose, other than making a record for appeal. Runnion v. Kitts, 531 P.2d 1307 (Wyo. 1975).

Purpose of requiring an objection under this rule is to inform court of the nature of the contended error and the specific grounds of objection, so that court may exercise judicial discretion in reconsidering the instruction to avoid error. Rittierodt v. State Farm Ins. Co., 3 P.3d 841 (Wyo. 2000).

Purpose of "objection" provisions of this rule is to insure that the trial judge is aware of the nature and grounds of the objection so that he can consider the propriety of the instruction and so that he may have an opportunity to correct any possible error. Danculovich v. Brown, 593 P.2d 187 (Wyo. 1979); ABC Bldrs., Inc. v. Phillips, 632 P.2d 925 (Wyo. 1981); Grable v. State, 649 P.2d 663 (Wyo. 1982).

Objections which are timely and specific are sufficient to preserve the issue and permit review of questioned instructions. Cervelli v. Graves, 661 P.2d 1032 (Wyo. 1983).

Federal and state procedure distinguished. — In the federal system the court may give such charge to the jury as it sees fit, together with such comment, explanation, modification, or change as it may desire. Under such a procedure, it is understandable why objection must be made following the giving of the charge. But under the state procedure the

parties know beforehand exactly what instructions will be given, and in what language, as well as which of the requested instructions will be refused. Being so apprised, the parties are in a position to make objections to the court's rulings before the instructions are given the jury, setting forth with particularity their reasons, and the rulings of the court then made become final with no exceptions being necessary under Rule 46. Shoemaker v. State, 444 P.2d 309 (Wyo. 1968).

Attorneys have a dual duty, i.e., not only to make proper objections to the instructions but to submit proper statements of the law as implement their view. Dodge v. State, 562 P.2d 303 (Wyo. 1977).

Proper procedure for objection to an insufficient instruction is to outline the reasons why the instruction is not a complete or accurate statement of the law and to submit to the court the proper language of an instruction which clearly states completely and correctly the law. Runnion v. Kitts, 531 P.2d 1307 (Wyo. 1975).

While the situation in which an assignment of error is premised upon an objection to an instruction which has been given does not always require the submission of the objecting party's version of a proper instruction, if his objection is to the form or language of an instruction, rather than to the propriety of giving any instruction on the issue, the best way to inform the court of his position is by the submission of his suggested language, in writing if possible. Haley v. Dreesen, 532 P.2d 399 (Wyo. 1975).

Procedure for making objections held objectionable. — Procedure by court in insisting that objections be made after argument and after the jury had retired, but before the jury had returned, is objectionable under this rule. Runnion v. Kitts, 531 P.2d 1307 (Wyo. 1975).

Clear explanation on grounds for objection may satisfy rule, if the objection by counsel is to the form or language of an instruction, rather than to the propriety of giving any instruction on the issue, the best way to inform the court of his position is by the submission of his suggested language, in writing if possible. Rissler & McMurry Co. v. ARCO, 559 P.2d 25 (Wyo. 1977).

Specificity required. — It is counsel's duty to make a specific legal objection to a refused instruction if he would rely upon the claimed error on appeal. Leitel v. State, 579 P.2d 421 (Wyo. 1978).

Error may not be assigned unless objection has been made thereto with a distinct statement of the matter to which objection is made and the grounds for this objection, indicating with definiteness and particularity the error asserted. Texas Gulf Sulphur Co. v. Robles, 511 P.2d 963 (Wyo. 1973).

Objection to jury instruction must be specific so that the trial court is offered an opportunity on second thought to correct any failure to instruct. Reeder v. State, 515 P.2d 969 (Wyo. 1973).

Reason for rule requiring specific objections to instructions is to give the court a timely opportunity to correct instruction errors before it is too late. Leitel v. State, 579 P.2d 421 (Wyo. 1978).

Where objection was that "the failure of the court to give said instruction to the jury is not in conformity with the laws of the State of Wyoming," the objection fails because it is not sufficiently specific. Reeder v. State, 515 P.2d 969 (Wyo. 1973).

When an assignment of error is premised upon an objection to an instruction which has been given, the record must contain a clear statement, defining the matter objected to and explaining the grounds of the objection, sufficient to inform the trial judge of possible errors so he may have an opportunity to correct them. Haley v. Dreesen, 532 P.2d 399 (Wyo. 1975).

The objection must be specific so that the trial judge is offered an opportunity on second thought to correct any failure to instruct. Moore v. State, 542 P.2d 109 (Wyo. 1975).

Instruction merely describing assault and battery too general. — Where defendant offered instructions which were refused and which defendant stated adequately described the crime of assault and battery with intent to commit rape, the language was very general in nature and violated the requirement that it be specific so that the trial court might have an opportunity to correct any mistake. Garcia v. State, 571 P.2d 606 (Wyo. 1977).

Voicing of general objections is tantamount to no objection at all under this rule. Heberling v. State, 507 P.2d 1 (Wyo.), cert. denied, 414 U.S. 1022, 94 S. Ct. 444, 38 L. Ed. 2d 313 (1973).

A general objection to an instruction is no objection at all. Moore v. State, 542 P.2d 109 (Wyo. 1975).

Voicing of general objections to instructions is tantamount to no objection at all, and appellate review will be where defense counsel has failed to specifically state the grounds for his objection. Leitel v. State, 579 P.2d 421 (Wyo. 1978).

Instruction given without objection becomes law of case. — An instruction given to the jury without objection becomes the law of the case and is not open to review by an appellate court. Gifford-Hill-Western, Inc. v. Anderson, 496 P.2d 501 (Wyo. 1972).

Without objection, the instructions became the law of the case on the issue of damages. DeWitty v. Decker, 383 P.2d 734 (Wyo. 1963).

An instruction, being given without objection, becomes the law of the case. Sanders v. Pitner, 508 P.2d 602 (Wyo. 1973); Cox v. Vernieuw, 604 P.2d 1353 (Wyo. 1980).

Absent objections to jury instructions, they become the law of the case. Pure Gas & Chem.

Co. v. Cook, 526 P.2d 986 (Wyo. 1974).

Where the plaintiff does not object to an instruction, nor offer another instruction, it becomes the law of the case. Mora v. Husky Oil Co., 611 P.2d 842 (Wyo. 1980).

Offering instruction does not amount to an objection if instruction is not given. Stone v. State, 745 P.2d 1344 (Wyo. 1987).

Instructions assumed satisfactory if failure to comply not explained. — Where no good reason is shown for an exception to this rule, and appellant did not attempt to explain or excuse his failure to comply with the rule, the Supreme Court assumed the instructions were satisfactory to him at the time they were given. Butcher v. McMichael, 370 P.2d 937 (Wyo. 1962).

But where spirit of rule observed, letter may be waived. — Where the record shows a motion was made to allow an oral objection made to the instruction prior to its submission to the jury and the court by its order allowed the objection to the questioned instruction, it seems obvious that the trial court deemed itself sufficiently advised of the nature and grounds of the objection. Where the spirit of the rule has been observed, its letter may be waived. Oeland v. Neuman Transit Co., 367 P.2d 967 (Wyo. 1962) (decided prior to the 1965 amendment).

Sufficiency of objections. — An opinion which states distinctly the objectionable matter and the grounds therefor is sufficient to preserve a jury instruction issue for appeal. Kemper Architects v. McFall, Konkel & Kimball Consulting Eng'rs, Inc., 843 P.2d 1178 (Wyo. 1992).

Insufficient objections. — It is an insufficient objection to an instruction to merely state that the same is not a complete or accurate statement of the law. Runnion v. Kitts, 531 P.2d 1307 (Wyo. 1975); City of Cheyenne v. Simpson, 787 P.2d 580 (Wyo. 1990).

Objection to jury instructions as being superfluous, not adding anything to the statement of the law, and tending toward confusion in the understanding of the instruction, is not one "stating distinctly the matter to which counsel objects and the grounds of his objection" and does not indicate "with definiteness and particularity the error asserted." Pure Gas & Chem. Co. v. Cook, 526 P.2d 986 (Wyo. 1974); Anderson v. Foothill Indus. Bank, 674 P.2d 232 (Wyo. 1984).

Trial court erred in instructing jury on the law regarding the duties of cyclists and motorists in a suit arising from a collision because the trial court failed to instruct the jury that the cyclist was properly in a crosswalk when the collision occurred; however, the cyclist failed to submit proposed instructions to correct the error; therefore, the cyclist was required to show plain error, and he failed to show material prejudice. Nish v. Schaefer, 138 P.3d 1134 (Wyo. 2006).

Objection necessary for consideration by appellate court. — Where no objection to an instruction is made to the trial court, it cannot be considered on appeal. North Cent. Gas Co. v. Bloem, 376 P.2d 382 (Wyo. 1962); Horn v. State, 554 P.2d 1141 (Wyo. 1976); Sybert v. State, 724 P.2d 463 (Wyo. 1986).

The propriety of an instruction may not be questioned in the Supreme Court where the record shows no ground of objection having been presented to the trial court as provided in this rule. O'Brien v. GMAC, 362 P.2d 455 (Wyo. 1961).

Where the record shows no ground of objection having been presented to the trial court, the propriety of the instruction may not be questioned upon appeal. Jackson v. Gelco Leasing Co., 488 P.2d 1052 (Wyo. 1971).

The failure to object to an instruction or to request an alternative instruction at the trial precludes the Supreme Court's review of the issue unless the instructions given can be said to be plainly erroneous. Gore v. State, 627 P.2d 1384 (Wyo. 1981); Alberts v. State, 642 P.2d 447 (Wyo. 1982).

Where a party raises questions on appeal not raised at the trial level as to the completeness and propriety of jury instructions, the appellate court will not consider the same and will assume that the instructions as given were satisfactory. ABC Bldrs., Inc. v. Phillips, 632 P.2d 925 (Wyo. 1981).

Failure to object to instructions precludes judicial review of possible error in the refusal to give requested instructions; provided, however, that review of such may be had if plain error is present. Morris v. State, 644 P.2d 170 (Wyo. 1982).

Although an appealing party may claim the submission of a particular instruction was erroneous for a multitude of reasons, in the absence of plain error the appellate court will only consider claims of error relating to those portions of the instruction to which the party offered a proper objection at trial. An instruction will not be declared erroneous if, viewing the instructions as a whole and in the context of the entire trial, it is determined that the instructions fairly and adequately presented the issues for the jury's consideration. Seaton v. State Hwy. Comm'n, Dist. No. 1, 784 P.2d 197 (Wyo. 1989).

Appellate court declined to review alleged instructional error where the appellant had the opportunity and the obligation to make his objections to the instructions, on the record, during the formal jury instruction conference prior to submission of the instructions to the jury. Despite having the opportunity to do so, he failed not only to state any objection to the court's ruling; he likewise failed to offer reasons why his proposed instructions were necessary. Landsiedel v. Buffalo Props., LLC, 112 P.3d 610 (Wyo. 2005).

Objection must be made before jury retires. — No party may assign as error the

failure to give an instruction unless he objects thereto before the jury retires to consider its verdict. Jaramillo v. State, 517 P.2d 490 (Wyo. 1974).

Except charge of jury misconduct. — Where a charge of misconduct on the part of the jury is made on the issue of damages and it is apparent that the instructions bear a direct relationship to the charge, it is appropriate that cognizance be taken of the entire matter, even if they were not objected to at the trial. DeWitty v. Decker, 383 P.2d 734 (Wyo. 1963) (decided prior to the 1965 amendment).

Or where plain error is present. — An erroneous instruction may be considered by a reviewing court if plain error is present, even in the absence of an objection at the time of trial. Hays v. State, 522 P.2d 1004 (Wyo. 1974).

Not having objected to the court's instructions, the appellant must show plain error. Cutbirth v. State, 663 P.2d 888 (Wyo. 1983).

The defendant waived any alleged error which he perceived the proffered instructions and the special-verdict form to contain when, having ample opportunity to object before submission to the jury, he failed to do so and failed to submit substitutes, unless his oversight could be saved by the doctrine of plain error. Goggins v. Harwood, 704 P.2d 1282 (Wyo. 1985).

Where there is not an objection to the instructions, any error must be considered under the plain error doctrine. Sanchez v. State, 751 P.2d 1300 (Wyo. 1988).

As the appellant did not object to certain instructions, they were reviewed for plain error only. Furman v. Rural Elec. Co., 869 P.2d 136 (Wyo. 1994).

Rule's requirements not nullified by "harmless error". — The "harmless error" rule of Rule 61 cannot be interpreted to nullify the specific requirements and provisions of the other rules, including this rule, requiring the necessity for an objection to the failure to give or to the giving of an instruction, and including Rule 49(a), requiring a demand to include the submission of a desired issue of fact in a special verdict to prevent the waiver of its consideration by the jury. Davis v. Consolidated Oil & Gas, Inc., 802 P.2d 840 (Wyo. 1990).

Arguing objected-to instruction to jury waives error. — A party who failed to object to an instruction and, in fact, argued that instruction to the jury in his closing argument, failed to sustain the burden of proof of error in the trial proceedings. Triton Coal Co. v. Mobil Coal Producing, Inc., 800 P.2d 505 (Wyo. 1990).

Only those errors are waived which might have been corrected had the proper objection or request been made; and if the trial judge is fully informed of the specific grounds of objection or request, there is no need for repetition. Edwards v. Harris, 397 P.2d 87 (Wyo. 1964).

Plaintiff, by not moving to correct verdict improper on its face, waives error. — Although there was no inherent error in telling the jury what the plaintiff's burden of proof was and that it must decide whether the plaintiff's injuries were caused by the alleged assault and battery, and then instructing the jury to assess damages without regard to its findings concerning the fact of the assault and whether or not it proximately caused any injuries, it was impossible to reconcile the jury's findings that there was an assault and battery and that the assault was not a "proximate cause of the injuries" with the testimony of the treating doctors who testified without conflict that the plaintiff in fact received injuries resulting in the necessity to prescribe and purchase medication. Therefore, the verdict of the jury was inconsistent and improper on its face. However, even though the substantial rights of the plaintiff were affected, because of the opportunity to correct the verdict offered by § 1-11-213, which the plaintiff didn't take advantage of, this error was waived. Coggins v. Harwood, 704 P.2d 1282 (Wyo. 1985).

Judge had opportunity to avoid error. — The facts that the objection was directed to a change in contemplated instructions which were a result of discussion and cooperation of counsel, that the judge had obviously considered the change overnight and at length, that the action was not only a refusal to give an instruction but was to sustain defendant's motion to dismiss the action insofar as it had to do with willful and wanton misconduct and exemplary damages and the fact that both willful and wanton misconduct and exemplary damages were referred to in that objection, direct the conclusion that the trial judge was well aware of the ramifications of his action and had ample opportunity to consider possible error and corrections necessary to avoid error. Danculovich v. Brown, 593 P.2d 187 (Wyo. 1979).

Objection to court's refusal to give offered instruction sufficient. — See B-T Ltd. v. Blakeman, 705 P.2d 307 (Wyo. 1985).

Objection to a jury instruction by the owner of oil and gas wells was sufficient because the owner provided the district court a proposed jury instruction with the exact language that it argued on appeal was legally correct. The owner explained at the instruction conference that it objected to the failure to give the instruction in the form it proposed. Merit Energy Co., LLC v. Horr, — P.3d —, 2016 Wyo. LEXIS 3 (Wyo. 2016).

Objections must be recorded. — This rule contains no provision that objections be reduced to writing, but while the rule does not specifically provide that objections must be recorded, if they are not, they cannot be preserved and thus become part of the record for consideration on appeal. Jackson v. Gelco Leasing Co., 488 P.2d 1052 (Wyo. 1971).

But trial court has some discretion in permitting objections to be later dictated into record where such objections were made

prior to the instructions being read to the jury. Jackson v. Gelco Leasing Co., 488 P.2d 1052 (Wyo. 1971).

Party has no absolute right to record objections at a time after objection made. — Under this rule a party has no absolute right to record his objections to instructions at a time subsequent to the time the objections were actually made. Jackson v. Gelco Leasing Co., 488 P.2d 1052 (Wyo. 1971).

Where objections are not recorded at the time actually made it would appear that some question could be raised that the objections later dictated to the court reporter were materially and significantly different from those made to the trial court. Jackson v. Gelco Leasing Co., 488 P.2d 1052 (Wyo. 1971).

Method of recording objections disapproved. — The Supreme Court cannot sanction the method used by many Wyoming trial courts of permitting counsel to dictate their instruction objections to the court reporter immediately after the jury retires. Jackson v. Gelco Leasing Co., 488 P.2d 1052 (Wyo. 1971).

Filing written objections after verdict not permitted. — The trial court could not, under the rules and local practices without the consent of both parties, permit a party to file written objections 72 hours after the jury retired and after it returned its verdict. Jackson v. Gelco Leasing Co., 488 P.2d 1052 (Wyo. 1971).

Rule 52. Findings by the court; judgment on partial findings; reserved questions.

(a) *General and Special Findings by Court.* —

(1) *Trials by the Court or Advisory Jury.* — Upon the trial of questions of fact by the court, or with an advisory jury, it shall not be necessary for the court to state its findings, except generally for the plaintiff or defendant. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 52(c).

(A) *Requests for Written Findings.* — If one of the parties requests it before the introduction of any evidence, with the view of excepting to the decision of the court upon the questions of law involved in the trial, the court shall state in writing its special findings of fact separately from its conclusions of law;

(B) *Written Findings Absent Request.* — Without a request from the parties, the court may make such special findings of fact and conclusions of law as it deems proper and if the same are preserved in the record either by stenographic report or by the court's written memorandum, the same may be considered on appeal. Requests for findings are not necessary for purposes of review.

(2) *Findings of a Master.* — The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court.

(b) *Amendment or Additional Findings.* — On a party's motion filed no later than 28 days after entry of judgment; the court may amend its findings - or make additional findings - and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59. When special findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the findings may be later questioned whether or not in the court the party raising the question objected to the findings, moved to amend them, or moved for partial findings.

(c) *Judgment on Partial Findings.* — If a party has been fully heard on an issue in a trial without a jury and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. The party against whom entry of such a judgment is considered shall be entitled to no special inference as a consequence of such consideration, and the court may weigh the evidence and resolve conflicts. Such a judgment shall be supported by findings as provided in Rule 52(a).

(d) *Reserved Questions.* —

(1) *In General.* — In all cases in which a court reserves an important and difficult constitutional question arising in an action or proceeding pending before it, the court, before sending the question to the supreme court for decision, shall

(A) dispose of all necessary and controlling questions of fact and make special findings of fact thereon, and

(B) state its conclusions of law on all points of common law and of construction, interpretation and meaning of statutes and of all instruments necessary for a complete decision of the case.

(2) *Constitutional Questions.* — No constitutional question shall be deemed to arise in an action unless, after all necessary special findings of fact and conclusions of law have been made by the court, a decision on the constitutional question is necessary to the rendition of final judgment. The constitutional question reserved shall be specific and shall identify the constitutional provision to be interpreted. The special findings of fact and conclusions of law required by this subdivision of this rule shall be deemed to be a final order from which either party may appeal, and such appeal may be considered by the supreme court simultaneously with the reserved question.

(Added February 2, 2017, effective March 1, 2017.)

Source. — Subdivision (b) of this rule is similar to Rule 52(b) of the Federal Rules of Civil Procedure.

I. GENERAL CONSIDERATION.
II. GENERAL AND SPECIAL FINDINGS.
III. AMENDMENT.
IV. PARTIAL FINDINGS.
V. RESERVED QUESTIONS.

I. GENERAL CONSIDERATION.

Failure to present record for review. — District court's judgment against a father was affirmed, because there was nothing before the appellate court from which it could determine that the district court's findings and conclusions were in error; the father failed to present the appellate court with a sufficient record for review of the issues which he presented. Smith v. Smith, 72 P.3d 1158 (Wyo. 2003).

Motion to reconsider a nullity. — Mother's appeal of trial court's denial of her "motion to reconsider" a child support abatement order was dismissed because the Wyoming Rules of Civil Procedure did not recognize a "motion for reconsider"; therefore the trial court order purportedly denying the motion was void and the court lacked jurisdiction under W.R.A.P. 1.04(a) and 1.05. The filing by aggrieved parties of a motion that is properly designated under the rule authorizing the motion, such as W.R.C.P. 50, 52, 59, or 60 will ensure full appellate rights are preserved. Plymale v. Donnelly, 125 P.3d 1022 (Wyo. (January 6, 2006)).

Special findings. — District court's decision letter and its findings of fact and conclusions of law did not constitute special findings as contemplated by Wyo. R. Civ. P. 52(a) and because the appellate court had no Wyo. R. App. P. 3.02(b) trial transcript, it therefore indulged the assumption that the evidence presented was sufficient to support the district court's findings that there had been no breach of contract. Arnold v. Day, 158 P.3d 694 (Wyo. 2007).

Support tables. — Although the district court erroneously stated what the presumptive child support would have been had the district court chosen to adhere to the presumptive support tables, that error was de minimus and harmless, where such information was not memorialized in the order from which the instant appeal was taken. Shelhamer v. Shelhamer, 138 P.3d 665 (Wyo. 2006).

Judgment on partial findings affirmed. — Where appellant tenants leased property for ten years, stopped making payments, and then filed an action to quiet title to the property on the theory of adverse possession, appellants' possession of the property as tenants was permissive and not adverse; appellee true owners continued to pay the property taxes on the parcel, entered into oil and gas leases, and sold a strip of the property to the State for a highway. When appellees moved for judgment on partial findings under this section, the district court did not err by granting the motion and entering a judgment for appellees. Hutchinson v. Taft, 222 P.3d 1250 (Wyo. 2010).

Applied in Lee v. Brown, 357 P.2d 1106 (Wyo. 1960); Phelan v. Read Constr. Co., 379 P.2d 829 (Wyo. 1963); Sun Land & Cattle Co. v. Brown, 387 P.2d 1004 (Wyo. 1964); Local 415 of Int'l Elec. Workers v. Hansen, 400 P.2d 531 (Wyo. 1965); In re Salisbury, 443 P.2d 135 (Wyo. 1968); Knudson v. Hilzer, 551 P.2d 680 (Wyo. 1976); Amfac Mechanical Supply Co. v. Federer, 645 P.2d 73 (Wyo. 1982); Rutar Farms & Livestock, Inc. v. Fuss, 651 P.2d 1129 (Wyo. 1982); Moncrief v. Harvey, 816 P.2d 97 (Wyo. 1991); Kaiser v. Farnsworth Drilling, Co., 851 P.2d 1292 (Wyo. 1993); Resource Technology Corp. v. Fisher Scientific Co., 924 P.2d 972 (Wyo. 1996); Walsh v. Holly Sugar Corp., 931 P.2d 241 (Wyo.

1997); Cross v. Berg Lumber Co., 7 P.3d 922 (Wyo. 2000); Reynolds v. Milatzo, 161 P.3d 509 (Wyo. 2007).

Quoted in Mountain View/Evergreen Imp. & Serv. Dist. v. Casper Concrete Co., 912 P.2d 529 (Wyo. 1996); Frost Constr. Co. v. Lobo, Inc., 951 P.2d 390 (Wyo. 1997).

Stated in In re Hagood, 356 P.2d 135 (Wyo. 1960); Wallis v. Luman, 625 P.2d 759 (Wyo. 1981); Powell v. Daily, 712 P.2d 356 (Wyo. 1986); Rossel v. Miller, 26 P.3d 1025 (Wyo. 2001).

Cited in Ellsworth Bros. v. Crook, 406 P.2d 520 (Wyo. 1965); State ex rel. Fire Fighters Local 946, I.A.F.F. v. City of Laramie, 437 P.2d 295 (Wyo. 1968); Holland v. Windsor, 461 P.2d 47 (Wyo. 1969); Banner v. Town of Dayton, 474 P.2d 300 (Wyo. 1970); State ex rel. Schieck v. Hathaway, 493 P.2d 759 (Wyo. 1972); Scotti's Drive In Restaurants, Inc. v. Mile High-Dart In Corp., 526 P.2d 1193 (Wyo. 1974); Tavares v. Horstman, 542 P.2d 1275 (Wyo. 1975); Angus Hunt Ranch, Inc. v. Reb, Inc., 577 P.2d 645 (Wyo. 1978); Quin Blair Enters., Inc. v. Julien Constr. Co., 597 P.2d 945 (Wyo. 1979); Dechert v. Christopulos, 604 P.2d 1039 (Wyo. 1980); County Court Judges Ass'n v. Sidi, 752 P.2d 960 (Wyo. 1988); Turner v. Floyd C. Reno & Sons, 769 P.2d 364 (Wyo. 1989); Burg v. Ruby Drilling Co., 783 P.2d 144 (Wyo. 1989); BHP Petro. Co. v. Okie, 836 P.2d 873 (Wyo. 1992); ANR Prod. Co. v. Kerr-McGee Corp., 893 P.2d 698 (Wyo. 1995); Boone v. Frontier Ref., Inc., 987 P.2d 681 (Wyo. 1999); Pace v. Pace, 22 P.3d 861 (Wyo. 2001); Parsons v. Parsons, 27 P.3d 270 (Wyo. 2001); RM v. Washakie County Sch. Dist. No. One, 102 P.3d 868 (Wyo. 2004); Befumo v. Johnson, 119 P.3d 936 (Wyo. 2005); Seherr-Thoss v. Seherr-Thoss, 141 P.3d 705 (Wyo. 2006); Phillips v. State, 151 P.3d 1131 (Wyo. 2007); FML v. TW, 157 P.3d 455 (Wyo. 2007); Krafczik v. Morris, 206 P.3d 372 (Wyo. 2009).

Law reviews. — For article, "Wyoming Practice," see 12 Wyo. L.J. 202 (1958).

For note, "Certified Question — Exercising the Power to Answer Federal Court Certification of State Law Questions. Hanchey v. Steighner, 549 P.2d 1310 (Wyo. 1976)," see XII Land & Water L. Rev. 337 (1977).

Tyler J. Garrett, Anatomy of a Wyoming Appeal: A Practitioner's Guide for Civil Cases, 16 Wyo. L. Rev. 139 (2016). Available at: http://repository.uwyo.edu/wlr/vol16$_s$s1⁄6

See article, "The 1994 Amendments to the Wyoming Rules of Civil Procedure," XXX Land & Water L. Rev. 151 (1995).

Am. Jur. 2d, ALR and C.J.S. references. — 75B Am. Jur. 2d Trial §§ 1991 to 1996.

How to obtain jury trial in eminent domain; waiver, 12 ALR3d 7.

Power of trial court, on remand for further proceedings, to change prior fact findings as to matter not passed upon by appellate court, without receiving further evidence, 19 ALR3d 502.

Power of successor or substituted judge, in civil case, to render decision or enter judgment on testimony heard by predecessor, 22 ALR3d 922.

Propriety and effect of trial court's adoption of findings prepared by prevailing party, 54 ALR3d 868.

Contractual jury trial waivers in state civil cases, 42 ALR5th 53.

Application of "clearly erroneous" test by Rule 52(a) of the Federal Rules of Civil Procedure to trial court's findings of fact based on documentary evidence, 11 ALR Fed 212.

Contractual jury trial waivers in federal civil cases, 92 ALR Fed 688.

49 C.J.S. Judgments §§ 270 to 273; 89 C.J.S. Trial §§ 609 to 657.

II. GENERAL AND SPECIAL FINDINGS.

When finding is clearly erroneous. — In accordance with Rule 52(a), W.R.C.P., the supreme court will not set aside a district court's findings of fact unless the findings are clearly erroneous. A finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. McNeiley v. Ayres Jewelry Co., 886 P.2d 595 (Wyo. 1994).

Purpose of subdivision (a). — The purpose of specific findings under subdivision (a) is to inform the appellate court of the underlying facts supporting the trial court's conclusions of law and disposition of the issues. Hopper v. All Pet Animal Clinic, Inc., 861 P.2d 531 (Wyo. 1993).

Not appropriate in summary judgment. — When a summary judgment is entered, there has been no trial of questions of fact but simply a determination that there is no genuine issue. This rule is, therefore, not appropriate. Baldwin v. Dube, 751 P.2d 388 (Wyo. 1988).

Necessity for request. — A trial court relying on discretionary power is not required to place on record the circumstances and factors that were crucial to its determination unless one of the parties requests it under subdivision (a). RDS v. GEMN, 9 P.3d 984 (Wyo. 2000).

When request not necessary. — Rule 41 makes it mandatory that when a motion to dismiss is granted at the end of the plaintiff's case, the trial judge is to make findings of fact and conclusions of law, and the requirement of a request that the court state its findings, in subdivision (a) of this rule, does not apply. Kure v. Chevrolet Motor Div., 581 P.2d 603 (Wyo. 1978).

Finding against great weight of evidence. — A determination that a finding is against the great weight of the evidence means a finding will be set aside even if supported by substantial evidence. The supreme court reviews a district court's conclusions of law de novo on appeal. McNeiley v. Ayres Jewelry Co., 886 P.2d 595 (Wyo. 1994).

General findings of juvenile court. —

Without a request for findings under Rule 52, W.R.C.P., the supreme court considers that the general findings by the juvenile court carries with it every finding of fact which is supported by the record. DB v. State, Dep't of Family Servs., 860 P.2d 1140 (Wyo. 1993).

Findings in child custody action. — Father in a child custody action who failed to request findings of fact or conclusions of law prior to trial waived any objection to the court's absence of formal findings. Resor v. Resor, 987 P.2d 146 (Wyo. 1999).

Where a father did not request that the district court make findings of fact pursuant to W.R.C.P. 52(a), he could not complain of the absence of formal findings with respect to each factor listed in Wyo. Stat. Ann. § 20-2-201. Stonham v. Widiastuti, 79 P.3d 1188 (Wyo. 2003).

Because a mother did not request under Wyo. R. Civ. P. 52(a) that the district court set forth specific findings, she could not argue on appeal that the district court failed to adequately address the statutory factors enumerated in Wyo. Stat. Ann. § 20-2-201(a) for determining the best interests of the child in a custody dispute or more fully explain its reasoning for concluding that the child's best interest would best be served by awarding primary custody to his father. JT v. KD, 192 P.3d 969 (2008).

Findings included in request. — A request for findings under this rule is only for findings which are sufficient to indicate the basis or steps taken for the decision upon the contested matters. Cline v. Sawyer, 600 P.2d 725 (Wyo. 1979).

Requested findings need not be set forth in elaborate detail but need only be clear, specific and complete in concise language informing the appellate court of the underlying bases for the trial court's decision. They are to be an aid to the appellate court on appeal affording it a clearer understanding of the trial court's decision. Whitefoot v. Hanover Ins. Co., 561 P.2d 717 (Wyo. 1977).

And may set out orally. — Where the court set out its findings and conclusions orally, preserving them by stenographic reporting in the transcript as part of the record, the technical requirements of subdivision (a), referred to in Rule 41(b), have been met. Kure v. Chevrolet Motor Div., 581 P.2d 603 (Wyo. 1978).

Timing of request. — Subdivision (a) does not require the trial court to make separate findings except on request made before introduction of evidence. True v. Hi-Plains Elevator Mach., Inc., 577 P.2d 991 (Wyo. 1978).

Right to examine statement made by trial judge. — Although trial court made a general finding, the Supreme Court had a right to examine the statement of the judge made at the time of the disposal of the case in order to more completely understand the basis of the judgment. Younglove v. Graham & Hill, 526 P.2d 689 (Wyo. 1974).

Failure to propose findings not bar to attack on erroneous findings. — The submission of proposed findings is a valuable aid to the court's decision making, but the failure to give the court the benefit thereof does not prevent the party from later attacking a finding that is clearly erroneous. Shores v. Lindsey, 591 P.2d 895 (Wyo. 1979).

In the absence of special findings of fact, the reviewing court must consider that a judgment carries with it every finding of fact which is supported by the evidence. Hendrickson v. Heinze, 541 P.2d 1133 (Wyo. 1975); Zitterkopf v. Roussalis, 546 P.2d 436 (Wyo. 1976); Brug v. Case, 600 P.2d 710 (Wyo. 1979); Deroche v. R.L. Manning Co., 737 P.2d 332 (Wyo. 1987).

In a divorce proceeding, the husband's argument that the trial court did not provide enough details about its findings on the value of the couple's business lacked merit; the record did not contain a request for a special finding, and the appellate court therefore presumed that the trial court's findings, supported by the evidence, were appropriate. Root v. Root, 65 P.3d 41 (Wyo. 2003).

Judgment affirmed on any legal ground in record. — In the absence of special findings of fact, the Supreme Court must consider that the trial court's judgment carries with it every finding of fact supported by the evidence, and a judgment will be affirmed on any legal ground appearing in the record. Skinner v. Skinner, 601 P.2d 543 (Wyo. 1979); Bishop v. Bishop, 944 P.2d 425 (Wyo. 1997).

And assumed that court considered necessary statutory factors. — There was no support for determining that the trial court, which was not requested to and did not make findings of fact, did not consider the necessary statutory factors in determining a division of marital property. In the absence of such findings, the judgment of the trial court carried with it every finding of fact necessary to support the judgment and decree. Barney v. Barney, 705 P.2d 342 (Wyo. 1985).

Findings of fact sufficient to indicate basis for decision for contested matter. — See Lebsack v. Town of Torrington, 698 P.2d 1141 (Wyo. 1985).

Findings sustained. — Because heirs, among other things, appeared not to have requested special findings of fact and conclusions of law under this section, the court sustained the trial court's findings that a sale of estate property was proper. George v. Allen (In re Estate of George), 77 P.3d 1219 (Wyo. 2003).

Court should set forth method of computation used in determining damage award. — In an action for damages due to the faulty construction of a commercial building, the court, pursuant to a request by the losing parties for findings of fact and conclusions of law, should have set forth its method of computation used in determining its damage award of $167,200. It was possible that the winning

party was getting a superior building with features not in the original building, resulting in unjust enrichment. Accordingly, the case was remanded for a rehearing on the issue of damages. Reiman Constr. Co. v. Jerry Hiller Co., 709 P.2d 1271 (Wyo. 1985).

Architect entitled to directed verdict. — Architect was entitled to directed verdict on building owner's claim that architect had been negligent where the owner failed to present any expert testimony which would establish the standard of care applicable to the architect as a licensed architect or the architect's breach of that standard of care. Garaman, Inc. v. Williams, 912 P.2d 1121 (Wyo. 1996).

III. AMENDMENT.

Purpose. — Subdivision (b) is not a conduit whereby an appeal may be taken for the sole purpose of expunging from the record or amending alleged erroneous special findings of fact and leaving the judgment stand, but on the contrary simply affords the Supreme Court the authority to review such findings without the necessity of raising such matters below. Boode v. Wolfe, 430 P.2d 119 (Wyo. 1967).

IV. PARTIAL FINDINGS.

Judgment on partial findings. — A hearing examiner's decision to grant a Rule 52(c) motion on certain limited issues did not serve the interests of judicial economy where the hearing examiner determined that a workers' compensation claimant failed to file a report of injury within 10 days and that his subsequent failure to rebut the presumption of claim denial were dispositive of the case, but the hearing examiner did not make a determination of whether the claimant carried his burden of proof that he suffered a compensable injury. State ex rel. Wyo. Workers' Safety & Comp. Div. v. Jensen, 24 P.3d 1133 (Wyo. 2001).

Defendants were entitled to partial judgment in action to enforce payment provisions of oil and gas leases. — In an action to enforce payment provisions of gas and oil leases, plaintiff successors in interest to the leaseholder were entitiled to payment of Net Profits Interest under the contract, because they provided sufficient notice of their ownership interests in accordance with the Wyoming Royalty Payment Act, Wyo. Stat. Ann. §§ 30-5-301 through 305. The district court correctly granted defendants' Wyo. R. Civ. P. 52(c) motion for partial judgment holding that plaintiffs had a duty to provide sufficient notice of their ownership interests, plaintiffs failed to show that defendants acted in bad faith in withholding payments, and the non-operator defendants were not liable to plaintiffs under WRPA. Ultra Res., Inc. v. Hartman, 226 P.3d 889 (Wyo. 2010).

V. RESERVED QUESTIONS.

Rule supplements statutory procedure. — This rule provides a supplement to the statutory procedure for reserving constitutional questions to the Supreme Court in civil cases. See §§ 1-13-101 through 1-13-107. State v. Rosachi, 549 P.2d 318 (Wyo. 1976).

And reduces case law to rule form. — This rule is no more than a reduction to rule form of the law of cases decided by the Supreme Court with respect to reserving of constitutional questions. State v. Rosachi, 549 P.2d 318 (Wyo. 1976).

No mandatory direction to reserve questions. — There is nothing in § 1-13-101 or in subdivision (d) of this rule which indicates a mandatory direction to a district judge to reserve important and difficult constitutional questions to the Supreme Court each time he is requested to do so. Wheatland Irrigation Dist. v. Prosser, 501 P.2d 1 (Wyo. 1972).

Trial court to dispose of preliminary questions and state conclusions. — It is the duty of the Supreme Court to examine the original papers in the record and determine whether all necessary and controlling questions of fact have been disposed of. State v. Rosachi, 549 P.2d 318 (Wyo. 1976).

Subdivision (d) makes it clear the district court, before reserving a constitutional question to the Supreme Court, shall dispose of all necessary and controlling questions of fact and state its conclusions of law on all points of construction, interpretation and meaning of statutes. Harding v. State, 478 P.2d 64 (Wyo. 1970); Griffith ex rel. Workmen's Comp. Dep't v. Stephenson, 494 P.2d 546 (Wyo. 1972).

The Supreme Court will not consider a reserved constitutional question until there is nothing left for the trial court to do but apply the Supreme Court's answer to the question or questions and enter judgment consistent with the answer or answers. Hanchey v. Steighner, 549 P.2d 1310 (Wyo. 1976).

The Supreme Court should not address, and resolve, the constitutional issue in those instances in which the trial court has not disposed of all of the necessary, and controlling, questions of fact and has not set forth its conclusions of law with respect to all questions other than the constitutional question. Rodabaugh v. Ross, 807 P.2d 380 (Wyo. 1991).

And all constitutional questions considered. — The trial court should not further certify constitutional questions to the Supreme Court unless and until it is sure all necessary constitutional questions are considered. Griffith ex rel. Workmen's Comp. Dep't v. Stephenson, 494 P.2d 546 (Wyo. 1972).

Trial court to apply Supreme Court decision. — When the Supreme Court decides a constitutional question reserved to it, there should be nothing left for the trial court to do but apply it and, depending upon the answer, either proceed at once to sentence and enter a judgment of conviction and sentence or dismiss the charges. State v. Rosachi, 549 P.2d 318 (Wyo. 1976).

Trial court's finding of guilt is not binding upon the Supreme Court in the reservation of constitutional questions. State v. Rosachi, 549 P.2d 318 (Wyo. 1976).

Am. Jur. 2d, ALR and C.J.S. references. — Power of successor or substituted judge, in civil case, to render decision or enter judgment on testimony heard by predecessor, 84 ALR5th 399.

Rule 53. Masters.

(a) *Appointment and compensation.* —

(1) *Appointment.* — The court in which any action is pending may appoint a master therein. As used in these rules the word "master" includes, but is not limited to, a referee, an auditor, or an examiner.

(2) *Compensation.* — The compensation to be allowed to a master shall be fixed by the court, and may be charged against one or more of the parties, paid out of any fund or subject matter of the action which is in the custody and control of the court, or as the court may direct. The master shall not retain the master's report as security for the master's compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) *Reference.* — A reference to a master shall be the exception and not the rule.

(1) *Jury Trials.* — In actions to be tried by a jury, a reference shall be made only when the issues are complicated.

(2) *Nonjury Trials.* — In actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

(c) *Powers.* — The order of reference to the master may specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order. The master may require the production before the master of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. The master may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence received, offered and excluded in the same manner and subject to the same limitations as provided in the Wyoming Rules of Evidence for a court sitting without a jury.

(d) *Proceedings.* —

(1) *Meetings.* — When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference.

(A) *Time.* — Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys.

(B) *Delay.* — It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make the master's report.

(C) *Appearance of Parties Required.* — If a party fails to appear at the time and place appointed, the master may proceed ex parte, or in the master's

discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) *Witnesses.* — The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, the witness may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(3) *Statement of Accounts.* — When matters of accounting are in issue before the master, the master may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as the master directs.

(e) *Report.* —

(1) *Contents and Filing.* — The master shall prepare a report upon the matters submitted to the master by the order of reference and, if required to make findings of fact and conclusions of law, the master shall set them forth in the report. The master shall file the report with the clerk of the court and serve on all parties notice of the filing. Unless otherwise directed by the order of reference, the master shall also serve a copy of the report on each party.

(2) *In Nonjury Actions.* — In an action to be tried without a jury, unless otherwise directed by the order of reference, the master shall file with the report a transcript of the proceedings and of the evidence and the original exhibits.

(A) *Findings Accepted.* — In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous.

(B) *Objections.* — Within 14 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice. The court, after hearing, may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) *In Jury Actions.* — In an action to be tried by a jury the master shall not be directed to report the evidence. The master's findings upon the issues submitted to the master are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) *Stipulation as to Findings.* — The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) *Draft of Report.* — Before filing the master's report, a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 53 of the Federal Rules of Civil Procedure.

Appointing master for accounting within court's discretion. — While the district court may appoint a "master," as defined in subdivision (a), to conduct an accounting, it is not required to do so. Such action is within the discretion of the court, to be taken after consideration of the complexity of the issue and the potential expense and delay a reference to a master might involve. Weisbrod v. Ely, 767 P.2d 171 (Wyo. 1989).

Timely objection to appointment required. — If objection to the appointment of a master is to be taken by a litigant, it must be made timely by a filed objection and, if possible,

before performance of the service as master is undertaken by the appointee. The failure to make timely objection, either at the time of the order or reference or promptly thereafter, constitutes a waiver of error. Palm v. Palm, 784 P.2d 1365 (Wyo. 1989).

District court, absent objection, could review special master's report. State v. Owl Creek Irrigation Dist. Members, 750 P.2d 681 (Wyo. 1988).

Objections to master's report need not be made in district court to preserve an issue for appeal. State v. Owl Creek Irrigation Dist. Members, 753 P.2d 76 (Wyo. 1988), aff'd, 492 U.S. 406, 109 S. Ct. 2994, 106 L. Ed. 2d 342, cert. denied, 492 U.S. 926, 109 S. Ct. 3265, 106 L. Ed. 2d 610 (1989), overruled on other grounds, Vaughn v. State, 962 P.2d 149 (Wyo. 1998).

Compensation within court's discretion. — The question of a master's compensation is to be determined by the district court as a matter of discretion. Palm v. Palm, 784 P.2d 1365 (Wyo. 1989).

United States pays master's expenses in stream adjudication. — Although the federal McCarran Amendment prohibits the taxing of costs against the United States, the court did not err in requiring the United States to pay one-half of the special master's fees and expenses in a stream adjudication under § 1-37-106. "Costs" are the expenses incurred by the litigant, not the court system. State v. Owl Creek Irrigation Dist. Members, 753 P.2d 76 (Wyo. 1988), aff'd, 492 U.S. 406, 109 S. Ct. 2994, 106 L. Ed. 2d 342, cert. denied, 492 U.S. 926, 109 S. Ct. 3265, 106 L. Ed. 2d 610 (1989), overruled on other grounds, Vaughn v. State, 962 P.2d 149 (Wyo. 1998).

Stated in Cross v. Cross, 586 P.2d 547 (Wyo. 1978).

Cited in Kearney Lake, Land & Reservoir Co. v. Lake DeSmet Reservoir Co., 487 P.2d 324 (Wyo. 1971).

Am. Jur. 2d, ALR and C.J.S. references. — 66 Am. Jur. 2d References §§ 3 to 14, 17 to 37.

Bankruptcy, right of creditor who has not filed timely petition for review of referee's order to participate in appeal secured by another creditor, 22 ALR3d 914.

Submission to referee as "final submission," within statute permitting plaintiff to take voluntary dismissal without prejudice before final submission, 31 ALR3d 449.

Power of successor or substituted master or referee to render decision or enter judgment on testimony heard by predecessor, 70 ALR3d 1079.

Referee's failure to file report within time specified by statute, court order or stipulation as terminating reference, 71 ALR4th 889.

What are "exceptional conditions" justifying reference under Rule of Civil Procedure 53(b), 1 ALR Fed 922.

76 C.J.S. References § 1 et seq.

VII. JUDGMENT

Rule 54. Judgment; costs.

(a) *Definition; Form.* — "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings. A court's decision letter or opinion letter, made or entered in writing, is not a judgment.

(b) *Judgment on Multiple Claims or Involving Multiple Parties.* — When an action presents more than one claim for relief — whether as a claim, counterclaim, crossclaim, or third-party claim — or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

(c) *Demand for Judgment; Relief to be Granted.* — A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) *Costs; Attorney's Fees.* —

(1) *Costs Other Than Attorney's Fees.* — Unless a statute, these rules, or a court order provides otherwise, costs — other than attorney's fees — should be allowed to the prevailing party, when a motion for such costs is filed no later than 21 days

after the entry of judgment. But costs against the State of Wyoming, its officers, and its agencies may be imposed only to the extent allowed by law.

