

# Washington Law Review

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Volume 56 | Number 4

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11-1-1981

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### Recommended Citation

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## PLEADING PRINCIPLES AND PROBLEMS IN WASHINGTON

Philip A. Trautman\*

It has now been a little over two decades since the present rules governing pleading became effective in Washington.<sup>1</sup> It was on January 1, 1960 that the pertinent Washington Civil Rules, patterned after the Federal Rules of Civil Procedure, took effect.<sup>2</sup> With some twenty years of experience to draw upon, it seems appropriate to review that experience with the hope of embellishing the stark provisions of the rules themselves, clarifying some of the problems that have arisen, and evaluating whether the objectives sought in the rules have been achieved.<sup>3</sup>

Perhaps the most commonly stated objective of the present pleading rules was to simplify the pleading stage of litigation.<sup>4</sup> In place of the technical fact-oriented approach of code pleading, the emphasis was to be upon notifying the opponent and the court in a general way of one's position and of the issues.<sup>5</sup> The more detailed presentation and revelation of facts and issues was to be left for the pre-trial devices such as discovery, summary judgment procedures and pre-trial conferences. It cannot be too often or too firmly stressed that the evaluation of modern rule pleading must include an awareness of those pre-trial devices.<sup>6</sup>

The objective of simplifying pleadings is achieved in part by authorizing and requiring few pleadings.<sup>7</sup> In the ordinary lawsuit there is only the

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1. The principal rules of consequence are WASH. SUPER. CT. CIV. R. 7-12 & 15.

2. The present rules relating to joinder of claims and parties became effective at the same time. They are discussed in Trautman, *Joinder of Claims and Parties in Washington*, 14 GONZ. L. REV. 103 (1978).

3. Professor Robert Meisenholder anticipated many of the problems and provided guidance in two valuable articles which preceded the effective date of the rules. Meisenholder, *The Effect of Proposed Rules 7 Through 25 on Present Washington Procedures*, 32 WASH. L. REV. 219 (1957) [hereinafter cited as Meisenholder I]; Meisenholder, *The Effect of Proposed Rules 7 Through 25 on Present Washington Procedures: Part II*, 32 WASH. L. REV. 336 (1957) [hereinafter cited as Meisenholder II]. See also R. MEISENHOLDER, COMMENTARIES ON NEW WASHINGTON RULES OF PLEADING, PRACTICE AND PROCEDURE (1959).

4. The objectives are summarized in Meisenholder I, *supra* note 3, at 220.

5. There has been some dissent from the asserted merits of general notice pleading. See L. ORLAND & D. REAUGH, 9 WASHINGTON PRACTICE x-xi (1971).

6. The devices are discussed in Trautman, *Discovery in Washington*, 47 WASH. L. REV. 409 (1972) and Trautman, *Motions for Summary Judgment: Their Use and Effect in Washington*, 45 WASH. L. REV. 1 (1970).

7. WASH. SUPER. CT. CIV. R. 7(a) lists the allowable pleadings.

complaint and answer.<sup>8</sup> A reply is required only in the event of a counterclaim denominated as such or in the unlikely instance that the court otherwise orders a reply. In addition, if the answer contains a cross-claim under Civil Rule 13, there may be an answer to such cross-claim. Finally, if a third-party complaint is served under Rule 14, there may be a third-party answer.

In essence, pleading under the rules is a two-stage affair with respect to each claim in the great majority of instances. There is a complaint and answer, a counterclaim and reply (in effect an answer), a cross-claim and answer, and a third-party complaint and third-party answer. No other pleading is permitted except if the court orders a reply to an answer or a third-party answer.

The other general change made by the rules as to the type of pleading was the abolishment of demurrers, pleas and exceptions for insufficiency of pleadings.<sup>9</sup> Of these the most important was the demurrer. In its place is the motion to dismiss for failure to state a claim, which is discussed in detail later.

## I. GENERAL PRINCIPLES OF PLEADING

The party seeking relief must set forth a claim for relief whether it be the original claim, a counterclaim, a cross-claim or a third-party claim. This is to consist of a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief to which the pleader is entitled.<sup>10</sup> This statement of a claim replaces the code-pleading requirement that the complaint state facts constituting a cause of action.<sup>11</sup> Instead of a detailed recitation of the ultimate facts upon which the claim is based, the pleader is to give fair notice to the court and the opponent of the general nature of the claim asserted and the ground upon which it rests.<sup>12</sup>

The stated claim is to be viewed liberally in favor of the pleader. Consequently, a complaint is not to be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts

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8. Under WASH. SUPER. CT. CIV. R. 81(a), statutes applicable to special proceedings may specify that other pleadings be used. In accordance therewith, *Snyder v. Cox*, 1 Wn. App. 457, 462 P.2d 573 (1969), held that a plaintiff in a garnishment action must file an affidavit controverting the garnishee's answer.