(2) *Attorney's Fees.* —

(A) *Claim to Be by Motion.* — A claim for attorney's fees and allowable costs shall be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.

(B) *Timing and Contents of the Motion.* — Unless a statute or a court order provides otherwise, the motion must:

(i) be filed no later than 21 days after the entry of judgment;

(ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;

(iii) state the amount sought or provide a fair estimate of it; and

(iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

(C) *Proceedings.* — Subject to Rule 23(g), the court must, on a party's request, give an opportunity for adversary submissions on the motion in accordance with Rule 43(c) or 78. The court may decide issues of liability for fees before receiving submissions on the value of services. The court must find the facts and state its conclusions of law as provided in Rule 52(a).

(D) *Special Procedures; Reference to a Master.* — The court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings. Also, the court may refer issues concerning the value of services to a special master under Rule 53 without regard to the limitations of Rule 53(a)(1).

(E) *Exceptions.* — Subparagraphs (A)-(D) do not apply to claims for fees and expenses as sanctions for violating these rules.

(3) *Contents of the Motion.* — Unless a statute or a court order provides otherwise, any motion must:

(A) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;

(B) state the amount sought or provide a fair estimate of it; and

(C) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 54 of the Federal Rules of Civil Procedure.

I. GENERAL CONSIDERATION.

Applied in Sun Land & Cattle Co. v. Brown, 387 P.2d 1004 (Wyo. 1964); United Pac. Ins. Co. v. Martin & Luther Gen. Contractors, 455 P.2d 664 (Wyo. 1969); Wheatland Irrigation Dist. v. McGuire, 537 P.2d 1128 (Wyo. 1975); Tobin v. Cities Serv. Oil Co., 540 P.2d 930 (Wyo. 1975); Choman v. Epperley, 592 P.2d 714 (Wyo. 1979); Gill v. Schaap, 601 P.2d 545 (Wyo. 1979); Buttrey Food Stores Div. v. Coulson, 620 P.2d 549 (Wyo. 1980); City of Evanston v. Robinson, 702 P.2d 1283 (Wyo. 1985); Althoff, Inc. v. IFG Leasing Co., 704 P.2d 1302 (Wyo. 1985); State v. Owl Creek Irrigation Dist. Members, 750 P.2d 681 (Wyo. 1988); State v. Owl Creek Irrigation Dist. Members, 753 P.2d 76 (Wyo. 1988), aff'd, 492 U.S. 406, 109 S. Ct. 2994, 106 L. Ed. 2d 342, cert. denied, 492 U.S. 926, 109 S. Ct. 3265, 106 L. Ed. 2d 610 (1989), overruled on other grounds, Vaughn v. State, 962 P.2d 149 (Wyo. 1998); Cooney v. Park County, 792 P.2d 1287 (Wyo. 1990); Mari v. Rawlins Nat'l Bank, 794 P.2d 85 (Wyo. 1990); Barker Bros. v. Barker-Taylor, 823 P.2d 1204 (Wyo. 1992); State ex rel. Farmers Ins. Exch. v. District Court, 844 P.2d 1099 (Wyo. 1993); Board of County Comm'rs v. Dunnegan, 884 P.2d 35 (Wyo. 1994); Kirkwood v. CUNA Mut. Ins. Soc'y, 937 P.2d 206 (Wyo. 1997); McLean v. Hyland Enters., Inc., 34 P.3d 1262 (Wyo. 2001); Wadi Petroleum, Inc. v. Ultra Res., Inc., 65 P.3d 703 (Wyo. 2003); Cathcart v. Meyer, 88 P.3d 1050 (Wyo. 2004); Heywood v. State, 208 P.3d 71 (Wyo. 2009).

Quoted in Logan v. Stannard, 439 P.2d 24 (Wyo. 1968); Spitzer v. Spitzer, 777 P.2d 587 (Wyo. 1989); Morris v. Kadrmas, 812 P.2d 549 (Wyo. 1991); Coones v. FDIC, 848 P.2d 783

(Wyo. 1993); Gonzales v. State ex rel. Wyoming Workers' Safety & Comp. Div., 992 P.2d 560 (Wyo. 1999); State ex rel. Workers' Safety & Compensation Div. v. Gerrard, 17 P.3d 20 (Wyo. 2001); Tusshani v. Allsop, 1 P.3d 1263 (Wyo. 2000).

Stated in Stone v. Stone, 842 P.2d 545 (Wyo. 1992).

Cited in Frontier Fibreglass Indus., Inc. v. City of Cheyenne, 435 P.2d 456 (Wyo. 1967); Spivey v. City of Casper, 455 P.2d 660 (Wyo. 1969); State ex rel. Schieck v. Hathaway, 493 P.2d 759 (Wyo. 1972); Hamburg v. Jones, 510 P.2d 791 (Wyo.), cert. denied, 414 U.S. 1027, 94 S. Ct. 455, 38 L. Ed. 2d 319 (1973); Newcom v. Keever, 513 P.2d 1021 (Wyo. 1973); Clouser v. Spaniol Ford, Inc., 522 P.2d 1360 (Wyo. 1974); Bard Ranch, Inc. v. Weber, 538 P.2d 24 (Wyo.), reh. denied, In re Final Proofs of Appropriation of Following Water Rights, 541 P.2d 791 (Wyo. 1975); Olmstead v. American Granby Co., 565 P.2d 108 (Wyo. 1977); Oroz v. Board of County Comm'rs, 575 P.2d 1155 (Wyo. 1978); Stevens v. Rock Springs Nat'l Bank, 577 P.2d 1374 (Wyo. 1978); Kopriva v. Union P.R.R., 592 P.2d 711 (Wyo. 1979); Centrella v. Morris, 597 P.2d 958 (Wyo. 1979); Ranchester State Bank v. Johnson, 608 P.2d 1271 (Wyo. 1980); Molle v. Iberlin Ranch, 614 P.2d 1339 (Wyo. 1980); Stratman v. Admiral Beverage Corp., 760 P.2d 974 (Wyo. 1988); Pioneer Bank v. Rykhus, 822 P.2d 372 (Wyo. 1992); Bredthauer v. Christian, Spring, Seilbach & Assocs., 824 P.2d 560 (Wyo. 1992); Gookin v. State Farm Fire & Cas. Ins. Co., 826 P.2d 229 (Wyo. 1992); Bowen v. Smith, 838 P.2d 186 (Wyo. 1992); Jurkovich v. Estate of Tomlinson, 843 P.2d 1166 (Wyo. 1992); JBC of Wyo. Corp. v. City of Cheyenne, 843 P.2d 1190 (Wyo. 1992); Park County v. Cooney, 845 P.2d 346 (Wyo. 1992); Bredthauer v. TSP, 864 P.2d 442 (Wyo. 1993); Dubray v. Howshar, 884 P.2d 23 (Wyo. 1994); Board of County Comm'rs v. Laramie County Sch. Dist. No. 1, 884 P.2d 946 (Wyo. 1994); Makinen v. PM P.C., 893 P.2d 1149 (Wyo. 1995), overruled on other grounds, Terex Corp. v. Hough, 50 P.3d 317 (Wyo. 2002); Dry Creek Cattle Co. v. Harriet Bros. Ltd. Partnership, 908 P.2d 399 (Wyo. 1995); Board of County Comm'rs v. State ex rel. Yeadon, 971 P.2d 129 (Wyo. 1998); Schlueter v. Bowers, 994 P.2d 937 (Wyo. 2000); Sorenson v. Sorenson, 9 P.3d 259 (Wyo. 2000); Mayland v. Flitner, 28 P.3d 838 (Wyo. 2001); Ahrenholtz v. Laramie Econ. Dev. Corp., 79 P.3d 511 (Wyo. 2003); Stone v. Devon Energy Prod. Co., L.P., 216 P.3d 489 (Wyo. 2009).

Law reviews. — For article, "Pleading Under the Federal Rules," see 12 Wyo. L.J. 177 (1958).

Tyler J. Garrett, Anatomy of a Wyoming Appeal: A Practitioner's Guide for Civil Cases, 16 Wyo. L. Rev. 139 (2016). Available at: http://repository.uwyo.edu/wlr/vol16_s1/6

For comment, "Ethics and the Reasonableness of Contingency Fees: A survey of state and federal law addressing the reasonableness of costs as they relate to contingency fee arrangements," see XXIX Land & Water L. Rev. 215 (1994).

See article, "The 1994 Amendments to the Wyoming Rules of Civil Procedure," XXX Land & Water L. Rev. 151 (1995).

Am. Jur. 2d, ALR and C.J.S. references. — 46 Am. Jur. 2d Judgments § 1 et seq.

Contempt for violation of compromise and settlement, the terms of which were approved by court but not incorporated in court order, decree or judgment, 84 ALR3d 1047.

Recovery of attorneys' fees and costs of litigation incurred as result of breach of agreement not to sue, 9 ALR5th 933.

Recoverability of cost of computerized legal research under 28 USC § 1920 or Rule 54(d), Federal Rules of Civil Procedure, 80 ALR Fed 168.

Modern status of Federal Civil Procedure Rule 54(b) governing entry of judgment on multiple claims, 89 ALR Fed 514.

Propriety under 28 U.S.C. § 1920 and Rule 54(d) of Federal Rules of Civil Procedure of allowing prevailing party costs for copies of depositions, 155 ALR Fed 445.

Taxation of costs associated with videotaped depositions under 28 U.S.C. § 1920 and Rule 54(d) of Federal Rules of Civil Procedure, 156 ALR Fed 311.

49 C.J.S. Judgments § 1 et seq.

II. DEFINITION; FORM.

Entry of judgment required. — Generally, until it is entered, the judgment is not final or subject to appeal. United States v. Hunt, 513 F.2d 129 (10th Cir. 1975).

Judgment should terminate the litigation. — A judgment should be the final determination of an action and thus should have the effect of terminating the litigation. 2-H Ranch Co. v. Simmons, 658 P.2d 68 (Wyo. 1983).

Judgment not certified as immediately appealable. — Although a district court's order annulling a municipal candidate's election was not appealable because it granted only partial summary judgment and was not certified as immediately appealable by the district court, the supreme court converted the notice of appeal into a writ of review because the issues raised presented questions of significant state importance. Smith v. Brito, 173 P.3d 351 (Wyo. 2007).

For purposes of judicial economy. — The purpose behind requiring that a judgment be the final determination of the rights of the parties in an action is one of judicial as well as financial economy in that such a rule prevents multiple appeals in the same suit. 2-H Ranch Co. v. Simmons, 658 P.2d 68 (Wyo. 1983).

"Conditional judgment" construed. — Conditional judgments are judgments that do not become effective unless the conditions they contain have been complied with or that may be

defeated or amended by the performance of a subsequent act or occurrence. 2-H Ranch Co. v. Simmons, 658 P.2d 68 (Wyo. 1983).

An agreement reached between the parties to an action, which states that if the terms of the agreement are lived up to, the action will be "dismissed with prejudice to all parties," is at best a conditional judgment. Where the terms of the agreement are not met, there is no "judgment," as defined by subdivision (a). 2-H Ranch Co. v. Simmons, 658 P.2d 68 (Wyo. 1983).

Conditional judgment not enforceable by writ of execution. — There can be no writ of execution properly issued to enforce a conditional judgment. Where property is sold pursuant to a writ of execution issued on such a nonexistent judgment, it follows that the sale is not conducted in conformity with the Code of Civil Procedure, as required by § 1-17-321, and should not have to be confirmed by the district court. 2-H Ranch Co. v. Simmons, 658 P.2d 68 (Wyo. 1983).

Order regularly rendered, signed and recorded took precedence over a prior oral order not entered in the court files or records. McAteer v. Stewart, 696 P.2d 72 (Wyo. 1985).

III. JUDGMENTS INVOLVING MULTIPLE CLAIMS OR PARTIES.

Reason for adoption of rule. — Historically, the reasoning which led to the adoption of this rule is that piecemeal appeals should be avoided because of the disruption resulting in the judicial process. Olmstead v. Cattle, Inc., 541 P.2d 49 (Wyo. 1975).

Subdivision (b) applies where there is more than one "claim" or when multiple parties are involved. Lutheran Hosps. & Homes Soc'y of Am. v. Yepsen, 469 P.2d 409 (Wyo. 1970).

Subdivision (b) cannot be employed to permit appeal of partial adjudication of the rights of one or more of the parties — only a complete disposition of the claim relating to at least one of the parties may be certified. Mott v. England, 604 P.2d 560 (Wyo. 1979).

Partial summary judgment appropriate only on finding of liability. — A district court may not grant a final, appealable summary judgment on part of a claim, other than a determination of liability. Errington v. Zolessi, 9 P.3d 966 (Wyo. 2000).

No appeal will lie from an order granting a partial summary judgment because such an order is not a final order under this rule. Hayes v. Nielson, 568 P.2d 905 (Wyo. 1977).

Partial summary judgment without certification not appealable. — A partial summary judgment which fails to contain the certification required by subdivision (b) is not appealable. Crossan v. Irrigation Dev. Corp., 598 P.2d 812 (Wyo. 1979).

Because two partial summary judgment orders in favor of a former wife relating to a child support arrearage were not final under Wyo. R. Civ. P. 54(b), an appeal was dismissed. Moreover, the appeal did not fall under Wyo. R. App. P. 1.05 nor was it the type that warranted conversion to a petition for a writ of review under Wyo. R. App. P. 13. Witowski v. Roosevelt, 156 P.3d 1001 (Wyo. 2007).

Where cross-claims against the state of Wyoming are left undetermined upon the issuance of an order granting partial summary judgment and there is no express determination that there is no just reason for delay, an appeal will be dismissed. Hoback Ranches, Inc. v. Urroz, 622 P.2d 948 (Wyo. 1981).

Appeal was timely under Wyo. R. App. P. 2.01 because a partial summary judgment was not certified for appeal under this section and did not become an appealable order under Wyo. R. App. P. 1.05 until the remaining issues were decided. King v. Bd. of County Comm'rs of Fremont, 244 P.3d 473 (Wyo. 2010).

Appeal was timely under Wyo. R. App. P. 2.01 because a partial summary judgment was not certified for appeal under Wyo. R. Civ. P. 54(b) and did not become an appealable order under this section until the remaining issues were decided. King v. Bd. of County Comm'rs of Fremont, 244 P.3d 473 (Wyo. 2010).

Partial summary judgment without certification generally not appealable. — Even though an order granting partial summary judgment did not have the required certification under W.R.C.P. 54(b), an appellate court still could review the case by converting the notice of appeal into a writ of review under W.R.A.P. 13.02. Stewart Title Guar. Co. v. Tilden, 110 P.3d 865 (Wyo. 2005).

Appeal from second partial summary judgment. — Plaintiff who failed to take an appeal from the first partial summary judgment did not waive her right to appeal from the second partial summary judgment. Rule 54(b) certifications are subject to review in the Wyoming supreme court for a determination as to whether certification would further the interests of judicial economy and the sound administration of the appellate process. Loghry v. Unicover Corp., 878 P.2d 510 (Wyo. 1994).

Intervening insurer. — Res judicata did not apply to bar the litigation of the issues between the injured passenger and the insurer even though the injured passenger and defendant driver settled where the insurer intervened early in litigation to protect its rights, with the intent to have its obligations under the underinsured motorist policy determined through litigation and to prevent itself from being bound to a settlement to which it was not a party, and the order of the district court, denying the insurer's motion for trial setting on the issue of damages, was reversed. Eklund v. Farmers Ins. Exch., 86 P.3d 259 (Wyo. 2004).

District court's dismissal order not final judgment. — Where the district court's dis-

missal order adjudicated only one of the two claims involved in the controversy, the dismissal order was not appealable until after resolution of the State's claim absent a certification under subdivision (b) of this rule by the district court. Ruppenthal v. State ex rel. Economic Dev. & Stabilization Bd., 849 P.2d 1316 (Wyo. 1993).

In the absence of a certification under subdivision (b) of this rule, a district court's order dismissing plaintiff's complaint against a county without prejudice was not a final appealable order, and the appeal of that order was subject to dismissal. Amos v. Lincoln Cnty. Sch. Dist. No. 2, — P.3d —, 2015 Wyo. LEXIS 130 (Wyo. 2015).

Determination of no reason for delay deemed real requirement. — The requirement of subdivision (b) that the court make an express determination that there is no reason for delay is a real requirement rather than perfunctory. Reeves v. Harris, 380 P.2d 769 (Wyo. 1963).

Otherwise judgment not final or appealable. — Unless the trial court, in accordance with subdivision (b), makes an express determination that there is no just reason for delay in the entry of a final judgment as to fewer than all of the claims before the court, the judgment is not final and not subject to appeal. Wheatland Irrigation Dist. v. Two Bar-Muleshoe Water Co., 431 P.2d 257 (Wyo. 1967); Spriggs v. Pioneer Carissa Gold Mines, Inc., 453 P.2d 400 (Wyo. 1969).

Under the provisions of subdivision (b), there can be no appeal from a judgment against one of multiple parties or from an adjudication of one of multiple claims without an express determination by the trial court as to the lack of just reason for delay. Ambariantz v. Cunningham, 460 P.2d 216 (Wyo. 1969); Whitehouse v. Stack, 458 P.2d 100 (Wyo. 1969).

Unless the language required by subdivision (b), relating to the express determination that there is no just reason for delay and express direction for the entry of judgment, is incorporated in the judgment, an order in an action involving multiple parties which dismisses the action as to fewer than all the defendants, for lack of jurisdiction over the dismissed defendants, is not a final order from which an appeal can be taken. Olmstead v. Cattle, Inc., 541 P.2d 49 (Wyo. 1975).

There can be no appeal from a judgment against one of multiple parties or from the adjudication of one of multiple claims without an express determination by the trial court as to lack of just reason for delay. Mott v. England, 604 P.2d 560 (Wyo. 1979).

Appeal from judgment matter of right. — The issuance of a writ of certiorari is discretionary with the Supreme Court and review in such an instance is not a matter of right as it is with the timely filing of a notice of appeal from a judgment or final order or from an order certified as a final judgment pursuant to subdivision (b). Alexander v. United States, 803 P.2d 61 (Wyo. 1990).

Rule's policy violated where liquidated damages left. — Where, in granting judgment to a party notwithstanding the verdict, the party's liquidated damages are left, pending a final disposition, the policy behind subdivision (a) has been violated. Mott v. England, 604 P.2d 560 (Wyo. 1979).

Nunc pro tunc order. — The fact that the subdivision (b) certification of "no just cause for delay" was entered in the form of a nunc pro tunc order did not alter the rule that the time for appeal began to run only upon its entry. White v. HA, Inc., 782 P.2d 1125 (Wyo. 1989).

Writ of certiorari. — Although a litigant normally may not appeal an order which is not final as to all issues unless the trial court makes a determination that there is no just cause for delay, such a case may be considered upon a writ of certiorari where judicial economy and justice require or where there has been procedural default by counsel. J Bar H, Inc. v. Johnson, 822 P.2d 849 (Wyo. 1991).

No deference given to district court's determination of multiple claims or multiple parties. — The district court's determination of the applicability of subdivision (b) as to whether there are multiple claims or multiple parties is by nature one of law, and the Supreme Court, on reviewing such a determination, gives no special deference to the determination made by the district court. Griffin v. Bethesda Found., 609 P.2d 459 (Wyo. 1980).

And there is no right of appeal where trial court errs in determining that there are multiple claims within the contemplation of subdivision (b). Griffin v. Bethesda Found., 609 P.2d 459 (Wyo. 1980).

But court's determination on delay reviewable only where discretion abused. — The district court's determination as to whether there is just reason for delay is reviewable only for an abuse of discretion. Griffin v. Bethesda Found., 609 P.2d 459 (Wyo. 1980).

Order as to beneficiaries under Wrongful Death Act properly treated as final judgment. — The trial judge properly determined under subdivision (b) that the effect of its order that surviving brothers and sisters are not beneficiaries under the Wrongful Death Act was to make a complete and final disposition of the claims for damages of some but not all of the parties for the benefit of whom an action by the administrator of the estate was brought, and there was no abuse of discretion in certifying that there was no just reason for delay and providing for the entry of a final judgment. Wetering v. Eisele, 682 P.2d 1055 (Wyo. 1984).

But not judge's decision letters. — The trial judge's decision letters, discussing legal principles and expressing his conclusions of law in a divorce proceeding, did not constitute a judicial determination which could be consid-

ered a final order. Broadhead v. Broadhead, 737 P.2d 731 (Wyo. 1987).

Dismissal of original parties not party to litigation corrects defects in judgment. — Where an order subsequent to the original judgment dismisses original parties not party to the litigation, the order corrects any defects which may have existed in the judgment and the appellate court can entertain proper jurisdiction over the merits of the plaintiff's appeal. Bacon v. Carey Co., 669 P.2d 533 (Wyo. 1983).

Cases arising under Rule 42 are within the purview of this rule. State ex rel. Pac. Intermountain Express, Inc. v. District Court, 387 P.2d 550 (Wyo. 1963).

Appeal of individual actions previously consolidated. — It is conceivable that there would be exceptional circumstances which might influence the trial court to certify that there was no cause for delay in entering the final judgment, and thus permit an appeal of individual actions previously consolidated under Rule 42, and the propriety of such an arrangement can best be determined by the court which tried the case. State ex rel. Pac. Intermountain Express, Inc. v. District Court, 387 P.2d 550 (Wyo. 1963).

Provisions of subdivision (b) construed with other rules. — The second sentence of subdivision (b) must be read in connection with provisions of Rule 58, which specify the event which signals the start of the 30-day period provided by Rule 73(a), (see, now, Rule 2, W.R.A.P.), during which a notice of appeal must be filed. Olmstead v. Cattle, Inc., 541 P.2d 49 (Wyo. 1975).

If judgment reversed, ruling becomes res judicata. — An appeal pursuant to subdivision (b) is an interlocutory appeal and, if the final judgment that is appealed is reversed, the ruling in favor of the appellant becomes the law of the case as it continues in the trial court. As the law of the case, it applies to all parties who remain in the case and, even if those parties did not participate in the appeal, they are not foreclosed from the benefit of the ruling by the doctrine of res judicata. Alexander v. United States, 803 P.2d 61 (Wyo. 1990).

Judgment should terminate the litigation. — District court's summary judgment order was not properly certified as a final appealable order pursuant to Wyo. R. Civ. P. 54(b) where there were two unresolved issues with respect to a claim for breach of a divorce agreement, the amount owed for mortgage contributions and the effect of a laches defense, and the claim for enforcement of the divorce decree was unresolved. Meiners v. Meiners, — P.3d —, 2016 Wyo. LEXIS 84 (Wyo. 2016).

IV. DEMAND FOR JUDGMENT.

Final judgment should grant all of the relief to which the plaintiff is entitled whether or not it has been demanded in the pleadings. Walton v. ARCO, 501 P.2d 802 (Wyo. 1972).

Relief may be granted different from that in the prayer. — Relief is not dependent upon a prayer, but even were this not true, it is a general rule that the prayer forms no part of the statement of a cause of action and is generally unimportant, and, therefore, relief may be granted different from that in the prayer if it is justified by the allegations and proof. State v. Moore, 356 P.2d 141 (Wyo. 1960).

The prayer is not a part of the complaint and a trial court is not bound thereby. Walton v. ARCO, 501 P.2d 802 (Wyo. 1972).

And trial court not bound to theories of counsel. — The trial court is not bound in determining the proper measure of damages to the theories of counsel. Walton v. ARCO, 501 P.2d 802 (Wyo. 1972).

Nor misapprehension of theory of case. — The fact that the parties proceeded under a misapprehension as to the proper theory of the case does not deprive the trial court of jurisdiction to render a judgment which the pleadings and proof in fact support. Karn v. Hayes, 530 P.2d 156 (Wyo. 1975).

Allegation of money damages required in default judgment. — In order to apply the first sentence of subdivision (c), the allegation of money damages is required. White v. Fisher, 689 P.2d 102 (Wyo. 1984).

Default judgment may be attacked upon appeal for noncompliance with subdivision (c). Zweifel v. State ex rel. Brimmer, 517 P.2d 493 (Wyo. 1974).

Default judgment was not void because complaint did not contain specific dollar amount in the demand for judgment. Melehes v. Wilson, 774 P.2d 573 (Wyo. 1989).

Decision letter was not a final judgment. — When the district court entered its decision letter concluding that the father's parental rights should be terminated, it was filed prior to the receipt of the social study required by Wyo. Stat. Ann. § 14-2-314; however, the father was not prejudiced. The decision letter was not a judgment for purposes of Wyo. R. Civ. P. 54(a); the district court had the opportunity to consider the social study before issuing the order terminating parental rights. JLW v. CAB (In re WDW), 224 P.3d 14 (Wyo. 2010).

V. COSTS.

Allowable costs. — What constitutes proper costs in an action, to be assessed against the losing party, is not very clearly established by either statute or rule. Roberts Constr. Co. v. Vondriska, 547 P.2d 1171 (Wyo. 1976).

Discovery deposition costs discretionary. — The award of costs, including subpoena, reporter and witness fees for discovery deposition, was discretionary with the trial court as coming within the criteria of "reasonably required for trial preparation." Hashimoto v.

Marathon Pipe Line Co., 767 P.2d 158 (Wyo. 1989).

Expert witness fees as determined by the court, to be reasonable in amount, should include actual time for testimony and not include charges of the experts for pretrial conferences or time during the trial session while waiting to actually testify. Hashimoto v. Marathon Pipe Line Co., 767 P.2d 158 (Wyo. 1989).

Proper and improper costs. — The following award of costs to the prevailing party was proper: witness fees for those days on which the witnesses attended, even if they did not testify on that day. The following award, however, was not proper: (1) service fees upon the parties with whom the successful party had settled; and (2) an expert witness fee for a physician who did not testify. State v. Dieringer, 708 P.2d 1 (Wyo. 1985).

When appellee trust beneficiary filed a lawsuit seeking an order directing appellant trustees to pay to him funds from the family trust to provide for his support, the trustees expended $49,000 of trust funds in attorney fees and costs; the district court did not abuse its discretion in limiting the attorney fees and costs to $ 10,000 under this section and directing the trustees to reimburse the trust for the remainder of their claimed litigation expenses. While the trustees did not submit their billing statements or the statutorily required application for fees and costs, this did not deprive the district court of its jurisdiction to issue the reimbursement order; the distirct court was permitted to address the issue pursuant to this rule when the beneficiary filed his application for fees and costs the day after the district court entered its judgment. Garwood v. Garwood, 233 P.3d 977 (Wyo. 2010).

Reasonable necessary deposition expenses reimbursable, but not expense of preparing enlarged exhibits. — Reasonable necessary deposition expenses made after the making of a settlement offer, such as those made for depositions relied upon by the court in granting partial summary judgment in favor of the defendant, were properly includable in reimbursable costs. However, the expense of preparing enlarged exhibits for trial was not a taxable cost. Duffy v. Brown, 708 P.2d 433 (Wyo. 1985).

Protection of interests. — Although attorney's fees are generally not recoverable in the absence of specific statutory or contract authority, one who, through the tort of another, has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney fees, and other expenditures suffered or incurred in the earlier action. Sundown, Inc. v. Pearson Real Estate Co., 8 P.3d 324 (Wyo. 2000).

Costs following successful summary judgment motion. — The district court may, in the exercise of its sound discretion, award costs following a successful motion for summary judgment. The costs awarded, however, must be those reasonably required in the preparation of the successful motion for summary judgment; the fact that no trial was held is no reason for disallowing costs. Abraham v. Andrews Trucking Co., 893 P.2d 1156 (Wyo. 1995).

Costs to defaulting defendant. — Defaulted defendant was regarded as the prevailing party and was entitled to award of costs, since plaintiff did not improve her position by the litigation, but defendant improved his position substantially over the result indicated by the entry of default. Schaub v. Wilson, 969 P.2d 552 (Wyo. 1998).

No basis for award to widow. — Where payment of the life insurance policy proceeds to the decedent's business associates, as opposed to the widow, was proper, no basis existed for awarding fees, costs, and interest to the widow. Principal Life Ins. Co. v. Summit Well Serv., 57 P.3d 1257 (Wyo. 2002).

Rejection of more favorable offer of settlement. — A plaintiff who rejected an offer of settlement that was more favorable than the amount she was eventually awarded by a jury was entitled to recover only those costs she incurred up until the time the offer was made, and the defendant was entitled to recover those costs incurred after the offer was made. Crawford v. Amadio, 932 P.2d 1288 (Wyo. 1997).

Cited in Mayland v. Flitner, 28 P.3d 838 (Wyo. 2001).

Rule 55. Default; default judgment.

(a) *Entering a Default.* — When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.

(b) *Entering a Default Judgment.* —

(1) *By the Clerk.* — If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk — on the plaintiff's request, with an affidavit showing the amount due — must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.

(2) *By the Court.* — In all other cases, the party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a guardian, guardian ad litem, trustee, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing. The court may conduct hearings or make referrals — preserving any statutory right to a jury trial — when, to enter or effectuate judgment, it needs to:

(A) conduct an accounting;

(B) determine the amount of damages;

(C) establish the truth of any allegation by evidence; or

(D) investigate any other matter.

(c) *Setting Aside a Default or a Default Judgment.* — The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b).

(d) *Judgment Against State.* — A default judgment may be entered against the state, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 55 of the Federal Rules of Civil Procedure.

Cross References. — As to age of majority, see § 14-1-101. As to default in the district court, see Rule 203, D. Ct.

Violation of due process. — In a divorce case, a wife's due process rights under Wyo. Const. art. I, § 6 and the Fourteenth Amendment were violated when a district court entered a default divorce decree based on a supplemental pleading that was not served on the wife; a wife's motion to modify the decree should have been granted because the supplemental affidavit contained claims for relief that were not in the original complaint. Bradley v. Bradley, 118 P.3d 984 (Wyo. 2005).

Default justified against party who continually refuses to comply with discovery orders. — Although the sanction of default is clearly not favored, the court did not abuse its discretion in entering a default judgment, and in refusing to set aside the judgment, against a party which had refused to comply with a court order compelling production of the same documents which had been ordered produced nearly one year earlier, and which party had never sought relief from the order or any of the number of requests for production. Farrell v. Hursh Agency, Inc., 713 P.2d 1174 (Wyo. 1986).

Default not justified against party filing motion to dismiss. — The clerk should not have entered defaults against defendants who filed a motion to dismiss the complaint. First S.W. Fin. Servs. v. Laird, 882 P.2d 1211 (Wyo. 1994).

Filing motion for summary judgment. — A manufacturer "otherwise defended" against a consumer's suit asserting claims for strict liability, breach of express and implied warranties of fitness, and negligence when it filed a summary judgment motion in response to the complaint; thus, entry of a default judgment against the manufacturer was inappropriate. M & A Constr. Corp. v. Akzo Nobel Coatings, Inc., 936 P.2d 451 (Wyo. 1997).

When judgment can be entered. — Judgment by default cannot properly be entered unless defendant is brought into court in some way sanctioned by law. Pease Bros. v. American Pipe & Supply Co., 522 P.2d 996 (Wyo. 1974).

What constitutes "appearance." An "appearance" in an action involves some submission or presentation to the court by which a party shows his intention to submit himself to the jurisdiction of the court. United States Aviation, Inc. v. Wyoming Avionics, Inc., 664 P.2d 121 (Wyo. 1983).

Where the only contact between the parties' attorneys is a conversation which occurs before the complaint is filed, such contact does not constitute an "appearance" under this rule. An appearance contemplates a pending action. United States Aviation, Inc. v. Wyoming Avionics, Inc., 664 P.2d 121 (Wyo. 1983).

Defendant's unsigned, unsworn and undated interrogatory responses do not constitute "appearance" under subdivision (b)(2). Melehes v. Wilson, 774 P.2d 573 (Wyo. 1989).

Following did not constitute an "appearance" under subdivision (b)(2) such as to require a three-day notice of the application for default judgment: (1) a telephone call by the defaulted party's attorney asking for an extension of time; (2) a statement by that attorney to the opposing attorney's secretary that an answer had been filed, even though it subsequently appeared that an answer had never been filed; and (3) settlement discussions well before the complaint was filed. Hochhalter v.

Great W. Enters., Inc., 708 P.2d 666 (Wyo. 1985).

Defendant in default may assert no damages. — In hearing to determine damages following defendant's default, defendant could properly assert that no damages were caused by collision between his vehicle and plaintiff's; even though defaulted defendant was charged with one hundred percent of the fault, no recovery could be had if no damages were caused. Schaub v. Wilson, 969 P.2d 552 (Wyo. 1998).

Claim not for a sum certain. — Default judgment entered by clerk of court was void, where theories of recovery that were pleaded did not permit a conclusion that plaintiff's claim for a real estate commission was for a sum certain. Exotex Corp. v. Rinehart, 3 P.3d 826 (Wyo. 2000).

Defendant in default must be permitted to address issue of relative fault. — The issue of fault, as distinguished from liability, is no longer separable from the issue of damages; the two are intertwined to the extent that one cannot defend on the issue of damages without being permitted to participate with respect to the issue of fault. The defendant in default must be permitted to participate in proceedings which address the issue of relative fault because it is a significant factor in any damage award. McGarvin-Moberly Constr. Co. v. Welden, 897 P.2d 1310 (Wyo. 1995).

Because, by our comparative negligence statute, the question of fault is inextricably intertwined with the amount of damages that may be awarded against any defendant, a defendant who makes an appearance after entry of default, but before default judgment, could participate fully in the discovery process and on issues concerning proximate cause and damages. McGarvin-Moberly Constr. Co. v. Welden, 897 P.2d 1310 (Wyo. 1995).

While appearance after entry of default, but before default judgment, does not save a defendant from being in default, that defendant is entitled to three days written notice of an application to the court by the plaintiffs for entry of judgment based on default. McGarvin-Moberly Constr. Co. v. Welden, 897 P.2d 1310 (Wyo. 1995).

A defendant who is in default still may contest the issue of unliquidated damages. McGarvin-Moberly Constr. Co. v. Welden, 897 P.2d 1310 (Wyo. 1995).

When basis for default entry against corporation is failure to appear with counsel, due process demands at least an informal hearing for presentation of evidence and explanations of the defendant, its counsel, and the opposing party. Lawrence-Allison & Assocs. W. v. Archer, 767 P.2d 989 (Wyo. 1989).

The trial court denied a corporate defendant due process of law when it entered a default judgment based on impressions it gained in an ex parte telephone conference that the defendant had fired its attorney one day before trial and thereby failed to "otherwise defend" when it appeared at trial without counsel. Lawrence-Allison & Assocs. W. v. Archer, 767 P.2d 989 (Wyo. 1989).

Neglect not excusable. — The trial court did not abuse its discretion in concluding from the evidence that the neglect was not excusable and that the company's culpable conduct led to the entry of default and the default judgment. Fluor Daniel (NPOSR), Inc. v. Seward, 956 P.2d 1131 (Wyo. 1998).

Failure to appear deemed excusable neglect. — Where the defendant undertook efforts to find substitute counsel and to inform the court of his back surgery, and his lack of success did not result from a lack of effort or diligence, his explanation for his failure to appear was the result of excusable neglect. Carlson v. Carlson, 836 P.2d 297 (Wyo. 1992).

Where Rule 60(b) reasons do not exist, good cause not shown. — Where defendants could not substantiate reasons under Rule 60(b) for setting aside the default judgment, good cause also did not exist to set aside the entry of default under subdivision (c) of this rule. Vanasse v. Ramsay, 847 P.2d 993 (Wyo. 1993).

Failure to timely file answer justifies default. — Where the defendants failed to file an answer to a complaint within three months, then failed to show good cause, the court did not abuse its discretion in refusing to vacate the entry of default against them. Halberstam v. Cokeley, 872 P.2d 109 (Wyo. 1994).

District court properly denied a corporation's request to set aside a default judgment because the corporation's expectation that another party was representing its interest was unreasonable; denial of a bank's motion to set aside a default was proper because it was unreasonable for the bank not to have filed an answer. Countrywide Home Loans, Inc. v. First Nat'l Bank of Steamboat Springs, N.A., 144 P.3d 1224 (Wyo. 2006).

Summary judgment for law firm on claim for legal fees was prematurely entered, where there was an undocumented continuance without a specific future date stated for a hearing, a decision entered before a stated 10 days had expired, and no compliance with the three-day notice provision required to obtain a default judgment. Storseth v. Brown, Raymond & Rissler, 805 P.2d 284 (Wyo. 1991).

Sufficient notice of default. — A motion for the sanction of judgment by default dated March 9, and the court's order of March 20, stating that unless certain documents were produced by noon on March 28, judgment would be given to the movant, constituted sufficient notice of default under subdivision (b)(2). Farrell v. Hursh Agency, Inc., 713 P.2d 1174 (Wyo. 1986).

Insufficient notice of default. — An order granting a default judgment as to liability but leaving the determination of damages for a

later hearing is not a final, appealable order until damages have been determined. Additionally, the notice requirements of subdivision (b)(2) of this rule in the context of the entry of default judgment were not satisfied, as the court's order compelling discovery did not mention sanctions. Ruwart v. Wagner, 880 P.2d 586 (Wyo. 1994).

A default judgment, which was entered the day after the application for default judgment, was reversed because the judgment was not in compliance with subdivision (b)(2) of this section. Schott v. Chamberlain, 923 P.2d 745 (Wyo. 1996).

Notice before default judgment not required. — Appearance by counsel for defendants at hearing on temporary restraining order and at deposition did not entitle defendants to notice before default judgment was entered by clerk under subdivision (a) where defendants failed to plead or otherwise defend the action and their counsel did not enter a written appearance. Lee v. Sage Creek Refining Co., 947 P.2d 791 (Wyo. 1997).

Where defendant's out-of-state attorney did not make a submittal or presentation to the court, and did no more than make a phone call to plaintiff's attorney requesting an extension of time to file an answer, and did not respond to two letters from plaintiff's attorney, the defendant did not appear or constructively appear and was not entitled under W.R.C.P. 55(b)(2) to notice of plaintiff's motion for a default. Multiple Resort Ownership Plan, Inc. v. Design-Build-Manage, Inc., 45 P.3d 647 (Wyo. 2002).

Hearing after default judgment. — After entry of a default judgment, a hearing on the issue of damages was not required where the damages claimed were liquidated because they were certain or, by computation, made certain, and they were supported by affidavit. Blittersdorf v. Eikenberry, 964 P.2d 413 (Wyo. 1998).

Failure to raise subdivision (b)(2) claim is waiver. — Where the appellant fails to raise a subdivision (b)(2) claim in the district court, the Supreme Court will consider it waived and not consider it. United States Aviation, Inc. v. Wyoming Avionics, Inc., 664 P.2d 121 (Wyo. 1983).

Default judgment was not void because complaint did not contain specific dollar amount in the demand for judgment. Melehes v. Wilson, 774 P.2d 573 (Wyo. 1989).

In contract action, damages must be liquidated. — In an action for breach of contract arising out of the purchase of real property, the court abused its discretion in entering a default judgment because the damages were unliquidated, there being no proof as to the fair market value of the land. Halberstam v. Cokeley, 872 P.2d 109 (Wyo. 1994).

Determination of damages, not liquidated in fashion sufficient for mathematical computation, requires evidence. — A hearing is required or evidence necessitated for determination of damages that are not liquidated in some fashion sufficient for mathematical computation. If the damages are unliquidated in amount, discretion to determine without evidence does not exist. Midway Oil Corp. v. Guess, 714 P.2d 339 (Wyo. 1986).

As does entry of divorce decree. — Although the district court properly entered a default against a husband for failure to comply with court-mandated discovery in a divorce proceeding, the court abused its discretion in entering a divorce decree, as a default judgment encompassing a property division and alimony award, absent an evidentiary hearing. Spitzer v. Spitzer, 777 P.2d 587 (Wyo. 1989).

Absence of evidence of defendant's wealth precludes punitive damages. — An award of punitive damages following default could not be sustained, as there was an absence of evidence of the defendant's wealth or financial condition. Adel v. Parkhurst, 681 P.2d 886 (Wyo. 1984).

There was no error in denying jury trial on issue of damages in a default case. Farrell v. Hursh Agency, Inc., 713 P.2d 1174 (Wyo. 1986).

Allegations relative to awarding damages deemed admitted. — Where entry of default was proper, allegations relative to the grounds for awarding damages were deemed admitted, and no error occurred when trial court adopted the admitted theory of damages in awarding judgment. Lee v. Sage Creek Refining Co., 947 P.2d 791 (Wyo. 1997).

Reasons for vacating default judgment. — The reasons for vacating an entry of default include mistake, inadvertence, surprise, or excusable neglect, or any other reason justifying relief from the operation of the judgment. M & A Constr. Corp. v. Akzo Nobel Coatings, Inc., 936 P.2d 451 (Wyo. 1997).

Factors used to determine good cause. — The factors to be applied in determining whether good cause has been shown to set aside a default judgment are: (1) whether the plaintiff will be prejudiced; (2) whether the defendant has a meritorious defense; and (3) whether culpable conduct of the defendant led to the default. M & A Constr. Corp. v. Akzo Nobel Coatings, Inc., 936 P.2d 451 (Wyo. 1997).

Good cause for setting aside not shown. — The death of plaintiff's attorney and the fact that plaintiff was then acting pro se did not constitute good cause for setting aside the dismissal of plaintiff's complaint or the entry of a default judgment on the defendant's counterclaim, both of which were entered as sanctions for plaintiff's failure to respond to discovery. Schott v. Chamberlain, 923 P.2d 745 (Wyo. 1996).

Where defendants' counsel represented them at hearing on temporary restraining order and at deposition, but refused to accept service or enter a written appearance, defendants did not

show mistake, inadvertence, surprise, excusable neglect, or extraordinary circumstances sufficient to entitle them to relief from default judgment. Lee v. Sage Creek Refining Co., 947 P.2d 791 (Wyo. 1997).

Wide discretion to set aside default. — A trial court has wide judicial discretion to grant or deny a defendant's motion under Rules 55(c) and 60(b). The exercise of that discretion will not be disturbed unless the appellant demonstrates that the trial court abused it and was clearly wrong. Claassen v. Nord, 756 P.2d 189 (Wyo. 1988); M & A Constr. Corp. v. Akzo Nobel Coatings, Inc., 936 P.2d 451 (Wyo. 1997).

A court did not abuse its discretion in granting a manufacturer's motion to set aside a default judgment against it in favor of plaintiffs who were allegedly injured by the manufacturer's product; there was no indication in the record that the plaintiffs detrimentally relied upon the entry of the default judgment, the manufacturer had a meritorious statute of limitations defense, and there was no culpable conduct on the part of the manufacturer leading to the entry of default. Nowotny v. L & B Contract Indus., Inc., 933 P.2d 452 (Wyo. 1997).

Vacation of default warranted. — The trial court's decision to vacate the entry of default was warranted. M & A Constr. Corp. v. Akzo Nobel Coatings, Inc., 936 P.2d 451 (Wyo. 1997).

Rule 60(b) relevant in good cause determination. — The reasons for setting aside a judgment under rule 60(b) are relevant in determining whether good cause has been shown for vacating an entry of default. M & A Constr. Corp. v. Akzo Nobel Coatings, Inc., 936 P.2d 451 (Wyo. 1997).

This rule and Rule 60 provide clear method for setting aside default for good cause. Robison v. Sales & Use Tax Div., State Tax Comm'n, 524 P.2d 82 (Wyo. 1974).

Right to have default set aside not absolute. — The right to have a default or default judgment set aside is not absolute in light of subdivision (c), which provides that good cause be shown to enable the court to set aside a default and further requires that default judgments should be set aside in accordance with Rule 60(b). Booth v. Magee Carpet Co., 548 P.2d 1252 (Wyo. 1976).

Individual has no absolute right to have default judgment set aside. United States Aviation, Inc. v. Wyoming Avionics, Inc., 664 P.2d 121 (Wyo. 1983).

And meritorious defense must be demonstrated. — The district court did not err when it set aside the entries of default against defendants who had filed their objection to the entries of default and their answer on the same day that plaintiff applied for and received its entries of default, and since the district court granted their motion to dismiss for improper venue, they had a meritorious defense to the complaint. First S.W. Fin. Servs. v. Laird, 882 P.2d 1211 (Wyo. 1994).

Sufficient grounds for relief do not exist when a party is dilatory in obtaining legal counsel and default judgment is entered against him. Whitney v. McDonough, 892 P.2d 791 (Wyo. 1995).

Or else default judgment nonreviewable. — A default judgment was nonreviewable where the defendant filed a motion to vacate entry of default and an answer at the same time, but the motion did not justify relief for any of the grounds found in Rule 60(b) and did not otherwise manifest good cause in accordance with subdivision (c) of this rule, nor did the answer articulate a meritorious defense other than by conclusory allegations which were not in any manner verified. Adel v. Parkhurst, 681 P.2d 886 (Wyo. 1984).