9. WASH. SUPER. CT. CIV. R. 7(c). An early, soundly reasoned case discussing the effect of the abolishment was *Sherwood v. Moxee School Dist.* No. 90, 58 Wn. 2d 351, 363 P.2d 138 (1961). The abolishment was not retroactive. *McDowell v. Burke*, 57 Wn. 2d 794, 359 P.2d 1037 (1961).

10. WASH. SUPER. CT. CIV. R. 8(a).

11. *Adams v. Allstate Ins. Co.*, 58 Wn. 2d 659, 364 P.2d 804 (1961).

12. *Mills v. Orcas Power & Light Co.*, 56 Wn. 2d 807, 355 P.2d 781 (1960).

in support of his claim which would entitle him to relief.<sup>13</sup> More definitive guidelines of when this is and is not accomplished will be developed in the later discussion of the motion to dismiss for failure to state a claim.

As indicated, a claim for relief is to include a demand for judgment for the relief to which the pleader deems himself entitled. A statute adopted in 1976<sup>14</sup> significantly affects the manner in which the relief desired may be stated. Thereunder, in a civil action for personal injuries, the complaint is not to contain a statement of the damages sought but instead a prayer for damages as shall be determined. The defendant may request a statement setting forth separately the amounts of any special and general damages sought, and the plaintiff is then to make service of such a statement within fifteen days after service of the request.

A question that arises under the statute is whether the failure of the plaintiff originally to comply, as by stating the damages claimed in the complaint, provides a basis for recovery by the defendant. In *McNeal v. Allen*<sup>15</sup> the plaintiff sought damages in the stated amount of \$500,000 in a medical malpractice action. The defendants asserted in a counterclaim that the allegation of damages violated the statute thereby entitling the defendants to recover. The defendants also filed a “third-party complaint” against the plaintiff’s attorneys based upon the same allegations.<sup>16</sup> The trial court dismissed these pleadings by the defendants and at the same time struck the stated amount of damages from the complaint. In a seven to two opinion, the Washington Supreme Court affirmed. The majority treated the defendants’ claim as one for injury to reputation and held the allegedly libelous statements to be absolutely privileged. The court suggested that violations of the statute could be curbed by striking the improper allegations from the pleadings and, if necessary, by reprimanding, fining and punishing the plaintiff’s attorneys.

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13. *Callahan v. Keystone Fireworks Mfg. Co.*, 72 Wn. 2d 823, 435 P.2d 626 (1967) (allegation of negligence and failure to warn sufficient); *Scharf v. Harstad*, 61 Wn. 2d 188, 377 P.2d 416 (1963) (failure to allege causal relationship not fatal); *Lightner v. Balow*, 59 Wn. 2d 856, 370 P.2d 982 (1962) (allegation broad enough to allow evidence that city was acting in proprietary capacity); *Christensen v. Swedish Hosp.*, 59 Wn. 2d 545, 368 P.2d 897 (1962) (allegation of malicious threat to refer matter to prosecuting attorney sufficient); *Seattle Professional Photographers Ass’n v. Sears, Roebuck & Co.*, 9 Wn. App. 656, 513 P.2d 840 (1973) (allegation of sales of photographic products as “loss leaders” sufficient). *See also Silver Surprise, Inc. v. Sunshine Mining Co.*, 74 Wn. 2d 519, 445 P.2d 334 (1968) (subject-matter jurisdiction dependent on nature of claim and relief sought as set forth in complaint).

14. WASH. REV. CODE § 4.28.360 (1979).

15. 95 Wn. 2d 265, 621 P.2d 1285 (1980).

16. It appears that labeling the claim against the attorneys as a third-party proceeding under Civil Rule 14 was incorrect as the defendants were not asserting that the attorneys were liable to the defendants for the claim by the plaintiff against the defendants. Instead the attorneys should have been joined as parties to the counterclaim under Civil Rule 13(h).