When appeal may be taken from default judgment. — An appeal may not be taken from a default judgment without there first having been presented a motion to the lower court for relief. Robison v. Sales & Use Tax Div., State Tax Comm'n, 524 P.2d 82 (Wyo. 1974).

Application for judgment after entry of default does not require a formal written document under subdivision (b) of this rule. Vanasse v. Ramsay, 847 P.2d 993 (Wyo. 1993).

Appeal from refusal of trial court to set aside default or default judgment entails an examination of the exercise of the court's discretion. Booth v. Magee Carpet Co., 548 P.2d 1252 (Wyo. 1976).

Default judgment may be attacked upon appeal for noncompliance with Rule 54(c). Zweifel v. State ex rel. Brimmer, 517 P.2d 493 (Wyo. 1974).

Applied in Board of Trustees v. Bell, 662 P.2d 410 (Wyo. 1983); Annis v. Beebe & Runyan Furn. Co., 685 P.2d 678 (Wyo. 1984); Sanford v. Arjay Oil Co., 686 P.2d 566 (Wyo. 1984); Condict v. Lehman, 837 P.2d 81 (Wyo. 1992); Lantz v. Bowman, 881 P.2d 1079 (Wyo. 1994).

Cited in Frontier Fibreglass Indus., Inc. v. City of Cheyenne, 435 P.2d 456 (Wyo. 1967); Gillis v. F & A Enters., 813 P.2d 1304 (Wyo. 1991); Osborn v. Emporium Videos, 848 P.2d 237 (Wyo. 1993); State Farm Mut. Auto. Ins. Co. v. Colley, 871 P.2d 191 (Wyo. 1994); Chamberlain v. Ruby Drilling Co., 986 P.2d 846 (Wyo. 1999); Vernier v. Vernier, 92 P.3d 825 (Wyo. 2004).

Law reviews. — For casenote, "Torts—I may be liable but it's not my fault!: The Wyoming Supreme Court rules that defaulting defendants can now challenge fault. McGarvin-Moberly Const. v. Welden, 897 P.2d 1310 (Wyo. 1995)," see XXXI Land & Water L. Rev. 645 (1996).

Am. Jur. 2d, ALR and C.J.S. references. — 46 Am. Jur. 2d Judgments §§ 265 to 321.

Necessity of taking proof as to liability against defaulting defendant, 8 ALR3d 1070.

Appealability of order setting aside, or refus-

ing to set aside, default judgment, 8 ALR3d 1272.

Amount of damages, defaulting defendant's right to notice and hearing as to determination of, 15 ALR3d 586.

Attorney's mistake as to time or place of appearance, trial or filing of necessary papers, opening default or default judgment claimed to have been obtained because of, 21 ALR3d 1255.

Fraud in obtaining or maintaining default judgment as ground for vacating or setting aside in state courts, 78 ALR3d 150.

Authority of court, upon entering default judgment, to make orders for child custody or support which were not specifically requested in pleadings of prevailing party, 5 ALR5th 863.

Waiver of right to default judgment, 64 ALR5th 163.

Default judgments against the United States under Rule 55(e) of the Federal Rules of Civil Procedure, 55 ALR Fed 190.

What constitutes "Appearance" under Rule 55(b)(2) of Federal Rules of Civil Procedure, providing that if party against whom default judgment is sought has "Appeared" in action, that party must be served with notice of application for judgment, 139 ALR Fed 603.

49 C.J.S. Judgments §§ 195 to 242.

Rule 56. Summary judgment.

(a) *Motion for Summary Judgment or Partial Summary Judgment.* — A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) *Time to File a Motion.* — Unless a different time is set by court order otherwise, a party may file a motion for summary judgment at any time.

(c) *Procedures.* —

(1) *Supporting Factual Positions.* — A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence.* — A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited.* — The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations.* — An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) *When Facts are Unavailable to the Nonmovant.* — If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) *Failing to Properly Support or Address a Fact.* — If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) *Judgment Independent of the Motion.* — After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) *Failing to Grant All the Requested Relief.* — If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

(h) *Affidavit or Declaration Submitted in Bad Faith.* — If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time to respond — may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 56 of the Federal Rules of Civil Procedure.

I. GENERAL CONSIDERATION.

Federal authority relative to this rule is highly persuasive since this rule is virtually identical to its federal counterpart. Kimbley v. City of Green River, 642 P.2d 443 (Wyo. 1982).

The purpose of a motion for summary judgment is not to decide the facts but to determine if any real issue exists. Kover v. Hufsmith, 496 P.2d 908 (Wyo. 1972); Knudson v. Hilzer, 551 P.2d 680 (Wyo. 1976); Hunter v. Farmers Ins. Group, 554 P.2d 1239 (Wyo. 1976); Timmons v. Reed, 569 P.2d 112 (Wyo. 1977); Fegler v. Brodie, 574 P.2d 751 (Wyo. 1978); Kimbley v. City of Green River, 642 P.2d 443 (Wyo. 1982).

The object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial. Vipont Mining Co. v. Uranium Research & Dev. Co., 376 P.2d 868 (Wyo. 1962); Weaver v. Blue Cross-Blue Shield, 609 P.2d 984 (Wyo. 1980); Siebert v. Fowler, 637 P.2d 255 (Wyo. 1981); Reno Livestock Corp. v. SUNOCO, 638 P.2d 147 (Wyo. 1981); McKenney v. Pacific First Fed. Sav. Bank, 887 P.2d 927 (Wyo. 1994).

The effect of a motion for summary judgment is to pierce the formal allegations and reach the merits of the controversy. Clouser v. Spaniol Ford, Inc., 522 P.2d 1360 (Wyo. 1974); Reno Livestock Corp. v. SUNOCO, 638 P.2d 147 (Wyo. 1981).

A summary judgment proceeding allows for a prompt disposition of actions in the early stages of lawsuits, permitting an end to unfounded claims and avoiding the heavy expense of a full-fledged trial to both the litigants and the already overburdened judicial machinery of the state. Bluejacket v. Carney, 550 P.2d 494 (Wyo. 1976).

Purpose of summary judgment is to dispose of suits before trial that present no genuine issue of material fact. Moore v. Kiljander, 604 P.2d 204 (Wyo. 1979).

The purpose of summary judgment is to eliminate formal trials where only questions of law are involved, and to pierce the formal allegations and reach the merits of a controversy where no material issue of fact is present. England v. Simmons, 728 P.2d 1137 (Wyo. 1986).

Where there are genuine issues of material fact, summary judgment is improper, but the purpose behind summary judgment would be defeated if a case could be forced to trial merely by asserting that a genuine issue of material fact exists. England v. Simmons, 728 P.2d 1137 (Wyo. 1986).

Where there were genuine issues of material fact regarding the reasonableness of defendant's placement of gates on an easement because plaintiffs had erected cattle guards on the boundaries of the easement, the trial court, which made factual findings regarding the gates and the cattle guards, erred in granting summary judgment for plaintiffs. White v. Allen, 65 P.3d 395 (Wyo. 2003).

But inapplicable if pleading raises issue as against evidence. — The purpose of this rule is to pierce the formal allegations of the

pleadings and reach immediately the merits of the controversy. If pleading allegations are sufficient to raise a genuine issue as against uncontradicted evidentiary matter, this remedy then becomes substantially without utility. Vipont Mining Co. v. Uranium Research & Dev. Co., 376 P.2d 868 (Wyo. 1962).

Motion for summary judgment is drastic remedy and one which is designed to pierce the formal allegations and reach the merits of the controversy — but only when no material issue of fact is present. Weaver v. Blue Cross-Blue Shield, 609 P.2d 984 (Wyo. 1980).

Judge should hear evidence and direct verdict, not try case through summary judgment. — In cases where the judge is of opinion that he will have to direct a verdict for one party or the other on the issues that have been raised, he should ordinarily hear the evidence and direct the verdict rather than attempt to try the case in advance on a motion for summary judgment, which was never intended to enable parties to evade jury trials or have the judge weigh evidence in advance of its being presented. Western Sur. Co. v. Town of Evansville, 675 P.2d 258 (Wyo. 1984).

Summary judgment is a proper means of reaching the merits of a controversy where no material issue of fact is present and only questions of law are involved. Treemont, Inc. v. Hawley, 886 P.2d 589 (Wyo. 1994).

Available where conflict as to legal conclusions only. — Summary judgment is proper where there is a question of law but no issue of fact, but grant of the motion is not precluded because the question of law is important, difficult or complicated. It is for the court to decide whether further development of the facts and surrounding circumstances will assist it in making a correct determination of the question of law. Normally where the only conflict is as to what legal conclusions should be drawn from the undisputed facts, a summary judgment should be entered. Fugate v. Mayor & City Council, 348 P.2d 76 (Wyo. 1959).

Similar to submission upon agreed statement of facts. — When there is an agreed statement of facts and a motion for summary judgment is interposed, the situation presented does not materially differ from one in which a case is submitted to a trial court upon an agreed statement of facts and judgment is rendered thereon. Fugate v. Mayor of Buffalo, 348 P.2d 76 (Wyo. 1959).

The ultimate question on review of summary judgment is as to whether or not the judgment rendered is warranted by the facts, that is to say, whether the trial court applied a proper or improper rule of law. Fugate v. Mayor of Buffalo, 348 P.2d 76 (Wyo. 1959).

But record need not disclose bases for summary judgment. — Where the record disclosed no specific bases upon which the defendants sought or were granted summary judgment, it was held that these are not mandatory, but their absence is a handicap to a reviewing court. Park County Implement Co. v. Craig, 397 P.2d 800 (Wyo. 1964).

The supreme court will affirm a summary judgment where no genuine issues of material fact exist and the prevailing party is entitled to judgment as a matter of law. Treemont, Inc. v. Hawley, 886 P.2d 589 (Wyo. 1994); Garcia v. Lawson, 928 P.2d 1164 (Wyo. 1996).

Judicial estoppel. — Wyoming Supreme Court reversed a district court's holding that purchasers' license for fishing rights, that were not avoided in bankruptcy proceeding, could not be terminated by parties who were judicially estopped from doing so. Markstein v. Countryside I, L.L.C., 77 P.3d 389 (Wyo. 2003).

Summary judgment may be appropriate in cases where a contract is involved if the language of the contract is plain and unequivocal. Dudley v. East Ridge Dev. Co., 694 P.2d 113 (Wyo. 1985).

Summary judgment is proper where the language of an agreement is plain and unambiguous. Sturman v. First Nat'l Bank, 729 P.2d 667 (Wyo. 1986).

District court properly determined that contract language was clear and unambiguous, and that use of extrinsic evidence to determine parties' intent was not justified. Wolter v. Equitable Resources Energy Co., 979 P.2d 948 (Wyo. 1999).

Interpretation of an unambiguous insurance contract presents an issue of law which may be appropriately considered on summary judgment. Helm v. Board of County Comm'rs, 989 P.2d 1273 (Wyo. 1999).

Summary judgment where statute of limitations is at issue. — In legal malpractice action, for purposes of summary judgment motion, even where a factual dispute exists, the statute of limitations issue is still a question of law within the province of the court. Hiltz v. Robert W. Horn, P.C., 910 P.2d 566 (Wyo. 1996).

Defense of statute of limitations may be raised by a motion for summary judgment. Mason v. Laramie Rivers Co., 490 P.2d 1062 (Wyo. 1971).

The defense of statute of limitations is a question of law because only one conclusion can be reasonably drawn from the factual picture. Mason v. Laramie Rivers Co., 490 P.2d 1062 (Wyo. 1971).

And applicable to partnership dissolution. — Summary judgment is a procedure that can be used in an action for the dissolving of a partnership even though this was formerly a case in equity, since the distinction between law and equity has been abolished. Thickman v. Schunk, 391 P.2d 939 (Wyo. 1964).

Where withdrawing member did not voluntarily forfeit his equity interest in a limited liability company (LLC), the highest court, in reversing summary judgment that had required a buyout, did not require withdrawn

LLC member's equity interest to be bought by LLC or members, as they did not contract for buyout and statute did not require it, and remanded for trial court to define, in the declaratory judgment action, the withdrawn LLC member's retained LLC equity rights. Lieberman v. Wyoming.com LLC, 82 P.3d 274 (Wyo. 2004).

But not to issues of negligence. — With certain exceptions, issues of negligence are not ordinarily susceptible of summary adjudication. Forbes Co. v. MacNeel, 382 P.2d 56 (Wyo. 1963); Gilliland v. Steinhoefel, 521 P.2d 1350 (Wyo. 1974); Keller v. Anderson, 554 P.2d 1253 (Wyo. 1976); Dubus v. Dresser Indus., 649 P.2d 198 (Wyo. 1982).

The question of negligence, whether nonexistent, slight or gross, is one of fact and if the evidence respecting it is in conflict and such that ordinarily might draw different conclusions, a question of fact for the jury to determine is presented. Knudson v. Hilzer, 551 P.2d 680 (Wyo. 1976); Timmons v. Reed, 569 P.2d 112 (Wyo. 1977).

In negligence cases, where the question of negligence is usually one of fact for the jury to determine, if the evidence respecting such negligence is in conflict, summary judgment should not be granted. Summary judgments are not commonly interposed and even less frequently granted in negligence actions — because issues of negligence do not often lend themselves to summary adjudication. Connett v. Fremont County Sch. Dist. No. 6, 581 P.2d 1097 (Wyo. 1978); Timmons v. Reed, 569 P.2d 112 (Wyo. 1977).

Even where the facts bearing upon the issue of negligence are undisputed, if reasonable minds could reach different conclusions and inferences from such facts, the issue must be submitted to the trier of fact. Reno Livestock Corp. v. SUNOCO, 638 P.2d 147 (Wyo. 1981).

Genuine issues of material fact existed where car's passenger was killed as result of collision of car with cattle on paved portion of road; jury should determine what type of precautions ranchers as reasonable persons under all the circumstances, should have taken to keep their cattle off roadway, and jury must be body to determine from conflicting evidence what precautions were actually taken by the ranchers and whether cattle were drifting from their summer pastures, since the record suggested the ranchers may have been using fenced roadway as a catchpen or corral for their cattle. Roitz v. Kidman, 913 P.2d 431 (Wyo. 1996).

Nor to issue of inquiry notice. — There may be circumstances or factual situations from which notice may be inferred, but when reliance is placed thereon, summary judgment is not a proper remedy because this is a factual determination to be made by the trier of fact. Whether a party has notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and whether by prosecuting such inquiry he might have learned such fact, are questions of fact for the court or jury. Peterson v. First Nat'l Bank, 579 P.2d 1038 (Wyo. 1978).

Trial court erred in granting summary judgment for irrigation district and neighbors, pursuant to this section, in the homeowners' action to recover for water damage allegedly caused by irrigation because before the four-year statute of limitations, Wyo. Stat. Ann. § 1-3-105(a)(iv)(A) & (C), could be applied to bar the homeowners' action, a determination of the source of the water, whether its release was negligent, and if it was a continuous tort occurring each season was needed. Reed v. Cloninger, 131 P.3d 359 (Wyo. 2006).

Hearsay could not defeat summary judgment. — Opponent of motion could not rely upon hearsay to defeat the summary judgment motion; he could have, however, presented competent evidence in the form of affidavits or deposition testimony by individuals with personal knowledge of relevant facts. Smith v. Board of County Comm'rs, 891 P.2d 88 (Wyo. 1995).

In a contract case, summary judgment is appropriate when two conditions are met. First, there must be no genuine issues of material fact. Second, the provisions of the contract must be unambiguous; because where the language is unambiguous, the construction of the contract's provisions is a matter of law. Treemont, Inc. v. Hawley, 886 P.2d 589 (Wyo. 1994).

May be utilized in case before office of administrative hearings. — In light of the 1990 amendment of the statute and the adoption of the Wyoming Rules of Civil Procedure by the Rules for Contested Case Practice, a summary judgment can be utilized in a case before the Office of Administrative Hearings and should be granted when appropriate. Neal v. Caballo Rojo, Inc., 899 P.2d 56 (Wyo. 1995).

Summary judgments are not favored, particularly in negligence actions. Hozian v. Weathermon, 821 P.2d 1297 (Wyo. 1991).

Summary judgment is not favored in a negligence action and is, therefore, subject to more exacting scrutiny. Woodard v. Cook Ford Sales, Inc., 927 P.2d 1168 (Wyo. 1996).

Summary judgment procedures should be applied with special caution in negligence actions. — This is particularly true in malpractice suits. DeHerrera v. Memorial Hosp., 590 P.2d 1342 (Wyo. 1979).

Summary judgment in medical malpractice action. — See Harris v. Grizzle, 625 P.2d 747 (Wyo. 1981); Siebert v. Fowler, 637 P.2d 255 (Wyo. 1981).

Factual issue in negligence not raised. — For purposes of summary judgment on a negligence action based on a theory of negligent entrustment, the entruster's denial of knowledge of the incompetence of the person to whom the instrumentality was entrusted does not per

se negate negligence. Moore v. Kiljander, 604 P.2d 204 (Wyo. 1979).

Demonstration of fraud. — Against the backdrop of a motion for summary judgment, fraud must be demonstrated in a clear and convincing manner. Laird v. Laird, 597 P.2d 463 (Wyo. 1979).

Termination of parental rights cannot generally be accomplished by summary judgment after a motion hearing. However, summary judgment is not necessarily precluded in every termination of parental rights case, and the fundamental fairness and propriety of a particular procedure invoked in a termination proceeding may be reviewed on a case-by-case basis. RHF v. RMC, 774 P.2d 624 (Wyo. 1989).

Nonassumption of district's debts. — Where a majority of landowners were informed by the town attorney's letter that the area to be annexed was within the water and sewer district, that the town did not intend to assume the district's debts, and the properties within the boundaries of the area to be annexed would continue to be served by the district instead of the town, where those who were not agreeable to the town's refusal to assume the bonded indebtedness to object did not object, and where there is no counteraffidavit or evidence of any kind indicating that less than a majority of the landowners in the annexed area approved the town's nonassumption of the water and sewer district's debts, the record is sufficient to support a summary judgment in favor of the appellee on this point. Miller v. Town of Mills, 590 P.2d 378 (Wyo. 1979).

Granting of summary judgment was improper where plaintiff alleges factual issues relating to violations of the insurance code. Wyoming Ins. Dep't v. Sierra Life Ins. Co., 599 P.2d 1360 (Wyo. 1979).

Summary judgment was upheld where the court refused to expand the context of an insurance third-party bad faith claim to situations other than claims on an excess judgment. Jarvis v. Farmers Ins. Exch., 948 P.2d 898 (Wyo. 1997).

Reasons for granting motion should appear in record. — Although the specific basis or bases upon which a summary judgment is granted is not a mandatory part of the record, the absence from the record of the district court's reasoning process is a handicap to the appellate court, and the reasons for granting a motion for summary judgment should appear clearly in the record. Weaver v. Blue Cross-Blue Shield, 609 P.2d 984 (Wyo. 1980).

While the rule governing summary judgment is a useful tool to cut short litigation in which there is no useful purpose for a trial, it is not a useful device for deciding doubtful cases in a summary manner and passing difficult questions of law on to the appellate court for resolution with an inadequate record. Weaver v. Blue Cross-Blue Shield, 609 P.2d 984 (Wyo. 1980).

Absent prejudice, omitted affirmative defense may be raised. — A board of county commissioners could raise an omitted affirmative defense of governmental immunity for the first time by a motion for summary judgment, where no prejudice to the adverse party was alleged. Pickle v. Board of County Comm'rs, 764 P.2d 262 (Wyo. 1988).

Disability benefits. — Hearing examiner did not err, as a matter of law, by considering the employee's actual post-injury employment even though it commenced after she applied for and was denied permanent partial disability (PPD) benefits and was located in Nebraska; the focus of Wyo. Stat. Ann. § 27-14-405(h), which set out the requirements for PPD benefits, was on an injured employee's actual ability to earn. There was no dispute regarding the employee's actual post-injury employment; therefore she did not meet the statutory requirements for PPD benefits under § 27-14-405(h) and the Workers' Safety and Compensation Division was entitled to summary judgment pursuant to this section, as a matter of law. Chavez v. Mem'l Hosp. of Sweetwater County, 138 P.3d 185 (Wyo. 2006).

Governmental immunity. — Order denying a summary judgment on a claim of governmental immunity is appealable and it is not necessary to grant discretionary review in such circumstances. State Dep't of Corr. v. Watts, 177 P.3d 793 (Wyo. 2008).

Appellate review. — An appellate court examines the record from the vantage point most favorable to the party who opposed the motion, and will give that party the benefit of all favorable inferences that may fairly be drawn from the record. Garcia v. Lawson, 928 P.2d 1164 (Wyo. 1996).

The supreme court evaluates the propriety of a summary judgment by employing the same standards and by using the same materials as were employed and used by the lower court. Garcia v. Lawson, 928 P.2d 1164 (Wyo. 1996).

Supreme court reviews a summary judgment in same light as district court, using same materials and following same standards. Unicorn Drilling, Inc. v. Heart Mt. Irrigation Dist., 3 P.3d 857 (Wyo. 2000).

Legal error. — District court committed an error of law by characterizing irrevocable trust as an investment rather than a conveyance, requiring reversal and remand for entry of summary judgment in favor of opposing party. Jewish Community Ass'n v. Community First Nat'l Bank, 6 P.3d 1264 (Wyo. 2000).

Applied in Spriggs v. Pioneer Carissa Gold Mines, Inc., 378 P.2d 238 (Wyo. 1963); Kelsey v. Anderson, 421 P.2d 163 (Wyo. 1966); Linde v. Bentley, 482 P.2d 121 (Wyo. 1971); Fagan v. Summers, 498 P.2d 1227 (Wyo. 1972); Johnson v. City of Cheyenne, 504 P.2d 1081 (Wyo. 1973); Stevens v. Rock Springs Nat'l Bank, 577 P.2d

1374 (Wyo. 1978); Peterson v. First Nat'l Bank, 579 P.2d 1038 (Wyo. 1978); Maguire v. Harriscope Broadcasting Co., 612 P.2d 830 (Wyo. 1980); Joslyn v. Professional Realty, 622 P.2d 1369 (Wyo. 1981); Kuehne v. Samedan Oil Corp., 626 P.2d 1035 (Wyo. 1981); Schepps v. Howe, 665 P.2d 504 (Wyo. 1983); Larsen v. Roberts, 676 P.2d 1046 (Wyo. 1984); Sannerud v. First Nat'l Bank, 708 P.2d 1236 (Wyo. 1985); Garner v. Hickman, 709 P.2d 407 (Wyo. 1985); Williams v. Blount, 741 P.2d 595 (Wyo. 1987); Williams v. First Wyo. Bank, 742 P.2d 197 (Wyo. 1987); White v. L.L. Smith Trucking, 742 P.2d 1286 (Wyo. 1987); Johnston v. Conoco, Inc., 758 P.2d 566 (Wyo. 1988); Johnson v. Anderson, 768 P.2d 18 (Wyo. 1989); Chasson v. Community Action of Laramie County, Inc., 768 P.2d 572 (Wyo. 1989); Jung-Leonczynska v. Steup, 782 P.2d 578 (Wyo. 1989); Kirkwood v. Kelly, 794 P.2d 891 (Wyo. 1990); State v. Homar, 798 P.2d 824 (Wyo. 1990); Apodaca v. Ommen, 807 P.2d 939 (Wyo. 1991); Clark v. Industrial Co., 818 P.2d 626 (Wyo. 1991); Worden v. Village Homes, 821 P.2d 1291 (Wyo. 1991); Arrow Constr. Co. v. Camp, 827 P.2d 378 (Wyo. 1992); Wilder v. Cody Country Chamber of Commerce, 868 P.2d 211 (Wyo. 1994); LC v. TL, 870 P.2d 374, cert. denied, 513 U.S. 871, 115 S. Ct. 195, 130 L. Ed. 2d 127 (1994); Raymond v. Steen, 882 P.2d 852 (Wyo. 1994); Roemer Oil Co. v. Aztec Gas & Oil Corp., 886 P.2d 259 (Wyo. 1994); Downen v. Sinclair Oil Corp., 887 P.2d 515 (Wyo. 1994); Bidache, Inc. v. Martin, 899 P.2d 872 (Wyo. 1995); Jack v. Enterprise Rent-A-Car Co., 899 P.2d 891 (Wyo. 1995); Hamilton v. Natrona County Educ. Ass'n, 901 P.2d 381 (Wyo. 1995); Kahrs v. Board of Trustees, 901 P.2d 404 (Wyo. 1995); State ex rel. Bayou Liquors, Inc. v. City of Casper, 906 P.2d 1046 (Wyo. 1995); Verschoor v. Mountain W. Farm Bureau Mut. Ins. Co., 907 P.2d 1293 (Wyo. 1995); Rue v. Carter, 919 P.2d 633 (Wyo. 1996); M & A Constr. Corp. v. Akzo Nobel Coatings, Inc., 936 P.2d 451 (Wyo. 1997); Kirkwood v. CUNA Mut. Ins. Soc'y, 937 P.2d 206 (Wyo. 1997); Estate of Coleman v. Casper Concrete Co., 939 P.2d 233 (Wyo. 1997); Grose v. Sauvageau, 942 P.2d 398 (Wyo. 1997); Terry v. Pioneer Press, Inc., 947 P.2d 273 (Wyo. 1997); Ahearn v. Tri-County Fed. Sav. Bank, 948 P.2d 896 (Wyo. 1997); Brown v. Life Ins. Co. of N. Am., 8 P.3d 333 (Wyo. 2000); Bender v. Phillips, 8 P.3d 1074 (Wyo. 2000); Sorenson v. Sorenson, 9 P.3d 259 (Wyo. 2000); Vernon T. Delgado Family Ltd. Partnership v. Shaw, 9 P.3d 982 (Wyo. 2000); Hovendick v. Ruby, 10 P.3d 1119 (Wyo. 2000); Lieberman v. Wyoming.com LLC, 11 P.3d 353 (Wyo. 2000); Beaulieu v. Florquist, 20 P.3d 521 (Wyo. 2001); Hulse v. First Am. Title Co., 33 P.3d 122 (Wyo. 2001); Hutchins v. Payless Auto Sales, Inc., 38 P.3d 1057 (Wyo. 2002); Bevan v. Fix, 42 P.3d 1013 (Wyo. 2002); Goglio v. Star Valley Ranch Ass'n, 48 P.3d 1072 (Wyo. 2002); Owsley v. Robinson, 65 P.3d 374 (Wyo. 2003); Beaulieu v. Florquist, 86 P.3d 863 (Wyo. 2004); D&D Transp., Ltd. v. Interline Energy Servs., Inc., 117 P.3d 423 (Wyo. 2005); Ballinger v. Thompson, 118 P.3d 429 (Wyo. 2005); Knapp v. Landex Corp., 130 P.3d 924 (Wyo. 2006); Knapp v. Landex Corp., 130 P.3d 924 (Wyo. 2006); Hincks v. Walton Ranch Co., 150 P.3d 669 (Wyo. 2007); White v. Woods, 202 P.3d 1053 (Wyo. 2009); William F. West Ranch, LLC v. Tyrrell, 206 P.3d 722 (Wyo. 2009); Duke v. State, 209 P.3d 563 (Wyo. 2009); Bloomer v. State, 209 P.3d 574 (Wyo. 2009); Hall v. Perry, 211 P.3d 489 (Wyo. 2009); Cheek v. Jackson Wax Museum, 220 P.3d 1288 (Wyo. 2009); Brown v. City of Casper, 248 P.3d 1136 (Wyo. 2011); Boykin v. Parkhurst (In re Parkhurst), 243 P.3d 961 (Wyo. 2010).

Quoted in Carter v. Davison, 359 P.2d 990 (Wyo. 1961); Urich v. Fox, 687 P.2d 893 (Wyo. 1984); Hurst v. State, 698 P.2d 1130 (Wyo. 1985); Keabler v. City of Riverton, 808 P.2d 205 (Wyo. 1991); Sandstrom v. Sandstrom, 880 P.2d 103 (Wyo. 1994); Mize v. North Big Horn Hosp. Dist., 931 P.2d 229 (Wyo. 1997); Snake River Brewing Co. v. Town of Jackson, 39 P.3d 397 (Wyo. 2002); Colo. Cas. Ins. Co. v. Sammons, 157 P.3d 460 (Wyo. 2007); Quinn v. Securitas Sec. Servs., 158 P.3d 711 (Wyo. 2007); Wagner v. Reuter, 208 P.3d 1317 (Wyo. 2009); Formisano v. Gaston, 246 P.3d 286 (Wyo. 2011); Royball v. State, 210 P.3d 1073 (Wyo. 2009).

Stated in Koontz v. Town of South Superior, 716 P.2d 358 (Wyo. 1986); Parker v. Haller, 751 P.2d 372 (Wyo. 1988); AMOCO Prod. Co. v. State, 751 P.2d 379 (Wyo. 1988); Wessel v. Mapco, Inc., 752 P.2d 1363 (Wyo. 1988); WR v. Natrona County Dep't of Family Servs., 916 P.2d 991 (Wyo. 1996); Shaffer v. State, 960 P.2d 504 (Wyo. 1998); Story v. State, 15 P.3d 1066 (Wyo. 2001); Wayt v. Urbigkit, 152 P.3d 1057 (Wyo. 2007); Dwan v. Indian Springs Ranch Homeowners Ass'n, 186 P.3d 1199 (Wyo. 2008); Riverview Heights Homeowners' Ass'n v. Rislov, 205 P.3d 1035 (Wyo. 2009); Cheek v. Jackson Wax Museum, 220 P.3d 1288 (Wyo. 2009); Singer v. New Tech Eng'g L.P., 227 P.3d 305 (Wyo. 2010); Lindsey v. Harriet, 255 P.3d 873 (Wyo. 2011).

Cited in Bircher v. Foster, 378 P.2d 901 (Wyo. 1963); State ex rel. Pearson v. Hansen, 401 P.2d 954 (Wyo. 1965); Miller v. Brown, 453 P.2d 884 (Wyo. 1969); Spivey v. City of Casper, 455 P.2d 660 (Wyo. 1969); Awe v. University of Wyo., 534 P.2d 97 (Wyo. 1975); Adams v. Frontier Broadcasting Co., 555 P.2d 556 (Wyo. 1976); Angus Hunt Ranch, Inc. v. Bowen, 571 P.2d 974 (Wyo. 1977); Town of Wheatland v. Allison, 577 P.2d 1006 (Wyo. 1978); Siebken v. Town of Wheatland, 700 P.2d 1236 (Wyo. 1985); Podolak v. Lingle State Bank, 730 P.2d 126 (Wyo. 1986); Connaghan v. Eighty-Eight Oil Co., 750 P.2d 1321 (Wyo. 1988); Baldwin v. Dube, 751 P.2d 388 (Wyo. 1988); Wales v. Roll, 769 P.2d 899 (Wyo. 1989); Doud v. First Interstate Bank, 769 P.2d 927 (Wyo. 1989); Fiscus v. ARCO, 773 P.2d 158 (Wyo. 1989); Mari v. Rawlins Nat'l Bank, 794 P.2d 85 (Wyo. 1990); Whiting v. Vines, 810

P.2d 126 (Wyo. 1991); Bredthauer v. Christian, Spring, Seilbach & Assocs., 824 P.2d 560 (Wyo. 1992); Cities Serv. Oil & Gas Corp. v. State, 838 P.2d 146 (Wyo. 1992); Coones v. FDIC, 848 P.2d 783 (Wyo. 1993); Moore v. Lubnau, 855 P.2d 1245 (Wyo. 1993); Prudential Preferred Properties v. J & J Ventures, Inc., 859 P.2d 1267 (Wyo. 1993); Hirsch v. McNeill, 870 P.2d 1057 (Wyo. 1994); Dubray v. Howshar, 884 P.2d 23 (Wyo. 1994); Mountain Cement Co. v. Johnson, 884 P.2d 30 (Wyo. 1994); Sandstrom v. Sandstrom, 884 P.2d 968 (Wyo. 1994); Vigil v. Ruettgers, 887 P.2d 521 (Wyo. 1994); Hanna v. Cloud 9, Inc., 889 P.2d 529 (Wyo. 1995); Martinez v. Associates Fin. Servs. Co., 891 P.2d 785 (Wyo. 1995); Beaudoin v. Kibbie, 905 P.2d 939 (Wyo. 1995); Goodrich v. Stobbe, 908 P.2d 416 (Wyo. 1995); Newberry v. Board of County Comm'rs, 919 P.2d 141 (Wyo. 1996); Schott v. Miller, 943 P.2d 1174 (Wyo. 1997); Townsend v. Living Ctrs. Rocky Mt., Inc., 947 P.2d 1297 (Wyo. 1997); Exxon Corp. v. Board of County Comm'rs, 987 P.2d 158 (Wyo. 1999); Oakden v. Roland, 988 P.2d 1057 (Wyo. 1999); Page v. Mountain W. Farm Bureau Mut. Ins. Co., 2 P.3d 506 (Wyo. 2000); Kendrick v. Barker, 15 P.3d 734 (Wyo. 2001); Corpening v. Corpening, 19 P.3d 514 (Wyo. 2001); Scherer Constr. LLC v. Hedquist Constr., Inc., 18 P.3d 645 (Wyo. 2001); Beaulieu v. Florquist, 20 P.3d 521 (Wyo. 2001); Williams Gas Processing-Wamsutter Co. v. Union Pac. Res. Co., 25 P.3d 1064 (Wyo. 2001); Terex Corp. v. Hough, 50 P.3d 317 (Wyo. 2002); Nuhome Invs., LLC v. Weller, 81 P.3d 940 (Wyo. 2003); Hede v. Gilstrap, 107 P.3d 158 (Wyo. 2005); Wilson v. Town of Alpine, 111 P.3d 290 (Wyo. 2005); Linton v. E. C. Cates Agency, Inc., 113 P.3d 26 (Wyo. 2005); Habco v. L&B Oilfield Serv., 138 P.3d 1162 (Wyo. 2006); Seherr-Thoss v. Seherr-Thoss, 141 P.3d 705 (Wyo. 2006); Cornelius v. Powder River Energy Corp., 152 P.3d 387 (Wyo. 2007); Long v. Daly, 156 P.3d 994 (Wyo. Apr. 27, 2007); Glenn v. Union Pac. R.R. Co., 176 P.3d 640 (Wyo. 2008); Alpine Lumber Co. v. Capital West Nat'l Bank, 231 P.3d 869 (Wyo. 2010); Harper v. Fid. & Guar. Life Ins. Co., 234 P.3d 1211 (Wyo. 2010).

Law reviews. — For article, "Pleading Under the Federal Rules," see 12 Wyo. L.J. 177 (1958).

For article, "Summary Judgment," see 12 Wyo. L.J. 247 (1958).

For note, "Proper and Improper Summary Judgment Cases," see 12 Wyo. L.J. 289 (1958).

For note, "Form of Summary Judgment Affidavits," see 12 Wyo. L.J. 295 (1958).

For case note, "Exclusivity Provisions of the Worker's Compensation Act as a Bar to Third-Party Actions Against Employers. Pan American Petroleum Corp. v. Maddux Well Service, 586 P.2d 1220 (Wyo. 1978)," see XIV Land & Water L. Rev. 587 (1979).

For article, "Recreational Injuries & Inherent Risks: Wyoming's Recreation Safety Act," see XXVIII Land & Water L. Rev. 149 (1993).

Am. Jur. 2d, ALR and C.J.S. references. — 73 Am. Jur. 2d Summary Judgment § 1 et seq.

Mandamus or prohibition cases, 3 ALR3d 675.

Counterclaim, proceeding for summary judgment as affected by presentation of, 8 ALR3d 1361.

Reviewability of order denying motion for summary judgment, 15 ALR3d 899.

Right to voluntary dismissal of civil action as affected by opponent's motion for summary judgment, judgment on the pleadings, or directed verdict, 36 ALR3d 1113.

Admissibility of oral testimony at state summary judgment hearing, 53 ALR4th 527.

Sufficiency of evidence to support grant of summary judgment in will probate or contest proceedings, 53 ALR4th 561.

Hearing and oral arguments, necessity of, on motion for summary judgment or for judgment on the pleadings in federal courts, 1 ALR Fed 295; 105 ALR Fed 755.

Application of local district court summary judgment rules to nonmoving party in federal courts — Statements of facts, 8 ALR Fed. 2d 611.

Sufficiency of showing, under Rule 56(f) of Federal Rules of Civil Procedure, of inability to present by affidavit facts justifying opposition to motion for summary judgment, 47 ALR Fed 206; 72 ALR Fed 133.

Propriety, under Rule 56(c) of the Federal Rules of Civil Procedure, of granting oral motion for summary judgment, 52 ALR Fed 567.

Necessity of oral argument on motion for summary judgment or judgment on pleadings in federal court, 105 ALR Fed 755.

Propriety, under rule 56 of the federal rules of civil procedure, of granting summary judgment when deponent contradicts in affidavit earlier admission of fact in deposition, 131 ALR Fed 403.

Necessity and Sufficiency of Notice of Court's Decision to Convert Motion to Dismiss Under Rule 12 (b)(6) of Federal Rules of Civil Procedure or Motion for Judgment on Pleadings Under Rule 12(c) to Motion for Summary Judgment under Rule 56 Due to Consideration of Matters Outside Pleadings, 143 ALR Fed 455.

49 C.J.S. Judgments §§ 243 to 274.

II. FOR CLAIMANT.

Plaintiff deemed moving party where seeks summary judgment in response to defendant's confession. — Where defendant's motion for summary judgment was more in the nature of a confession of judgment in the amount of $15,000, and plaintiff then filed an affidavit seeking entry of summary judgment in the amount of $30,000, plaintiff was the moving party to the extent that he sought summary judgment in an amount greater than $15,000, and his affidavit would be closely scrutinized by appellate court viewing the evidence in the

light most favorable to defendant. Western Sur. Co. v. Town of Evansville, 675 P.2d 258 (Wyo. 1984).

Court properly considered second motion for summary judgment and earlier filed untimely affidavit following denial of the first motion on procedural grounds (i.e., supporting affidavit filed late). The second motion amounted, in effect, to a request for an extension of time within which to file the supporting documents. Greaser v. Williams, 703 P.2d 327 (Wyo. 1985).

Judgment should have been for plaintiffs in mineral-deeds case. — In a declaratory judgment action, the trial court should have granted summary judgment to the plaintiffs (grantors and predecessors in interest), instead of to the defendant coal company, as under the plain meaning of the mineral deeds' terms, the grantors and the successor's predecessors did not intend to include coalbed methane gas as a mineral "extracted in association with coal operations," as CMB was not captured automatically during coal excavation, but had to be recovered only through wells drilled before the coal was mined. McGee v. Caballo Coal Co., 69 P.3d 908 (Wyo. 2003).

Judgment improper for claimants in breach-of-contract case. — With respect to a breach of contract action where the buyers rescinded their offer to buy real estate, in the operative portion of the contract description, the phrase "a parcel of land" identified neither the size nor the specific location of the land, there was nothing within the contract that guided the appellate court to specific extrinsic evidence of those facts, and therefore, the real-estate contract was void, and summary judgment for the plaintiff sellers, which awarded them the earnest money deposit, plus attorney's fees, was reversed. Pullar v. Huelle, 73 P.3d 1038 (Wyo. 2003).

Assignee properly granted summary judgment. — Assignee of promissory note, mortgage, and guaranty was properly awarded summary judgment, pursuant to Wyo. R. Civ. P. 56(c), against the guarantor who alleged that the guaranty was obtained by fraud, mistake, misrepresentation, or illegality, for even when the evidence was viewed in the light most favorable to the guarantor, there were no genuine issues of material fact as to fraud, illegality, mistake, or the discharge of the underlying debt. Lee v. LPP Mortg. Ltd., 74 P.3d 152 (Wyo. 2003).

Collateral estoppel. — In appellees' suit for a judgment declaring an easement valid, the fact that a directed verdict had been entered against appellants' predecessors in a prior lawsuit concerning the easement did not mean that the predecessors had not been presented with the opportunity to litigate; thus, the trial court properly held that appellants' challenge to the validity of the easement was precluded by collateral estoppel, and properly granted summary judgment to appellees. Pokorny v. Salas, 81 P.3d 171 (Wyo. 2003).

Summary judgment in mortgage lien priority dispute. — District court properly granted summary judgment to a bank in a mortgage foreclosure action because it would have been improper to apply the doctrine of equitable subrogation to allow a refinancing mortgagee to be subrogated to the priority lien position held by an original mortgagee as Wyo. Stat. Ann. § 34-1-121 was clearly a filing date priority statute and the refinancing mortgagee, which was considered a purchaser under Wyo. Stat. Ann. § 34-1-101, had constructive notice of a prior lien held by a bank. Countrywide Home Loans, Inc. v. First Nat'l Bank of Steamboat Springs, N.A., 144 P.3d 1224 (Wyo. 2006).

Summary judgment proper where easement language clear and unambiguous. — In appellees' suit for a judgment declaring an easement valid, the language of the easement was clear and unambiguous, and the surrounding circumstances of the warranty deed confirmed that the parties intended the easement to be appurtenant; thus, the trial court properly granted summary judgment to appellees. Pokorny v. Salas, 81 P.3d 171 (Wyo. 2003).

Summary judgment was properly granted in favor of a developer to enforce equitable servitudes in a subdivision because the developer had acquired equitable, although not legal, title to the property when he recorded the protective covenants, he intended to burden the entire development therewith, and the property owners purchased their individual lots with notice of the covenants. Cash v. Granite Springs Retreat Ass'n, 248 P.3d 614 (Wyo. 2011).

Homeowners' association properly granted summary judgment where restrictive covenant violated. — Summary judgment was properly granted in favor of the homeowners' association where, although the homeowner's placing of a portable hot tub on a deck did not affect the structure of the deck or townhouse and was not the type of permanent alteration or change addressed by the covenants, the covenant regarding keeping outside areas clean, sightly, and free of obstructions applied to decks, and management committee approval was required before a hot tub could be placed on a deck. Stevens v. Elk Run Homeowners' Ass'n, 90 P.3d 1162 (Wyo. 2004).

III. FOR DEFENDING PARTY.

Cause need not be at issue before summary judgment granted. — In considering Rule 7(a), which requires an answer, together with subdivision (c) of this rule, a cause need not be at issue before summary judgment may be granted, since subdivision (b) of this rule clearly provides that a party against whom a claim is asserted may, at any time, move for a summary judgment in his favor. Ford v. Madia, 480 P.2d 101 (Wyo. 1971).

Affidavit in lieu of answer. — A defen-

dant's supporting affidavit of a motion for summary judgment may be considered in place of an answer required by Rule 7(a). Ford v. Madia, 480 P.2d 101 (Wyo. 1971).

Judgment for defending physician proper. — Summary judgment for physician was proper in prisoner's suit under 42 U.S.C.S. § 1983 for alleged violation of Eight Amendment and on negligence grounds where prisoner did not establish the applicable standard of care or a breach of that standard by the physician, and the totality of the evidence contained in the summary judgment materials revealed no genuine issues of material fact. Garnett v. Coyle, 33 P.3d 114 (Wyo. 2001).

Liability of independent contractor. — Summary judgment was entered for a coal bed operator, a partnership that supervised the operation, and a partner, in a wrongful death action where the deceased, who was delivering casing to the site, was killed in a backhoe accident because the backhoe driver was employed by a drilling company that was an independent contractor hired by the operator. The partner, who was an employee of the supervising partnership, could direct the employees of the independent contractor without incurring liability for their actions. Franks v. Indep. Prod. Co., 96 P.3d 484 (Wyo. 2004).

Summary judgment properly granted to defendant accountant. — Summary judgment in favor of an accountant in a professional malpractice suit was not reversed where no genuine issues of material fact remained because the accountant established through expert opinion testimony that he had not breached the professional standard of care. Rino v. Mead, 55 P.3d 13 (Wyo. 2002).

Summary judgment affirmed. — Since the 1997 endorsement to the insured's health insurance policy clearly did not expressly supercede a waiver signed by the insured, and the amended definitions of a preexisting condition found at 42 U.S.C.S. § 300gg(a) were inapplicable, the decision of a state district court granting an insurance company summary judgment was affirmed on appeal. O'Donnell v. Blue Cross Blue Shield, 76 P.3d 308 (Wyo. 2003).

Summary judgment to defendant bank that denied plaintiff borrowers' loan despite a loan officer's contrary assurances was proper where, inter alia, there was no express or implied contract and neither promissory nor equitable estoppel applied. Birt v. Wells Fargo Home Mortg., Inc., 75 P.3d 640 (Wyo. 2003).

Trial court properly granted summary judgment to subcontractor in a negligence suit arising from an automobile accident, which occurred at a construction site, because the undisputed evidence showed that the subcontractor owed no duty to appellants as the subcontractor performed no work and had no control over the work where the accident occurred. Hatton v. Energy Elec. Co., 148 P.3d 8 (Wyo. 2006).

Hearing officer properly granted the employer summary judgment in the 59-year-old employee's age discrimination action arising out of his termination because the employee's summary judgment evidence failed to counter a supervisor's assertions that at times the employee could not be found at work when he was scheduled to be there and did not change his behavior after being specifically instructed to do so. The employee failed to show that the employer's reason for terminating him was pretextual because, other than the employee's assertion that the supervisor made a discriminatory statement early on in the supervisor's tenure, the employee provided no details about the context or timing of the supervisor's ageist comments, and none of the employee's submissions indicated that the supervisor's remarks were made in connection with his discharge. Rollins v. Wyo. Tribune-Eagle, 152 P.3d 367 (Wyo. 2007).

In a suit by a property owner challenging a special assessment issued by the subdivision's design committee to fund the repair of common roads in the subdivision, the trial court properly granted summary judgment in favor of the design committee because the subdivision covenants granted to the design committee the authority to issue special assessments to remedy "unusual conditions"; although that phrase was not defined, it was reasonable to interpret that phrase to include common area conditions that required remedy. The condition of the common roads constituted an unusual condition that justified the special assessments because the uncontradicted evidence established that the gravel roads were in poor condition, that maintenance had become difficult, and that the drainage ditches had been destroyed when the roads were widened. Fayard v. Design Comm. of the Homestead Subdivision, 230 P.3d 299 (Wyo. 2010).

Where buyers purchased a home and subsequently discovered defects that rendered the home uninhabitable, where the home was soon thereafter condemned by the city, and where the buyers filed suit against the sellers, the real estate agents for both the buyers and the sellers, and the home inspection company that inspected the home and declared it free from major defects, summary judgment was properly granted in favor of the real estate agents on the buyers' claim of professional negligence because the sellers' agent had no duty to prospective sellers to independently inspect the home to discover and disclose all defects and because the buyers' agent had no duty to inspect all homes prior to showing them to buyer/clients to warrant that the homes were free from defect; further, the real estate agents were entitled to summary judgment on the buyers claim of breach of contract because the buyers were not in privity of contract with the sellers' agent and because the buyers' contract with their real estate agent placed the duty of ascertaining the

condition of the home upon the buyers. Throckmartin v. Century 21 Top Realty, 226 P.3d 793 (Wyo. 2010).

Summary judgment improperly granted to grantors. — Summary judgment was improperly granted in favor of the grantors of coal interests; rather, summary judgment should have been granted to coal company where the deeds demonstrated that the grantors' predecessors intended to convey all of the coalbed methane to the coal company's predecessors. Caballo Coal Co. v. Fid. Exploration & Prod. Co., 84 P.3d 311 (Wyo. 2004).

Statute of limitations. — Because a home owner and its occupants learned of water in their crawl space three years before they filed a negligence action against a real estate agency and an associate broker, the matter was time-barred under Wyo. Stat. Ann. § 1-3-107(a) and the trial court correctly granted the agency and broker summary judgment pursuant to W.R.C.P. 56(c). Rawlinson v. Greer, 64 P.3d 120 (Wyo. 2003).

Summary judgment on the basis of a 2-year professional-negligence statute of limitations was proper in an action for negligent misrepresentation against real estate professionals by non-client buyers. Hulse v. BHJ, Inc., 71 P.3d 262 (Wyo. 2003).

Judgment proper for defendants in contract-interpretation case. — A district court's order, granting partial summary judgment for the defendants in a contract-interpretation case, was appropriate where the district court (1) correctly determined that the disputed assignments were ambiguous; (2) properly examined extrinsic evidence in order to resolve the ambiguity; and (3) correctly evaluated this evidence as producing the conclusion that a corporation's overriding royalty interest in an oil and gas lease was proportionately reduced. Wadi Petroleum, Inc. v. Ultra Res., Inc., 65 P.3d 703 (Wyo. 2003).

Judgment for defendant employer in retaliatory discharge action. — Summary judgment was properly granted to the employer in the employee's action for retaliatory discharge in violation of public policy because the Wyoming Fair Employment Practices Act, Wyo. Stat. Ann. § 27-9-101 et seq., includes claims for sexual harassment, and therefore, the employee was required to follow administrative procedures and exhaust her administrative remedies rather than pursue a tort action. Hoflund v. Airport Golf Club, 105 P.3d 1079 (Wyo. 2005).

Judgment for defending dog owners improper. — Dog owners were improperly granted summary judgment in connection with a minor's dog bite action for damages because (1) material issues of fact existed as to the minor's strict liability claim regarding whether the dog owners were aware of a previous attack by the dog, (2) material issues of fact existed as to the minor's negligence claim regarding whether the dog owners were aware of the dog's unfriendly disposition and the minor's abuse toward the animal, and (3) the grant of summary judgment was premised on the incorrect conclusion that there was no distinction between negligence and strict liability. Borns v. Voss, 70 P.3d 262 (Wyo. 2003).

Judgment for defending psychologist proper. — Trial court's grant of summary judgment in favor of a licensed psychological counselor was proper in a patient's negligence action, where (1) the counselor was not retained to make a recommendation as to whether the patient should have remained employed; and (2) therefore, in performing an independent psychological evaluation for the benefit of the patient's employer, the counselor did not owe the patient a duty of care. Erpelding v. Lisek, 71 P.3d 754 (Wyo. 2003).

Judgment for defending attorney proper. — Because the clients' bankruptcy filing terminated both their contractual relationship with their attorney, and their property interest in a pre-petition medical malpractice claim, they had no standing to pursue either a legal malpractice claim against their attorney or a medical malpractice claim against the medical provider, and summary judgment for the attorney in the client's malpractice suit was appropriate. Kolschefsky v. Harris, 72 P.3d 1144 (Wyo. 2003).

Judgment for defending corporation dismissing derivative suit by former president. — When a corporation obtained a judgment against its former president for stealing corporate funds, and the former president filed a derivative action against the corporation's other officers, summary judgment dismissing the suit was properly entered because, under Wyo. Stat. Ann. § 17-16-741(a)(ii), the former president did not fairly and adequately represent the interests of the corporation; a lawsuit filed by the corporation against the former president for the misappropriation of corporate funds was pending and the former president's history of animosity, hostility and chicanery toward the corporation and its other shareholders rendered the former president unable to fairly represent them. Woods v. Wells Fargo Bank, 90 P.3d 724 (Wyo. 2004).

Judgment for defending city and police officer in governmental claims action. — Where an individual sued the city and a police officer for negligence, the individual's notice of claim, signed by the individual's attorney but not by the individual, did not meet the constitutional requirements for a valid claim under the Wyoming Governmental Claims Act, Wyo. Stat. Ann. § 1-39-101 et seq., because it was not signed by the individual, and it was not certified to under penalty of perjury; thus, summary judgment for the city and the police officer was proper despite any imprecision as to whether the district court dismissed the complaint under W.R.C.P. 12(b)(1) or W.R.C.P. 12(c).

Yoak v. Ide, 86 P.3d 872 (Wyo. 2004).

Partial judgment for medical-malpractice defendants improper. — Wyoming's highest court recognized the recoverability of damages for lost chance of survival in appropriate medical-malpractice cases; therefore, the trial court should not have entered partial summary judgment in favor of the defendants on the issue of causation, where the patient's child argued that the patient's last chance of avoiding a fatal major stroke was lost when the providers failed to attend to earlier mini-strokes. McMackin v. Johnson County Healthcare Ctr., 73 P.3d 1094 (Wyo. 2003).

Genuine issue of material fact. — In an intentional interference with contract case, a court erred by granting summary judgment to an economic development corporation and against a contractor where there was a genuine issue of material fact as to what potential building site was the subject of a meeting between the parties. Ahrenholtz v. Laramie Econ. Dev. Corp., 79 P.3d 511 (Wyo. 2003).

No damages suffered. — Court properly granted summary judgment to an attorney because a personal representative of an estate was not entitled to pursue a malpractice case against the attorney where the estate suffered no loss because the estate had no interest in how its assets were distributed; stated another way, the estate had no damages. Connely v. McColloch (In re Estate of Drwenski), 83 P.3d 457 (Wyo. 2004).

Court properly granted summary judgment to an attorney because a daughter could not pursue a malpractice action against her father's attorney for failing to obtain the father's divorce before his death because the daughter was not an intended beneficiary of the divorce action. Connely v. McColloch (In re Estate of Drwenski), 83 P.3d 457 (Wyo. 2004).

Lack of evidence. — In an intentional infliction of emotional distress case, a court did not err by granting summary judgment to an economic development corporation and against plaintiff contractor where there was no evidence that supported a claim for emotional damages. There was only the basic allegation that the contractor's wife was emotionally damaged, and that was not sufficient to avoid the motion. Ahrenholtz v. Laramie Econ. Dev. Corp., 79 P.3d 511 (Wyo. 2003).

Summary judgment for defending bank was proper. — In an action in which a company and its president, who defaulted on a personal commercial loan, sued a bank for breach of good faith after the bank transferred funds from the company's account to cover past the due loan payments, the trial court properly dismissed the entire action on the bank's partial motion for summary judgment; any damages suffered by the president personally upon return of the funds to the company's account were attributable not to the bank's actions but to the president's own failure to make his loan payments in a timely manner. Lewis v. Cmty. First Nat'l Bank, N.A., 101 P.3d 457 (Wyo. 2004).

Summary judgment for city proper where action barred by statute of limitations. — Limitation period found in Wyoming Governmental Claims Act applied to an inverse condemnation cause of action and to the homeowners' tort claims against a city and where the undisputed material facts showed that complaint had been filed well beyond one-year period set forth in Wyo. Stat. Ann. § 1-39-114, and was therefore time-barred. The district court was correct in applying its statute of limitation analysis to all of the state law claims and in dismissing the action on summary judgment. Lankford v. City of Laramie, 100 P.3d 1238 (Wyo. 2004).

IV. MOTION AND PROCEEDINGS THEREON.

Conversion from Rule 12(b)(6) to summary judgment was proper. — Documents which could have been filed pursuant to a motion for summary judgment, but were filed with the motion to dismiss, indicated that the moving party expected to have the motion decided pursuant to this rule. While the court order did not specifically say that an automatic conversion had occurred, and in spite of the fact that no notice is necessary in instances of automatic conversion, the trial court specifically ordered that the opposing party have 10 days in which to respond; this was "reasonable" notice. Mostert v. CBL & Assocs., 741 P.2d 1090 (Wyo. 1987).

No conversion from Rule 12(b)(6) where court ambiguous. — A motion for dismissal under Rule 12(b)(6) will convert to a motion for summary judgment if the trial court considers matters other than the pleadings and, where materials other than affidavits are considered, the parties have notice of the conversion and the nonmovant had an opportunity to respond. Where the court made ambiguous statements regarding this conversion, the notice requirement was not satisfied and conversion did not take place. Cranston v. Weston County Weed & Pest Bd., 826 P.2d 251 (Wyo. 1992).

Notice of intent to treat as summary judgment motion. — Where documentation relating to a motion for summary judgment was filed in the record by both sides, indicating that the parties were prepared to have the Rule 12(b)(6) motion decided pursuant to Rule 56, the plaintiff had adequate notice of the court's intent to treat the motion as a summary judgment motion and was not prejudiced by the trial court's treatment of the defendant's motion as a motion to dismiss. Burlington N.R.R. v. Dunkelberger, 918 P.2d 987 (Wyo. 1996).

Summary judgment decided on issues not raised by movant. — The fact that summary judgment was granted for defendant on reasons different than those assigned by it is

immaterial where the motion was properly granted on the undisputed facts shown and the issues presented by plaintiff's complaint. Ahearn v. Anderson-Bishop Partnership, 946 P.2d 417 (Wyo. 1997).

Additional notice of conversion if surprise demonstrated. — When affidavits are attached to a motion to dismiss and considered by the trial court, the motion converts automatically to a motion for summary judgment. In such circumstances, the nonmoving party is not entitled to additional notice of the conversion unless the record demonstrates unfair or inappropriate surprise. Shriners Hosps. for Crippled Children v. First Sec. Bank, 835 P.2d 350 (Wyo. 1992).

Nonmoving party must receive notice of conversion. — This rule in combination with Rule 6(c), establishes a general requirement that the nonmoving party receive 10 days' notice of conversion in order to file opposing matters (or seek a continuance under subdivision (f) of this rule). Alm v. Sowell, 899 P.2d 888 (Wyo. 1995).

Motion to dismiss was properly converted to a motion for summary judgment and the plaintiff received reasonable notice of the conversion where all issues in the present case were fully joined in a prior proceeding such that plaintiff was on notice of defendant's position. Alm v. Sowell, 899 P.2d 888 (Wyo. 1995).

Where summary judgment can be upheld on basis of immunity, the court need not search the record to see if there are disputed material facts, nor need it examine in detail the materials in support of summary judgment or in opposition. May v. Southeast Wyo. Mental Health Ctr., 866 P.2d 732 (Wyo. 1993).

Improper not to consider material outside pleadings. — The trial court, in an apparent effort to avoid the time-of-notice requirements of this rule, structured its order as one for dismissal rather than summary judgment, and specifically stated that it was not necessary to consider material extraneous to the pleadings in treating the motion as one for dismissal. In light of this, and the fact that, on its face, the plaintiffs' claim stated a cause of action, the trial court's disposition of the case on a motion to dismiss was improper. Cockreham v. Wyoming Prod. Credit Ass'n, 743 P.2d 869 (Wyo. 1987).

Error to grant summary judgment prior to discovery. — In negligence case, a court erred by denying plaintiffs' motion for a continuance of the summary judgment hearing and granting defendants' motion for summary judgment because the court scheduled the hearing before the deadline for discovery had passed, and therefore plaintiffs were deprived of due process. All of the proposed discovery materials clearly had a bearing on whether there were genuine issues of material fact and needed to be examined by plaintiffs' expert in order to rebut defendants' assertions with respect to spoliation of evidence. Abraham v. Great Western Energy, LLC, 101 P.3d 446 (Wyo. 2004).

A summary judgment should be granted only where it is clear that no issue of fact is involved, and this is true even where there is no dispute as to evidentiary facts but only as to the conclusions to be drawn therefrom. Forbes Co. v. MacNeel, 382 P.2d 56 (Wyo. 1963).

Where there is a genuine issue of material fact concerning the respective rights of the parties, the entry of a summary judgment under the provisions of this rule is precluded. Wilson Bros. Sand & Gravel Co. v. Cheyenne Nat'l Bank, 389 P.2d 681 (Wyo. 1964).

Where there are no material facts in dispute, and, normally, where the only conflict is as to what legal conclusion should be drawn from the undisputed facts, a summary judgment should be entered. Guggenmos v. Tom Searl-Frank McCue, Inc., 481 P.2d 48 (Wyo. 1971).

Motions for summary judgment may only be granted when there is no conflict as to the material facts. McClure v. Watson, 490 P.2d 1059 (Wyo. 1971); Wood v. Trenchard, 550 P.2d 490 (Wyo. 1976); Kirby Bldg. Sys. v. Independence Partnership No. One, 634 P.2d 342 (Wyo. 1981).

When there are genuine issues of material fact, the summary judgment should not be granted. Knudson v. Hilzer, 551 P.2d 680 (Wyo. 1976); Keller v. Anderson, 554 P.2d 1253 (Wyo. 1976); Timmons v. Reed, 569 P.2d 112 (Wyo. 1977); Connett v. Fremont County Sch. Dist. No. 6, 581 P.2d 1097 (Wyo. 1978).

The formal summary judgment should be granted only where it is clear that no issue of material fact is involved, and where inquiry into the facts is not desirable to clarify the application of the law. Connett v. Fremont County Sch. Dist. No. 6, 581 P.2d 1097 (Wyo. 1978); Forbes Co. v. MacNeel, 382 P.2d 56 (Wyo. 1963); Wyoming Ins. Dep't v. Sierra Life Ins. Co., 599 P.2d 1360 (Wyo. 1979).

A summary judgment is proper only where no issue of material fact is involved and where inquiry into the facts is not desirable to clarify the application of the law. Weaver v. Blue Cross-Blue Shield, 609 P.2d 984 (Wyo. 1980); Kimbley v. City of Green River, 642 P.2d 443 (Wyo. 1982).

A motion for summary judgment is proper where a question of law is prescribed and there is no factual dispute. Lafferty v. Nickel, 663 P.2d 168 (Wyo. 1983).

Summary judgment is appropriate when no genuine question of material fact exists and when the movant is entitled to judgment as a matter of law. Thus, the decision is justified when the issue to be decided involves construction of a written agreement clearly expressing the terms of the agreement between the parties as raising a question of law and not an issue of

fact. J & M Invs. v. Davis, 726 P.2d 96 (Wyo. 1986).

Summary judgment is appropriate when no genuine issue as to any material fact exists and when the prevailing party is entitled to have a judgment as a matter of law. Garcia v. Lawson, 928 P.2d 1164 (Wyo. 1996).

Summary judgment properly denied where opposing party's affidavit results in material fact questions. — Summary judgment was properly denied, as opposing party's affidavit resulted in the existence of questions of material facts, irrespective of movant's attack directed to credibility of opposing affiant. Osborn v. Manning, 685 P.2d 1121 (Wyo. 1984).

Disputed material facts precluded summary judgment. — See Wilder v. Cody Country Chamber of Commerce, 868 P.2d 211 (Wyo. 1994).

Where supporting and opposing affidavits from both parties to an action to quiet title in gas rights averred that "oil rights" in a warranty deed historically may or may not have contemplated by-product gas, summary judgment was improperly granted under Wyo. R. Civ. P. 56(c) to a buyer's successor to quiet title to gas despite a reservation of oil rights in the sellers' successors. Hickman v. Groves, 71 P.3d 256 (Wyo. 2003).

And, also, where resolution of issues depends on credibility of witnesses. — The district court erred in entering summary judgment on a claim to enforce a promissory note, because the affidavits of the parties set forth conflicting facts, and resolution of the issues depended, at least in part, on the credibility of the witnesses. Greaser v. Williams, 703 P.2d 327 (Wyo. 1985).

Material fact defined. — A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a course of action or defense asserted by the parties. Shrum v. Zeltwanger, 559 P.2d 1384 (Wyo. 1977); Wood v. Trenchard, 550 P.2d 490 (Wyo. 1976); Seay v. Vialpando, 567 P.2d 285 (Wyo. 1977); Timmons v. Reed, 569 P.2d 112 (Wyo. 1977); Laird v. Laird, 597 P.2d 463 (Wyo. 1979); Hyatt v. Big Horn Sch. Dist. No. 4, 636 P.2d 525 (Wyo. 1981); Lyman v. Jennings, 637 P.2d 259 (Wyo. 1981); Reno Livestock Corp. v. SUNOCO, 638 P.2d 147 (Wyo. 1981); S.C. Ryan, Inc. v. Lowe, 753 P.2d 580 (Wyo. 1988); McDonald v. Mobil Coal Producing, Inc., 789 P.2d 866 (Wyo. 1990); Schuler v. Community First Nat'l Bank, 999 P.2d 1303 (Wyo. 2000).

If there is a genuine issue of fact, then neither party is entitled to summary judgment. Seay v. Vialpando, 567 P.2d 285 (Wyo. 1977).

Genuine issue of material fact as to existence of "cause" for employment discharge. — See Alexander v. Phillips Oil Co., 707 P.2d 1385 (Wyo. 1985).

In action on lease, movant failed to establish prima facie case as to exact amount of rental due. — See Shanor v. A-Pac, Ltd., 711 P.2d 420 (Wyo. 1986).

No genuine issue of material fact. — Where parties agree that no material facts are in dispute, court on appeal has only to determine whether lower court properly granted summary judgment as a matter of law. Cooper v. Town of Pinedale, 1 P.3d 1197 (Wyo. 2000).

See Allen v. Safeway Stores, Inc., 699 P.2d 277 (Wyo. 1985); Davenport v. Epperly, 744 P.2d 1110 (Wyo. 1987) (tortious interference with contract).

Stipulation of parties. — Stipulation of parties foreclosed any factual dispute, and therefore reviewing court was required to determine only whether district court properly applied law in ordering summary judgment. Farmers Ins. Exch. v. Dahlheimer, 3 P.3d 820 (Wyo. 2000).

Determination of equitable estoppel matter of law where relevant facts not present. — Although the existence of equitable estoppel preventing a statute of limitations defense will generally involve questions of fact, where relevant facts are not present in a particular case, this determination becomes a matter of law for the court. Olson v. A.H. Robins Co., 696 P.2d 1294 (Wyo. 1985).

Chattel's status mixed question of law and fact. — Whether a chattel is a fixture or has in any case become a part of the realty is a mixed question of law and fact, and is to be determined from a consideration of all the facts and circumstances attending its annexation and use. Wyoming State Farm Loan Bd. v. Farm Credit Sys. Capital Corp., 759 P.2d 1230 (Wyo. 1988).

Admissible evidence required. — Evidence that is relied upon to sustain or defeat a motion for summary judgment must be such as would be admissible at trial and it should be as carefully tailored and professionally correct as any evidence which would be presented to the court at the time of trial. Equality Bank v. Suomi, 836 P.2d 325 (Wyo. 1992).

Evidence relied upon to demonstrate issue of fact must be admissible evidence; parol evidence to vary the terms of a written instrument cannot be considered. Laird v. Laird, 597 P.2d 463 (Wyo. 1979).

As a general rule, motions for summary judgment are to be supported by competent evidence admissible at trial, and the court is required to examine that evidence from a viewpoint most favorable to the party opposing the motion in making the determination of whether or not there is a genuine issue as to a material fact. Lafferty v. Nickel, 663 P.2d 168 (Wyo. 1983).

Else motion is equivalent to Rule 12 motion. — Where a motion for summary judgment is based on the pleadings without providing any other competent evidence to support the motion, the motion for summary judgment

is equivalent to either a motion to dismiss for failure to state a claim upon which relief can be granted made pursuant to Rule 12(b)(6), or a motion for a judgment on the pleadings made pursuant to Rule 12(c). Lafferty v. Nickel, 663 P.2d 168 (Wyo. 1983).

Bare inferences raise no genuine issue. — Bare inferences in and of themselves — when pitted against uncontroverted testimony to the contrary — raise no genuine issue of material fact. Blackmore v. Davis Oil Co., 671 P.2d 334 (Wyo. 1983).

But two reasonable inferences arising from relevant facts create genuine issue of material fact making summary judgment inappropriate. Intermountain Brick Co. v. Valley Bank, 746 P.2d 427 (Wyo. 1987).

Conclusions are not sufficient to form genuine issue as to material fact. Bancroft v. Jagusch, 611 P.2d 819 (Wyo. 1980).

Conclusory, irrelevant statements insufficient. — The plaintiff's affidavits offered in opposition to a summary judgment motion did not create an issue of fact or rebut the defendant's prima facie case where they contained conclusory statements and material not relevant to the issues of the case. McClellan v. Britain, 826 P.2d 245 (Wyo. 1992).

Summary judgment order terminating parental rights was not appropriately granted where the affidavit of the mother denying abandonment raised a clear factual conflict, especially in light of the strict scrutiny and clear and convincing evidence required for parental rights termination. TK v. Lee, 826 P.2d 237 (Wyo. 1992).

Nor is mere assertion. — It is clear that where there are genuine issues of material fact, summary judgment is improper, but the purpose behind summary judgment would be defeated if a case could be forced to trial merely by asserting that a genuine issue of material fact exists. Mayflower Restaurant Co. v. Griego, 741 P.2d 1106 (Wyo. 1987).

Neither is subjective dispute over interpretation of contract. — A motion for summary judgment was properly granted in fraud and negligent misrepresentation claims for relief, there being no basis for the claims other than the plaintiff's subjective belief that he had a contract for an entire construction project, not just one building, and the defendant's belief otherwise. There was no factual basis for the claims, particularly with regard to intent to deceive, only a dispute over the interpretation of the contract. Duffy v. Brown, 708 P.2d 433 (Wyo. 1985).

Pleading denial insufficient to support summary judgment. — An allegation of loss of profits countered by a pleading denial is not sufficient to support a summary judgment for the party entering the denial. Landmark, Inc. v. Stockmen's Bank & Trust Co., 680 P.2d 471 (Wyo. 1984).

Oral testimony refused at hearing where offer of proof not made. — Where the defending party had made no offer of proof at a summary judgment hearing regarding the proposed testimony of two witnesses, the Supreme Court declined to decide permissibility of oral testimony at the hearing and held that the trial court had not abused its discretion in refusing to allow such oral testimony. Dudley v. East Ridge Dev. Co., 694 P.2d 113 (Wyo. 1985).

Summary judgment proper in negligence case where no issue of material fact established. — Summary judgment will not often be proper in a negligence case. The question of negligence will be taken from the jury in only the most exceptional cases. However, where the record fails to establish an issue of material fact, the entry of summary judgment is proper, even in a negligence case. DeWald v. State, 719 P.2d 643 (Wyo. 1986).

Although summary judgments are not favored in negligence actions, where the record fails to establish an issue of material fact, the entry of summary judgment is proper. MacKrell v. Bell H_2S Safety, 795 P.2d 776 (Wyo. 1990).

Such as no evidence of necessary element. — When a plaintiff bringing a negligence action is unable to show any evidence of a necessary element to prove the case on which his claim is based, it is appropriate for the trial court to recognize the plaintiff's failings in making his case and thus to grant summary judgment to the defendant/party moving for summary judgment. Popejoy v. Steinle, 820 P.2d 545 (Wyo. 1991).

And such as failure to establish a duty. — Summary judgment was properly granted in personal representative's negligence action against a store owner, manager, and lessee in connection with the murder of the decedent during a burglary at the store; the plaintiff failed to establish that the defendants had a duty to protect against criminal acts of a third person or were culpably negligent. Krier v. Safeway Stores 46, Inc., 943 P.2d 405 (Wyo. 1997).

Bank was entitled to summary judgment on negligence claim brought by borrower, because bank owed no duty independent of contractual relationship arising from loan agreement. Schuler v. Community First Nat'l Bank, 999 P.2d 1303 (Wyo. 2000).

And such as where causal connection between breach of duty and injury missing. — The plaintiff, 7½ months pregnant, who was in fact suffering from appendicitis, and without personal examination, was prescribed an antinausea medication over the telephone by the defendant-doctor; her appendix eventually ruptured and was removed several weeks after she delivered her baby prematurely. A conflict as to what the patient told the doctor over the phone was not sufficient to create a material fact issue, rendering an order granting summary judgment improper, in view of the uncontroverted medical testimony that the con-

dition of appendicitis could not have been diagnosed at the time of the telephone call even with personal examination. An essential element, the causal connection between the breach of a duty owed and the injury sustained, was missing in the case. Fiedler v. Steger, 713 P.2d 773 (Wyo. 1986).

Summary judgments are not proper in negligence actions where the question is whether or not the defendant's actions violate the required duty. Bancroft v. Jagusch, 611 P.2d 819 (Wyo. 1980).

A bald statement, in an affidavit or otherwise, that a party is negligent or that he is not negligent, without more, is insufficient to support a position that there exists a genuine issue of a material fact and thus prevent a summary judgment given pursuant to subdivision (c). Bancroft v. Jagusch, 611 P.2d 819 (Wyo. 1980).

Unless no evidence establishing causation. — In cases such as medical malpractice cases, in which a presumption of no breach of duty causing injury is present, in the absence of evidence establishing causation, a summary judgment will be sustained. Bettencourt v. Pride Well Serv., Inc., 735 P.2d 722 (Wyo. 1987).

Causation probable where breach of duty. — Where the discovery materials or unrefuted allegations regarding negligence disclose a duty and a breach of that duty, the existence of the element of causation is treated as more probable than its nonexistence, and the issue must be submitted to the finder of fact. Bettencourt v. Pride Well Serv., Inc., 735 P.2d 722 (Wyo. 1987).

Unrefuted allegation sufficient to state claim. — An unrefuted allegation a hospital district failed to provide an adequate handrail for steps, upon which the plaintiff slipped, was sufficient to state a claim upon which relief could be granted. Therefore, the trial court inappropriately entered summary judgment against that allegation. Petersen v. Campbell County Mem. Hosp. Dist., 760 P.2d 992 (Wyo. 1988).

Summary judgment upheld in negligence action. — See Randolph v. Gilpatrick Constr. Co., 702 P.2d 142 (Wyo. 1985).

And in trespass case. — Where, with respect to plaintiff's claim against defendants for trespass arising out of the use of an easement, there was no genuine issue as to any material fact and the only conflict was with respect to the legal conclusion which should be drawn from undisputed facts, summary judgment was appropriate. Curutchet v. Bordarrampe, 726 P.2d 500 (Wyo. 1986).

Summary judgment appropriate in quiet title action. — See Bush v. Duff, 754 P.2d 159 (Wyo. 1988).

Documentary evidence to quiet title. — Summary judgment was properly granted in favor of the boyfriend where he brought forward documentary evidence in his action to quiet title that he was the owner of the disputed property; the girlfriend did not come forward with any specific facts to dispute the recorded deeds that proved the boyfriend's case and her conclusory statements went to an entirely different case, a matter which was being pursued in California and which she had not pleaded before the courts of Wyoming. Burnham v. Coffinberry, 76 P.3d 296 (Wyo. 2003).

Summary judgment appropriate in undue influence case. — A mother failed to show the existence of a genuine issue of material fact where she sought to recover property granted to her sons on the basis of the exercise of undue influence within the context of a confidential relationship because the mother failed to establish the existence of a confidential relationship between herself and her sons. Walsh v. Walsh, 841 P.2d 831 (Wyo. 1992).

Summary judgment appropriate in contract action on duress. — In an action seeking damages for wrongful termination, where plaintiff failed to advance evidence of immediate financial ruin and his shock and distress upon entering a receipt and release agreement constituted emotional, not economic, duress, there was no genuine issue of material fact and summary judgment for the defendants was properly entered. Blubaugh v. Turner, 842 P.2d 1072 (Wyo. 1992).

Summary judgment is appropriate for disputes relating to unambiguous contracts. Lincoln v. Wackenhut Corp., 867 P.2d 701 (Wyo. 1994).

Because no material questions of fact existed regarding the findings that (1) the property owners had no right under an agreement to drill for subsurface waters, (2) res judicata barred certain of the owners' claims on appeal, and (3) the agreement in question did not violate public policy, the city was entitled to partial summary judgment under W.R.C.P. 56(c) as a matter of law. Polo Ranch Co. v. City of Cheyenne, 61 P.3d 1255 (Wyo. 2003).

But summary judgment is inappropriate where there is a question regarding whether parties intended an agreement; such is a factual question, not a legal one, rendering summary judgment inappropriate. Roussalis v. Wyoming Med. Ctr., Inc., 4 P.3d 209 (Wyo. 2000).

Interpretation of insurance contract. — As with any contract, interpretation of an unambiguous insurance contract presents an issue of law which may be appropriately considered by summary judgment. Doctors' Co. v. Insurance Corp. of Am., 864 P.2d 1018 (Wyo. 1993).

Summary judgment order terminating parental rights was not appropriately granted where the affidavit of the mother denying abandonment raised a clear factual conflict, especially in light of the strict scrutiny and clear and convincing evidence required for

parental rights termination. TG v. Lee, 826 P.2d 237 (Wyo. 1992).

Normally, summary judgment not entered upon expert opinion testimony. — Although there are some cases in which summary judgment may appropriately be entered upon expert opinion testimony, such as cases (generally in the field of medical malpractice) in which the only issue is a highly technical one requiring expert opinion, expert evidence normally will not constitute sufficient support for a motion for summary judgment and will be more useful as a means of raising an issue of fact, since the weight to be given expert evidence is normally an issue for the trier of fact. Western Sur. Co. v. Town of Evansville, 675 P.2d 258 (Wyo. 1984).

And plaintiff in malpractice action without obligation to support complaint with expert testimony. — In a medical malpractice action, the doctor, as the party moving for summary judgment, bore the burden of establishing that no genuine issues of material fact existed for resolution at trial. Absent a showing of specific facts probative of the doctor's right to judgment, the plaintiff had no obligation to support her complaint with expert testimony. Summary judgment was improper where there were no affidavits, depositions or other evidence purporting to refute the claims of negligence. Metzger v. Kalke, 709 P.2d 414 (Wyo. 1985).

If evidence is subject to conflicting interpretations, or reasonable minds might differ as to its significance, summary judgment is improper. Fegler v. Brodie, 574 P.2d 751 (Wyo. 1978); Weaver v. Blue Cross-Blue Shield, 609 P.2d 984 (Wyo. 1980); Reno Livestock Corp. v. SUNOCO, 638 P.2d 147 (Wyo. 1981).

Question of law for court. — The fact that both parties have moved for summary judgment does not mean that there is no genuine issue of fact. This determination is a question of law that must be decided by the court, irrespective of what either of the parties may have thought about the matter. Seay v. Vialpando, 567 P.2d 285 (Wyo. 1977).

A motion for summary judgment may be made wholly on the pleadings. Carter v. Davison, 359 P.2d 990 (Wyo. 1961).

But considerations of the trial court, on a motion for summary judgment, go beyond the pleadings, and the mere assertion of a claim such as undue influence is not sufficient to prevent entry of summary judgment. In re Estate of Wilson, 399 P.2d 1008 (Wyo. 1965).

As pleading does not create issue as against motion with affidavits. — Pleading allegations do not create an issue as against a motion for summary judgment supported with affidavits. Vipont Mining Co. v. Uranium Research & Dev. Co., 376 P.2d 868 (Wyo. 1962).

Allegations of a complaint are not sufficient to show the existence of a genuine issue of fact, where the alleged basis for relief is challenged by statements of fact in affidavits and other forms of evidence in support of a motion for summary judgment. In re Estate of Wilson, 399 P.2d 1008 (Wyo. 1965).

Purpose of affidavits. — The affidavit and showings for a summary judgment are not for the purpose of establishing the factual situation, but to determine if there is any general issue as to the facts. Clouser v. Spaniol Ford, Inc., 522 P.2d 1360 (Wyo. 1974).

As parties must present facts to show material issue. — If this rule is to be meaningful, the parties at this stage are obligated to present to the court sufficient facts either by pleading or otherwise which would show that there is a material issue of fact to be tried. Carter v. Davison, 359 P.2d 990 (Wyo. 1961).

The factual matters presented by defendants were sufficient to show substantial compliance with applicable statutory requirements for the creation and establishment of a special improvement district, and consequently, if plaintiffs were to succeed in their claims, they could no longer rest upon the mere allegations of their complaint, but had to go forward in the prescribed manner and set forth specific facts showing that there was a genuine issue for trial. Marion v. City of Lander, 394 P.2d 910 (Wyo. 1964), cert. denied, 380 U.S. 925, 85 S. Ct. 929, 13 L. Ed. 2d 810 (1965).

If allegations of the complaint are controverted by affidavits and other evidence tending to show the allegations are not true, it becomes incumbent upon plaintiff to set forth "specific facts" in opposition, if plaintiff's contention (or allegations of the complaint) are to remain a genuine issue of fact for trial. In re Estate of Wilson, 399 P.2d 1008 (Wyo. 1965).

This rule and Wyoming cases impose a burden on both parties to demonstrate to the court the absence or existence of conflict and this is to be demonstrated to the court through the existence of specific facts showing that there is a genuine issue for trial. McClure v. Watson, 490 P.2d 1059 (Wyo. 1971); Hunter v. Farmers Ins. Group, 554 P.2d 1239 (Wyo. 1976).

A party cannot rest upon denials or allegations in his pleadings, but must set forth facts showing existence of a genuine issue, and this burden is upon him. Edmonds v. Valley Nat'l Bank, 518 P.2d 7 (Wyo. 1974); Clouser v. Spaniol Ford, Inc., 522 P.2d 1360 (Wyo. 1974); Hunter v. Farmers Ins. Group, 554 P.2d 1239 (Wyo. 1976).

A party cannot rely upon allegations in his pleadings to demonstrate a genuine issue of fact. Apperson v. Kay, 546 P.2d 995 (Wyo. 1976).

Where there is competent evidence, presenting a prima facie case, the party opposing a summary judgment motion must affirmatively set forth competent and material opposing facts. Cantonwine v. Fehling, 582 P.2d 592 (Wyo. 1978).

When a party opposes a motion for summary

judgment, it cannot simply rely on its allegations and pleadings, but must affirmatively set forth material opposing facts. Murray First Thrift & Loan Co. v. N-C Paving, 576 P.2d 455 (Wyo. 1978); Hyatt v. Big Horn Sch. Dist. No. 4, 636 P.2d 525 (Wyo. 1981).

And evidence is examined for that purpose. — To test the propriety of the grant of a summary judgment the court examines evidence on the motion, not to decide any issue of fact, but to discover if any real issue exists. Western Std. Uranium Co. v. Thurston, 355 P.2d 377 (Wyo. 1960).

Tax liability proper question of fact. — Where a foreign order declares that defendant is liable for the past, present and future obligations of another company, defendant's liability for past premium taxes is a question of fact that is properly before the district court. Wyoming Ins. Dep't v. Sierra Life Ins. Co., 599 P.2d 1360 (Wyo. 1979).

As is meaning of written instrument. — Where there is any doubt about the meaning of a written instrument, there arises an issue of fact to be litigated and summary judgment is inappropriate. Weaver v. Blue Cross-Blue Shield, 609 P.2d 984 (Wyo. 1980).

Summary judgment inappropriate in case construing indemnification clause. — Summary judgment for a welding service, against whom the contractor had sought indemnification, was inappropriate. The indemnification clause of the parties' contract was enforceable, despite the anti-indemnification provisions of Wyo. Stat. Ann. §§ 30-1-131 and 30-1-132, where a worker was injured while working on a water line that transported water after it had been separated from oil and was located at some distance from the oil well. Union Pac. Res. Co. v. Dolenc, 86 P.3d 1287 (Wyo. 2004).

Granting of summary judgment proper in case involving interpretation of deed, where language of deed clear. See Samuel Mares Post No. 8 v. Board of County Comm'rs, 697 P.2d 1040 (Wyo. 1985).

Rights of adverse party prior to determination of summary judgment motion. — Before a motion for summary judgment can be properly determined, the adverse party must be: (1) specifically advised, either by court rule or order, as to whether a motion for summary judgment will be determined without oral hearing; and (2) given notice of a cutoff date for filing materials in opposition to a motion for summary judgment. Lee v. Board of County Comm'rs, 644 P.2d 189 (Wyo. 1982).

Case deemed proper for motion. — The facts necessary to establish an affirmative defense must ordinarily be shown by evidence and the issue developed on the trial. Nevertheless, if these are admitted or uncontroverted and are completely disclosed on the face of the pleadings, as they are supplemented by affidavits at the time of a motion for summary judgment, and nothing further could be developed by the trial of the issue, the cause may properly be disposed of upon a motion for summary judgment. Ford v. Madia, 480 P.2d 101 (Wyo. 1971).

The burden is on the movant to demonstrate clearly that there was no genuine issue of material fact and that movant is entitled to judgment as a matter of law. This is so regardless of which party would have the burden of proof at the trial. Mealey v. City of Laramie, 472 P.2d 787 (Wyo. 1970), appeal dismissed, 404 U.S. 931, 92 S. Ct. 282, 30 L. Ed. 2d 245 (1971); Gilliland v. Steinhoefel, 521 P.2d 1350 (Wyo. 1974); DeHerrera v. Memorial Hosp., 590 P.2d 1342 (Wyo. 1979); Kirby Bldg. Sys. v. Independence Partnership No. One, 634 P.2d 342 (Wyo. 1981).

Summary judgment is proper where the showing made by movant is sufficient and is uncontroverted. Mealey v. City of Laramie, 472 P.2d 787 (Wyo. 1970), appeal dismissed, 404 U.S. 931, 92 S. Ct. 282, 30 L. Ed. 2d 245 (1971).

The movant has a definite burden to clearly demonstrate there is no genuine issue of material fact, and unless this is clearly demonstrated no summary judgment should be granted. Kover v. Hufsmith, 496 P.2d 908 (Wyo. 1972); Knudson v. Hilzer, 551 P.2d 680 (Wyo. 1976); Hunter v. Farmers Ins. Group, 554 P.2d 1239 (Wyo. 1976); Shrum v. Zeltwanger, 559 P.2d 1384 (Wyo. 1977); Minnehoma Fin. Co. v. Pauli, 565 P.2d 835 (Wyo. 1977); Seay v. Vialpando, 567 P.2d 285 (Wyo. 1977); Timmons v. Reed, 569 P.2d 112 (Wyo. 1977); Connett v. Fremont County Sch. Dist. No. 6, 581 P.2d 1097 (Wyo. 1978); Cantonwine v. Fehling, 582 P.2d 592 (Wyo. 1978).

If the movant makes out a prima facie case that would entitle him to a directed verdict if uncontroverted at trial, summary judgment will be granted unless the party opposing the motion offers some competent evidence that could be presented at trial showing that there is a genuine issue as to a material fact. Wood v. Trenchard, 550 P.2d 490 (Wyo. 1976); Moore v. Kiljander, 604 P.2d 204 (Wyo. 1979); Hyatt v. Big Horn Sch. Dist. No. 4, 636 P.2d 525 (Wyo. 1981); Dubus v. Dresser Indus., 649 P.2d 198 (Wyo. 1982).

Although both parties are obligated to come forward with their evidence, the burden is on the moving party to demonstrate clearly that there is no genuine issue of material fact, and if that is not done, the motion for summary judgment should be denied. Weaver v. Blue Cross-Blue Shield, 609 P.2d 984 (Wyo. 1980).

A motion for summary judgment places an initial burden on the movant to make a prima facie showing that no genuine issue of material fact exists and that summary judgment should be granted as a matter of law. Once a prima facie showing is made, the burden shifts to the party opposing the motion to present specific facts showing that a genuine issue of material fact does exist. Boehm v. Cody Country Cham-

ber of Commerce, 748 P.2d 704 (Wyo. 1987).

And opposing party without obligation to produce evidence where his allegations not refuted. — Where no evidence in support of summary judgment refuted allegation in the complaint that the fuel system at issue was a product of defendant, the contention in the pleadings concerning defendant's responsibility for the allegedly defective parts was deemed admitted, and plaintiff had no obligation to produce any evidence on that point in order to withstand the motion for summary judgment, despite defendant's suggestion, in appellate brief, of problems of proof because the alleged defective parts were never found. O'Donnell v. City of Casper, 696 P.2d 1278 (Wyo. 1985).

And plaintiff may not shift burden. — Plaintiff by invoking summary judgment procedure could not shift his burden, and it was incumbent on plaintiff to show there was a genuine issue of fact for trial. Bon v. Lemp, 444 P.2d 333 (Wyo. 1968).

Burden of proof in civil rights action. — Once a government official asserts qualified immunity, the plaintiff in an action under 42 U.S.C. § 1983 bears the initial burden of convincing the court that the constitutional right was clearly established. If the plaintiff fails to meet this burden, summary judgment in favor of the government official should be granted. However, once the plaintiff identifies the clearly established law and the alleged conduct that violated the law with sufficient particularity, the government official then bears the burden of establishing that there are no disputed material facts which would defeat the claim of qualified immunity. Abell v. Dewey, 870 P.2d 363 (Wyo. 1994).

Where plaintiff did not successfully assume her burden of showing that there was no genuine issue of fact with respect to defendant's counterclaims for damages, summary judgment on these claims was improper. Curutchet v. Bordarrampe, 726 P.2d 500 (Wyo. 1986).

Evidence opposing summary judgment that is conclusory or speculative is insufficient to demonstrate that a material fact exists, and the trial court has no duty to anticipate possible proof. TZ Land & Cattle Co. v. Condict, 795 P.2d 1204 (Wyo. 1990).

Where affidavit insufficient. — Where the undisputed facts showed that more than five years had elapsed from the accrual of the cause of action to the date summons was served on plaintiff, an affidavit of plaintiff's counsel, stating that an investigation was made at the time the action was filed, but otherwise consisting of vague and conclusionary allegations of the whereabouts of the defendant at other times during the critical period, was not sufficient to forestall the award of summary judgment. Bon v. Lemp, 444 P.2d 333 (Wyo. 1968).

When burden shifts. — The summary judgment movant has the initial burden of establishing by admissible evidence a prima facie case; once this is accomplished, the burden shifts and the opposing party must show that there is a genuine issue of material fact. Gennings v. First Nat'l Bank, 654 P.2d 154 (Wyo. 1982).

Court may indicate directed verdict probability. — There was no error where, when the trial court orally granted defendant's summary judgment motion, it declared that if the case went to trial on the basis of what was before the court at the time argued, it would not permit it to go to the jury and would direct a verdict for defendant. Holliday v. Bannister, 741 P.2d 89 (Wyo. 1987).

Right to trial not lost if material issue of fact presented. — While the summary judgment procedure permits early disposition of unfounded lawsuits, if there is a material issue of fact presented, the plaintiff does not lose a right to trial. Timmons v. Reed, 569 P.2d 112 (Wyo. 1977).

Due process of law and the proper administration of justice do not permit determination of a controversy where the evidence is disputed without an opportunity of the opposing party to interrogate in open court and without a means for the court to evaluate the witnesses who testify. Newton v. Misner, 423 P.2d 648 (Wyo. 1967).

Conflicts of evidence upon genuine issues of material facts necessitate trial. Kover v. Hufsmith, 496 P.2d 908 (Wyo. 1972).