The relief sought in any proceeding may be in the alternative or of different types.<sup>17</sup> In the event relief is sought in the alternative, the plaintiff has no basis to complain if he is awarded the lesser relief desired. Thus, where the plaintiff brought an action for breach of contract and prayed for damages or "such other and different judgment in law and in equity" as appropriate, the plaintiff had no basis for reversal of a judgment which permitted the defendant to specifically perform.<sup>18</sup>

Even if alternative relief is not demanded, the plaintiff is not restricted to the relief requested. To the contrary, a judgment should grant the relief to which the party in whose favor it is rendered is entitled.<sup>19</sup> The exception is a judgment by default, which is not to be different in kind or exceed the amount prayed for in the pleadings.<sup>20</sup> The reason for the exception is that the defaulting party might have appeared had the party known the award was to be different from, or greater than, that requested.

Adopting the present rule relating to the general form of denials did not substantially change the earlier practice in Washington and no particular problems appear to have arisen.<sup>21</sup> The expectation is that the defendant will admit and deny the averments of the adverse party with particularity and, when appropriate, will deny only parts of an averment and specify so much as is true.<sup>22</sup> Ordinarily, the denials will be specific in nature. In the unusual circumstance wherein the defendant can in good faith controvert

17. WASH. SUPER. CT. CIV. R. 8(a).

18. *Baylor v. Municipality of Metropolitan Seattle*, 75 Wn. 2d 710, 453 P.2d 829 (1969).

19. WASH. SUPER. CT. CIV. R. 54(c). The principle applies to the award of attorneys' fees. *Hos Bros. Bulldozing, Inc. v. Hugh S. Ferguson Co.*, 8 Wn. App. 769, 508 P.2d 1377 (1973). See also *Interstate Hosts, Inc. v. Airport Concessions, Inc.*, 71 Wn. 2d 487, 429 P.2d 245 (1967); *Mazon v. Druxman*, 68 Wn. 2d 701, 415 P.2d 86 (1966); *Lester v. Percy*, 58 Wn. 2d 501, 364 P.2d 423 (1961) (excellent discussion by Foster, J., concurring).

20. *Davis v. Bafus*, 3 Wn. App. 164, 473 P.2d 192 (1970). A footnote by the court in the recent case of *McNeal v. Allen*, 95 Wn. 2d 265, 266 n.1, 621 P.2d 1285, 1286 n.1 (1980), creates some confusion. The court said:

It is not disputed that the statement of the amount of damages claimed was inadvertent. Prior to the enactment of RCW 4.28.360, the amount of the claim properly was included in the complaint, both under statute (RCW 4.32.040(3)) and court rule (CR 8(a)). This practice was deemed necessary to give notice to the defendant, and because of the rule that the judgment may not exceed the amount claimed in the complaint, unless the claim has been amended before the case has been submitted. See *McKelvie v. Hackney*, 58 Wn. 2d 23, 360 P.2d 746 (1961); *Ware v. Phillips*, 77 Wn. 2d 879, 468 P.2d 444 (1970). Whether, under RCW 4.28.360, that rule has been abrogated in personal injury actions, is a question not presently before the court.

To the extent the quotation suggests that the "rule" generally governs, the statement seems erroneous. The *McKelvie* case states the Washington position prior to adoption of Civil Rule 54(c). The *Ware* case involved a default and while it contained dicta that a judgment may not exceed the demand of the complaint, even in the absence of a default, it cited as authority cases representing the pre-Civil Rule 54(c) doctrine.

21. See *Meisenholder I*, *supra* note 3, at 234-35.

22. WASH. SUPER. CT. CIV. R. 8(b).

all the averments of the adversary, a general denial is permissible.<sup>23</sup> Also permissible, and more likely justifiable, is a statement by the defendant that he is without knowledge or information sufficient to form a belief as to the truth of an averment. Such a statement has the effect of a denial. All denials are subject to the obligations set forth in Civil Rule 11, discussed later.

While the provisions relating to denials have generated little case law, the contrary has been true as to affirmative defenses. The purpose in requiring that certain defenses be pleaded affirmatively is to avoid surprising the adversary.<sup>24</sup> The thought is that, as to those defenses, the adversary would be surprised if evidence were admissible simply on the basis of a denial.

To provide some guidance to the defendant as to what is to be pleaded, Civil Rule 8(c) lists nineteen affirmative defenses. The designated defenses which "shall" be pleaded affirmatively are accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations and waiver. In determining whether a designated defense has been pleaded, the court presumably will interpret the pleading liberally in favor of the pleader.<sup>25</sup>

If, despite a liberal construction, a designated defense is not pleaded, evidence in support of that defense will not be admitted. For example, several cases have held that a failure to plead estoppel or waiver precludes considering those defenses.<sup>26</sup> It is to be noted that this duty to plead waiver relates to defenses. It does not impose a duty on the plaintiff to plead matters in anticipation of their being raised affirmatively by the defendant.<sup>27</sup>

Of the other designated defenses, those which seem to have been most often lost as a result of a failure to plead are contributory (and now, per-

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23. A general denial verified only by the party's attorney, who lacked personal knowledge of the facts denied, was not sufficient to meet an affidavit of the adversary in a summary judgment proceeding. *Carlson v. Milbrad*, 68 Wn. 2d 847, 415 P.2d 1020 (1966).

24. *Mahoney v. Tingley*, 85 Wn. 2d 95, 529 P.2d 1068 (1975).

25. *Seattle-First Nat'l Bank v. Pearson*, 63 Wn. 2d 890, 389 P.2d 665 (1964) (defendant's affirmative defense of fraud interpreted to encompass theory of failure of consideration; however, evidence did not support theory).

26. *Farmers Ins. Co. v. Miller*, 87 Wn. 2d 70, 549 P.2d 9 (1976); *Fiorito v. M. A. Segale, Inc.*, 18 Wn. App. 158, 566 P.2d 1268 (1977); *Bonanza Real Estate v. Crouch*, 10 Wn. App. 380, 517 P.2d 1371 (1974).

27. *Clover Park School Dist. No. 400 v. Consolidated Dairy Prods. Co.*, 15 Wn. App. 429, 550 P.2d 47 (1976) (plaintiff not obligated under Civil Rule 8(c) to plead waiver of a right to rescind by defendant).

haps, comparative) negligence,<sup>28</sup> *res judicata*,<sup>29</sup> and the running of a statute of limitations.<sup>30</sup> This most often creates a problem for the defendant when evidence of the defense is excluded or there is a refusal to instruct the jury on the defense.<sup>31</sup>

In addition to the nineteen specifically designated defenses, Civil Rule 8(c) requires pleading "any other matter constituting an avoidance or affirmative defense." This has been construed to mean any matter that does not merely controvert the plaintiff's *prima facie* case, or that injects an issue not raised by the plaintiff's pleading, or that is directed at avoiding rather than destroying the plaintiff's case.<sup>32</sup> The effect of such an approach is not self-evident and is best appreciated by noting some results. It has been held that the following constitute affirmative defenses: insufficient service of process,<sup>33</sup> revocation of acceptance of a product,<sup>34</sup> *ultra vires*,<sup>35</sup> and abandonment in an action for forcible entry and detainer.<sup>36</sup> Probably the safest approach for the defendant when in doubt is to plead a matter affirmatively rather than take the chance that the issue can be raised under a denial.

By pleading affirmatively the defendant avoids the possibility of waiving the particular defense. It is also possible, of course, that in adopting this approach, a defendant will thereby plead something which would have been available simply with a denial. A conceivable tactical disadvantage in this is that a defense may be highlighted which otherwise might not readily appear until the trial, thereby causing the defendant to lose the element of surprise. Balanced against this are the factors of the propriety of such tactics, the likelihood that the defense will become apparent during discovery in any event, the benefit gained as a result of

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28. *Boley v. Larson*, 69 Wn. 2d 621, 419 P.2d 579 (1966); *Golub v. Mantopli*, 65 Wn. 2d 361, 397 P.2d 433 (1964); *Hughey v. Winthrop Motor Co.*, 61 Wn. 2d 227, 377 P.2d 640 (1963); *Liesey v. Wheeler*, 60 Wn. 2d 209, 373 P.2d 130 (1962).

29. *Meder v. CCME Corp.*, 7 Wn. App. 801, 502 P.2d 1252 (1972); *Banchero v. City Council*, 2 Wn. App. 519, 468 P.2d 724 (1970).

30. *Davis v. Nielson*, 9 Wn. App. 864, 515 P.2d 995 (1973). *Cf. Matthies v. Knodel*, 19 Wn App. 1, 573 P.2d 1332 (1977) (notice of appearance by defendant held not to have constituted waiver of defense of statute of limitations which was thereafter pleaded in the answer).