While summary judgment procedure permits early disposition of unfounded lawsuits, if there is a material issue of fact presented, the plaintiff does not lose a right to trial. Knudson v. Hilzer, 551 P.2d 680 (Wyo. 1976).

Use of affidavits to determine whether requirements of rule met. — Under certain circumstances, affidavits may be used in order to determine whether the requirement of this rule is met. Fugate v. Mayor & City Council, 348 P.2d 76 (Wyo. 1959).

Service of supporting affidavit may not occur subsequent to service of motion for summary judgment, but within the time in which such motion may be served. DeHerrera v. Memorial Hosp., 590 P.2d 1342 (Wyo. 1979).

Depositions receivable before entering order. — The trial court did not err in granting a motion for partial summary judgment even though the depositions relied upon by the court were not filed until after the court had signed the order granting summary judgment. The trial court had requested and received the depositions in question at a motion hearing some eight months before entering the order. The failure to file the depositions was merely a technical imperfection not affecting a substantial right. Atlas Constr. Co. v. Slater, 746 P.2d 352 (Wyo. 1987).

Error not considered where material in late-filed depositions also included in affidavits. — The alleged error of the trial court in

considering depositions of the moving party which had not been physically filed in the record with the motion for summary judgment in violation of subdivision (c) was not considered on appeal because the material in said depositions was also included in or deducible from the affidavits and thus was unnecessary to support the motion for summary judgment. Sanders v. Lidle, 674 P.2d 1291 (Wyo. 1984).

Ample time must be allowed for discovery. — In a suit alleging negligence and culpable negligence on the part of the plaintiffs' co-employees, the defendants filed motions to dismiss and for summary judgment only 40 days after the initial complaint was filed. Despite being apprised by the plaintiffs that there had been inadequate time for making discovery and gathering important facts in the case, the district court issued a decision letter allowing them only 21 additional days in which to gather information and oppose such motions. Given the great burden placed upon the plaintiffs to oppose both motions through the use of specific facts, ample time was not allowed for the development of the case through discovery. Pace v. Hadley, 742 P.2d 1283 (Wyo. 1987).

Where the plaintiff had at least 10 months in which she could have developed her case through discovery, the district court did not abuse its discretion by denying the plaintiff's request for additional time for discovery. Brown v. Avery, 850 P.2d 612 (Wyo. 1993).

Untimely motion valid. — In an action for negligent infliction of emotional distress, the trial court did not abuse its discretion in choosing to hear in the interest of judicial economy a motion for summary judgment filed 24 days after the pretrial order deadline and fewer than 10 days before the hearing because the appellants were neither unfairly prejudiced nor subjected to a manifest injustice. Contreras ex rel. Contreras v. Carbon County Sch. Dist., 843 P.2d 589 (Wyo. 1992).

Timeliness. — The buyers' papers resisting the motion for summary judgment in the seller's replevin action were not filed in a timely manner under W.R.C.P. 56 and 6; therefore, the trial court properly struck the pleading and properly proceeded to hear argument on the seller's motion, leaving out of consideration the buyers' evidentiary materials and only considering the seller's evidentiary materials. Johnson v. Creager, 76 P.3d 799 (Wyo. 2003).

In a dispute over joint venture cattle operation, under this provision and Wyo. R. Civ. P. 6(c), a trustee was required to serve a response to summary judgment motion within 20 days or to file a motion to enlarge the time, and an informal agreement between the parties did not constitute "excusable neglect" to allow enlargement of time without required motion. Platt v. Creighton, 150 P.3d 1194 (Wyo. 2007).

District court properly denied patient's motion for enlargement of time pursuant to Wyo. R. Civ. P. 6(b), 56(f) in a medical malpractice action against a doctor, where the patient had over ten months in which to commence discovery and simply failed to take any action during the pendency of the matter to commence or complete discovery. Jacobson v. Cobbs, 160 P.3d 654 (Wyo. 2007).

Untimely appeal. — Because a decision granting summary judgment in a labor dispute was an appealable order under Wyo. R. App. P. 1.05(a) since it left nothing for further consideration, a notice of appeal filed more than 30 days thereafter was untimely under Wyo. R. App. P. 2.01(a); dismissal entered in the case after summary judgment was merely a nullity, and there was no equitable tolling principals recognized under Wyoming law. Merchant v. Gray, 173 P.3d 410 (Wyo. 2007).

Motion denied under attractive nuisance doctrine. — In a negligence claim against a railroad company for the loss of a child's leg, the district court erred by granting summary judgment because under the applicable attractive nuisance doctrine, sufficient evidence was presented to create a genuine issue of material fact as to whether the child really understood the risks involved in playing on or about trains. Thunder Hawk ex rel. Jensen v. Union Pac. R.R., 844 P.2d 1045 (Wyo. 1992).

Summary judgment for law firm on claim for legal fees was prematurely entered, where there was an undocumented continuance without a specific future date stated for a hearing, a decision entered before a stated 10 days had expired, and no compliance with the three-day notice provision required to obtain a default judgment. Storseth v. Brown, Raymond & Rissler, 805 P.2d 284 (Wyo. 1991).

New-trial motion not necessary to preserve issue as to late filing of depositions. — A motion for a new trial was not necessary, after the grant of a summary judgment, to preserve the issue on appeal that the trial court erred by allowing the filing of depositions at the date of the hearing over the appellants' objections. Harden v. Gregory Motors, 697 P.2d 283 (Wyo. 1985).

Test of propriety of summary judgment. — The propriety of granting a summary judgment depends upon the correctness of the court's dual findings that there was no genuine issue as to any material fact and that the prevailing party was entitled to judgment as a matter of law. Connett v. Fremont County Sch. Dist. No. 6, 581 P.2d 1097 (Wyo. 1978); Laird v. Laird, 597 P.2d 463 (Wyo. 1979); Coronado Oil Co. v. Grieves, 603 P.2d 406 (Wyo. 1979); Weaver v. Blue Cross-Blue Shield, 609 P.2d 984 (Wyo. 1980); Reno Livestock Corp. v. SUNOCO, 638 P.2d 147 (Wyo. 1981).

Judgment on portion of agreement improper. — Where in a foreclosure action and a counterclaim for breach of lease the summary judgment was predicated on only a portion of the entire agreement between the parties and,

therefore, could not have been with full consideration of whether or not a genuine issue existed as to a material fact and since there exists genuine issues of material facts, the summary judgment was improper. Williams v. Waugh, 593 P.2d 583 (Wyo. 1979).

Facts must be ultimate facts. — On review of the affidavits, depositions and other matters submitted under oath, to determine if facts set forth therein concerning the issues are uncontroverted and make possible a determination of the case as a matter of law, such facts must be ultimate facts. Williams v. Waugh, 593 P.2d 583 (Wyo. 1979).

When judgment is appealable. — After summary judgment is granted and an order filed, the judgment is final and appealable. No subsequent motion under Rule 60(b) is required. Wyoming Ins. Dep't v. Sierra Life Ins. Co., 599 P.2d 1360 (Wyo. 1979).

Denial of motion for summary judgment is not appealable, as it is not a final order. Kimbley v. City of Green River, 663 P.2d 871 (Wyo. 1983).

Standard on review of appeal. — When the Supreme Court reviews on appeal the denial or grant of a summary judgment, it must look at the record from a viewpoint most favorable to the party opposing the motion. Bluejacket v. Carney, 550 P.2d 494 (Wyo. 1976); Minnehoma Fin. Co. v. Pauli, 565 P.2d 835 (Wyo. 1977); Seay v. Vialpando, 567 P.2d 285 (Wyo. 1977); Fegler v. Brodie, 574 P.2d 751 (Wyo. 1978); Dubus v. Dresser Indus., 649 P.2d 198 (Wyo. 1982).

The material lodged, affidavits and other matter which may be considered, must be viewed in the light most favorable to the opposing party. Hunter v. Farmers Ins. Group, 554 P.2d 1239 (Wyo. 1976); Timmons v. Reed, 569 P.2d 112 (Wyo. 1977); Williams v. Waugh, 593 P.2d 583 (Wyo. 1979); Wyoming Ins. Dep't v. Sierra Life Ins. Co., 599 P.2d 1360 (Wyo. 1979).

The appellate court looks at the record from the viewpoint most favorable to the party opposing the motion, giving to him all favorable inferences to be drawn from the facts contained in the affidavits, exhibits and depositions. Weaver v. Blue Cross-Blue Shield, 609 P.2d 984 (Wyo. 1980); Kirby Bldg. Sys. v. Independence Partnership No. One, 634 P.2d 342 (Wyo. 1981); Reno Livestock Corp. v. SUNOCO, 638 P.2d 147 (Wyo. 1981).

The standard under which the Supreme Court considers an appeal from a summary judgment is as follows: the burden of showing the absence of a genuine issue of a material fact is upon the party moving for the summary judgment; and it looks at the record from the viewpoint most favorable to the party opposing the motion, giving to him all favorable inferences to be drawn from the facts contained in the affidavits, exhibits, depositions and testimony. Bancroft v. Jagusch, 611 P.2d 819 (Wyo. 1980); Hyatt v. Big Horn Sch. Dist. No. 4, 636 P.2d 525 (Wyo. 1981).

In reviewing a summary judgment the Supreme Court first considers whether or not there is a genuine issue of material fact underlying the granting of the summary judgment; if there is no issue of material fact, the court then decides whether the substantive law was correctly applied by the trial court. Sutherland v. Bock, 688 P.2d 157 (Wyo. 1984).

When evaluating the propriety of a lower court's grant of summary judgment, an appellate court employs the same standards as were employed and used by the lower court and does not accord any deference to the lower court's decision on issues of law. O'Donnell v. Blue Cross Blue Shield, 76 P.3d 308 (Wyo. 2003).

When a district court grants one party's motion and denies the other party's motion and the court's decision completely resolves the case, both the grant and the denial of the motions for summary judgment are subject to appeal; an appellate court's review encompasses the entire case, including the grant and the denial of the cross-motions for summary judgment O'Donnell v. Blue Cross Blue Shield, 76 P.3d 308 (Wyo. 2003).

Summary judgment should be sustained in absence of real and material fact issue, considering the movant's burden, the respondent's right to the benefit of all favorable inferences and any reasonable doubt, with credibility questions to be resolved by trial. Cordova v. Gosar, 719 P.2d 625 (Wyo. 1986).

Review from opposing party's viewpoint. — The Supreme Court must consider a review of a summary judgment from the viewpoint favorable to the party opposing it. DeHerrera v. Memorial Hosp., 590 P.2d 1342 (Wyo. 1979).

Review as if district judge. — The Supreme Court examines a motion for summary judgment in the same light as the district judge and treats it as though originally before it because it is acting upon the same materials in the record as he had. Fegler v. Brodie, 574 P.2d 751 (Wyo. 1978); Centrella v. Morris, 597 P.2d 958 (Wyo. 1979); Hyatt v. Big Horn Sch. Dist. No. 4, 636 P.2d 525 (Wyo. 1981); Reno Livestock Corp. v. SUNOCO, 638 P.2d 147 (Wyo. 1981); Kimbley v. City of Green River, 642 P.2d 443 (Wyo. 1982).

When a motion for summary judgment is before the Supreme Court, it has exactly the same duty as the trial judge and if the record is complete, it has exactly the same material and information in front of it as he did. Minnehoma Fin. Co. v. Pauli, 565 P.2d 835 (Wyo. 1977); Seay v. Vialpando, 567 P.2d 285 (Wyo. 1977); Timmons v. Reed, 569 P.2d 112 (Wyo. 1977); Weaver v. Blue Cross-Blue Shield, 609 P.2d 984 (Wyo. 1980); Reno Livestock Corp. v. SUNOCO, 638 P.2d 147 (Wyo. 1981).

The Supreme Court reviews a summary judgment in the same light as the district court,

using the same materials and following the same standards. The Supreme Court examines the record from the vantage point most favorable to the party opposing the motion, and gives that party the benefit of all favorable inferences which may fairly be drawn from the record. Four Nines Gold, Inc. v. 71 Constr., Inc., 809 P.2d 236 (Wyo. 1991); Cline v. State, Dep't of Family Servs., 927 P.2d 261 (Wyo. 1996).

Entire record reviewed on appeal. — In reviewing a summary judgment the Supreme Court has the same obligation as that of the trial judge and must review the entire record that is before it. Wyoming Ins. Dep't v. Sierra Life Ins. Co., 599 P.2d 1360 (Wyo. 1979).

And summary judgment upheld where all materials not part of record. — A summary judgment will be upheld where the appellant has not properly made all materials, upon which he relied to oppose the summary judgment, a part of the record. Toltec Watershed Imp. Dist. v. Johnston, 717 P.2d 808 (Wyo. 1986).

Artificiality and avoidance in statements. — The Supreme Court is reluctant to decide important factual issues on statements containing elements of artificiality and avoidance. DeHerrera v. Memorial Hosp., 590 P.2d 1342 (Wyo. 1979).

Rule 12(b)(6) motion treated as motion for summary judgment. — If a court pursuant to a motion under Rule 12(b)(6) reviews material in addition to the complaint, the Supreme Court will treat the motion as one of summary judgment. Wyoming Ins. Dep't v. Sierra Life Ins. Co., 599 P.2d 1360 (Wyo. 1979).

Waiver of objection. — Objection to the court's examination of factual support or opposition to a motion for summary judgment, first made on appeal, after consideration by the trial court without objection at the scheduled hearing, is waived. Macaraeg v. Wilson, 749 P.2d 272 (Wyo. 1988).

On appeal from summary judgment, question from which there is no appealable order cannot be raised. Collins v. Memorial Hosp., 521 P.2d 1339 (Wyo. 1974).

When summary judgment interlocutory. — A summary judgment, where liability is resolved but damages are left undetermined, is interlocutory and not a final order from which an appeal may be taken. Wheatland Irrigation Dist. v. McGuire, 537 P.2d 1128 (Wyo. 1975).

Requested admissions deemed admitted. — Where a builder filed a motion for summary judgment when the homeowners failed to timely respond to requests for admissions and other discovery demands, the district court properly granted the motion for summary judgment, concluding that the requested admissions, which were not timely answered, were deemed admitted. Orcutt v. Shober Invs. Inc., 69 P.3d 386 (Wyo. 2003).

The denial of a motion for summary judgment is not appealable unless the denial is coupled with a grant of summary judgment to the opposing party, thereby completely resolving the case. Estate of McLean v. Benson, 71 P.3d 750 (Wyo. 2003).

V. CASE NOT FULLY ADJUDICATED ON MOTION.

The rules do not permit an appeal from a partial summary judgment, such being merely a pretrial adjudication that certain issues are deemed established for the trial of the case. Reeves v. Harris, 380 P.2d 769 (Wyo. 1963).

Procedure on partial judgment. — If on motion under this rule a judgment is not rendered on the whole of the case or for all the relief asked, procedure must be in accordance with subdivision (d) unless the court, under the provisions of Rule 54(b) makes an express determination that there is no reason for delay. This last mentioned requirement is real rather than perfunctory. Reeves v. Harris, 380 P.2d 769 (Wyo. 1963).

Procedure for review on partial judgment. — Even though an order granting partial summary judgment did not have the required certification under W.R.C.P. 54(b), an appellate court still could review the case by converting the notice of appeal into a writ of review under W.R.A.P. 13.02. Stewart Title Guar. Co. v. Tilden, 110 P.3d 865 (Wyo. 2005).

Partial summary judgment granted because no agreement, reasonable reliance or misrepresentation.— Partial summary judgment was properly granted to an owner in a quiet title action because there was no oral contract between the owner and two relatives regarding the management of a ranch since, at most, it was an "agreement to agree." Promissory estoppel did not remove the requirements of the statute of frauds because the reliance was not reasonable, and equitable estoppel did not apply either since there was no evidence of any misrepresentation. Parkhurst v. Boykin, 94 P.3d 450 (Wyo. 2004).

Summary judgment inappropriate when contract is ambiguous. — Parties' divorce settlement agreement's references to an irrevocable life insurance trust of which the wife was the beneficiary was ambiguous as to whether the wife continued to be the beneficiary following the divorce; because she had not unambiguously waived her interest in the trust nor consented to its modification, a trial court erred in granting the husband's petition to modify. Dowell v. Dowell (In re Dowell), 290 P.3d 357 (Wyo. 2012).

Judgment with multiple claims. — Where the seller sued for breach of contract and incidental damages in separate claims, and a summary judgment was granted on the first claim, the judgment was not final until the stipulation to dismiss the second claim was filed, and the notice of appeal which was filed within 30 days of the filing of that stipulation

was timely so as to vest the Supreme Court with jurisdiction over the appeal. Connor v. Bogrett, 596 P.2d 683 (Wyo. 1979).

VI. AFFIDAVITS.

Admissible evidence required. — Evidence which is relied on to sustain or defeat a summary judgment must be such as would be admissible in evidence. Hunter v. Farmers Ins. Group, 554 P.2d 1239 (Wyo. 1976).

Affidavits based on opinion, belief, conclusions of law, or hearsay statements do not comply with subdivision (e) of this rule and should not be considered. Cook Ford Sales, Inc. v. Benson, 392 P.2d 307 (Wyo. 1964).

Material presented to trial court as basis for summary judgment should be as carefully tailored and professionally correct as any evidence which is admissible to the court at the time of trial. Newton v. Misner, 423 P.2d 648 (Wyo. 1967).

Hearsay and conclusions of that nature, being inadmissible in evidence, are insufficient of employment by a court in determining the lack of genuine issue as to material fact under subdivision (c). This is true as it relates to affidavits; and answers to interrogatories are also subject to such infirmities. Low v. Sanger, 478 P.2d 60 (Wyo. 1970).

The material presented to the court by way of affidavit in summary judgment proceedings should be such as would be admissible in evidence at time of trial. Keller v. Anderson, 554 P.2d 1253 (Wyo. 1976).

Affidavit of party competent to testify at trial admissible. — In an action to enforce a promissory note, since a party would have been competent to testify at trial as to the facts within his knowledge as the agent for the plaintiffs-sellers, his affidavit provided evidence of such matters for purposes of summary judgment. Greaser v. Williams, 703 P.2d 327 (Wyo. 1985).

Conclusory statement held not to be used to support summary judgment. — See Peterson v. First Nat'l Bank, 579 P.2d 1038 (Wyo. 1978).

A party cannot rely upon conclusions, nor can they be employed by a court in disposing of a motion on summary judgment. McClure v. Watson, 490 P.2d 1059 (Wyo. 1971); Maxted v. Pacific Car & Foundry Co., 527 P.2d 832 (Wyo. 1974); Hunter v. Farmers Ins. Group, 554 P.2d 1239 (Wyo. 1976); Keller v. Anderson, 554 P.2d 1253 (Wyo. 1976).

A conclusory affidavit is inadequate to raise an issue of material fact. Affidavits on a motion for summary judgment must set forth specific facts indicating the presence or absence of a genuine issue of material fact. Blackmore v. Davis Oil Co., 671 P.2d 334 (Wyo. 1983).

In an action claiming that a water and sewer district was negligent in its supervision and maintenance of an open water meter vault, summary judgment was not precluded on the basis of an engineer's affidavit stating that the meter vault cover was not "appropriate" and was not "standard." This affidavit did not establish a standard of care in the industry or set out what legal duty was imposed on the district, but was a bare conclusion with no reasonable basis therefor. Thomas ex rel. Thomas v. South Cheyenne Water & Sewer Dist., 702 P.2d 1303 (Wyo. 1985).

In an action for intentional interference with contractual relations, the conclusionary nature of the deposition filed in opposition to the defendants' motion for summary judgment, in which the plaintiff made the bald assertion that the defendants succeeded in getting him fired, contrary to the defendants' affidavits and depositions, fell far short of the specific facts necessary to raise a genuine issue of material fact. Spurlock v. Ely, 707 P.2d 188 (Wyo. 1985).

In an action brought to contest a will, in opposition to the defendants' motion for summary judgment, the plaintiff filed a number of affidavits. Other than a conclusional statement that the testator lacked the capacity to sign a will, the facts in these affidavits did not lead to any inference with respect to the testator's comprehension of the extent and nature of his estate, the identity of and the nature of his relationship to the beneficiary, or the nature of the disposition of the property that was to take effect at his death. The court therefore correctly ruled that there was no genuine issue of material fact manifested as to testamentary capacity. Whipple v. Northern Wyo. Community College Found., 753 P.2d 1028 (Wyo. 1988).

Self-serving affidavits that are not based in fact are insufficient to create a genuine issue of material fact. Claassen v. Nord, 756 P.2d 189 (Wyo. 1988).

Summary judgment reversed where affidavit drew premature conclusion. — Summary judgment in favor of an attorney in a legal malpractice suit was reversed where affidavit of attorney's expert failed to counter the plaintiff's factual allegations that the attorney failed to hire accountant and attorney experts as promised, failed to prepare for the mediation session, failed to prepare for the trial, and failed to give correct advice as to the treatment of a retirement account in a property division; with these issues of material fact remaining, the expert's opinion that the attorney "acted in a reasonable, careful and prudent manner with respect to her representation of" the plaintiff was premature to establish that there were not genuine issues of material fact. Rino v. Mead, 55 P.3d 13 (Wyo. 2002).

Affidavit stating facts within affiant's knowledge. — A portion of an affidavit stating what the affiant did, stated facts within his knowledge to which he was able to testify. Wunnicke Fin. Co. v. Tupper, 373 P.2d 142 (Wyo. 1962).

An affidavit and the statements therein could not be considered where it was made by plain-

tiff's attorney and demonstrated upon its face it was not made upon personal knowledge of plaintiff. Apperson v. Kay, 546 P.2d 995 (Wyo. 1976).

An attorney does have the right to submit his own affidavit when he is competent to testify to facts within his personal knowledge. Hunter v. Farmers Ins. Group, 554 P.2d 1239 (Wyo. 1976).

Where the statement of defendant's attorney demonstrates upon its face that it was not made upon personal knowledge, it should therefore not be considered on a motion for summary judgment. S.C. Ryan, Inc. v. Lowe, 753 P.2d 580 (Wyo. 1988).

Affidavits must be made on personal knowledge and based on evidence about which the affiant is competent to testify. Deckert v. Lang, 774 P.2d 1285 (Wyo. 1989).

An affidavit was sufficient to support summary judgment in a declaratory judgment action where the affiant asserted personal knowledge of the facts related and, while some of the contents were conclusional, the factual and legal conclusions stated flowed from other facts that were contained in the affidavit. State v. Union Pac. R.R., 823 P.2d 539 (Wyo. 1992).

Both parties to a motion for summary judgment are entitled to any presumption applicable. Anderson ex rel. Anderson v. Schulz, 527 P.2d 151 (Wyo. 1974).

But inferences made most favorably to party opposing motion. — The inferences to be drawn from the facts contained in the affidavits, exhibits and depositions must be made in the light most favorable to the party opposing a motion for summary judgment. Bluejacket v. Carney, 550 P.2d 494 (Wyo. 1976); Williams v. Waugh, 593 P.2d 583 (Wyo. 1979).

Where pleading required. — Where the question of want of diligence by plaintiff was a matter of fact, under subdivision (e) defendant could not rely upon its pleadings, and should have set up the defense when a motion for summary judgment was filed. Wunnicke Fin. Co. v. Tupper, 373 P.2d 142 (Wyo. 1962).

If the movant has adequately supported his motion to the point of demonstrating that the issue tendered by the opposing party is frivolous or a sham then "a burden" is cast upon the opposing party to come forward as required by this rule. Mealey v. City of Laramie, 472 P.2d 787 (Wyo. 1970), appeal dismissed, 404 U.S. 931, 92 S. Ct. 282, 30 L. Ed. 2d 245 (1971).

But assertions of ultimate facts insufficient. — Categorical assertions of ultimate facts, without supporting evidence, cannot be used to defeat summary judgment. Maxted v. Pacific Car & Foundry Co., 527 P.2d 832 (Wyo. 1974); Keller v. Anderson, 554 P.2d 1253 (Wyo. 1976); Cantonwine v. Fehling, 582 P.2d 592 (Wyo. 1978).

A party to a negligence action cannot defeat summary judgment merely by asserting a position on an ultimate fact in the supporting affidavit. Likewise, neither can a conclusion and categorical assertion of an ultimate fact made by affidavit support a summary judgment. Greenwood v. Wierdsma, 741 P.2d 1079 (Wyo. 1987).

And affidavits without specific facts. — Plaintiff's affidavits in response to defendant's affidavits accompanying motion for summary judgment did not set forth specific facts which challenged in any way the truth of defendant's affidavits challenging plaintiff's alleged basis of liability and did not meet the requirements of subdivision (e). Lieuallen v. Northern Utils. Co., 368 P.2d 949 (Wyo. 1962).

Unsworn and unexecuted affidavit is not sufficient under subdivision (e). The material presented to the trial court as a basis for summary judgment should be as carefully tailored and professionally correct as any evidence which is admissible to the court at the time of trial. Lane Co. v. Busch Dev., Inc., 662 P.2d 419 (Wyo. 1983).

Failure to comply. — Department of family services failed to comply with affidavit requirements of subdivision (e) to such an extent that clear and convincing evidence standard, required for termination of mother's parental rights, was not met, and district court's failure to hold hearing before terminating mother's parental rights on summary judgment therefore deprived her of due process. CAC v. Natrona County Dep't of Family Servs., 983 P.2d 1205 (Wyo. 1999).

Factors considered in determining sham fact issue. — In assessing the effect of a contradiction created by the parties submitting affidavits that conflict with their own depositions, the court should consider several factors to determine whether the submission of an affidavit constitutes an attempt to create a sham fact issue; these factors are whether the affiant was cross-examined during his earlier testimony, whether the affiant had access to the pertinent evidence at the time of his earlier testimony or whether the affidavit was based on newly discovered evidence, and whether the earlier testimony reflects confusion which the affidavit attempts to explain. Morris v. Smith, 837 P.2d 679 (Wyo. 1992).

Judicial discretion under subdivision (e). — It is by virtue of the discretion of the trial judge that supplemental or additional affidavits are allowed under subdivision (e), once affidavits are properly submitted. DeHerrera v. Memorial Hosp., 590 P.2d 1342 (Wyo. 1979).

Court may rely on expert testimony, sufficient and uncontroverted, in supporting affidavit. — In response to a complaint alleging that a cable company negligently installed a cable television line, which negligent installation was the cause of property damage during an electrical storm, the company filed a motion for summary judgment, with a supporting affidavit which stated that there was no way of preventing lightning from damaging a television set other than by unhooking the cable and

pulling the plug; that regardless of the groundings made, lightning could still pass through the cable and damage the television set; and that any damage done was beyond the control of the company, which motion was granted. Although summary judgment is not usually appropriate when the court must rely on expert testimony, it is proper when the showing made by the movant is sufficient and uncontroverted. Conway v. Guernsey Cable TV, 713 P.2d 786 (Wyo. 1986).

Experts' affidavits were properly struck. — Stepson failed to show a disputed question of material fact regarding his stepmother's mental capacity to execute the estate planning documents and therefore the trial court properly granted appellees summary judgment because: (1) the stepmother's attorneys and treating physician testified that the stepmother had the mental capacity to execute the documents; (2) the stepson's opposing evidence concerning the stepmother's signatures that were difficult to discern and the fact that she did not recognize a friend were explained and were speculative; and (3) the affidavits of two of the stepson's experts were properly struck because the records they referred to were not attached to the affidavits as required by Wyo. R. Civ. P. 56(e). Kibbee v. First Interstate Bank, 242 P.3d 973 (Wyo. 2010).

Opinions of expert in motorcycle design and crashworthiness as to need for a system capable of containing fuel on impact, technologically feasible means of incorporating such a system into new and existing motorcycles, and tests conducted by the expert affiant was not categorical assertions of ultimate facts without supporting evidence but rather presented a material question of fact for trial, in opposition to the manufacturer's evidence that no defect existed. O'Donnell v. City of Casper, 696 P.2d 1278 (Wyo. 1985).

Waiver of objection to unauthenticated document. — A party waived his objection on appeal to the consideration by the trial court of an unsworn and uncertified document submitted with a summary judgment motion by not filing a timely objection to the submission of the document at the trial court level. Boller v. Key Bank, 829 P.2d 260 (Wyo. 1992).

Prejudicial error. — The trial court's refusal to strike a supplemental memorandum in support of a motion for summary judgment, allegedly containing misleading, scandalous and impertinent material, did not rise to the level of prejudicial error because, even without the materials in the memorandum, the movants met their burden under this rule. Oil, Chem. & Atomic Workers Int'l Union v. Sinclair Oil Corp., 748 P.2d 283 (Wyo. 1987), cert. denied, 488 U.S. 821, 109 S. Ct. 65, 102 L. Ed. 2d 42 (1988).

Summary judgment improper where no opposing information. — Where plaintiff alleged that defendants had, in the course of using an easement, left the roadway and damaged the surrounding pasture and submitted an affidavit which supported her claim for damages flowing from the alleged misuse of the easement by one defendant, but in support of their motion for summary judgment on plaintiff's claims, neither defendant submitted any information which would demonstrate that there was no genuine issue of fact with respect to plaintiff's claim for damages for improper use of the easement, defendants did not establish that they were entitled to summary judgment on plaintiff's claim for damages on the record, and it should not have been granted. Curutchet v. Bordarrampe, 726 P.2d 500 (Wyo. 1986).

Upon failure of required showing, no response necessary. — Where defendant did not demonstrate that there was no genuine issue of material fact and that he was entitled to judgment as a matter of law, it is not necessary to discuss plaintiff's affidavits in resistance, as plaintiff had no obligation to respond. S.C. Ryan, Inc. v. Lowe, 753 P.2d 580 (Wyo. 1988).

Failure to deny permissive use of land has effect of admission. — Where the moving party's affidavits stated that the opposing party's use of land had been permissive, the latter's failure to deny permissive use, once it was stated in the movant's affidavits, had the legal effect of admitting permissive use. Sanders v. Lidle, 674 P.2d 1291 (Wyo. 1984).

Motion for partitioning not defeated merely by opposing party's statement of possession. — The opposing party's statement that he was a tenant in common in possession for a period of 10 years and that the movants were tenants in common out of possession, without any affidavits, facts or evidence supporting the claim that possession was adverse, did not defeat the motion for summary judgment for partitioning of the property. Osborn v. Warner, 694 P.2d 730 (Wyo. 1985).

Summary judgment proper where affidavits of opposing party indicating contrary evidence not submitted. — In an action to force payment for the medical treatment of a prisoner under § 18-6-303, summary judgment was proper where the hospital filed affidavits and other evidence as to necessary medical attendance and nursing, but the county did not submit any affidavits nor other information to indicate the existence of potential evidence to the contrary. Board of County Comm'rs v. Memorial Hosp., 682 P.2d 334 (Wyo. 1984).

Judgment not disturbed where opposing affidavits not filed nor enlargement of time requested. — The Supreme Court will not disturb a summary judgment where, if opposing affidavits cannot be filed, the party opposing the motion neither files an affidavit pursuant to subdivision (f), setting forth the reasons why he cannot file an opposing affidavit, nor files a motion pursuant to Rule 6(b),

requesting enlargement of the time in which to file the affidavits. Dudley v. East Ridge Dev. Co., 694 P.2d 113 (Wyo. 1985).

Sufficient to present affidavits to court at commencement of hearing. — In the absence of local written rules providing otherwise, when affidavits have been served in compliance with the general rule requirement, concurrent presentation to the court at the commencement of the scheduled hearing on a motion for summary judgment under the purview of this rule is sufficient, so that the text of the affidavits will be considered by the trial court in order to determine whether there are specific facts showing that there is a genuine issue for trial. Nation v. Nation, 715 P.2d 198 (Wyo. 1986).

Materials forwarded to court, but not filed, not properly before court. — The parties moving for summary judgment forwarded certain materials to the court for its consideration but did not file them. This method of supporting the motion did not satisfy this rule's mandatory requirements, nor was it within the spirit and intent of these rules. The materials, therefore, were not properly before the court and could not be relied upon to support the motion. Hickey v. Burnett, 707 P.2d 741 (Wyo. 1985).

When subdivisions (c) and (e) inapplicable. — Where the affidavits filed did not present matters outside the complaint, nor raise any genuine issue of fact necessary or material to the determination of the action, neither subdivision (c) nor subdivision (e) applied. Sump v. City of Sheridan, 358 P.2d 637, rehearing denied, 359 P.2d 1008 (Wyo. 1961).

It is proper that matter which fails to meet requirements of subdivision (e) be stricken on motion. Newton v. Misner, 423 P.2d 648 (Wyo. 1967).

Last two sentences of subdivision (e) are self-explanatory and not deserving of comment. Vipont Mining Co. v. Uranium Research & Dev. Co., 376 P.2d 868 (Wyo. 1962); Edmonds v. Valley Nat'l Bank, 518 P.2d 7 (Wyo. 1974).

Rule 56.1. Summary judgment -- required statement of material facts.

(a) Upon any motion for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure, in addition to the materials supporting the motion, there shall be annexed to the motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried.

(b) In addition to the materials opposing a motion for summary judgment, there shall be annexed a separate, short and concise statement of material facts as to which it is contended that there exists a genuine issue to be tried.

(c) Such statements shall include pinpoint citations to the specific portions of the record and materials relied upon in support of the parties' position.

(Added February 2, 2017, effective March 1, 2017.)

Rule 57. Declaratory judgment.

These rules govern the procedure for obtaining a declaratory judgment pursuant to statute. Rules 38 and 39 govern a demand for a jury trial. The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. The court may order a speedy hearing of a declaratory judgment action.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 57 of the Federal Rules of Civil Procedure.

Declaratory-judgment vehicle cannot be utilized for the purpose of obtaining an advisory opinion; thus the issue concerning which judgment is sought must be justiciable. Police Protective Ass'n v. City of Casper, 575 P.2d 1146 (Wyo. 1978).

If there is any legal ground in the record to sustain a declaratory judgment, it will be affirmed. Police Protective Ass'n v. City of Casper, 575 P.2d 1146 (Wyo. 1978).

Declaratory judgment relief not precluded by existence of another remedy. — The existence of another adequate remedy will not, of itself, preclude declaratory judgment relief. Rocky Mt. Oil & Gas Ass'n v. State, 645 P.2d 1163 (Wyo. 1982).

Other relief not foreclosed. — By the action for declaratory judgment plaintiffs were not foreclosed from obtaining any other statutory relief to which they might have been entitled. School Dists. Nos. 2, 3, 6, 9 & 10 v. Cook, 424 P.2d 751 (Wyo. 1967).

A narrow view of the remedy selected is not to be taken because another remedy is available. School Dists. Nos. 2, 3, 6, 9 & 10 v. Cook, 424 P.2d 751 (Wyo. 1967).

Declaratory judgment action, filed beyond 30 days from driver license revocation, properly considered. — Declaratory judgment and mandamus actions filed by driv-

ers whose licenses had been revoked, challenging the interpretation by the department of motor vehicles of the statute upon which the department relied in refusing to restore the drivers' driving privileges, even though filed beyond 30 days from the rulings by independent hearing officers revoking the licenses, were properly considered by the district court. State v. Kraus, 706 P.2d 1130 (Wyo. 1985).

Applied in Wyoming Community College Comm'n v. Casper Community College Dist., 31 P.3d 1242 (Wyo. 2001); Wyo. Dep't of Revenue v. Exxon Mobil Corp., 150 P.3d 1216 (Wyo. 2007).

Cited in O'Neal v. School Dist. No. 15 Sch. Bd., 451 P.2d 791 (Wyo. 1969).

Law reviews. — For article, "Administrative Law, Wyoming Style," see XVIII Land & Water L. Rev. 223 (1983).

Am. Jur. 2d, ALR and C.J.S. references. — 22A Am. Jur. 2d Declaratory Judgments § 1 et seq.

Availability and scope of declaratory judgment actions in determining rights of parties to arbitration agreements, or powers and exercise thereof by arbitrators, 12 ALR3d 854.

26 C.J.S. Declaratory Judgment § 1 et seq.

Rule 58. Entering judgment.

(a) *Presentation.* — Subject to the provisions of Rule 55(b) and unless otherwise ordered by the court, if the parties are unable to agree on the form and content of a proposed judgment or order, it shall be presented to the court and served upon the other parties within 14 days after the court's decision is made known. Any objection to the form or content of a proposed judgment or order, together with an alternate form of judgment or order which cures the objection(s), shall be filed with the court and served upon the other parties within 5 days after service of the proposed judgment or order. If no written objection is timely filed, the court may sign the judgment or order. If objection is timely filed, the court will resolve the matter with or without a hearing.

(b) *Form and Entry.* — Subject to the provisions of Rule 54(b), in all cases, the judge shall promptly settle or approve the form of the judgment or order and direct that it be entered by the clerk. Every judgment shall be set forth on a separate document, shall be identified as such, and may include findings of fact and conclusions of law. The names of all parties shall be set out in the caption of all final orders, judgments and decrees. All judgments and orders must be entered on the journal of the court and specify clearly the relief granted or order made in the action.

(c) *Time of Entry.* — A judgment or final order shall be deemed to be entered whenever a form of such judgment or final order pursuant to these rules is filed in the office of the clerk of court in which the case is pending.

(d) *Cost or Fee Awards.* — Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Wyoming Rule of Appellate Procedure 2.02(a) as a timely motion under Rule 59. (Added February 2, 2017, effective March 1, 2017.)

Cross References. — As to preparation of orders, see Rule 304, D. Ct.

Utterances from bench not entry of judgment or final order. — Where the notice of appeal, while referring to a "final judgment … entered December 13, 1974," was in fact addressed to the oral remarks and conclusions of the judge from the bench, such utterances pertaining to the law of the case did not constitute the "entry of the judgment or final order" for purposes of filing a notice of appeal to the Supreme Court. Jackson v. State, 547 P.2d 1203 (Wyo. 1976).

Judgment by consent. — Because a party to a judgment by consent is deemed to have waived any objections within the scope of the judgment, a judgment by consent may only be appealed to claim: a lack of subject matter jurisdiction; a lack of actual consent; fraud in the procurement of the order; or, mistake. Pinther v. Hiett, 884 P.2d 631 (Wyo. 1994).

Decision letters not deemed final order. — The trial judge's decision letters, discussing legal principles and expressing his conclusions of law in a divorce proceeding, did not constitute a judicial determination which could be considered a final order. Broadhead v. Broadhead, 737 P.2d 731 (Wyo. 1987).

In a divorce action, the trial court's adoption of the wife's proposed distribution and subsequent award of the subject stock, which differed slightly from the decision letter, did not appear to have been a mistake, but rather was an exercise of the district court's discretion. A

district can, in its discretion, make changes in the final order from what was indicated in its decision letter; moreover, the husband did not assert any abuse of discretion, and he had failed to object. Madigan v. Maas, 117 P.3d 1194 (Wyo. 2005).

Decree must conform to reflect award. — Where decision letter failed to reflect a monetary award to the husband, as ordered by the court, and did not have a place for the parties to sign to indicate their approval, the case had to be remanded to the trial court with instructions that the decree of divorce be conformed. Root v. Root, 65 P.3d 41 (Wyo. 2003).

Order regularly rendered, signed and recorded took precedence over a prior oral order not entered in the court files or records. McAteer v. Stewart, 696 P.2d 72 (Wyo. 1985).

Default judgments are not favored when issue is child custody or visitation. — When the parties do not intentionally ignore the process involving the future of their child, default is not favored when the issue of child custody or visitation is before the court. Esquibel v. Esquibel, 917 P.2d 1150 (Wyo. 1996).

Orders not circulated but no error found. — Mother's procedural due process rights were not violated even though she alleged that orders were not circulated for approval as required under this section, and instead the orders were made available to the mother's counsel for five days after being prepared by the State; the mother failed to cite to any legal authority in her brief on the issue, and nothing was provided to the court that justified reversing the trial court on the issue. DH v. Wyo. Dep't of Family Servs. (In re 'H' Children), 79 P.3d 997 (Wyo. 2003).

Jurisdiction. — District court retained jurisdiction over an award of costs to a motorist in a suit arising out of a collision with a cyclist, and the cyclist, who appealed, failed to file a separate notice of appeal pertaining to his challenge to the award of costs; therefore, the appellate court lacked jurisdiction to hear this issue on appeal. Nish v. Schaefer, 138 P.3d 1134 (Wyo. 2006).

Contents of order. — Although the district court erroneously stated what the presumptive child support would have been had the district court chosen to adhere to the presumptive support tables, that error was de minimus and harmless, where such information was not memorialized in the order from which the instant appeal was taken. Shelhamer v. Shelhamer, 138 P.3d 665 (Wyo. 2006).

Applied in Chadwick v. Nagel, 68 Wyo. 76, 229 P.2d 502 (1951); United States v. Hunt, 373 F. Supp. 1079 (D. Wyo. 1974); Bowman v. Worland School Dist., 531 P.2d 889 (Wyo. 1975); United States v. Hunt, 513 F.2d 129 (10th Cir. 1975); 2-H Ranch Co. v. Simmons, 658 P.2d 68 (Wyo. 1983); Scherer v. Scherer, 931 P.2d 251 (Wyo. 1997).

Quoted in Oatts v. Jorgenson, 821 P.2d 108 (Wyo. 1991).

Stated in Olmstead v. Cattle, Inc., 541 P.2d 49 (Wyo. 1975).

Cited in Pawlowski v. Pawlowski, 925 P.2d 240 (Wyo. 1996); Bixler v. Oro Mgmt., L.L.C., 145 P.3d 1260 (Wyo. 2006).

Law reviews. — See article, "The 1994 Amendments to the Wyoming Rules of Civil Procedure," XXX Land & Water L. Rev. 151 (1995).

For comment, "Child Custody Arrangements: Say What You Mean, Mean What You Say," see XXXI Land & Water L. Rev. 591 (1996).

Am. Jur. 2d, ALR and C.J.S. references. — 46 Am. Jur. 2d Judgments § 1 et seq.

What constitutes "entry of judgment" within meaning of Rule 58 of Federal Rules of Civil Procedure, 10 ALR Fed 709.

Requirement of Rule 58, Federal Rules of Civil Procedure, that every judgment shall be set forth on a separate document, 53 ALR Fed 595.

49 C.J.S. Judgments §§ 106 to 137.

Rule 59. New trial; altering or amending a judgment.

(a) *In General.* —

(1) *Grounds for New Trial.* — The court may, on motion, grant a new trial on all or some of the issues, for any of the following causes:

(A) Irregularity in the proceedings of the court, jury, referee, master or prevailing party, or any order of the court or referee, or abuse of discretion, by which the party was prevented from having a fair trial;

(B) Misconduct of the jury or prevailing party;

(C) Accident or surprise, which ordinary prudence could not have guarded against;

(D) Excessive damages appearing to have been given under the influence of passion or prejudice;

(E) Error in the assessment of the amount of recovery, whether too large or too small;

(F) That the verdict, report or decision is not sustained by sufficient evidence or is contrary to law;

(G) Newly discovered evidence, material for the party applying, which the party could not, with reasonable diligence, have discovered and produced at the trial;

(H) Error of law occurring at the trial.

(2) *Further Action After a Nonjury Trial.* — After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

(b) *Time to File a Motion for a New Trial.* — A motion for a new trial must be filed no later than 28 days after the entry of judgment.

(c) *Time to Serve Affidavits.* — When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 14 days after being served to file opposing affidavits, but that period may be extended for up to 21 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.

(d) *New Trial on the Court's Initiative or for Reasons Not in the Motion.* — No later than 28 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) *Motion to Alter or Amend a Judgment.* . — A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 59 of the Federal Rules of Civil Procedure.

Cross References. — As to computation of time for motions, see Rule 6(a). As to stay of enforcement of judgment upon motion for new trial, see Rule 62(b).

I. GENERAL CONSIDERATION.

Courts ought to independently exercise their power to grant new trials, and, with entire freedom from the rule which controls appellate tribunals, they ought to grant new trials whenever their superior and more comprehensive judgment teaches them that the verdict of the jury fails to administer substantial justice to the parties in the case. Whenever it appears that the jury have, from any cause, failed to respond truly to the real merits of the controversy they have failed to do their duty, and the verdict ought to be set aside and a new trial granted. Brasel & Sims Constr. Co. v. Neuman Transit Co., 378 P.2d 501 (Wyo. 1963).

Relief under this rule is not granted as matter of inherent right. DeWitty v. Decker, 383 P.2d 734 (Wyo. 1963).

And rule may be waived by conduct at trial. DeWitty v. Decker, 383 P.2d 734 (Wyo. 1963).

The matter of waiver of the right to a new trial by conduct at the trial is grounded on the proposition that jury trials are time-consuming and costly proceedings and while a litigant is entitled to a fair trial, certain it is that he has responsibilities to assist the trial court in bringing about such a result. It will not do to permit a litigant to remain mute and speculate on the outcome of a jury trial on the record made with knowledge of irregularities or improprieties therein that might readily and easily have been corrected during the trial and then, when misfortune comes his way, to attempt to set the invited result aside by way of a new trial because of such matters. DeWitty v. Decker, 383 P.2d 734 (Wyo. 1963).