31. *Haslund v. Seattle*, 86 Wn. 2d 607, 547 P.2d 1221 (1976).

32. *Shinn Irrigation Equip., Inc. v. Marchand*, 1 Wn. App. 428, 462 P.2d 571 (1969) (in an action upon an open account for goods delivered, a defense that the charges therefor were subject to an oral agreement had to be pleaded and could not be supported under a denial).

33. *Raymond v. Fleming*, 24 Wn. App. 112, 600 P.2d 614 (1979). The defense may also be raised by motion under WASH. SUPER. CT. CIV. R. 12(b)(5).

34. *Allis-Chalmers Corp. v. Sygitowicz*, 18 Wn. App. 658, 571 P.2d 224 (1977).

35. *Rutcosky v. Tracy*, 89 Wn. 2d 606, 574 P.2d 382 (1978); *Chappel v. Franklin Pierce School Dist. No. 402*, 71 Wn. 2d 17, 426 P.2d 471 (1967) (*dicta*).

36. *Tuschoff v. Westover*, 65 Wn. 2d 69, 395 P.2d 630 (1964).

emphasizing the defense, and, again, the avoidance of waiver of the defense should one guess wrongly.

Another conceivable disadvantage is the possibility that the defendant will be deemed to have assumed the burden of proving an allegation which the defendant has unnecessarily affirmatively pleaded. Courts differ on this issue, but an early Washington case held that the pleading of an affirmative defense which added nothing to a denial should not itself result in incurring the burden of proof.<sup>37</sup> No cases in point have been found since the adoption of the present pleading rules, but presumably the early authority continues to control. If anything, the present policy of avoiding decisions based on the technicalities of pleading should strengthen the likelihood of a similar result.

The necessity of affirmatively pleading certain matters may in a few instances result in some issues being pleaded twice. An excellent illustration arises when the issue is one of whether payment has been made on a contract. A plaintiff suing for breach of contract because of nonpayment by the defendant must allege the nonpayment to state a claim. Presumably, the defendant must affirmatively allege payment since it is specifically listed in Civil Rule 8(c), rather than simply relying upon a denial of the plaintiff's allegation.<sup>38</sup> Certainly this is the safer course for the defendant to take to assure that there is no waiver, with the result, as stated, that the issue will be pleaded twice.

In all this one must keep in mind that the purpose of requiring affirmative pleading in the designated instances is to avoid surprising the adversary. As with most modern procedural rules, the requirement is to be read with an allowance for flexibility and not with absoluteness. A failure to plead affirmatively should be considered harmless if it does not affect the substantial rights of the parties. If the issue is litigated or argued without objection to the failure to affirmatively plead it, the failure to comply with the rule should be deemed waived.<sup>39</sup>

This flexible approach is supported by a related provision in Civil Rule 8(c). If a party mistakenly designates a defense as a counterclaim or a

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37. *Schmitz v. Mathews*, 133 Wash. 335, 233 P. 660 (1925), held that the defendant's affirmative pleading, to a complaint for money loaned, that the money was paid for stock sold, added nothing to a general denial and should not have resulted in an instruction that the defendant had the burden of proof on the issue. *See also Nissen v. Obde*, 55 Wn. 2d 527, 348 P.2d 421 (1960), in which the affirmative pleading of bad faith did not result in the incurrence of the burden of proof on that issue.

38. *West Coast Credit Corp. v. Pedersen*, 64 Wn. 2d 33, 390 P.2d 551 (1964), left open the question whether in such circumstances it was necessary to specially allege payment as an affirmative defense, though in the particular case, there had been such an affirmative allegation. The court did hold that the defendant had the burden to prove payment since it is comparatively easier for the defendant to prove he has paid than for the plaintiff to prove nonpayment, a negative.

39. *Mahoney v. Tingley*, 85 Wn. 2d 95, 529 P.2d 1068 (1975); *Hughes v. Gibbs*, 55 Wn. 2d 791, 350 P.2d 475 (1960).



counterclaim as a defense, the court is directed to accomplish justice rather than rigorously enforce conformance. Thus, the pleading is to be treated as if there had been a proper designation.