Judgment is unaffected by motion for new trial unless court opens it under this rule. Sun Land & Cattle Co. v. Brown, 387 P.2d 1004 (Wyo. 1964).

And becomes effective for appeal purposes when motion is overruled by court or by inaction. — The judgment becomes effective for the purposes of the appeal as of the

date that the motion for new trial is overruled either by action of the court or automatically because of inaction. Sun Land & Cattle Co. v. Brown, 387 P.2d 1004 (Wyo. 1964); Rutledge v. Vonfeldt, 564 P.2d 350 (Wyo. 1977).

Necessity of motion. — A motion for a new trial is not necessary to preserve the issue of a directed verdict on appeal. Coulthard v. Cossairt, 803 P.2d 86 (Wyo. 1990), overruled on other grounds, Vaughn v. State, 962 P.2d 149 (Wyo. 1998).

Applicability of general restrictions on court for modification or vacation of judgments. — The general restrictions on a court for modification or vacation of judgments, after the term in which such are made, do not apply to decrees concerning child custody, child support or alimony, but do apply to decrees concerning property divisions. Paul v. Paul, 631 P.2d 1060 (Wyo. 1981).

Court had power to amend divorce judgment to recognize the bankruptcy of one of the husband's debtors. Dice v. Dice, 742 P.2d 205 (Wyo. 1987).

Burden of proof. — The party in whose behalf a motion for a new trial is filed has a heavy burden to show an abuse of discretion. Walton v. Texasgulf, Inc., 634 P.2d 908 (Wyo. 1981).

Defective record. — In a suit to have the sale of trust property to a corporation set aside, the trial court did not abuse its discretion in reopening the evidence sua sponte. The trial court apparently had informed the parties that it would take judicial notice of its earlier ruling in a prior action, making the presentation of evidence of the ruling unnecessary; upon further reflection, the trial court concluded that evidence of the prior ruling properly had to appear in the record for it to conclude that the trusts met their burden of proof and were entitled to judgment. Befumo v. Johnson, 119 P.3d 936 (Wyo. 2005).

Decision letter was not a final order. — In an action involving child custody, the award of primary legal custody and shared physical custody of the child to the mother was improper, in part because a decision letter did not constitute a judicial determination which could have been considered a final order and thus, the district court was free to revise its rulings prior to judgment, and could have heard the prejudgment motion to reconsider. Procedurally, both Wyo. R. Civ. P. 59 and 60 provided methods, even after judgment, for reopening the evidence or providing a new trial. Parris v. Parris, 204 P.3d 298 (Wyo. 2009).

Trial courts will not be reversed unless discretion abused. — Trial courts have always been clothed with a large discretion in the matter of granting a new trial, and their action will not be disturbed in the appellate court unless that court can clearly and conclusively say that there was an abuse of that discretion. It will take a stronger case to warrant a reversal where a new trial has been granted than where it is denied. Brasel & Sims Constr. Co. v. Neuman Transit Co., 378 P.2d 501 (Wyo. 1963); Walton v. Texasgulf, Inc., 634 P.2d 908 (Wyo. 1981).

Trial courts are vested with broad discretion when ruling on a motion for new trial, and on review the appellate court will not overturn the trial court's decision except for an abuse of that discretion. Cody v. Atkins, 658 P.2d 59 (Wyo. 1983).

A trial court has broad discretion when it is ruling upon a motion requesting a new trial; its decision on the motion will not be overturned absent an abuse of that discretion. Carlson v. Carlson, 836 P.2d 297 (Wyo. 1992).

But courts should not substitute their opinion for that of jury. — Neither the appellate court nor any trial court should ever substitute its opinion for that of the jury. Reilly v. State, 496 P.2d 899 (Wyo. 1972).

And jury's finding not disturbed where there is any substantial evidence. — A jury's finding of fact should not be interfered with if there is any substantial evidence to support it. Reilly v. State, 496 P.2d 899 (Wyo. 1972).

And judge's refusal to grant new trial in such circumstances not disturbed. — A judge's refusal to grant a new trial should not be interfered with if there is any substantial evidence to support it. Reilly v. State, 496 P.2d 899 (Wyo. 1972).

Motion to reconsider a nullity. — Mother's appeal of trial court's denial of her "motion to reconsider" a child support abatement order was dismissed because the Wyoming Rules of Civil Procedure did not recognize a "motion for reconsider"; therefore the trial court order purportedly denying the motion was void and the court lacked jurisdiction under W.R.A.P. 1.04(a) and 1.05. The filing by aggrieved parties of a motion that is properly designated under the rule authorizing the motion, such as W.R.C.P. 50, 52, 59, or 60 will ensure full appellate rights are preserved. Plymale v. Donnelly, 125 P.3d 1022 (Wyo. 2006).

Order disposing of a motion for new trial is not an appealable order. Sun Land & Cattle Co. v. Brown, 387 P.2d 1004 (Wyo. 1964).

An order of the trial court denying the personal representatives' motion for a new trial following an adverse verdict in their wrongful death action was not an appealable final order, as the appeal had to be from the judgment entered on the verdict in order to bestow jurisdiction upon the Supreme Court to hear the appeal. Scott v. Sutphin, 109 P.3d 520 (Wyo. 2005).

Joining motions for judgment notwithstanding verdict and new trial does not extend time to appeal. — The fact that the motion for judgment notwithstanding the verdict was joined with a motion for new trial

could not in the proper administration of justice be allowed to effect an extension of time for appeal. This was not the Supreme Court's intention at the time the rules were adopted and any such interpretation of the rules would permit an appellant by the addition of a motion for judgment notwithstanding the verdict to effect a delay. Brasel & Sims Constr. Co. v. Neuman Transit Co., 378 P.2d 501 (Wyo. 1963) (decided prior to the 1965 amendment).

Supreme Court may remand cause to prevent failure of justice. — The Supreme Court has the power to remand the cause for a new trial so as to prevent failure of justice. Coronado Oil Co. v. Grieves, 642 P.2d 423 (Wyo. 1982).

Although this rule pertains to the authority of trial courts to remand for retrial on all or part of the issues, the Supreme Court possesses equivalent authority to order a partial new trial. Texas W. Oil & Gas Corp. v. Fitzgerald, 726 P.2d 1056 (Wyo. 1986).

Applied in Phelps v. Woodward Constr. Co., 66 Wyo. 33, 204 P.2d 179 (1949); Kennedy v. Kennedy, 483 P.2d 516 (Wyo. 1971); Dellapenta v. Dellapenta, 838 P.2d 1153 (Wyo. 1992); Loghry v. Unicover Corp., 878 P.2d 510 (Wyo. 1994); Cundy Asphalt Paving Constr., Inc. v. Angelo Materials Co., 915 P.2d 1181 (Wyo. 1996); John Q. Hammonds Inc. v. Poletis, 954 P.2d 1353 (Wyo. 1998); Beck v. Townsend, 116 P.3d 465 (Wyo. 2005).

Quoted in Spitzer v. Spitzer, 777 P.2d 587 (Wyo. 1989); Barron v. Barron, 834 P.2d 685 (Wyo. 1992); Little v. Kobos ex rel. Kobos, 877 P.2d 752 (Wyo. 1994); Carlson v. Carlson, 888 P.2d 210 (Wyo. 1995); Paxton Res., L.L.C. v. Brannaman, 95 P.3d 796 (Wyo. 2004).

Cited in Marshall v. Rugg, 6 Wyo. 270, 44 P. 700 (1896); In re Estate of Brennan, 433 P.2d 512 (Wyo. 1967); Spomer v. Spomer, 580 P.2d 1146 (Wyo. 1978); Downs v. State, 581 P.2d 610 (Wyo. 1978); Mott v. England, 604 P.2d 560 (Wyo. 1979); Gifford v. Casper Neon Sign Co., 618 P.2d 547 (Wyo. 1980); Harris v. Grizzle, 625 P.2d 747 (Wyo. 1981); Foster Lumber Co. v. Hume, 645 P.2d 1176 (Wyo. 1982); Cervelli v. Graves, 661 P.2d 1032 (Wyo. 1983); Hampton v. All Field Serv., Inc., 726 P.2d 98 (Wyo. 1986); Jones v. Sheridan County Sch. Dist. No. 2, 731 P.2d 29 (Wyo. 1987); Carlson v. BMW Indus. Serv., Inc., 744 P.2d 1383 (Wyo. 1987); Swasso v. State ex rel. Worker's Comp. Div., 751 P.2d 887 (Wyo. 1988); Parker v. Kahin, 758 P.2d 570 (Wyo. 1988); Colton v. Brann, 786 P.2d 880 (Wyo. 1990); Miller v. Murdock, 788 P.2d 614 (Wyo. 1990); Storseth v. Brown, Raymond & Rissler, 805 P.2d 284 (Wyo. 1991); Cardwell v. American Linen Supply, 843 P.2d 596 (Wyo. 1992); Moore v. Lubnau, 855 P.2d 1245 (Wyo. 1993); Odegard v. Odegard, 69 P.3d 917 (Wyo. 2003); MJH v. AV (In re JRH), 138 P.3d 683 (Wyo. 2006); State ex rel. Wyo. Workers' Safety & Comp. Div. v. Carson, 252 P.3d 929 (Wyo. 2011).

Law reviews. — Tyler J. Garrett, Anatomy of a Wyoming Appeal: A Practitioner's Guide for Civil Cases, 16 Wyo. L. Rev. 139 (2016). Available at: http://repository.uwyo.edu/wlr/vol16_s1/6

Am. Jur. 2d, ALR and C.J.S. references. — 58 Am. Jur. 2d New Trial § 1 et seq.

Filing of notice of appeal as affecting jurisdiction of state trial court to consider motion to vacate judgment, 5 ALR5th 422.

Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages — modern cases, 5 ALR5th 875.

Amendment of record of judgment in state civil case to correct judicial errors and omissions, 50 ALR5th 653.

Request for attorney fees as motion to alter or amend judgment within Federal Rule of Civil Procedure 59(e), 74 ALR Fed 797.

Excessiveness or adequacy of compensatory damages for personal injury to or death of seaman in actions under Jones Act (46 USC Appx § 688) or doctrine of unseaworthiness—modern cases, 96 ALR Fed 541.

Excessiveness or adequacy of awards of damages for personal injury or death in actions under Federal Employers' Liability Act (45 USC § 51 et seq.)—modern cases, 97 ALR Fed 189.

49 C.J.S. Judgments §§ 434 to 498; 66 C.J.S. New Trial § 1 et seq.

II. GROUNDS.

A. In General.

Statutory enumeration of grounds for a new trial is exclusive. Bosick v. Owl Creek Coal Co., 48 Wyo. 46, 41 P.2d 533 (1935) (decided under § 89-2101, R.S. 1931).

Duty of judge to grant new trial under certain circumstances. — This rule confirms the long-standing principle that it is the duty of a judge, when not satisfied with a jury verdict, to set it aside and grant a new trial for one of the reasons allowed. Town of Jackson v. Shaw, 569 P.2d 1246 (Wyo. 1977).

"Substantial justice" is not individual ground upon which new trial may be granted. — It is merely a criterion to guide trial judges when deciding whether a new trial should be ordered for one of the reasons enumerated in this rule. Clarke v. Vandermeer, 740 P.2d 921 (Wyo. 1987).

Exercise of court's power under subdivision (a) is not in derogation of right of trial by jury but is one of the historic safeguards of that right. Town of Jackson v. Shaw, 569 P.2d 1246 (Wyo. 1977).

Jury entitled to calculate damages. — The trial court did not abuse its discretion in denying plaintiff's motion under subdivision (a)(5) of this rule because the awarding jury was entitled to disbelieve an interested expert's calculation of damages and to arrive at an

unexplained, nonitemized lesser sum which was within the broad range of permissible recovery in light of the speculative nature of plaintiff's profits. Ryn, Inc. v. Platte County Mem. Hosp. Bd. of Trustees, 842 P.2d 1084 (Wyo. 1992), overruled on other grounds, Vaughn v. State, 962 P.2d 149 (Wyo. 1998).

Substantial evidence. — Sufficient evidence supported the jury's allocation of negligence where the jury calculated both parties' culpability for the accident exactly as instructed and determined, based on the all the evidence presented, how it believed the accident occurred and then determined the fault of both parties in regard to the causation of the accident; a new trial was not warranted. Lake v. D & L Langley Trucking, Inc., 233 P.3d 589 (Wyo. 2010).

Am. Jur. 2d, ALR and C.J.S. references. — Propriety and prejudicial effect of suggestions or comments by judge as to compromise or settlement of civil case, 6 ALR3d 1457.

Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written, 10 ALR3d 501.

New trial for inadequacy of damages in action by person injured for personal injuries not resulting in death (for years 1941-1950), 11 ALR3d 9; 12 ALR4th 96; 13 ALR4th 212.

Prejudicial effect of unauthorized view by jury in civil case of scene of accident or premises in question, 11 ALR3d 918.

Propriety and prejudicial effect of reference by counsel in civil case to result of former trial of same case, or amount of verdict therein, 15 ALR3d 1101.

Absence of judge from courtroom during trial of civil case, 25 ALR3d 637.

Recantation by prosecuting witness in sex crime as ground for new trial, 51 ALR3d 907.

Juror's voir dire denial or nondisclosure of acquaintance or relationship with attorney in case, or with partner or associate of such attorney, as ground for new trial or mistrial, 64 ALR3d 126.

B. Surprise.

Surprise not found. — See Richardson v. Schaub, 796 P.2d 1304 (Wyo. 1990).

C. Excessive Damages.

Subdivision (a)(4) carries forward the historical privilege of dealing with excessive verdicts in the interest of justice. Town of Jackson v. Shaw, 569 P.2d 1246 (Wyo. 1977).

There is no mathematical formula by which to determine the amount by which a verdict is excessive. Town of Jackson v. Shaw, 569 P.2d 1246 (Wyo. 1977).

Limited retrial upon liability issue alone is permitted when it is clear that such a course can be pursued without confusion, inconvenience or prejudice to the rights of any party. Wheatland Irrigation Dist. v. McGuire, 562 P.2d 287 (Wyo. 1977).

Verdict of a jury is subject to supervision of court, whether too large or too small. McPike v. Scheuerman, 398 P.2d 71 (Wyo. 1965).

Or if award is inadequate. — The court has both the right and the duty to grant a new trial if it considers that under the facts and circumstances disclosed at the trial the award is inadequate. McPike v. Scheuerman, 398 P.2d 71 (Wyo. 1965).

Jury award within the bounds of discretion creates no basis for new trial. — Where damage award by jury was not so excessive and unreasonable as to indicate passion or prejudice on the part of the jury, the jury was within the bounds of its sound discretion in the grant of the award, and no basis for a new trial arose. Vivion v. Brittain, 510 P.2d 21 (Wyo. 1973).

Deliberate injection of insurance coverage into trial of damage action presents a basis for a new trial. Elite Cleaners & Tailors, Inc. v. Gentry, 510 P.2d 784 (Wyo. 1973).

If special damages result, then general damages also result, and the jury was wrong in not making an award for general damages. Thus, the case must be remanded for new trial on the issue of amount of damages. Smith v. Blair, 521 P.2d 581 (Wyo. 1974).

Failing to award general damages with award for medical expense is improper. — As a general rule, the failure of a jury to award general damages, in the face of an award for substantial medical and hospital expense, results at least in an improper or irregular verdict. DeWitty v. Decker, 383 P.2d 734 (Wyo. 1963).

Where there was some divergence of view in the medical testimony as to whether the pain and suffering claimed was largely feigned or real, but although the jury awarded plaintiff substantial medical and hospital expenses said to have been incurred as a result of the accident, it also found that pain and suffering did not bring about or accompany the treatment that resulted in such medical and hospital expenses, on the face of the verdict, the findings appear to be inconsistent. DeWitty v. Decker, 383 P.2d 734 (Wyo. 1963).

Compensatory damages held not so excessive as to require modification of the verdict. — See Cates v. Eddy, 669 P.2d 912 (Wyo. 1983).

Punitive damage award held to be excessive. — See Cates v. Eddy, 669 P.2d 912 (Wyo. 1983).

D. Verdict Not Sustained.

Findings of fact are subject to review by trial judge, who, like the jury has had the benefit of observing the demeanor and deportment of the witnesses. If he concludes that the evidence is insufficient to support the verdict, he should grant a new trial. Brasel & Sims

Constr. Co. v. Neuman Transit Co., 378 P.2d 501 (Wyo. 1963).

Cases may be reversed based upon finding that there was no substantial credible evidence to support the verdict. Reilly v. State, 496 P.2d 899 (Wyo. 1972).

Verdict approved by trial judge not disturbed on ground evidence unbelievable. — When a trial judge has given the verdict his approval and endorsement by denying a new trial, the judgment will not be disturbed upon the ground that the jury was not entitled to believe certain testimony. Brasel & Sims Constr. Co. v. Neuman Transit Co., 378 P.2d 501 (Wyo. 1963).

Where jury obviously misunderstood, misapprehended, or ignored court's instruction, the verdict was improper, and that portion of the judgment must be reversed. Gifford-Hill-Western, Inc. v. Anderson, 496 P.2d 501 (Wyo. 1972).

Counsel is obligated to bring to attention of court an irregularity appearing on the face of a jury verdict and thus afford the trial court, while the jury is still present, an opportunity to correct the verdict; failing in this, the point is waived on appeal. Chittim v. Armco Steel Corp., 407 P.2d 1015 (Wyo. 1965).

Discovery of juror's false answer after verdict. — A juror's false answer as to whether he or a member of his family had brought personal injury litigation may be ground for a new trial where the falsity of the answer was discovered after the verdict and may have deprived the party of a fair trial. Vivion v. Brittain, 510 P.2d 21 (Wyo. 1973).

Failure of jury verdict to administer substantial justice. — A trial court should grant new trials whenever, in its judgment, the jury's verdict fails to administer substantial justice to the parties. Cody v. Atkins, 658 P.2d 59 (Wyo. 1983).

Evidence sufficient to sustain verdict. — See Halliburton Co. v. Claypoole, 868 P.2d 252 (Wyo. 1994).

New trial where evidence supporting verdict uncertain. — This rule articulates the authority of the trial court to grant a new trial when the evidence is insufficient, but the rule does not permit the granting of a new trial if there is a total failure of proof. Where the court erred in admitting into evidence the plaintiff's unedited claim as to damages, it correctly held that a new trial should be held on the issue of damages, where it was not possible to determine with particularity what evidence logically supported the jury award of damages. City of Kemmerer v. Wagner, 866 P.2d 1283 (Wyo. 1993).

E. Newly Discovered Evidence.

Prerequisites for obtaining new trial based on newly discovered evidence. — A party seeking a new trial on the basis of newly discovered evidence must satisfy the court that: (1) the evidence has come to his knowledge since the trial; (2) it was not owing to the want of due diligence that it did not come sooner; (3) it is so material that it would probably produce a different verdict if a new trial were granted; and (4) it is not cumulative, i.e., speaking to facts in relation to which there was evidence at trial. Walton v. Texasgulf, Inc., 634 P.2d 908 (Wyo. 1981).

Sole question under subdivision (a)(7) is whether or not the party making the motion sustained his burden of showing that the evidence he sought to present was newly discovered and could not with reasonable diligence have been produced at the trial. Barbour v. Barbour, 518 P.2d 12 (Wyo. 1974).

Evidence available at time of hearing, or which can be inferred was available, cannot be basis for grant of a new hearing as newly discovered. Brees v. Gulley Enters., Inc., 6 P.3d 128 (Wyo. 2000).

New trial denied where newly discovered evidence is cumulative only. — A new trial will not be granted just for the purpose of introducing newly discovered cumulative evidence. Henderson v. Sky, 71 Wyo. 250, 256 P.2d 106 (1953), (decided under § 3-3404, C.S. 1945); Walton v. Texasgulf, Inc., 634 P.2d 908 (Wyo. 1981).

Where the evidence which party sought to introduce by his motion for new trial was merely cumulative, it would not constitute a valid basis for a new trial because of newly discovered evidence. Barbour v. Barbour, 518 P.2d 12 (Wyo. 1974).

Evidence which is cumulative is not newly discovered evidence justifying the granting of a new trial. Shaw v. Shaw, 544 P.2d 1004 (Wyo. 1976).

Motion under subdivision (a)(7) properly denied. — A new trial on the ground of newly discovered evidence was properly denied where the evidence was available but was not produced at trial. Barbour v. Barbour, 518 P.2d 12 (Wyo. 1974).

If evidence is available at the time of the trial, it cannot be the basis for the grant of a new trial as newly discovered. Shaw v. Shaw, 544 P.2d 1004 (Wyo. 1976).

The appellate court would not consider the appellant's subdivision (a)(7) grounds for a new trial where it could not tell from the record or brief whether the evidence was discoverable prior to trial, whether it was merely cumulative, or whether it was of such import and materiality as would have probably produced a different verdict if a new trial had been granted. Curless v. Curless, 708 P.2d 426 (Wyo. 1985).

Deed had been a matter of public record for over fifteen years, and affidavit contained evidence that had long been available, and therefore district court did not err in denying appellant's motion to alter or amend judgment. Dudley v. Franklin, 983 P.2d 1223 (Wyo. 1999).

Jury instructions included the actual language of Wyo. Code Ann. § 31-5-205(a)(ii), and the jury was instructed that the written instructions would govern over any argument regarding the law by either counsel; a different result would not be obtained from a new trial. Lake v. D & L Langley Trucking, Inc., 233 P.3d 589 (Wyo. 2010).

F. Error of Law.

Case not always remanded for error of law. — Where a case was tried to a court and the court erred as to a rule of law in arriving at its judgment, the case may not necessarily always be remanded for a new trial; and where the factual situation was fully explored, there is little reason for a new trial. S-Creek Ranch, Inc. v. Monier & Co., 518 P.2d 930 (Wyo. 1974).

III. TIME FOR MOTION.

Am. Jur. 2d, ALR and C.J.S. references. — Consent as ground of vacating judgment, or granting new trial, in civil case, after expiration of term or time prescribed by statute or rules of court, 3 ALR3d 1191.

Amendment, after expiration of time for filing motion for new trial, of motion made in due time, 69 ALR3d 845.

IV. MOTION TO ALTER OR AMEND JUDGMENT.

Determining motion to alter or amend judgment. — An assigning judge cannot determine a motion under subdivision (e) to alter or amend a judgment by a special judge. Huckfeldt v. Huckfeldt, 463 P.2d 927 (Wyo. 1970).

The plaintiff's motion to reconsider a grant of summary judgment could not be considered a motion to alter or amend judgment so as to toll the period for filing a notice of appeal where the motion did not: (1) illustrate a change in controlling law; (2) present any evidence that became available subsequent to the hearing; or (3) show any necessity to correct a clear error of law or prevent manifest injustice. Sherman v. Rose, 943 P.2d 719 (Wyo. 1997).

Wife's motion to vacate and alter or amend a judgment of divorce on grounds that husband had perjured himself was, in essence, a motion to reconsider and did not stay the 30-day period for filing a notice of appeal. Morehouse v. Morehouse, 959 P.2d 179 (Wyo. 1998).

Motion properly denied. — Where appellant tenants leased property for ten years, stopped making payments, and then filed an action to quiet title to the property on the theory of adverse possession, appellants' possession of the property as tenants was permissive and not adverse; appellee true owners continued to pay the property taxes on the parcel, entered into oil and gas leases, and sold a strip of the property to the State for a highway. When appellees moved for judgment on partial findings, the district court did not err by granting the motion and entering a judgment for appellees; while appellants did not have the opportunity to examine a witness or offer an exhibit into evidence, they were not entitled to amend the findings or hold a new trial under this section because the evidence did not establish adverse possession. Willis v. Bender, 596 F.3d 1244 (10th Cir. 2010).

Allegation at trial cannot gainsay affidavit. — The factual accuracy of defendant's allegation at trial cannot gainsay defendant's affidavit submitted in support of defendant's motion to alter or amend the judgment. Bollig v. Bollig, 919 P.2d 136 (Wyo. 1996).

Motion for new trial treated as a motion for reconsideration did not toll appellate deadlines. — When appellant grandson filed a motion for new trial under this rule following summary judgment in the distribution of his grandmother's estate, the motion was inappropriate because there was no trial; therefore, it was treated as a motion for reconsideration and did not toll the time for appealing from the summary judgment order. Mathewson v. Estate of Nielsen (In re Estate of Nielsen), 252 P.3d 958 (Wyo. 2011).

Rule 60. Relief from a judgment or order.

(a) *Corrections Based on Clerical Mistakes; Oversights and Omissions.* — The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the Supreme Court, and while it is pending, such a mistake may be corrected only with leave of the Supreme Court.

(b) *Grounds for Relief from a Final Judgment, Order, or Proceeding.* — On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) *Timing and Effect of the Motion.* —

(1) *Timing.* — A motion under Rule 60(b) must be made within a reasonable time-and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) *Effect on Finality.* — The motion does not affect the judgment's finality or suspend its operation.

(d) *Other Powers to Grant Relief.* — This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief as provided by statute; or

(3) set aside a judgment for fraud on the court.

(e) *Bills and Writs Abolished.* — The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela. (Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 60 of the Federal Rules of Civil Procedure.

I. GENERAL CONSIDERATION.

Purpose of rule. — The express purpose of this rule is to provide the courts with the means of relieving a party from the oppression of a final judgment or order, on a proper showing where such judgments are unfairly or mistakenly entered. Westring v. Cheyenne Nat'l Bank, 393 P.2d 119 (Wyo. 1964); Kennedy v. Kennedy, 483 P.2d 516 (Wyo. 1971).

This rule applies to special situations justifying extraordinary relief, and a showing of the exceptional circumstances should be made. Martellaro v. Sailors, 515 P.2d 974 (Wyo. 1973); Paul v. Paul, 631 P.2d 1060 (Wyo. 1981).

This rule is remedial and is to be liberally construed. Westring v. Cheyenne Nat'l Bank, 393 P.2d 119 (Wyo. 1964); Spomer v. Spomer, 580 P.2d 1146 (Wyo. 1978).

No conflict between Wyo. Stat. Ann. § 1-16-401 and this rule. — Wyo. Stat. Ann. § 1-16-401 does not conflict with W.R.C.P. 60 insofar as a party seeks modification of a divorce judgment. Bradley v. Bradley, 118 P.3d 984 (Wyo. 2005).

Counsel is obligated to bring to the attention of the trial court an irregularity appearing on the face of a jury verdict and thus afford the trial court, while the jury is still present, an opportunity to correct the verdict; failing in this, the point is waived on appeal. Chittim v. Armco Steel Corp., 407 P.2d 1015 (Wyo. 1965).

Res judicata, collateral estoppel, and judicial estoppel are not applicable to relief granted pursuant to subdivision (b) of this rule where the trial court vacates its earlier judgment in the same action and acts pursuant to the express authority of these rules. State, Dep't of Family Servs. v. PAJ, 934 P.2d 1257 (Wyo. 1997).

Inapplicable to agency appeal. — District court's dismissal of an appeal from an administrative ruling denying unemployment benefits could not be challenged through a motion for relief under this rule, even if considered as a Wyo. R. App. P. 9.07 application for rehearing or a Wyo. R. App. P. 15 petition for reinstatement. The above rules did not apply, in light of the absence of anything in Wyo. R. App. P. 12.01 and the scope of the civil rules as defined in Wyo. R. Civ. P. 1 to indicate that other civil or appellate rules might extend to Wyo. R. App. P. 12 agency appeals. Jones v. State, 278 P.3d 729 (Wyo. 2012).

Applicability of general restrictions on court for modification or vacation of judgments. — The general restrictions on a court for modification or vacation of judgments, after the term in which such are made, do not apply to decrees concerning child custody, child support or alimony, but do apply to decrees concerning property divisions. Paul v. Paul, 631 P.2d 1060 (Wyo. 1981).

Rule applicable to adjudication of water rights. — The adjudication of water rights under § 1-37-106 is final and binding. Claimants have several avenues available to them should unforeseen future problems develop, such as this rule and § 1-37-110 (supplemental relief). The court does not need to retain jurisdiction as a "safety net." State v. Owl Creek Irrigation Dist. Members, 753 P.2d 76 (Wyo. 1988), aff'd, 492 U.S. 406, 109 S. Ct. 2994, 106

L. Ed. 2d 342, cert. denied, 492 U.S. 926, 109 S. Ct. 3265, 106 L. Ed. 2d 610 (1989), overruled on other grounds, Vaughn v. State, 962 P.2d 149 (Wyo. 1998).

Cognovit judgment not per se unconstitutional. — A cognovit judgment is not per se violative of the fourteenth amendment to the constitution of the United States or art. 1, §§ 6 and 8, Wyo. Const. This is so because a defendant against whom a cognovit judgment is obtained has a remedy under subdivision (b) of this rule, which allows relief from judgment on basis of such grounds as mistake, inadvertence, excusable neglect, newly discovered evidence or fraud. Gifford v. Casper Neon Sign Co., 639 P.2d 1385 (Wyo. 1982).

Statute of limitations in effect. — The effect of subdivision (b) of this rule is like that of a statute of limitations. Osborn v. Painter, 909 P.2d 960 (Wyo. 1996).

Where subdivision (b) reasons do not exist, good cause not shown. — Where defendants could not substantiate reasons under subdivision (b) of this rule for setting aside the default judgment, good cause also did not exist to set aside the entry of default under Rule 55(c). Vanasse v. Ramsay, 847 P.2d 993 (Wyo. 1993).

This rule and Rule 55 provide a clear method for setting aside a default for good cause. Robison v. Sales & Use Tax Div., State Tax Comm'n, 524 P.2d 82 (Wyo. 1974).

Failure to show good cause for relief from default. — Where defendants' counsel represented them at hearing on temporary restraining order and at deposition, but refused to accept service or enter a written appearance, defendants did not show mistake, inadvertence, surprise, excusable neglect, or extraordinary circumstances sufficient to entitle them to relief from default judgment. Lee v. Sage Creek Refining Co., 947 P.2d 791 (Wyo. 1997).

The district court did not abuse its discretion when it did not find good cause for setting aside the entry of default under W.R.C.P. 60(b)(1) on the basis of mistake, inadvertence, or excusable neglect in failing to timely file an answer; belief by out-of-state attorney that he had been orally granted an extension of time within which to file an answer by plaintiff's attorney was not reasonable. Multiple Resort Ownership Plan, Inc. v. Design-Build-Manage, Inc., 45 P.3d 647 (Wyo. 2002).

District court properly denied a corporation's request to set aside a default judgment because the corporation's expectation that another party was representing its interest was unreasonable; denial of a bank's motion to set aside a default was proper because it was unreasonable for the bank not to have filed an answer. Countrywide Home Loans, Inc. v. First Nat'l Bank of Steamboat Springs, N.A., 144 P.3d 1224 (Wyo. 2006).

Vacating default judgment. — The reasons for setting aside a judgment under subdivision (b) of this rule are relevant in determining whether good cause has been shown for vacating an entry of default. M & A Constr. Corp. v. Akzo Nobel Coatings, Inc., 936 P.2d 451 (Wyo. 1997).

The factors to be applied in determining whether good cause has been shown to set aside a default judgment are: (1) whether the plaintiff will be prejudiced; (2) whether the defendant has a meritorious defense; and (3) whether culpable conduct of the defendant led to the default. M & A Constr. Corp. v. Akzo Nobel Coatings, Inc., 936 P.2d 451 (Wyo. 1997).

Vacation of default warranted. — The trial court's decision to vacate the entry of default was warranted. M & A Constr. Corp. v. Akzo Nobel Coatings, Inc., 936 P.2d 451 (Wyo. 1997).

Full faith and credit given to Florida judgment. — Because the parties would be barred from relitigating the issue in Florida as to whether the pleadings requested the relief which had been granted to the wife and the issue which the husband asserts in the Wyoming action is exactly the same issue which he presented to the Florida courts, and the Florida district court of appeal, which was a court of competent jurisdiction, entered a final judgment on the issue, the Wyoming district court properly gave full faith and credit to the Florida judgment. Sandstrom v. Sandstrom, 880 P.2d 103 (Wyo. 1994).

Applied in Brown v. Sievers, 410 P.2d 574 (Wyo. 1966); Piper v. Piper, 487 P.2d 1062 (Wyo. 1971); United States v. Hunt, 513 F.2d 129 (10th Cir. 1975); Herring v. Welltech, Inc., 660 P.2d 361 (Wyo. 1983); Randolph v. Hays, 665 P.2d 500 (Wyo. 1983); Midway Oil Corp. v. Guess, 714 P.2d 339 (Wyo. 1986); Lewis v. Lewis, 716 P.2d 347 (Wyo. 1986); Spitzer v. Spitzer, 777 P.2d 587 (Wyo. 1989); Harshfield v. Harshfield, 842 P.2d 535 (Wyo. 1992); Forney v. Minard, 849 P.2d 724 (Wyo. 1993); Loghry v. Unicover Corp., 878 P.2d 510 (Wyo. 1994); Jacobs v. Jacobs, 895 P.2d 441 (Wyo. 1995); Nowotny v. L & B Contract Indus., Inc., 933 P.2d 452 (Wyo. 1997); Blittersdorf v. Eikenberry, 964 P.2d 413 (Wyo. 1998); Strngari v. Taylor (In re Estate of Novakovich), 101 P.3d 931 (Wyo. 2004).

Quoted in Lawrence-Allison & Assocs. W. v. Archer, 767 P.2d 989 (Wyo. 1989).

Stated in State v. Owl Creek Irrigation Dist. Members, 750 P.2d 681 (Wyo. 1988).

Cited in In re Estate of Brennan, 433 P.2d 512 (Wyo. 1967); Saunders v. Saunders, 464 P.2d 1020 (Wyo. 1970); Clouser v. Spaniol Ford, Inc., 522 P.2d 1360 (Wyo. 1974); Spomer v. Spomer, 580 P.2d 1146 (Wyo. 1978); Foster Lumber Co. v. Hume, 645 P.2d 1176 (Wyo. 1982); Barrett v. Town of Guernsey, 652 P.2d 395 (Wyo. 1982); Meyer v. Travelers Ins. Co., 741 P.2d 607 (Wyo. 1987); Abelseth v. City of Gillette, 752 P.2d 430 (Wyo. 1988); Cooney v. Park County, 792 P.2d 1287 (Wyo. 1990);

Storseth v. Brown, Raymond & Rissler, 805 P.2d 284 (Wyo. 1991); Louisiana Land & Exploration Co. v. Wyoming Oil & Gas Conservation Comm'n, 809 P.2d 775 (Wyo. 1991); Pioneer Bank v. Rykhus, 822 P.2d 372 (Wyo. 1992); Forni v. Pathfinder Mines, 834 P.2d 688 (Wyo. 1992); DB v. State, Dep't of Family Servs., 860 P.2d 1140 (Wyo. 1993); Lantz v. Bowman, 881 P.2d 1079 (Wyo. 1994); First S.W. Fin. Servs. v. Laird, 882 P.2d 1211 (Wyo. 1994); Odegard v. Odegard, 69 P.3d 917 (Wyo. 2003); Maher v. Maher, 90 P.3d 739 (Wyo. 2004); Phillips v. Toner, 133 P.3d 987 (Wyo. 2006); Nish v. Schaefer, 138 P.3d 1134 (Wyo. 2006); Mullinax Concrete Serv. Co. v. Zowada, 243 P.3d 181 (Wyo. 2010); State ex rel. Wyo. Workers' Safety & Comp. Div. v. Carson, 252 P.3d 929 (Wyo. 2011).

Am. Jur. 2d, ALR and C.J.S. references. — 18 Am. Jur. 2d Coram Nobis and Allied Statutory Remedies § 1 et seq.; 47 Am. Jur. 2d Judgments §§ 740 to 943; 58 Am. Jur. 2d New Trial §§ 83 to 469.

Incompetence of counsel as ground for relief from state court civil judgment, 64 ALR4th 323.

Filing of notice of appeal as affecting jurisdiction of state trial court to consider motion to vacate judgment, 5 ALR5th 422.

Amendment of record of judgment in state civil case to correct judicial errors and omissions, 50 ALR5th 653.

Vacating or opening judgment by confession on ground of fraud, illegality, or mistake, 91 ALR5th 485.

Relief from judicial error by motion under F.R.C.P. 60(b)(1), 1 ALR Fed 771.

Propriety of conditions imposed in granting relief from judgment under Rule of Civil Procedure 60(b), 3 ALR Fed 956.

Independent actions to obtain relief from judgment, order, or proceeding under Rule 60(b) of the Federal Rules of Civil Procedure, 53 ALR Fed 558.

Application of civil or criminal procedural rules in federal court proceeding on motion in nature of writ of error coram nobis, 53 ALR Fed 762.

Propriety of United States district court where judgment is registered, pursuant to 28 USC § 1963, granting relief from that judgment under Rule 60(b) of Federal Rules of Civil Procedure, 55 ALR Fed 439.

Lack of jurisdiction, or jurisdictional error, as rendering federal district court judgment "void" for purposes of relief under Rule 60(b)(4) of Federal Rules of Civil Procedure, 59 ALR Fed 831.

Effect of filing of notice of appeal on motion to vacate judgment under Rule 60(b) of Federal Rules of Civil Procedure, 62 ALR Fed 165.

Who has burden of proof in proceeding under Rule 60(b)(4) of Federal Rules of Civil Procedure to have default judgment set aside on ground that it is void for lack of jurisdiction, 102 ALR Fed 811.

Construction and application of Rule 60(b)(5) of federal rules of civil procedure, authorizing relief from final judgment where its prospective application is inequitable, 117 ALR Fed 419.

Who is "legal representative" within provision of rule 60(b) of Federal Rules of Civil Procedure permitting court to relieve "party or his legal representative" from final judgment or order, 136 ALR Fed 651.

49 C.J.S. Judgments §§ 434 to 498.

II. CLERICAL MISTAKES.

Purpose. — Subdivision (a) is designed to clarify as well as correct. In this respect, it can properly be utilized to dispel ambiguities that exist in the record, whether that ambiguity is patent or latent. Spomer v. Spomer, 580 P.2d 1146 (Wyo. 1978).

Clerical error has been defined as a mistake or omission that prevented the judgment as entered from accurately reflecting the judgment that was rendered, and mistakes of the court are not necessarily judicial error. In re Estate of Kimball, 583 P.2d 1274 (Wyo. 1978); Kane v. Kane, 616 P.2d 780 (Wyo. 1980).

Clerical mistake refers to the type of error identified with mistakes in transmission, alterations or omission of a mechanical nature. Spomer v. Spomer, 580 P.2d 1146 (Wyo. 1978).

Clerical error is not dependent upon its sources but may be made by the judge of the court himself. All errors, mistakes or omissions which are not the result of the exercise of the judicial function may be called clerical errors, while a judicial error is one which is the deliberate result of judicial reasoning and determination. In re Estate of Kimball, 583 P.2d 1274 (Wyo. 1978).

Error must be apparent on face of record. — A criterion for a clerical error to be correctable under this rule is that it must be apparent upon the face of the record. In re Estate of Kimball, 583 P.2d 1274 (Wyo. 1978).

Not substitute for appeal. — Subdivision (a) is not designed as a substitute for appeal, nor to affect substantive portions of a judgment or decree. Spomer v. Spomer, 580 P.2d 1146 (Wyo. 1978).

And not to correct error in judgment. — Courts do not possess the power to correct an error by the court in rendering a judgment it did not intend to render and by such order change a judgment actually but erroneously pronounced by the court to the one the court intended to record. Spomer v. Spomer, 580 P.2d 1146 (Wyo. 1978).

Enlargement of time allowed. — Enlargement of time for appeal was allowed, where summary judgment was entered against nonmovant after the passage of time when the motion was to be deemed denied, and clerical error on the part of the court resulted in failure to notify nonmovant of entry of the summary judgment order. Harris v. Taylor, 969 P.2d 142 (Wyo. 1998).

No time parameters on power to correct errors. — When an error in an original decree of distribution is a clerical one, and such a mistake is readily apparent from an inspection of the record, then even though many years have elapsed before any action is taken, there are no time parameters on the court's power and authority to correct errors of this nature. In re Estate of Kimball, 583 P.2d 1274 (Wyo. 1978); Kane v. Kane, 616 P.2d 780 (Wyo. 1980).

The district court has power to enter a nunc pro tunc order, which order purports to correct a final decree of settlement of account and distribution in the matter of a decedent's estate, when the order is made some 28 years after entry of the final decree since there is equitable power without reference to the statutes to grant relief from accident or mistake. In re Estate of Kimball, 583 P.2d 1274 (Wyo. 1978).

Motion not required within court term. — Subdivision (a) eliminates the requirement that motions to correct clerical errors be made within the court term. Spomer v. Spomer, 580 P.2d 1146 (Wyo. 1978).

District court did not act outside its authority in amending original judgment, after end of court term, to clarify and correct a patent ambiguity in location of an access easement. R.C.R., Inc. v. Rainbow Canyon, Inc., 978 P.2d 581 (Wyo. 1999).

Judgment nunc pro tunc may clarify original judgment, but not alter original intent. — An original judgment on a promissory note failed to reflect the exact date from which the co-makers were liable. This mistake was a clerical error, as opposed to the deliberate result of judicial reasoning and determination, and was therefore subject to clarification under subdivision (a). The actions of the court in rendering a judgment nunc pro tunc, however, did not clarify the original judgment, which was entered pursuant to a stipulation, but rather altered the original judgment from what was intended, and had to be set aside. Eddy v. First Wyo. Bank, 713 P.2d 228 (Wyo. 1986).

Amendment of a final judgment, or entry of a judgment nunc pro tunc, must be done in accordance with subdivision (a), which allows for retrospective alteration of a final judgment to correct clerical errors or omissions. The nunc pro tunc is limited to cases where it is necessary to make the judgment speak the truth, and cannot be used to change the judgment. Wyoming Nat'l Bank v. Davis, 770 P.2d 215 (Wyo. 1989).

Domestic relations order. — District court had not erred by entering a second amended qualified domestic relations order (QDRO) because the divorce decree was ambiguous and needed clarification to meet the statutory requirements of the Uniformed Services Former Spouses Protection Act (USFSPA), 10 U.S.C.S. § 1408, and such a clarification was properly considered "clerical mistake" for the purposes of Wyo. R. Civ. P. 60(a). Wyland v. Wyland, 138 P.3d 1165 (Wyo. 2006).

Nunc pro tunc divorce decree. — Nunc pro tunc divorce decree which clarified calculation of wife's share of husband's retirement benefits in order to meet the federal statutory requirements for a qualified domestic relations order (QDRO) (26 U.S.C. § 414(p)) was a proper amendment of the original property settlement provisions in the original decree. Elsasser v. Elsasser, 989 P.2d 106 (Wyo. 1999).

Divorce decree modifiable to reflect prior oral pronouncement regarding tax liability. — The district court had the jurisdiction and authority, under subdivision (a), to modify a divorce decree, so as to provide that the parties were co-owners of certain property during their marriage, to reflect a prior oral pronouncement that any tax liability should be shared equally. As modified, the decree correctly reflected Wyoming law, which provides that, even though property is owned separately by one spouse, as it was here, at the time the divorce complaint is filed, the other spouse acquires a co-ownership interest in that property which is not defined until the entry of the decree which articulates the property settlement. Where the court finally grants co-ownership, which it did here, the co-ownership continues until the sale of the property, at which time each party is to pay his/her respective share of the federal income taxes arising, as though each party was a co-owner of the property during the marriage. Kane v. Kane, 706 P.2d 676 (Wyo. 1985).

But judgment not set aside where no defense against default for several months. — The judge did not abuse his discretion in refusing to set aside a default judgment where the defendants requested an additional 20 days to answer, but then failed to file any other papers, or in any way defend against the action for five months. Annis v. Beebe & Runyan Furn. Co., 685 P.2d 678 (Wyo. 1984).

Once appeal remanded, no need for Supreme Court leave. — Once the appeal to the Supreme Court has been decided and remanded to the trial court, there is no need for leave of the Supreme Court to be given. Kane v. Kane, 616 P.2d 780 (Wyo. 1980).

III. OTHER REASONS.

No tort action for fraud. — Former wife's claim in the nature of a tort action for damages, based on an alleged fraud on the court, was dismissed; the proper remedy was the modification or revocation of the divorce judgment, since monetary damages is a remedy not available under Wyo. R. Civ. P. 60(b)(3); further, nothing in the language of Rule 60 created any tort duty that a litigant owes to the court or to an opposing party. Dowlin v. Dowlin, 162 P.3d 1202 (Wyo. 2007).

The provisions of subdivision (b) are not a substitute for appeal. Kennedy v. Kennedy,

483 P.2d 516 (Wyo. 1971); Martellaro v. Sailors, 515 P.2d 974 (Wyo. 1973); Paul v. Paul, 631 P.2d 1060 (Wyo. 1981).

Nor do they enlarge time for appeal. — One of the principal purposes behind the adoption of the Wyoming Rules of Civil Procedure was to put an end to delays in litigation; and subdivision (b) was not intended as a means of enlarging by indirection the time for appeal except in compelling circumstances where justice requires that course or unless relief under the motion has been granted. Kennedy v. Kennedy, 483 P.2d 516 (Wyo. 1971).

Motion under this rule is addressed to sound discretion of the court, and it must be clearly substantiated by adequate proof. Martellaro v. Sailors, 515 P.2d 974 (Wyo. 1973); Atkins v. HFC, 581 P.2d 193 (Wyo. 1978).

The granting of relief pursuant to subdivisions (b)(1) and (b)(6) is left to the sound discretion of the trial court. United States Aviation, Inc. v. Wyoming Avionics, Inc., 664 P.2d 121 (Wyo. 1983).

The district court was within its discretion in finding that interrogatory response omitted from the material filed by insurer in support of its motion for summary judgment had no effect on the district court's final order; accordingly, subdivision (b) motion was properly denied. Doctors' Co. v. Insurance Corp. of Am., 864 P.2d 1018 (Wyo. 1993).

The granting of relief pursuant to subdivision (b) of this rule is a matter of the exercise of discretion by the trial court, and appellate review is limited to the question of whether the trial court abused its discretion. State, Dep't of Family Servs. v. PAJ, 934 P.2d 1257 (Wyo. 1997).

Criteria for exercise of discretion under subdivision (b). — See McBride v. McBride, 598 P.2d 814 (Wyo. 1979).

The granting of relief under subdivision (b) is a matter of the exercise of discretion by the trial court, and appellate review is limited to the question of whether the trial court abused its discretion. In exercising its discretion, the trial court must consider whether the movant has established one of the enumerated grounds for relief and whether he has demonstrated a meritorious defense. S.C. Ryan, Inc. v. Lowe, 753 P.2d 580 (Wyo. 1988).

In order not to undermine the purpose of W.R.A.P. 2.01(a)(i), where a party does not learn of a judgment until after the time provided in W.R.A.P. 2.01(a)(i), relief under subsection (b) is available only where the party has shown due diligence, sufficient reason for the lack thereof, or other special circumstances. Ahearn v. Anderson-Bishop Partnership, 946 P.2d 417 (Wyo. 1997).

Scope of consideration of Supreme Court. — On a motion under subdivision (b)(1), the Supreme Court will not consider matters upon which the record is silent, nor will it consider matters not called to the attention of the trial court. Atkins v. HFC, 581 P.2d 193 (Wyo. 1978).

Special consideration would not be given litigant acting pro se who believed he was appealing judgment but failed to include his judgment in his notice of appeal, and district court's grant of relief under subsection (b) was improper as to judgment not included in litigant's notice. Ahearn v. Anderson-Bishop Partnership, 946 P.2d 417 (Wyo. 1997).

Burden of proof. — The appellant bears the burden of proof to show that the trial court abused its discretion and was clearly wrong in granting relief under subdivision (b) of this rule. State, Dep't of Family Servs. v. PAJ, 934 P.2d 1257 (Wyo. 1997).

The burden is upon the movant to bring himself within the provisions of this rule, i.e., show excusable neglect. Turnbough v. Campbell County Mem. Hosp., 499 P.2d 595 (Wyo. 1972); Martellaro v. Sailors, 515 P.2d 974 (Wyo. 1973); Atkins v. HFC, 581 P.2d 193 (Wyo. 1978).

A higher standard of proof is applicable when the ground in subsection (b)(3) is asserted, because in order to prevail, the party in default must establish the plaintiff's misconduct by clear and convincing evidence. Fluor Daniel (NPOSR), Inc. v. Seward, 956 P.2d 1131 (Wyo. 1998).

The burden is upon the movant seeking relief under subdivision (b)(4) to establish entitlement to the relief of vacation of a void order or judgment. JW v. State, ex rel. Laramie County Dep't of Pub. Assistance, 778 P.2d 1106 (Wyo. 1989).

Burden not satisfied. — On a motion to vacate a divorce decree, where there was nothing in the record to substantiate appellant's claim that he did not receive notice of the hearing date or terminated counsel prior to the hearing, appellant failed to establish any basis for granting relief pursuant to subsection (b) of this rule. Barnes v. Barnes, 998 P.2d 942 (Wyo. 2000).

Offer of proof insufficient. — District court did not abuse its discretion by denying a husband's motion for a continuance under Wyo. R. Civ. P. 60(b), which was made during a hearing at which the husband requested more time for discovery, but after the stipulation had been entered, because the husband did not meet his burden of coming forward with the requisite level of clear and convincing evidence to sustain his claim; the husband's offer of proof did nothing to advance his claims of fraud and did not excuse his lack of evidence to support his personal opinion that his wife had defrauded him during their divorce concerning an athletic club. Richard v. Richard, 170 P.3d 612 (Wyo. 2007).

Subdivision (b)(1) motion must be clearly substantiated by adequate proof; and the burden is on the movant to bring himself within this rule. United States Avia-

tion, Inc. v. Wyoming Avionics, Inc., 664 P.2d 121 (Wyo. 1983).

Lack of jurisdiction where record did not support basis for requested reduction. — Court lacked jurisdiction to consider defendant's appeal from the denial of a pro se motion for reconsideration of an order denying a request for sentence reduction because of consideration of a dismissed case where the record did not support the basis for the requested reduction. Padilla v. State, 91 P.3d 920 (Wyo. 2004).

Relief granted where no hearing. — Where a husband had no opportunity to be heard or respond to the wife's motion to alter judgment, and he lost all rights of visitation with his children, trial court abused its discretion by not granting the husband's motion for relief from the judgment. Barron v. Barron, 834 P.2d 685 (Wyo. 1992).

And where constitutional, statutory provisions misconstrued. — Denial of a motion to vacate a determination denying payment of worker's compensation benefits was reversed, where the trial court misconstrued the basic structure of worker's compensation benefits as established by the constitution and statutes. Carson v. Wyoming State Penitentiary, 735 P.2d 424 (Wyo. 1987).

Excusable neglect. — District court did not err in setting aside default judgment on grounds of excusable neglect, where record demonstrated that all attorneys were confused by timing and content of scheduling order. Jackson Hole Community Housing Trust v. Scarlett, 979 P.2d 500 (Wyo. 1999).

Failure to consult attorney not excusable neglect. — An employer's failure to consult an attorney for nearly two months in the case of a worker's compensation claim was not such excusable neglect as would justify relief. Apollo Drilling v. Seevers, 720 P.2d 899 (Wyo. 1986).

Sufficient grounds for relief do not exist when a party is dilatory in obtaining legal counsel and default judgment is entered against him. Whitney v. McDonough, 892 P.2d 791 (Wyo. 1995).

Dismissal for discovery violations. — Plaintiffs were not entitled to relief under subdivision (b) from the dismissal of their complaint for discovery violations, notwithstanding their assertions that there was no culpable conduct relating to the failure to respond to the defendant's discovery requests; even if the lack of diligence on the part of their attorney was attributable to severe personal, physical, and psychological problems, and their attorney did not inform them of the discovery requests or the motion to compel but instead assured them that their case was progressing in an appropriate manner, the plaintiffs were accountable for their attorney's actions or his failure to act. Orosco v. Schabron, 9 P.3d 264 (Wyo. 2000).

Judgment against party who continually disobeyed discovery orders not set aside. — Although the sanction of default is clearly not favored, the court did not abuse its discretion in entering a default judgment, and in refusing to set aside the judgment, against a party which had refused to comply with a court order compelling production of the same documents which had been ordered produced nearly one year earlier, and which party had never sought relief from the order or any of the number of requests for production. Farrell v. Hursh Agency, Inc., 713 P.2d 1174 (Wyo. 1986).

Where defendant was misled as to the time available for presenting a defense, there is no valid ground for holding that defendant did not bring his proceedings within the ambit of subdivision (b)(1). Westring v. Cheyenne Nat'l Bank, 393 P.2d 119 (Wyo. 1964).

Claimant granted relief from worker's compensation orders where mistake in employer's accident report. — Trial court did not abuse its discretion in granting claimant relief from worker's compensation orders and terminating her benefits, where there was a mistake made in the employer's accident report regarding claimant's status as a "sales clerk." Mini Mart, Inc. v. Wordinger, 719 P.2d 206 (Wyo. 1986).

Dismissal without prejudice for failure to prosecute. — If the dismissal for failure to prosecute is without prejudice and the appellant can file another claim for workmen's compensation, the appellant cannot argue that she has been prejudiced by a dismissal. If there had been no harm by the dismissal, there could be no abuse of discretion in the trial court's failure to grant the employee's motion to reinstate. Turnbough v. Campbell County Mem. Hosp., 499 P.2d 595 (Wyo. 1972).

Court may modify marital property division where parties stipulate debt omitted from decree. — The parties to a divorce action stipulated that a particular debt was omitted from the original decree. They also agreed that the district court should make a disposition of the debt. Under such circumstances, the court did not abuse its discretion when it modified the judgment containing the division of marital property. Barnett v. Barnett, 704 P.2d 1308 (Wyo. 1985).

Failure to appear deemed excusable neglect. — Where the defendant undertook efforts to find substitute counsel and to inform the court of his back surgery, and his lack of success did not result from a lack of effort or diligence, his explanation for his failure to appear was the result of excusable neglect. Carlson v. Carlson, 836 P.2d 297 (Wyo. 1992).

Failure to attend hearing via teleconference was not excusable neglect. — See In re JLB, 914 P.2d 828 (Wyo. 1996).

Ongoing settlement negotiations not excusable neglect or surprise. — In a case to set aside a default judgment, the defendants did not bring themselves within this rule by arguing that the ongoing settlement negotia-

tions excused their failure to file an answer until 59 days after petitioner's complaint was filed, and the settlement negotiations did not constitute excusable neglect or surprise. Vanasse v. Ramsay, 847 P.2d 993 (Wyo. 1993).

Gross negligence not excusable neglect. — Relief under subdivision (b)(6) of this rule does not apply to the gross negligence of an insurance company. Vanasse v. Ramsay, 847 P.2d 993 (Wyo. 1993).

Culpable conduct leading to neglect. — Culpable conduct of the defendant lead to the default judgment where the defendants, through their insurance company, showed culpable conduct in failing to file a responsive pleading within the 20-day time limit allowed under Rule 12(a). Vanasse v. Ramsay, 847 P.2d 993 (Wyo. 1993).

Misconduct. — Former husband's refusal to execute the documents necessary to effectuate the sale of marital real property as ordered by the court constituted misconduct under subdivision (b)(3) of this rule, and the court appropriately divested the former husband of his interest in the property pursuant to Wyo. R. Civ. P. 70. Walker v. Walker, 925 P.2d 1305 (Wyo. 1996).

Perjury as a ground for relief under subdivision (b). — When perjury is relied on as basis for relief, a witness is not guilty of perjury simply because his testimony is inconsistent or confusing. The movant must establish perjury by clear and convincing evidence. Little v. Kobos ex rel. Kobos, 877 P.2d 752 (Wyo. 1994).

Subdivision (b) provides a vehicle for developing facts in the district court record following entry of a cognovit judgment. Gifford v. Casper Neon Sign Co., 618 P.2d 547 (Wyo. 1980).

Evidence in party's possession before judgment is rendered is not newly discovered evidence entitling one to relief under subdivision (b)(2). Apollo Drilling v. Seevers, 720 P.2d 899 (Wyo. 1986).

Lack of diligence precludes relief. — Where no factual basis appears for the appellant's conclusory claim that she was inhibited earlier from discovering certain information, her failure to bring it to the attention of the trial court would not justify disturbing the final judgment on a ground of newly discovered evidence. McBride v. McBride, 598 P.2d 814 (Wyo. 1979).

Workers' compensation awards. — Where benefits have been awarded to a workers' compensation claimant, the specific language in § 27-14-605 regarding the reopening of the workers' compensation case supersedes the general provisions regarding relief from judgment found in subdivision (b) of this rule. Erhart v. Flint Eng'g & Constr., 939 P.2d 718 (Wyo. 1997).

Rule inapplicable to workers compensation award. — Because an award of workers' compensation benefits is no longer a "judicial determination," the modification or termination of such an award should not be governed by the one-year statute of limitations contained in Rule 60(b), but is superseded by § 27-14-605(a) (time limitation for modification of benefits). State ex rel. Wyo. Workers' Comp. Div. v. Jerding, 868 P.2d 244 (Wyo. 1994).

The claimant's application to reopen his workers' compensation case under § 27-14-605(a) would not be construed as being a motion for relief under subsection (b) of this rule where the record did not show that the workers compensation and safety division violated the workers' compensation law. Shaffer v. State, 960 P.2d 504 (Wyo. 1998).

A 1994 amendment to Workers' Compensation Act § 27-14-601(k) specifically precluding "further administrative or judicial review" absent a timely written request for hearing, renders subsection (b) of this rule inapplicable in cases where the employee fails to file a timely written objection. Bila v. Accurate Telecom, 964 P.2d 1270 (Wyo. 1998).

Property value increase not new evidence. — Where appellant's affidavit indicates that the impact of the development plans for the property was a matter of speculation and conjecture at the time of judgment, a subsequent increase in the value of the property is not newly discovered evidence within the context of subdivision (b). McBride v. McBride, 598 P.2d 814 (Wyo. 1979).

Neither is previously filed, but undelivered, document. — A document filed in a formal worker's compensation court file, but not sent to the claimant or his attorney, does not constitute "newly discovered evidence" for the purpose of subdivision (b)(2). Swasso v. State ex rel. Worker's Comp. Div., 751 P.2d 887 (Wyo. 1988).

Court had power to amend divorce judgment to recognize the bankruptcy of one of the husband's debtors. Dice v. Dice, 742 P.2d 205 (Wyo. 1987).

Adoption cases. — Review of default judgment was granted even though the plaintiff had failed to file a motion under this rule to set aside the default judgment; plaintiff was natural mother in adoption case and therefore had pro se status. In re JLB, 914 P.2d 828 (Wyo. 1996).

Natural father's attempt to revoke his consent and vacate final adoption decree more than two years after entry of decree was untimely, and he was not entitled to relief from decree., 65 ALR5th 407.

Paternity actions. — Evidence was sufficient to establish fraud or excusable neglect to justify the trial court's grant of relief from a paternity judgment. State, Dep't of Family Servs. v. PAJ, 934 P.2d 1257 (Wyo. 1997).

Fraud as a ground for relief under subdivision (b) must clearly be established by adequate proof. McBride v. McBride, 598 P.2d

814 (Wyo. 1979); Kreuter v. Kreuter, 728 P.2d 1129 (Wyo. 1986).

Where fraud and misrepresentation is relied upon as a ground for relief sought pursuant to this rule, it must be proved by clear and convincing evidence. Fraud is never presumed, and the burden of proof to clearly establish such fraud or misrepresentation is upon the party seeking relief. Stevens v. Murphy, 680 P.2d 78 (Wyo. 1984); Crawford v. Crawford, 757 P.2d 563 (Wyo. 1988).

Courts to grant relief from void judgments. — When confronted with a subdivision (b)(4) motion and a void judgment, courts must relieve the parties from such a judgment. Once a judgment is determined to be void, there is no question of discretion on the part of the court. 2-H Ranch Co. v. Simmons, 658 P.2d 68 (Wyo. 1983).

The granting or denying of relief pursuant to subdivision (b) is a matter within the discretion of the trial court, and review is limited to the question of whether there has been an abuse of that discretion. When the judgment is attacked pursuant to subdivision (b)(4), however, there is no question of discretion — either the judgment is void or it is valid — and, once the question of its validity is resolved, the trial court must act accordingly. State ex rel. TRL ex rel. Avery v. RLP, 772 P.2d 1054 (Wyo. 1989).

Appeal proper remedy for mistake of law. — The trial court's erroneous application of the law relating to the entry of a decree of disposition placing a child in accordance with the statutes relating to juvenile courts did not serve to justify a conclusion that the order of the court was "void" within the meaning of subdivision (b). The appropriate remedy for such a mistake of law was an appeal. JW v. State ex rel. Laramie County Dep't of Pub. Assistance & Social Servs., 778 P.2d 1106 (Wyo. 1989).

Default judgment was not void because complaint did not contain specific dollar amount in the demand for judgment. Melehes v. Wilson, 774 P.2d 573 (Wyo. 1989).

Default judgment against nonresident defendant not void. — In a breach of contract action in which the complaint and attached contract showed that nonresident defendant had contracted with the Wyoming plaintiff to drill a well on the defendant's Wyoming ranch, the plaintiff made a prima facie showing of personal jurisdiction over the defendant, and thus the defendant failed to establish any grounds for relief from the default judgment entered against it. Chamberlain v. Ruby Drilling Co., 986 P.2d 846 (Wyo. 1999).

Proof necessary for subdivision (b)(6) motion. — Although the purpose of subdivision (b)(6) is to provide courts with the power to vacate judgments whenever such action is appropriate to accomplish justice, an appellant must do more than assert that the default judgment should have been vacated by the district court in the interest of justice. United States Aviation, Inc. v. Wyoming Avionics, Inc., 664 P.2d 121 (Wyo. 1983).

Unjust judgment insufficient for relief under equitable principles. — An unjust judgment or order by itself is not enough to grant relief under equitable principles; in order to succeed, the aggrieved party in addition must show a satisfactory excuse for not having made his claim or defense in the original action and diligence in seeking relief. Paul v. Paul, 631 P.2d 1060 (Wyo. 1981).

Following constituted ample justification for setting aside a default judgment: (1) the plaintiff failed to serve the defendant with written notice of the application for judgment, although the defendant manifested its intent to defend by filing responsive pleadings through out-of-state counsel who was not licensed to practice in Wyoming, engaging in extensive discovery and stipulating to an amended complaint; and (2) the defendant's counsel unexpectedly failed to appear at the pretrial conference and failed to notify his client of the default judgment. Sanford v. Arjay Oil Co., 686 P.2d 566 (Wyo. 1984).

Defaulted party not entitled to relief because of counsel's gross neglect. — A defaulted party was not entitled to relief under subdivision (b)(6) simply because his counsel was grossly negligent. In addition, the party's affidavit, which stated that his counsel separated from his wife and relocated his practice, was insufficient evidence of the counsel's alleged personal or psychological problems which caused him to neglect the case. Accordingly, the court did not abuse its discretion in refusing to grant relief. Hochhalter v. Great W. Enters., Inc., 708 P.2d 666 (Wyo. 1985).

Death of attorney. — The death of plaintiff's attorney and the fact that plaintiff was then acting pro se did not constitute good cause for setting aside the dismissal of plaintiff's complaint or the entry of a default judgment on the defendant's counterclaim, both of which were entered as sanctions for plaintiff's failure to respond to discovery. Schott v. Chamberlain, 923 P.2d 745 (Wyo. 1996).

Order denying relief appealable, but not appeal substitute. — An order denying relief under subdivision (b) is appealable, but proceeding under the rule is not to be regarded as a substitute for an appeal. McBride v. McBride, 598 P.2d 814 (Wyo. 1979).

And denial must be predicated on final judgment. — An order denying relief under subdivision (b) is appealable; however, there must be a final judgment on which the denial of the motion to vacate the judgment can be predicated. Dexter v. O'Neal, 649 P.2d 680 (Wyo. 1982).

Subsequent motion not required for appeal. — After summary judgment is granted and an order filed, the judgment is final and appealable. No subsequent motion under sub-

division (b) is required. Wyoming Ins. Dep't v. Sierra Life Ins. Co., 599 P.2d 1360 (Wyo. 1979).

Review limited to abuse of discretion. — Since the granting of relief pursuant to subdivision (b) is a matter of the exercise of discretion by the trial court, on review the appellate court is limited to the question of whether there has occurred an abuse of the trial court's discretion. McBride v. McBride, 598 P.2d 814 (Wyo. 1979); Kreuter v. Kreuter, 728 P.2d 1129 (Wyo. 1986).

The abuse of discretion required on appellate review was found in the failure of the district court to recognize that it had no jurisdiction to proceed with the case. R.L. Manning Co. v. Millsap, 687 P.2d 252 (Wyo. 1984).

A trial court has wide judicial discretion to grant or deny a defendant's motion under Rules 55(c) and 60(b). The exercise of that discretion will not be disturbed unless appellant demonstrates that the trial court abused it and was clearly wrong. Claassen v. Nord, 756 P.2d 189 (Wyo. 1988).

When reversal of order denying relief proper. — A reversal of an order denying relief under subdivision (b) will be ordered only if the trial court clearly was wrong. Gifford v. Casper Neon Sign Co., 639 P.2d 1385 (Wyo. 1982).

Court may consider motion during pending appeal. — If the appellant chooses to pursue a subdivision (b) motion, it should be filed in the district court, and the district court has jurisdiction to consider it, and if it indicates that it is inclined to grant it, application then can be made to the appellate court for a remand. Doctors' Co. v. Insurance Corp. of Am., 837 P.2d 685 (Wyo. 1992).

Default judgment nonreviewable where no grounds nor good cause. — A default judgment was nonreviewable where the defendant filed a motion to vacate entry of default and an answer at the same time, but the motion did not justify relief for any of the grounds found in subdivision (b) and did not otherwise manifest good cause in accordance with Rule 55(c), nor did the answer articulate a meritorious defense other than by conclusory allegations which were not in any manner verified. Adel v. Parkhurst, 681 P.2d 886 (Wyo. 1984).

Motion to reconsider a nullity. — Mother's appeal of trial court's denial of her "motion to reconsider" a child support abatement order was dismissed because the Wyoming Rules of Civil Procedure did not recognize a "motion for reconsider"; therefore the trial court order purportedly denying the motion was void and the court lacked jurisdiction under W.R.A.P. 1.04(a) and 1.05. The filing by aggrieved parties of a motion that is properly designated under the rule authorizing the motion, such as W.R.C.P. 50, 52, 59, or 60 will ensure full appellate rights are preserved. Plymale v. Donnelly, 125 P.3d 1022 (Wyo. 2006).

District court may not alter matters affirmed by Supreme Court. — While a district court may take appropriate action under subdivision (b) on matters not subject to a mandate from the Supreme Court without first obtaining leave of that court, it may not alter an affirmance of the Supreme Court of any matter considered, and disposed of, on appeal. Paul v. Paul, 631 P.2d 1060 (Wyo. 1981).

But may grant relief where appropriate, depending upon occurrence of later events. — The trial court, on a motion after remand, pursuant to subdivision (b), may grant relief where appropriate without first obtaining leave of the supreme court. However, the granting of such relief generally depends upon the occurrence of later events or requires a showing of something that was unknown or not before the court originally. Stevens v. Murphy, 680 P.2d 78 (Wyo. 1984).

Vacation of judgment confessed under warrant of attorney. — In order to vacate a judgment confessed under a warrant of attorney, the application for relief must be accompanied by a sufficient showing of a meritorious defense. Westring v. Cheyenne Nat'l Bank, 393 P.2d 119 (Wyo. 1964).

Since prior to this rule a district court during the same term had inherent power to vacate a default judgment in the exercise of a sound discretion, it would be somewhat anomalous to say that subdivision (b) has now provided an expedient method to accomplish that end by the filing of a motion within one year after judgment without regard to term, and not at the same time accord the privilege to a party imposed upon in similar circumstances by a judgment taken without notice under warrant of attorney. Westring v. Cheyenne Nat'l Bank, 393 P.2d 119 (Wyo. 1964).

Failure to timely file answer justifies default. — Where the defendants failed to file an answer to a complaint within three months, then failed to show good cause, the court did not abuse its discretion in refusing to vacate the entry of default against them. Halberstam v. Cokeley, 872 P.2d 109 (Wyo. 1994).

Rule 61. Harmless error.

Unless justice requires otherwise, no error in admitting or excluding evidence — or any other error by the court or a party — is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 61 of the Federal Rules of Civil Procedure.

This rule is merely declaratory of old principles of law established by statute and rules of equity. Robertson v. State Hwy. Comm'n, 450 P.2d 1003 (Wyo. 1969); ABC Bldrs., Inc. v. Phillips, 632 P.2d 925 (Wyo. 1981).

The burden is on the appellant to show wherein the error was prejudicial. State Hwy. Comm'n v. Joe Miller Land Co., 467 P.2d 450 (Wyo. 1970).

The critical consideration is the seriousness of the error, not its occurrence, and the concept of harmless error is routinely applied in eminent domain proceedings. Robertson v. State Hwy. Comm'n, 450 P.2d 1003 (Wyo. 1969); State Hwy. Comm'n v. Joe Miller Land Co., 467 P.2d 450 (Wyo. 1970).

Error, to warrant reversal, must be prejudicial and affect the substantial rights of an appellant. ABC Bldrs., Inc. v. Phillips, 632 P.2d 925 (Wyo. 1981).

On appeal, trial court will not be deemed to have abused its discretion in determining that error did not affect substantial rights of parties unless error caused a miscarriage of justice, damaged the integrity, reputation and fairness of the judicial process, or clearly possessed a capacity to bring about an unjust result. Betts v. Crawford, 965 P.2d 680 (Wyo. 1998).

Court, at a personal injury trial, did not abuse its discretion in deciding not to exclude the purported surprise testimony of a doctor; the appropriate response from a surprised party wishing to counter testimony is a request for continuance, and where the party only requested exclusion of evidence it was fair to conclude that the party was not prevented from effectively cross-examining doctor with his previous deposition testimony. Betts v. Crawford, 965 P.2d 680 (Wyo. 1998).

Stopping trial was harmless error. — Because neither the record nor the wife's brief pointed to specific material evidence the wife could have presented if she were given more time, the trial court committed harmless error when it halted the trial. Pittman v. Pittman, 999 P.2d 638 (Wyo. 2000).

Show cause hearing held on less than fifteen days notice was harmless error. — Although holding a show cause hearing five days after the condemnees were served with the condemnor's motion for immediate entry, despite the condemnees' objection, was error, the error was not reversible as the condemnees did not address on appeal the nature of any harm they may have incurred as a result of the district court's decision to hold the hearing over their objection. Conner v. Bd. of County Comm'rs, 54 P.3d 1274 (Wyo. 2002).

Testimony addressing the issue of damages. — Trial court improperly allowed defendant's witness to testify that student who sued school district after she was injured in gym class could receive rehabilitation services at the college she attended and from other sources at no cost, but the error was harmless. Garnick v. Teton County Sch. Dist. No. 1, 39 P.3d 1034 (Wyo. 2002).

Other requirements not nullified by "harmless error". — The "harmless error" rule cannot be interpreted to nullify the specific requirements and provisions of the other rules, including Rule 51, requiring the necessity for an objection to the failure to give or to the giving of an instruction, and including Rule 49(a), requiring a demand to include the submission of a desired issue of fact in a special verdict to prevent the waiver of its consideration by the jury. Davis v. Consolidated Oil & Gas, Inc., 802 P.2d 840 (Wyo. 1990).

Harmless error standard applies to communications between judge and jury. — The status of communications between judge and jury that do not involve instructions on the law can be characterized as administrative directives, and the harmless error doctrine applies to such communications. Carlson v. Carlson, 888 P.2d 210 (Wyo. 1995).

Admission of hearsay testimony concerning deceased declarant's statements about how defendant was handling her funds was harmless, where testimony simply corroborated the wealth of appropriate evidence already presented. Clark v. Gale, 966 P.2d 431 (Wyo. 1998).

Error associated with damages harmless where liability not shown. — Because jury determined that plaintiff's failed to establish that defendant owed a duty of reasonable care any error associated with the damages portion of the trial was, therefore, harmless and could not constitute a basis for reversal. Thunder Hawk v. Union Pac. R.R., 891 P.2d 773 (Wyo. 1995).

Arbitrary limitation upon party's right to call rebuttal witnesses. — The court's decision, in a proceeding seeking modification of a divorce decree, to limit a party's right to call rebuttal witnesses, made without inquiring whether there was anything new to present, was in error under the Wyoming Rules of Evidence and infringed upon the constitutional right to be heard. However, since there was nothing which indicated that the rebuttal witness to be called had, in fact, anything new to say, the error was harmless. Hall v. Hall, 708 P.2d 416 (Wyo. 1985).

Rule applies to cases on appeal. Waggoner v. GMC, 771 P.2d 1195 (Wyo. 1989).

Harmless error rule applies to evidentiary rulings. — Where appellant tenants leased property for ten years, stopped making payments, and then filed an action to quiet title to the property on the theory of adverse possession, appellants' possession of the property as tenants was permissive and not adverse; when appellee true owners moved for judgment on partial findings, the district court did not err by granting the motion and entering a judgment

for appellees. While appellants did not have the opportunity to examine a witness or offer an exhibit into evidence, the district court did abuse its discretion by denying their motion to amend the findings or hold a new trial; any error in the evidentiary rulings was harmless under this section, because the evidence simply did not establish adverse possession. Horse Creek Conservation Dist. v. State ex rel. Wyo. AG, 221 P.3d 306 (Wyo. 2009).

In ruling on a petition to modify child support, the district court did not err by admitting letters from contractors stating they had no work available for the father. While the mother made a hearsay objection, the letters did nothing more than corroborate the father's testimony; therefore, admission of the letters was harmless for purposes of this rule. Lauderman v. State, 232 P.3d 604 (Wyo. 2010).

This rule is applicable in appeals to the Supreme Court in criminal cases. Neel v. State, 452 P.2d 203 (Wyo. 1969).

Effect of including nonappealable order with a valid appeal. — Although an order denying a motion for a new trial is normally not appealable, when it was included in a valid appeal from an order dismissing the action, the Supreme Court allowed it to be treated as a harmless error. Wyoming Wool Mktg. Ass'n v. Urruty, 394 P.2d 905 (Wyo. 1964).

Applied in Logan v. Pacific Intermountain Express Co., 400 P.2d 488 (Wyo. 1965); Claim of Brannan, 455 P.2d 241 (Wyo. 1969); MS v. Kuchera, 682 P.2d 982 (Wyo. 1984); Wardell v. McMillan, 844 P.2d 1052 (Wyo. 1992); D&D Transp., Ltd. v. Interline Energy Servs., Inc., 117 P.3d 423 (Wyo. 2005).

Cited in Grams v. Environmental Quality Council, 730 P.2d 784 (Wyo. 1986); Thunder Hawk v. Union Pac. R.R., 891 P.2d 773 (Wyo. 1995); Schott v. Miller, 943 P.2d 1174 (Wyo. 1997); Smyth v. Kaufman, 67 P.3d 1161 (Wyo. 2003); Odegard v. Odegard, 69 P.3d 917 (Wyo. 2003); Parkhurst v. Boykin, 94 P.3d 450 (Wyo. 2004).

Am. Jur. 2d, ALR and C.J.S. references. — 58 Am. Jur. 2d New Trial §§ 83, 90, 347.

Counsel's appeal in civil case to self-interest or prejudice of jurors as taxpayers, as ground for mistrial, new trial, or reversal, 93 ALR3d 556.

Counsel's argument or comment stating or implying that defendant is not insured and will have to pay verdict himself as prejudicial error, 68 ALR4th 954.

Prejudicial effect of bringing to jury's attention fact that plaintiff in personal injury or death action is entitled to workers' compensation benefits, 69 ALR4th 131.

5 C.J.S. Appeal and Error §§ 825 to 830; 66 C.J.S. New Trial § 17.

Rule 62. Stay of proceedings to enforce a judgment.

(a) *Automatic Stay; Exceptions for Injunctions, and Receiverships.* — Except as stated in this rule, no execution may issue on a judgment, nor may proceedings be taken to enforce it, until 14 days have passed after its entry. But unless the court orders otherwise, an interlocutory or final judgment in an action for an injunction or a receivership is not stayed after being entered, even if an appeal is taken.

(b) *Stay Pending Disposition of a Motion.* — On appropriate terms for the opposing party's security, the court may stay the execution of a judgment — or any proceedings to enforce it — pending disposition of any of the following motions:

(1) under Rule 50, for judgment as a matter of law;

(2) under Rule 52(b), to amend the findings or for additional findings;

(3) under Rule 59, for a new trial or to alter or amend a judgment; or

(4) under Rule 60, for relief from a judgment or order.

(c) *Injunction Pending an Appeal.* — While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights.

(d) *Stay with Bond on Appeal.* — If an appeal is taken, the appellant may obtain a stay by supersedeas bond, except in the limitations contained in the Wyoming Rules of Appellate Procedure and an action described in the last sentence of Rule 62(a). The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.

(e) *Stay Without Bond on Appeal by the State, Its Officers, or Its Agencies.* — The court must not require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the State, its officers, or its agencies.

(f) *Supreme Court's Power Not Limited.* — This rule does not limit the power of the Supreme Court or one of its justices:

(1) to stay proceedings — or suspend, modify, restore, or grant an injunction — while an appeal is pending; or

(2) to issue an order to preserve the status quo or the effectiveness of the judgment to be entered.

(g) *Stay with Multiple Claims or Parties.* — A court may stay the enforcement of a final judgment entered under Rule 54(b) until it enters a later judgment or judgments, and may prescribe terms necessary to secure the benefit of the stayed judgment for the party in whose favor it was entered.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 62 of the Federal Rules of Civil Procedure.

Courts need recourse to procedures which will maintain litigated issues in status quo pending decision so that the subsequent judgment will be effective. Wyoming Bancorporation v. Bonham, 563 P.2d 1382 (Wyo. 1977).

Where no automatic stay for reasons of public policy. — These rules grant the trial judge broad authority to prevent the effect of any judgment during the pendency of an appeal, and this court sees no occasion to establish types of cases which merit special consideration as to a stay of execution by reason of public policy, so there will be no automatic stay of the district court's judgment in a boundary board dispute by an appeal to the Supreme Court "for reasons of public policy." School Dist. No. 9 v. District Boundary Bd., 351 P.2d 106 (Wyo. 1960).

Jurisdiction reserved relative to injunctions. — This rule reserves jurisdiction to the court, whatever the status of the appeal, to consider virtually all matters relative to an injunction which may have been issued or denied by the court. Taylor Ditch Co. v. Carey, 520 P.2d 218 (Wyo. 1974).

And to damages. — District court has jurisdiction to consider damages when liability on a supersedeas bond is sought to be enforced after remand from the appellate courts. Wyoming Bancorporation v. Bonham, 563 P.2d 1382 (Wyo. 1977).

But not in excess of supersedeas bond. — Where an action is upon supersedeas bond without surety, nothing in excess of the face of the bond is recoverable by way of damages, since neither the Supreme Court's stay order nor the rules indicate an intent to extend liability on the bond beyond the maximum stated therein. Wyoming Bancorporation v. Bonham, 563 P.2d 1382 (Wyo. 1977).

Guidelines set for establishing boundaries of supersedeas bond. — See Wyoming Bancorporation v. Bonham, 563 P.2d 1382 (Wyo. 1977).

Am. Jur. 2d, ALR and C.J.S. references. — 30 Am. Jur. 2d Executions and Enforcement of Judgments § 1 et seq.; 42 Am. Jur. 2d Injunctions § 327.

Appealability of order staying, or refusing to stay, action because of pendency of another action, 18 ALR3d 400.

Modern status of state court rules governing entry of judgment on multiple claims, 80 ALR4th 707.

Circumstances in which indefinite stay of proceedings in federal civil case constitutes abuse of discretion or is otherwise unlawful, 150 ALR Fed 577.

33 C.J.S. Executions §§ 152 to 174; 50 C.J.S. Judgments § 636.

Rule 62.1. Indicative ruling on a motion for relief that is barred by a pending appeal.

(a) *Relief Pending Appeal.* — If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer considering the motion;

(2) deny the motion; or

(3) state either that it would grant the motion if the appellate court remands for that purpose or that the motion raises a substantial issue.

(b) *Notice to the appellate court.* — The movant must promptly notify the Clerk of the appellate court if the trial court states that it would grant the motion or that the motion raises a substantial issue.

(c) *Remand.* — The trial court may decide the motion if the appellate court remands for that purpose.

(Added February 2, 2017, effective March 1, 2017.)

Rule 63. Judge's inability to proceed.

(a) If a judge conducting a hearing or trial is unable to proceed, any other judge may proceed upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties. In a hearing or a nonjury trial, the successor judge must, at a party's request, recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.

(b) *After verdict or filing of findings of fact and conclusions of law.* — If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge sitting in or assigned to the district in which the action was tried or any active or retired district judge or supreme court justice designated by the supreme court may perform those duties; but if the successor judge cannot perform those duties because the successor judge did not preside at the trial or for any other reason, the successor judge may grant a new trial.

(Added February 2, 2017, effective March 1, 2017.)

Source. — Subdivision (a) of this rule is similar to Rule 63 of the Federal Rules of Civil Procedure.

Applied in State ex rel. Pac. Intermountain Express, Inc. v. District Court, 387 P.2d 550 (Wyo. 1963).

Quoted in Hagar v. Mobley, 638 P.2d 127 (Wyo. 1981).

Law reviews. — For comment, "Article VI of the Wyoming Rules of Evidence: Witnesses," see XIII Land & Water L. Rev. 909 (1978).

Am. Jur. 2d, ALR and C.J.S. references. — 46 Am. Jur. 2d Judges §§ 44 to 53.

Waiver or loss of right to disqualify judge by participation in proceedings — modern state civil cases, 24 ALR4th 870.

Power of successor or substituted judge, in civil case, to render decision or enter judgment on testimony heard by predecessor, 84 ALR5th 399.

48A C.J.S. Judges §§ 36 to 38, 98 to 160.

VIII. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS

Rule 64. Seizing a person or property.

At the commencement of and during the course of an action, all remedies provided by statute for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under these rules.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 64 of the Federal Rules of Civil Procedure.

Am. Jur. 2d, ALR and C.J.S. references. — 5 Am. Jur. 2d Arrest § 1 et seq.; 6 Am. Jur. 2d Attachment and Garnishment § 1 et seq.

Construction and effect of provision for execution sale on short notice, or sale in advance of judgment under writ of attachment, where property involved is subject to decay or depreciation, 3 ALR3d 593.

Joint bank account as subject to attachment, garnishment or execution by creditor of one of the joint depositors, 11 ALR3d 1465.

Attachment and garnishment of funds in branch bank or main office of bank having branches, 12 ALR3d 1088.

Family allowance from decedent's estate as exempt from attachment, garnishment, execution and foreclosure, 27 ALR3d 863.

What constitutes malice sufficient to justify an award of punitive damages in action for wrongful attachment or garnishment, 61 ALR3d 984.

Recovery of damages for mental anguish, distress, suffering or the like in action for wrongful attachment, garnishment, sequestration or execution, 83 ALR3d 598.

Modern views as to validity, under federal constitution, of state prejudgment attachment, garnishment and replevin procedures, distraint procedures under landlords' or innkeepers' lien statutes and like procedures authorizing summary seizure of property, 18 ALR Fed 223; 29 ALR Fed 418.

6A C.J.S. Arrest §§ 73 to 93; 7 C.J.S. Attachment § 1 et seq.

Rule 65. Injunctions and restraining orders.

(a) *Preliminary Injunction.* —

(1) *Notice.* — The court may issue a preliminary injunction only on notice to the adverse party.

(2) *Consolidating the Hearing with the Trial on the Merits.* — Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.

(b) *Temporary Restraining Order.* —

(1) *Issuing Without Notice.* — The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

(2) *Contents; Expiration.* — Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry — not to exceed 14 days — that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

(3) *Expediting the Preliminary-Injunction Hearing.* — If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.

(4) *Motion to Dissolve.* — On 2 days' notice to the party who obtained the order without notice — or on shorter notice set by the court — the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.

(c) *Security.* — The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.

(d) *Contents and Scope of Every Injunction and Restraining Order.* —

(1) *Contents.* — Every order granting an injunction and every restraining order must:

(A) state the reasons why it issued;

(B) state its terms specifically; and

(C) describe in reasonable detail — and not by referring to the complaint or other document — the act or acts restrained or required.

(2) *Persons Bound.* — The order binds only the following who receive actual notice of it by personal service or otherwise:

(A) the parties;

(B) the parties' officers, agents, servants, employees, and attorneys; and

(C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

(e) *When inapplicable.* — This rule shall not apply to suits for divorce, alimony, separate maintenance, or custody of minors.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule, except for subdivision (e), is similar to Rule 65 of the Federal Rules of Civil Procedure.

Cross References. — As to age of majority, see § 14-1-101.

This rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood. Bard Ranch Co. v. Weber, 557 P.2d 722 (Wyo. 1976).

Nature of injunctive remedy. — The extraordinary remedy of an injunction is a far-reaching force and must not be indulged in under hastily contrived conditions. It is a delicate judicial power and a court must proceed with caution and deliberation before exercising the remedy. Simpson v. Petroleum, Inc., 548 P.2d 1 (Wyo. 1976).

Purpose of the preliminary injunction is to preserve the status quo until the rights of the parties can be fairly inquired into and determined under equitable conditions and principles. To do otherwise is perverting the function of the preliminary injunction. Simpson v. Petroleum, Inc., 548 P.2d 1 (Wyo. 1976).

A temporary restraining order or preliminary injunction is in the nature of a provisional remedy, and one may be issued at any time during the pending litigation. Weber v. Johnston Fuel Liners, Inc., 519 P.2d 972 (Wyo. 1974).

But awarding of injunction not to circumvent trial. — Generally, a preliminary injunction will not be awarded where its effect is to give the principal relief plaintiff seeks without bringing the cause to trial. Simpson v. Petroleum, Inc., 548 P.2d 1 (Wyo. 1976).

A suit for injunction is a civil suit, and the rules of procedure are the same as in any other civil suit. Weber v. Johnston Fuel Liners, Inc., 519 P.2d 972 (Wyo. 1974).

Complaint must clearly set out all necessary facts. — The extraordinary character of the injunctive remedy requires that the complaint clearly set out all the facts necessary to establish such right. Tri-County Elec. Ass'n v. City of Gillette, 525 P.2d 3 (Wyo. 1974).

Order advancing hearing required. — The language of subdivision (b) is abundantly clear in its very terms that there must be an order advancing a hearing on the temporary restraining order. Simpson v. Petroleum, Inc., 548 P.2d 1 (Wyo. 1976).

As is notice of advancement. — When a hearing on a preliminary injunction becomes a hearing on the merits, there must be notice of such advancement. Simpson v. Petroleum, Inc., 548 P.2d 1 (Wyo. 1976).

The specificity provisions of subdivision (d) are not mere technical requirements. Bard Ranch Co. v. Weber, 557 P.2d 722 (Wyo. 1976).

When party enjoined can recover. — If the plaintiff prevails in the final hearing on the injunction, the defendant cannot recover even if the temporary restraining order or preliminary injunction was wrongfully issued. However, good sense and equity dictate an exception to this rule when the temporary restraining order is overly broad or too far-reaching in scope. Weber v. Johnston Fuel Liners, Inc., 519 P.2d 972 (Wyo. 1974).

Guidelines provided for establishing boundaries of supersedeas bond. — See Wyoming Bancorporation v. Bonham, 563 P.2d 1382 (Wyo. 1977).

District court has jurisdiction to enforce zoning decision by injunction. Wardwell Dev. Corp. v. Board of County Comm'rs, 639 P.2d 888 (Wyo. 1982).

In adoption proceedings, court may deny injunction unnecessarily restricting natural father's activities. — In connection with adoption proceedings, the trial court did not abuse its discretion in denying a permanent injunction restraining the natural father, who was in prison and who threatened to do bodily harm to numerous people, including the prospective adoptive parents, from contacting those persons or seeking them out after his release, and restraining him from entering certain locations after his release. The requested relief was over-broad, sought protection for persons not parties to the proceedings, requested protection for persons not named, and unnecessarily sought to restrict the father's activities. PAA v. Doe, 702 P.2d 1259 (Wyo. 1985).

Permanent injunction. — An injunction enjoining land owners from interfering with an irrigation company's access to and repair of its facilities across the owners land was proper and specific enough where there was absolutely no possibility of uncertainty or confusion when the merits of the case had already been decided and the latest injunction merely told the owners for the third time that they were restrained from interfering with the company's access to its facilities. Wilson v. Lucerne Canal & Power Co., 77 P.3d 412 (Wyo. 2003).

In an irrigation company's suit to enjoin land owners from interfering with access, the entry of a permanent injunction at a preliminary hearing was proper, and did not violate the owner's due process rights, where the district court's failure to enter an order of consolidation was not erroneous because the underlying rights of the parties were determined in earlier litigation and were therefore res judicata. Wilson v. Lucerne Canal & Power Co., 77 P.3d 412 (Wyo. 2003).

Likelihood of harm. — Ex parte temporary restraining order (TRO) against an anti-abortion organization was issued in violation of the First Amendment and this rule. Although it

was unlikely that the organization suffered damages as a result of the TRO, the district court was nonetheless required to make findings as to the likelihood of harm to the organization, and it abused its discretion in issuing the TRO without those required findings. Operation Save Am. v. City of Jackson, 275 P.3d 438 (Wyo. 2012).

Applied in Wardwell Dev. Corp. v. Board of County Comm'rs, 639 P.2d 888 (Wyo. 1982).

Stated in Weiss v. State ex rel. Leimback, 435 P.2d 280 (Wyo. 1967); Gray v. Fitzhugh, 576 P.2d 88 (Wyo. 1978).

Cited in Johnson v. Smith, 455 P.2d 244 (Wyo. 1969); State ex rel. Johnston v. District Court, 495 P.2d 255 (Wyo. 1972); Weber v. Johnston Fuel Liners, Inc., 540 P.2d 535 (Wyo. 1975); Wallis v. Luman, 625 P.2d 759 (Wyo. 1981).

Am. Jur. 2d, ALR and C.J.S. references. — 42 Am. Jur. 2d Injunctions § 1 et seq.

Appealability of order granting, extending or refusing to dissolve temporary restraining order, 19 ALR3d 403.

Appealability of order refusing to grant or dissolving temporary restraining order, 19 ALR3d 459.

Recovery of damages resulting from wrongful issuance of injunction as limited to amount of bond, 30 ALR4th 273.

Enforceability of sale-of-business agreement not to compete against nonsigner or nonowning signer, 60 ALR4th 294.

Who, under Rule 65(d) of Federal Rules of Civil Procedure, are persons "in active concert or participation" with parties to action so as to be bound by order granting injunction, 61 ALR Fed 482.

43 C.J.S. Injunctions § 1 et seq.

Rule 65.1. Proceedings against a surety.

Whenever these rules require or allow a party to give security, and security is given through a bond or other undertaking with one or more sureties, each surety submits to the court's jurisdiction and irrevocably appoints the court clerk as its agent for receiving service of any papers that affect its liability on the bond or undertaking. The surety's liability may be enforced on motion without an independent action. The motion and any notice that the court orders may be served on the court clerk, who must promptly mail a copy of each to every surety whose address is known.
(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 65.1 of the Federal Rules of Civil Procedure.

Cross References. — As to rule applying to surety upon appeal or supersedeas bond, see Rule 4.01, W.R.A.P.

This rule serves two purposes: (1) it gives a court jurisdiction over a surety; and (2) it establishes a permissible motion procedure for determining liability. Wyoming Bancorporation v. Bonham, 563 P.2d 1382 (Wyo. 1977).

Scope of allowable proceedings. — This rule allows only proceedings to enforce a bond as ancillary to the principal suit. Weber v. Johnston Fuel Liners, Inc., 540 P.2d 535 (Wyo. 1975).

Separate action against surety eliminated. — This rule eliminates the necessity of a separate action against the surety by the obligee. Lange v. Valencia, 533 P.2d 304 (Wyo. 1975).

Where the question relates to the ability of a district court to assess damages on a supersedeas bond after an unsuccessful appeal, and sureties are involved, this rule clearly provides for the enforcement of liability by motion rather than by independent action. Wyoming Bancorporation v. Bonham, 563 P.2d 1382 (Wyo. 1977).

When the motion or summary procedure is utilized, there is no right of jury trial on the issues presented. Such a proceeding assessing damages is ancillary to the main action and is determined as a part of it without a right to a jury trial. As a result, no error is committed by denying appellant's demand for a trial by jury. Wyoming Bancorporation v. Bonham, 563 P.2d 1382 (Wyo. 1977).

This rule does not preclude an independent action against a principal or surety. Wyoming Bancorporation v. Bonham, 563 P.2d 1382 (Wyo. 1977).

Applied in Roberts Constr. Co. v. Vondriska, 547 P.2d 1171 (Wyo. 1976).

Am. Jur. 2d, ALR and C.J.S. references. — 42 Am. Jur. 2d Injunctions §§ 282 to 291.

43A C.J.S. Injunctions §§ 168 to 174.

Rule 66. Receivers.

An action wherein a receiver has been appointed shall not be dismissed except by order of the court. The practice in the administration of estates by receivers shall be in accordance with the practice heretofore followed in the courts of Wyoming. In all other

respects the action in which the appointment of a receiver is sought or which is brought by or against a receiver is governed by these rules.
(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 66 of the Federal Rules of Civil Procedure.

Am. Jur. 2d, ALR and C.J.S. references. — 65 Am. Jur. 2d Receivers § 1 et seq.

Receiver's personal liability for negligence in failing to care for or maintain property in receivership, 20 ALR3d 967.

75 C.J.S. Receivers § 1 et seq.

Rule 67. Deposit into court.

(a) *Depositing Property.* . — If any part of the relief sought is a money judgment or the disposition of a sum of money or some other deliverable thing, a party — on notice to every other party and by leave of court — may deposit with the court all or part of the money or thing, whether or not that party claims any of it. The depositing party must deliver to the clerk a copy of the order permitting deposit.

(b) *Investing and Withdrawing Funds.* — Money paid into court under this rule shall be held by the clerk of the court subject to withdrawal in whole or in part at any time upon order of the court or written stipulation of the parties. The money shall be deposited in an interest-bearing account or invested in a court-approved, interest-bearing instrument.

(c) Prior to the disbursement of the funds, all information necessary for the clerk to make a proper disbursement shall be provided by the party seeking disbursement, in a form that complies with the Rules Governing Redaction From Court Records.
(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 67 of the Federal Rules of Civil Procedure.

The purpose of this rule is to relieve the depositor of the responsibility for the funds and, in some circumstances, to stop the accrual of interest by authorizing a payment into the court. Parker v. Artery, 889 P.2d 520 (Wyo. 1995).

Tolling accrual of interest. — By tendering payment into the district court of the judgment amount as authorized by this Rule, party against whom judgment was rendered surrendered control of the funds to the court, and the accrual of statutory interest ceased. Parker v. Artery, 889 P.2d 520 (Wyo. 1995).

Defendant's good-faith deposit of the full amount of the judgment against her with the clerk of court during the pendency of the appeal of the case was an unconditional offer to perform coupled with the ability to carry out the offer, and was sufficient to stop the accrual of interest. Crawford v. Amadio, 932 P.2d 1288 (Wyo. 1997).

Income tax liability for interest. — Equity favors assigning any income tax liability for interest accruing while a judgment amount remains on deposit with the court to the party who will enjoy the benefit of the interest. Parker v. Artery, 889 P.2d 520 (Wyo. 1995).

Satisfaction of judgment. — When a judgment debtor has paid the judgment amount, the trial court may order that a satisfaction of judgment be entered. Stilson v. Hodges, 934 P.2d 736 (Wyo. 1997).

Authority of trial court. — The trial court had the authority to order a judgment debtor to submit the amount of the judgment debt to the clerk of the court and to order the clerk to enter a satisfaction after the debtor satisfied the judgment. Stilson v. Hodges, 934 P.2d 736 (Wyo. 1997).

Am. Jur. 2d, ALR and C.J.S. references. — 23 Am. Jur. 2d Deposits in Court § 1 et seq.

Funds deposited in court as subject of garnishment, 1 ALR3d 936.

Appealability of order directing payment of money into court, 15 ALR3d 568.

26A C.J.S. Deposits in Court §§ 1 to 9.

Rule 68. Offer of settlement or judgment.

(a) *Making an Offer; Acceptance of Offer.* — At any time more than 60 days after service of the complaint and at least 28 days before the date set for trial, any party may serve on an opposing party an offer to allow settlement or judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service.

(b) *Unaccepted Offer.* — An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs. As used herein, "costs" do not include attorney's fees.

(c) *Offer After Liability is Determined.* — When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time not less than 14 days before the date set for a hearing to determine the extent of liability.

(d) *Paying Costs After an Unaccepted Offer.* — If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 68 of the Federal Rules of Civil Procedure.

An offer of judgment, to be effective, must be for a definite sum. Snodgrass v. Rissler & McMurry Co., 903 P.2d 1015 (Wyo. 1995).

Since the offer must be for a definite or ascertainable amount, later proof cannot cure any defect in the offer since the party to whom the offer was made must base their decision to accept or reject solely on what is contained within that offer. A later motion is not the proper means to establish that value. Snodgrass v. Rissler & McMurry Co., 903 P.2d 1015 (Wyo. 1995).

Costs. — A plaintiff who rejected an offer of settlement that was more favorable than the amount she was eventually awarded by a jury was entitled to recover only those costs she incurred up until the time the offer was made, and the defendant was entitled to recover those costs incurred after the offer was made. Crawford v. Amadio, 932 P.2d 1288 (Wyo. 1997).

Attorney fees in offer of judgment. — In an action by a real estate agent and her corporation (realtors') against a seller for breach of a listing agreement, the seller's W.R.C.P. 68 offer included attorney fees as part of the amount stated in the offer although the offer was silent about attorney fees, where the agreement provided that the breaching party would pay the nonbreaching party's attorney fees, where the realtors included a claim for attorney fees in their complaint, and where the offer stated that the offer was in full and final satisfaction of all claims. Real Estate Pros, P.C. v. Byars, 90 P.3d 110 (Wyo. 2004).

Reasonable necessary deposition expenses, made after settlement offer, reimbursable. — Reasonable necessary deposition expenses made after the making of a settlement offer, such as those made for depositions relied upon by the court in granting partial summary judgment in favor of the defendant, were properly includable in reimbursable costs. However, the expense of preparing enlarged exhibits for trial was not a taxable cost. Duffy v. Brown, 708 P.2d 433 (Wyo. 1985).

Conditional acceptance of settlement offer was not valid. — In a personal injury suit, plaintiff's communication of acceptance modified the offer of settlement by adding language stating plaintiff did not admit the damages she sustained were limited to the amount offered and she did not waive her right to pursue her personal injury claim. Because plaintiff's acceptance was not unconditional and did not mirror the offer of settlement, she did not validly accept the offer of settlement under this rule; therefore, a judgment could not be entered in her favor. Dunham v. Fullerton, 258 P.3d 701 (Wyo. 2011).

Cited in Morris v. CMS Oil & Gas Co., 227 P.3d 325 (Wyo. 2010).

Applied in Anderson v. Foothill Indus. Bank, 674 P.2d 232 (Wyo. 1984).

Quoted in Blanchard v. Blanchard, 770 P.2d 227 (Wyo. 1989).

Am. Jur. 2d, ALR and C.J.S. references. — 20 Am. Jur. 2d Costs §§ 18 to 21.

Constitutionality, construction, application and effect of statute invalidating powers of attorney to confess judgment or contract giving such powers, 40 ALR3d 1158.

Construction of state offer of judgment rule—Issues of time, 112 ALR5th 47.

Construction of state offer of judgment rule-Sufficiency of offer and contract formation issues, 118 ALR 5th 91.

Allowance and determination of attorney's fees under state offer of judgment rule, 119 ALR 5th 121.

State offer of judgment rule-Construction, operation, and effect of acceptance and resulting judgment, 120 ALR 5th 559.

Disallowance of award under state offer of judgment rule due to lack of good faith, 121 ALR 5th 325.

49 C.J.S. Judgments §§ 188 to 192.

Rule 69. Execution.

(a) *Money Judgment; Applicable Procedure.* — A money judgment is enforced by a writ of execution, unless the court directs otherwise.

(b) *Obtaining Discovery.* — In aid of the judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person — including the judgment debtor — as provided in these rules.
(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 69(a) of the Federal Rules of Civil Procedure.

Arrest of judgment debtor outside county of residence. — There is nothing stated or contemplated in the Wyoming Rules of Civil Procedure pertaining to depositions which would allow the arrest of a judgment debtor outside the county of his residence. Poljanec v. Freed Fin. Co., 440 P.2d 251 (Wyo. 1968).

Quoted in Coones v. FDIC, 848 P.2d 783 (Wyo. 1993).

Cited in Permian Corp. v. Armco Steel Corp., 508 F.2d 68 (10th Cir. 1974).

Law reviews. — For comment, "How to Enforce a Money Judgment in Wyoming," see XX Land & Water L. Rev. 645 (1985).

Am. Jur. 2d, ALR and C.J.S. references. — 30 Am. Jur. 2d Executions and Enforcement of Judgments § 1 et seq.

Joint bank account as subject to attachment, garnishment, or execution by creditor of one of the joint depositors, 11 ALR3d 1465.

Family allowance from decedent's estate as exempt from attachment, garnishment, execution and foreclosure, 27 ALR3d 863.

Validity, construction and effect of body execution statutes allowing imprisonment based on judgment, debt or the like — modern cases, 79 ALR4th 232.

33 C.J.S. Executions § 1 et seq.

Rule 70. Enforcing a judgment for a specific act.

(a) *Party's Failure to Act; Ordering Another to Act.* — If a judgment requires a party to convey land, to deliver a deed or other document, or to perform any other specific act and the party fails to comply within the time specified, the court may order the act to be done — at the disobedient party's expense — by another person appointed by the court. When done, the act has the same effect as if done by the party.

(b) *Vesting Title.* — If the real or personal property is within the district, the court — instead of ordering a conveyance — may enter a judgment divesting any party's title and vesting it in others. That judgment has the effect of a legally executed conveyance.

(c) *Obtaining a Writ of Attachment or Sequestration.* — On application by a party entitled to performance of an act, the clerk must issue a writ of attachment or sequestration against the disobedient party's property to compel obedience.

(d) *Obtaining a Writ of Execution or Assistance.* — On application by a party who obtains a judgment or order for possession, the clerk must issue a writ of execution or assistance.

(e) *Holding in Contempt.* — The court may also hold the disobedient party in contempt.
(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 70 of the Federal Rules of Civil Procedure.

Divestment of title. — Former husband's refusal to execute the documents necessary to effectuate the sale of marital real property as ordered by the court constituted misconduct pursuant to Wyo. R. Civ. P. 60(b)(3), and the court appropriately divested the former husband of his interest in the property. Walker v. Walker, 925 P.2d 1305 (Wyo. 1996).

Partition by consent enforced. — Although a partition agreement differed from the statutory scheme of Wyo. Stat. Ann. § 1-32-104, the agreement was properly enforced under Wyo. R. Civ. P. 70 and Wyo. Stat. Ann. § 1-32-108 when a co-tenant failed to abide by agreement. The "deemed denied" rule of Wyo. R. Civ. P. 6(c)(2) did not divest district court of subject matter jurisdiction to enter partition order because no showing of error was made and the motion at issue was interlocutory so that the court retained jurisdiction to enter the order enforcing partition after the original motion was deemed denied. Bixler v. Oro Mgmt., L.L.C., 145 P.3d 1260 (Wyo. 2006).

Applied in Caldwell v. Armstrong, 342 F.2d 485 (10th Cir. 1965); Allen v. Allen, 550 P.2d 1137 (Wyo. 1976).

Cited in Mari v. Rawlins Nat'l Bank, 794 P.2d 85 (Wyo. 1990); Parsons v. Parsons, 27 P.3d 270 (Wyo. 2001).

Am. Jur. 2d, ALR and C.J.S. references. — 71 Am. Jur. 2d Specific Performance §§ 112 to 119, 223, 224.

Contempt for violation of compromise and settlement the terms of which were approved by court but not incorporated in court order, decree or judgment, 84 ALR3d 1047.

81A C.J.S. Specific Performance §§ 215 to 219.

Rule 71. Enforcing relief for or against a nonparty.

When an order grants relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party.
(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 71 of the Federal Rules of Civil Procedure.

Rule 71.1. Condemnation of property.

(a) *Applicability of rules.* — The Wyoming Rules of Civil Procedure govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.

(b) *Joinder of properties.* — The plaintiff may join in the same action any number of separate parcels of property, rights or interests situated in the same county and the compensation for each shall be assessed separately by the same or different appraisers as the court may direct.

(c) *Complaint.* —

(1) *Contents.* — The complaint shall contain a short and plain statement of:

(A) The authority for the taking, the use for which the property is to be taken, and the necessity for the taking, a description of the property sufficient for its identification, the interests to be acquired,

(B) The efforts made to comply with W.S. 1-26-504, -505, -509 and -510,

(C) As to each separate piece of property, a designation of the defendants who have been joined as owners thereof of some interest therein, together with their residences, if known, and whether the plaintiff demands immediate possession or desires to continue in possession,

(D) If plaintiff is a public entity, facts demonstrating compliance with W.S. 1-26-512, and

(E) If plaintiff seeks a court order permitting entry upon the property for any of the purposes set out in W.S. 1-26-506, plaintiff shall set forth in the complaint or in a separate application to the court a short and plain statement that it has made reasonable efforts to enter the property, that such entry has been obstructed or denied, and that a court order permitting entry is sought pursuant to W.S. 1-26-507.

(2) *Joinder.* — Upon the commencement of the action the plaintiff shall join as defendants those persons having or claiming an interest in the property as owner, lessee or encumbrancer whose names are then known, but prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all persons having or claiming an interest in that property as owner, lessee or encumbrancer whose names can be ascertained by a reasonably diligent search of the records, considering the character and value of the property involved and the interests to be acquired, and also those whose names have otherwise been learned. Other defendants, as described in Rule 4(o), shall be made defendants when they are necessary parties.

(3) *Informal Procedure.* — If plaintiff desires that the amount of compensation be determined by informal procedure, pursuant to W.S. 1-26-601, et seq., it shall allege that the amount in dispute is less than $20,000 or that the difference between plaintiff's latest offer and the total amount demanded is less than $5,000, and shall request that the court proceed informally.

(4) *Deposit at Commencement of Action.* — Condemnor shall make the deposit required by W.S. 1-26-513.

(d) *Order for hearing; process; answer.* —

(1) *Order for Hearing.* — If plaintiff seeks a court order permitting immediate entry upon the property pursuant to W.S. 1-26-507, it shall apply to the court for an order fixing time for a hearing, and the court shall direct defendant or defendants to appear at the time and place set for the hearing to show cause why such an order should not be entered. If plaintiff does not seek such an order, it shall apply to the court for an order fixing the time and place for a hearing upon the complaint.

(2) *Process.* — Summons shall be issued and served and proof of service shall be made in accordance with Rule 4. The summons and complaint shall be served together. The summons shall state the time and place of the hearing at which the defendant is to appear and defend, and shall further notify the defendant that if the defendant fails to appear at said time and place, judgment will be rendered for plaintiff condemning defendant's interest in the property therein described, appointing appraisers to ascertain the compensation to be paid therefor, and permitting plaintiff, if application therefor has been made as provided in subdivision (e) of this rule, to take possession or to continue in possession thereof upon the payment into court of such sum of money as may be required, or upon the giving of such approved security as may be determined by the court, and shall further notify the defendant that if the defendant desires to contest the plaintiff's right to take the property, or the necessity therefor, the defendant shall, prior to the time set for hearing, file with the court an answer to the complaint.

(3) *Answer.* —

(A) No answer is required unless defendant desires to contest the plaintiff's right to take the property or the necessity therefor, in which event the answer shall be filed five days prior to the time set for the hearing on the complaint.

(B) If no answer is filed, defendant may file an appearance with the clerk describing the property in which the defendant claims an interest so as to facilitate prompt receipt of notices by the defendant.

(C) If defendant desires that the amount of compensation be determined by informal procedure, the defendant shall allege that the amount in dispute is less than $20,000 or that the difference between plaintiff's latest offer and the total amount demanded is less than $5,000, and shall request that the court proceed informally.

(e) *Hearings.* —

(1) *Show Cause Hearing.* — If plaintiff has requested an order authorizing immediate entry, a show cause hearing shall be held not sooner than 15 days after service of the order to show cause upon the defendant or defendants.

(A) At the hearing, the district judge shall require evidence that notice and an order to show cause has been served upon the defendant as required, and shall hear and determine questions of plaintiff's right to enter the property, the purposes for which entry is sought, plaintiff's efforts to enter under notice to the owner and the owner's prior agreement thereto, if any; and shall require defendant or defendants to show good cause why an order authorizing entry should not be entered.

(B) If plaintiff prevails on these points, the district judge shall enter an order permitting entry. Any order permitting immediate entry shall describe the purpose therefor, setting forth the nature and scope of activities determined to be reasonably necessary and authorized by law, and including terms and conditions respecting time, place, and manner of entry, and authorized activities by plaintiff, all in order to facilitate the purpose of entry and to minimize damage, hardship, and burden upon the parties.

(C) An order permitting entry where the purpose does not contemplate condemnation shall include a determination of the amount, if any, that will fairly compensate defendant or defendants or any other person in lawful possession or physical occupancy for damages for physical injury to the property or substantial interference with its possession or use, if such damage or interference are found likely to be caused by entry. The district judge will require plaintiff to deposit cash or other security with the court in any such amount.

(2) *Hearing on Complaint for Condemnation.* — The hearing shall be held not sooner than 15 days after service of the complaint for condemnation upon the defendant, unless the defendant otherwise consents in writing.

(A) At the hearing, which may be adjourned from time to time, the district judge shall require evidence that notice of hearing has been given as provided in this rule, and shall hear and determine the questions of the plaintiff's right to make the appropriation, plaintiff's inability to agree with the owner, the necessity for the appropriation, and shall hear proofs and allegations of all parties interested touching the regularity of the proceedings.

(B) If the district judge determines these questions in favor of the plaintiff as to any or all of the property and persons interested therein, the judge shall first decide whether a request by any party to proceed informally should be granted.

(C) If the judge decides to proceed informally, the judge shall determine compensation without jury in an informal manner on the basis of such oral and documentary evidence as the parties shall offer which the court deems sufficient.

(D) If the judge determines not to proceed informally, the judge shall make an order appointing three disinterested appraisers, residents of the county in which the complaint is filed, to ascertain the compensation to be made to the defendant, or defendants, for the taking or injuriously affecting the property described in the complaint, and specifying a time and place for the first meeting of such appraisers, and the time within which the said appraisers shall make such assessment.

(E) At the hearing, or at any stage of the proceedings under this rule after the questions previously mentioned have been heard and determined, the district judge may, by order in that behalf made and if demanded by plaintiff in the plaintiff's complaint or in any amendment thereto, authorize the plaintiff, if already in possession, and if not in possession, to take possession of, and use said property during the pendency and until the final conclusion of such proceedings, and may stay all actions and proceedings against the plaintiff on account thereof; provided,

(F) Unless exempted by statute and subject to the deposit provision of W.S. 1-26-513, plaintiff shall pay a sufficient sum into the court, or give approved security to pay the compensation in that behalf when ascertained; and

(G) In every case where possession shall be so authorized, it shall be lawful for the defendant, or defendants, to conduct the proceedings to a conclusion if the same shall be delayed by the plaintiff.

(f) *Amendment of pleadings.* — With the leave of court, the plaintiff may amend the complaint at any time before the award of compensation is made, and as many times as desired, but no amendment shall be made which will result in a dismissal forbidden by subdivision (k). The plaintiff shall serve a copy of any amendment, as provided in Rule 5(b), upon any party affected thereby who has appeared. If a party has not appeared in the action and is affected by the amendment, then a notice directed to that party shall be served personally or by publication or other substituted service in the manner provided in subdivision (d).

(g) *Substitution of parties.* — Substitution of parties may be made in accordance with Rule 25.

(h) *Appraisers; procedure.* —

(1) The appraisers appointed by the court, before entering upon the duties of their office, shall take an oath to faithfully and impartially discharge their duties as said appraisers.

(2) The court shall instruct them in writing as to their duties and as to the applicable and proper law to be followed by them in making their ascertainment.

(3) They shall carefully inspect and view the property sought to be taken or affected and shall thereupon ascertain and certify the compensation proper to be made to the defendant, or defendants, for the real or personal property to be taken or affected, according to the rule of damages as set forth in the written instructions given by the court.

(4) They shall make, subscribe and file with the clerk of the district court in which the action is pending a certificate of their said ascertainment and assessment in which the real or personal property shall be described with convenience, certainty and accuracy. In addition, supporting data for the amounts set forth in the certificate shall be included with said certificate.

(5) Fees allowed the appraisers shall be fixed by the court.

(i) *Order of award.* —

(1) Upon proceeding informally to a determination of the amount of compensation to be paid, under subdivision (e)(2) above, and if neither party rejects the judgment of the district court, as authorized by W.S. 1-26-604, or

(2) Upon filing of the certificate of appraisers under subdivision (h) above, or

(3) Upon entry of the jury verdict under subdivision (j) below,

(A) The district judge shall upon receiving due proof that such compensation and separate sums, if any be certified, have been paid to the parties entitled to the same, or have been deposited to the credit of such parties in the county treasury, or other place for that purpose approved by the court, make and cause to be entered an order describing the real or personal property taken, the compensation ascertained, and the mode of making compensation or deposit thereof as aforesaid; and

(B) A certified copy of said order shall be recorded and indexed in the office of the register of deeds of the proper county; and

(C) Upon the entry of such order, the plaintiff shall have such rights in the condemned property as are granted to the plaintiff by the statutes of this state authorizing the exercise of the power of eminent domain by plaintiff and which have been the subject matter of the action.

(j) *Formal trial; jury trial.* — If a judgment has been entered on the basis of informal proceedings, any party may file, within 30 days after such entry of judgment, a written demand for a formal trial to the court or for a jury trial, whereupon the action shall proceed as though no informal proceedings had occurred. If an assessment has been made by appraisers, any party not satisfied with the award may file, within 30 days after the certificate of assessment has been filed, a written demand for a trial by jury on the issue of just compensation, whereupon the action shall proceed to a jury trial on that issue.

(1) *Demand.* — The demand, whether for a formal trial to the court or for a jury trial, shall be filed with the clerk and served upon the other parties in accordance with Rule 5(b).

(2) *Procedure.* — The formal trial or trial by jury shall be conducted in the same manner as other civil actions.

(3) *Decision; Verdict.* — If the action is tried without jury, the court shall determine the compensation to be made to the defendant or defendants, and shall

render its decision in writing, and enter its judgment accordingly. If the action is tried with jury, the jury shall determine these matters, and shall render its verdict in writing, signed by the foreman, and the verdict shall be entered in the record.

(k) *Dismissal of action.* —

(1) *As of Right.* — If no certificate of appraisers has been filed and the plaintiff has not acquired the title or a lesser interest in or taken possession, the plaintiff may dismiss the action as to that property, without an order of the court, by filing a notice of dismissal setting forth a brief description of the property as to which the action is dismissed.

(2) *By Stipulation.* — Before the entry of any judgment vesting the plaintiff with title or a lesser interest in or possession of property, the action may be dismissed in whole or in part without an order of the court as to any property by filing a stipulation of dismissal by the plaintiff and defendant affected thereby; and, if the parties so stipulate, the court may vacate any judgment that has been entered.

(3) *By Order of the Court.* — At any time before compensation for a piece of property has been determined and paid and after motion and hearing, the court for good cause shown may dismiss the action as to that property, except that it shall not dismiss the action as to any part of the property of which the plaintiff has taken possession or in which the plaintiff has taken title or a lesser interest, but shall award just compensation for the possession, title or lesser interest so taken. The court at any time may drop a defendant unnecessarily or improperly joined.

(4) *Effect.* — Except as otherwise provided in the notice, or stipulation of dismissal or order of the court, any dismissal is without prejudice.

(l) *Deposit and its distribution.* — The plaintiff shall deposit with the court any money or bond required by law as a condition to the exercise of the power of eminent domain, or as a condition to the right of continuing or obtaining immediate possession. In such cases the court and attorneys shall expedite the proceedings for the distribution of the money so deposited and for the ascertainment and payment of just compensation. Interest shall not accrue as to the sum deposited by the plaintiff from and after the time the deposit becomes available for distribution to the defendant or defendants. If the compensation finally awarded to any defendant exceeds the amount which has been paid to that defendant on distribution of the deposit, the court shall enter judgment against the plaintiff and in favor of that defendant for the deficiency. If the compensation finally awarded to any defendant is less than the amount which has been paid to that defendant, the court shall enter judgment against that defendant and in favor of the plaintiff for the overpayment.

(m) *Costs.* — In any proceeding under this rule costs may be allowed and apportioned between the parties on the same or adverse sides in the discretion of the court as authorized by statute or by rule of this court.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 71A of the Federal Rules of Civil Procedure.

The purpose of this rule is to require a plaintiff in condemnation to arrange with the court for a time and place when a hearing can be had. This obviously is because the time for appearance is shorter than in the usual action, and pleadings prior to hearing are not necessarily required. Robertson v. State Hwy. Comm'n, 450 P.2d 1003 (Wyo. 1969).

The application for fixing of a time and place when hearing can be had would be an ex parte matter. Robertson v. State Hwy. Comm'n, 450 P.2d 1003 (Wyo. 1969).

Purpose of required description is to give general notice to all who will be concerned what lands are contemplated by the condemnation. Coronado Oil Co. v. Grieves, 603 P.2d 406 (Wyo. 1979).

Adequate procedures available to prevent surprise. — Adequate procedures for discovery, pretrial conferences, and other methods of delineating issues and positions are available under the Wyoming Rules of Civil Procedure to prevent surprise in condemnation cases as well as other actions. State Hwy. Comm'n v. Laird, 426 P.2d 439 (Wyo. 1967).

Show cause hearing held on less than fifteen days notice. — Although holding a show cause hearing five days after the condemnees were served with the condemnor's motion for immediate entry, despite the

condemnees' objection, was error, the error was not reversible as the condemnees did not address on appeal the nature of any harm they may have incurred as a result of the district court's decision to hold the hearing over their objection. Conner v. Bd. of County Comm'rs, 54 P.3d 1274 (Wyo. 2002).

Burden of proof. — Landowners in eminent domain cases have the burden of proving their damages. State Hwy. Comm'n v. Laird, 426 P.2d 439 (Wyo. 1967); Coronado Oil Co. v. Grieves, 642 P.2d 423 (Wyo. 1982); Energy Transp. Sys. v. Mackey, 650 P.2d 1152 (Wyo. 1982).

When failure to instruct on burden of proof deemed error. — Failure to give instructions on burden of proof and preponderance of evidence in condemnation cases, where the landowners have that burden of proof, is error. Energy Transp. Sys. v. Mackey, 650 P.2d 1152 (Wyo. 1982).

When a prima facie case has been made indicating damage resulting as a natural and necessary incident of the improvement, if the condemnor claims the damage resulted from negligence and a tort, it has the responsibility of going forward with proof sufficient to overcome the prima facie case of the owners. State Hwy. Comm'n v. Laird, 426 P.2d 439 (Wyo. 1967).

Appraisers' recommendations not weighed by jury. — The involvement of appraisers in effect constitutes a panel like a special master to advise the court, and the product of the appraisers' deliberations and consideration of just compensation should not be weighed in the balance of evidence at a jury trial, which clearly is a determination de novo and not a review of the appraisers' recommendation. L.U. Sheep Co. v. Board of County Comm'rs, 790 P.2d 663 (Wyo. 1990).

Judgment as a matter of law. — Although a jury demand was made pursuant to Wyo. R. Civ. P. 71.1(j) and a jury trial was held on the issue of compensation, judgment as a matter of law was properly granted where the condemnees did not meet their burden to prove damages by establishing by competent evidence the values of their property before and after the taking. Conner v. Bd. of County Comm'rs, 54 P.3d 1274 (Wyo. 2002).

Damages in road establishment proceeding. — This rule was invoked by requirement in road establishment statute that damages be determined "as in a civil action"; district court was therefore required, on appeal, to conduct a trial de novo in order to determine damages to land owner in road establishment proceeding. Thunderbasin Land, Livestock & Inv. Co. v. County of Laramie, 5 P.3d 774 (Wyo. 2000).

Crop damage is not usually a compensable item, but it may be proper for such damage to be included as a part of owners' damage to the remaining portions of their land. State Hwy. Comm'n v. Laird, 426 P.2d 439 (Wyo. 1967).

When condemnee entitled to interest. — Where a jury award exceeds the amount initially deposited to the credit of the condemnee, the condemnee is entitled to interest on the difference between amounts of the deposit and the just compensation fixed at the time of the order of award (time of taking) and later increased by the jury, measured from the date of the order of award. Associated Enters., Inc. v. Toltec Watershed Imp. Dist., 656 P.2d 1144 (Wyo. 1983).

Applied in State Hwy. Comm'n v. Scrivner, 641 P.2d 735 (Wyo. 1982); Snodgrass v. Rissler & McMurry Co., 903 P.2d 1015 (Wyo. 1995); Wyo. Res. Corp. v. T-Chair Land Co., 49 P.3d 1009 (Wyo. 2002); Bridle Bit Ranch Co. v. Basin Elec. Power Coop., 118 P.3d 996 (Wyo. 2005).

Quoted in State ex rel. Cities Serv. Gas Co. v. District Court, 626 P.2d 78 (Wyo. 1981).

Cited in McGuire v. McGuire, 608 P.2d 1278 (Wyo. 1980); Continental Pipe Line Co. v. Irwin Livestock Co., 625 P.2d 214 (Wyo. 1981); Canyon View Ranch v. Basin Elec. Power Corp., 628 P.2d 530 (Wyo. 1981); Town of Wheatland v. Bellis Farms, Inc., 806 P.2d 281 (Wyo. 1991); TZ Land & Cattle Co. v. Grieve, 887 P.2d 511 (Wyo. 1994).

Law reviews. — For comment, "Wyoming Eminent Domain Act: Comment on the Act and Rule 71.1 of the Wyoming Rules of Civil Procedure," see XVIII Land & Water L. Rev. 739 (1983).

For comment, "The Use of Opinion Testimony for Valuing Real Property in an Eminent Domain Suit," see XIX Land & Water L. Rev. 43 (1984).

For article, "Supreme Court Jurisdiction and the Wyoming Constitution: Justice v. Judicial Restraint," see XX Land & Water L. Rev. 159 (1985).

Am. Jur. 2d, ALR and C.J.S. references. — Necessity of trial separate from main condemnation trial, to determine divided interest in state condemnation award, 94 ALR3d 696.

Right of owner of land not originally taken or purchased as part of adjacent project to recover, on enlargement of project to include adjacent land, enhanced value of property by reason of proximity to original land, 95 ALR3d 752.

Eminent domain: unity or contiguity of separate properties sufficient to allow damages for diminished value of parcel remaining after taking of other parcel, 59 ALR4th 308.

Eminent domain: industrial park or similar development as public use justifying condemnation of private property, 62 ALR4th 1183.

Dismissal, under Rule 71A(i)(3) of Federal Rules of Civil Procedure, of defendant unnecessarily or improperly joined in condemnation action, 57 ALR Fed 490.

IX. DISTRICT COURTS AND CLERKS

Rule 77. District courts and clerks; notice of an order or judgment.

(a) *District Courts Always Open.* — The district courts shall be deemed always open for the purpose of filing any pleading or other paper, of issuing and returning any mesne or final process, and of making and directing all interlocutory motions, orders and rules.

(b) *Trials and Hearings; Orders in Chambers.* — All trials upon the merits shall be conducted in open court and, so far as convenient, in a regular courtroom. Any other act or proceeding may be done or conducted in chambers without the attendance of the clerk or other court officials and at any place within the state; but no hearing, other than one ex parte, may be conducted outside of the county in which the action is pending without the consent of all parties affected thereby who are not in default.

(c) *The Clerk's Office Hours; Clerk's Orders.* —

(1) *Hours.* — The clerk's office, with the clerk or a deputy in attendance, must be open during all business hours every day except Saturdays, Sundays, and legal holidays (by designation of the legislature, appointment as a holiday by the governor or the chief justice of the Wyoming Supreme Court, or any day designated as such by local officials).

(2) *Orders.* — All motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgments, for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but the clerk's action may be suspended, altered or rescinded by the court upon cause shown.

(d) *Service of Orders or Judgments.* —

(1) *Service.* — Immediately upon the entry of an order or judgment the clerk shall provide and serve a copy thereof to every party who is not in default for failure to appear. The clerk shall record the date of service and the parties served in the docket. Service by the clerk may be accomplished by mail, hand delivery, clerk's boxes, or electronic means. The clerk shall provide envelopes and postage for the mailings. If service is accomplished by electronic means, this rule supersedes the requirements of W.S. § 5-3-210 to attach the seal of the court to all writs and orders. Any party may in addition serve a notice of such entry in the manner provided in Rule 5(b) for the service of papers.

(2) *Time to Appeal Not Affected by Lack of Notice.* — Lack of notice of the entry by the clerk does not affect the time to appeal or relieve, or authorize the court to relieve, a party for failure to appeal within the time allowed, except as permitted by the Wyoming Rules of Appellate Procedure.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 77 of the Federal Rules of Civil Procedure.

Service of orders. — For sanctions purposes, no hearing is required in the case of an unexplained failure to comply; the onus was on counsel to provide an explanation for his failure to file required pretrial pleadings and appear for the conference, but he did nothing, such that the trial court was well within its discretion to impose the sanction it did in limiting his presentation of evidence without holding a hearing beforehand; nowhere in the record did he ever say that he was unaware that orders were served on attorneys through the clerk's boxes. Goforth v. Fifield, — P.3d —, 2015 Wyo. LEXIS 93 (Wyo. 2015).

Untimely filing of notice of appeal. — Subdivision (d) bars relief from the untimely filing of a notice of appeal when the sole reason asserted for relief is the failure of a litigant to receive notice of the entry of a judgment. Ahearn v. Anderson-Bishop Partnership, 946 P.2d 417 (Wyo. 1997).

Where a party does not learn of a judgment until after the time provided in W.R.A.P. 2.01(a)(i) to file notice of an appeal, relief under W.R.C.P. 60(b) is available only where the party has shown due diligence, sufficient reason for the lack thereof, or other special circumstances. Ahearn v. Anderson-Bishop Partnership, 946 P.2d 417 (Wyo. 1997).

Cited in Martellaro v. Sailors, 515 P.2d 974 (Wyo. 1973); Atkins v. HFC, 581 P.2d 193 (Wyo. 1978).

Rule 78. Hearing motions; decision on briefs.

(a) *Providing a Regular Schedule for Oral Hearings. .* — A court may establish regular times and places for oral hearings on motions.

(b) *Providing for Decision on Briefs.* — The court may provide for submitting or deciding motions on briefs, without oral hearings.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to the first paragraph of Rule 78 of the Federal Rules of Civil Procedure.

Applied in Kimbley v. City of Green River, 642 P.2d 443 (Wyo. 1982); Kimbley v. City of Green River, 663 P.2d 871 (Wyo. 1983).

Am. Jur. 2d, ALR and C.J.S. references. — 56 Am. Jur. 2d Motions, Rules and Orders §§ 1, 7, 8.

60 C.J.S. Motions and Orders §§ 8, 37(1) to 37(3).

Rule 79. Books and records kept by the clerk.

(a) *Books and Records.* — Except as herein otherwise specifically provided, the clerk of court shall keep books and records as provided by statute.

(b) *Other Books and Records.* — The clerk of court shall also keep such other books, records, data and statistics as may be required from time to time by the Supreme Court or the judge of the district in which the clerk is acting.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar in scope to Rule 79 of the Federal Rules of Civil Procedure.

Rule 80. Stenographic transcript as evidence.

If stenographically reported testimony at a hearing or trial is admissible in evidence at a later trial, the testimony may be proved by a transcript certified by the person who reported it.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 80(c) of the Federal Rules of Civil Procedure.

X. GENERAL PROVISIONS

Rule 81. Applicability in general.

Statutory provisions shall not apply whenever inconsistent with these rules, provided:

(a) that in special statutory proceedings any rule shall not apply insofar as it is clearly inapplicable; and

(b) where the statute creating a special proceeding provides the form, content, time of service or filing of any pleading, writ, notice or process, either the statutory provisions relating thereto or these rules may be followed.

(Added February 2, 2017, effective March 1, 2017.)

Petition for post-conviction relief was continuation of criminal case and not civil action, and it was not appropriate to apply the Wyoming Rules of Civil Procedure to the extent urged. Specifically, the filing of the petition was not, in itself, sufficient to create entitlement to a evidentiary hearing; supporting documents were required to be attached. State ex rel. Hopkinson v. District Court, 696 P.2d 54 (Wyo.), cert. denied, 474 U.S. 865, 106 S. Ct. 187, 88 L. Ed. 2d 155 (1985).

Applied in Strahan v. Strahan, 400 P.2d 542 (Wyo. 1965).

Quoted in RHF v. RMC, 774 P.2d 624 (Wyo.

1989); Squillace v. Kelley, 990 P.2d 497 (Wyo. 1999).

Stated in Weiss v. State ex rel. Leimback, 435 P.2d 280 (Wyo. 1967).

Law reviews. — For article, "Wyoming Practice," see 12 Wyo. L.J. 202 (1958).

Am. Jur. 2d, ALR and C.J.S. references. — 14 Am. Jur. 2d Certiorari § 1 et seq.

Right to compensation of retired employee receiving pension or the like, 56 ALR3d 520.

Discharge for absenteeism or tardiness as affecting right to unemployment compensation, 58 ALR3d 674.

Status, in federal court, of judgment or order rendered in state court before removal of case, 2 ALR Fed 760.

When period for filing petition for removal of civil action from state court to federal district court begins to run under 28 USC § 1446(b), 16 ALR Fed 287.

What constitutes ancillary, incidental or auxiliary cause of action, so as to preclude its removal from state to federal court, 18 ALR Fed 126.

Civil actions removable from state court to federal district court under 28 USC § 1443, 28 ALR Fed 488.

14 C.J.S. Certiorari § 1 et seq.; 73A C.J.S. Public Administrative Law and Procedure §§ 172 to 271; 77 C.J.S. Removal of Causes § 1 et seq.

Rule 82. Jurisdiction and venue unaffected.

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 82 of the Federal Rules of Civil Procedure.

Rules govern procedure but not substantive rights or jurisdiction. — The rules by their own pronouncement, as well as by the enabling statutes, §§ 5-2-115 and 5-2-116, govern procedure but do not abridge, enlarge, or modify the substantive rights of persons or the jurisdiction of a court. State ex rel. Frederick v. District Court, 399 P.2d 583 (Wyo. 1965).

Cited in Sellers v. Employment Sec. Comm'n, 760 P.2d 394 (Wyo. 1988).

Am. Jur. 2d, ALR and C.J.S. references. — 77 Am. Jur. 2d Venue §§ 1 to 5.

92A C.J.S. Venue § 1 et seq.

Rule 83. Rules by courts of record; judge's directives.

(a) *Uniform Rules.* —

(1) *In General.* — A court conference, acting by a majority of the judges of the conference and approval by the Supreme Court, may adopt and amend uniform rules governing its practice. A uniform rule must be consistent with — but not duplicate — Wyoming statutes and rules. A uniform rule takes effect on the date specified by the Supreme Court and remains in effect unless amended by the court. Approved uniform rules shall be published in the Wyoming Court Rules volume.

(2) No court may establish rules of procedure applicable only in that court.

(3) *Requirement of Form.* — A uniform rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply.

(b) *Procedure When There is No Controlling Law.* — A judge may regulate practice in any manner consistent with state law, rules, and the uniform rules. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in state law, state rules, or the uniform rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

(Added February 2, 2017, effective March 1, 2017.)

Source. — This rule is similar to Rule 83 of the Federal Rules of Civil Procedure.

No authority for local rules pertaining to appeals. — The Wyoming Rules of Appellate Procedure do not encompass any authorization for the adoption of local rules pertaining to appeals. Wood v. City of Casper, 660 P.2d 1163 (Wyo. 1983).

Quoted in Bi-Rite Package, Inc. v. District Court, 735 P.2d 709 (Wyo. 1987).

Stated in Ballinger v. State, 437 P.2d 305 (Wyo. 1968); Torrey v. Twiford, 713 P.2d 1160 (Wyo. 1986).

Cited in Bowman v. Worland School Dist., 531 P.2d 889 (Wyo. 1975).

Am. Jur. 2d, ALR and C.J.S. references.

— Consent as ground of vacating judgment, or granting new trial, in civil case, after expiration of term or time prescribed by statute or rules of court, 3 ALR3d 1191.

Validity and effect of local district court rules providing for use of alternative dispute resolution procedures as pretrial settlement mechanisms, 86 ALR Fed 211.

Rule 84. Forms.

No forms are provided with these rules.
(Added February 2, 2017, effective March 1, 2017.)

Source. — The first paragraph of this rule is similar to Rule 84 of the Federal Rules of Civil Procedure.

Quoted in Rocky Mt. Helicopters, Inc. v. Air Freight, Inc., 773 P.2d 911 (Wyo. 1989).

Rule 85. Title.

These rules shall be known as the Wyoming Rules of Civil Procedure and may be cited as W.R.C.P.
(Added February 2, 2017, effective March 1, 2017.)

Rule 86. Effective dates.

(a) *In General.* — These rules take effect on March 1, 2017. They govern:
(1) proceedings in an action commenced after their effective date; and
(2) proceedings after that date in an action then pending unless:
(A) the Supreme Court specifies otherwise; or
(B) the court determines that applying them in a particular action would be infeasible or work an injustice.

(b) *Amendments and additions.* — Amendments or additions to these rules shall take effect on dates to be fixed by the supreme court subject to the exception above set out as to pending actions. If no date is fixed by the supreme court, the amendments or additions take effect 60 days after their publication in the Pacific Reporter Advance Sheets.
(Added February 2, 2017, effective March 1, 2017.)

Cross References. — As to effective date of revised rules, see the editor's note following the analysis of this rules set.

Am. Jur. 2d, ALR and C.J.S. references. — 82 C.J.S. Statutes §§ 372, 388 to 431.