Flexibility does not, of course, justify the complete absence of a response to a claim. A failure to respond, for example, to averments in a complaint (or comparable claim) when such is required results in an admission of such averments.<sup>40</sup> On the other hand, when no response is required or permitted, averments in a pleading are taken as denied or avoided.<sup>41</sup> An example is an affirmative defense which is deemed denied without the necessity of a reply, unless the court orders otherwise.

The general approach to be taken to the drafting of a pleading is set forth in Civil Rule 8(e). No technical form is required, but each averment should be simple, concise and direct. The pleader may set forth alternate, hypothetical or inconsistent claims or defenses. This includes alternate statements of facts and of legal theories to support a claim or a defense. It matters not whether such statements are included in one count or defense or in separate counts or defenses. Further, when alternative statements are made and one of them is sufficient, the pleading is not ineffective because of any insufficiency in the other statements.<sup>42</sup>

Alternate, hypothetical and inconsistent pleading is allowed to avoid forcing the pleader to assert a position too early in the process when the pleader is not yet sure what facts may develop and what legal theories may be relevant. This can better be determined after discovery, pre-trial proceedings, and even trial have been completed. So long as the adversary receives general notice of the position of the pleader, the purpose of the pleading has been accomplished. Consequently, if at the beginning the pleader is unsure of the factual or legal situation, there is no reason the pleader should not simply so state and allow the clarification to be accomplished in the subsequent litigation process.

The court has looked favorably upon effectuating the policy described. As examples, it has permitted the pleading of alternate theories of defamation and invasion of privacy,<sup>43</sup> and of tort and contract,<sup>44</sup> for a wrong growing out of a single transaction, and the naming of alternate defen-

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40. *Thayer v. Anacortes School Dist.*, 81 Wn. 2d 709, 504 P.2d 1130 (1972); *Makah Indian Tribe v. Clallam County*, 73 Wn. 2d 677, 440 P.2d 442 (1968). A party may waive the admission by failing to raise the matter and allowing a trial to be conducted on the averments. *Card v. Western Farmers Ass'n*, 72 Wn. 2d 45, 431 P.2d 206 (1967) (plaintiff failed to respond to counterclaim, but defendant deemed to waive the matter by permitting a trial to proceed on the averments in the counterclaim).

41. WASH. SUPER. CT. CIV. R. 8(d).

42. WASH. SUPER. CT. CIV. R. 8(e)(2).

43. *Brink v. Griffith*, 65 Wn. 2d 253, 396 P.2d 793 (1964).

44. *Anderson Feed & Produce Co. v. Moore*, 66 Wn. 2d 237, 401 P.2d 864 (1965).

dants and combinations of defendants as possibly responsible for a single injury in a single transaction when the plaintiff was unsure who was responsible.<sup>45</sup>

The pleader will not be allowed a double recovery for a single wrong by such pleading<sup>46</sup> nor may the pleader thereby combine claims which require litigation before courts with different subject matter jurisdiction.<sup>47</sup> There is also the fundamental limitation that the adversary must not be misled or otherwise seriously prejudiced by the alternate, hypothetical and inconsistent pleading.<sup>48</sup> Lastly, all such pleading is subject to the good faith obligations of Civil Rule 11, discussed later.

Perhaps the best summary of the general approach to pleading is the admonition in Civil Rule 8(f) that all pleadings shall be so construed as to do substantial justice. This has led to a generally liberal, flexible and favorable construction on behalf of the pleader.<sup>49</sup> Even when parts of a pleading are found defective, the entire pleading need not be stricken, and, if stricken, leave to amend should be liberally granted.<sup>50</sup> Despite all this, there is also the fact that the concluding passage in Civil Rule 8 is that one is not to consider the adoption of the rules as an "adoption or approval" of the federal forms approved in Federal Rule 84. Certainly in 1960, and probably even today, a more conservative approach to pleading is advisable in Washington than in the federal courts. It is not inconsistent, however, to observe that as time passes Washington pleading becomes more and more like that in the federal system.

## II. PLEADING SPECIAL MATTERS

Because of peculiar problems thought to relate to certain items, specific provision is made in Civil Rule 9 as to the pleading of such items. Particular note should be taken that such provisions govern only the matter of pleading. There is no intent to shift or alter the burden of proof which otherwise exists as to such items.<sup>51</sup>

It is not necessary to aver the capacity of a party to sue or be sued, or the authority of a party to sue or be sued in a representative capacity, or the legal existence of an organized association of persons that is made a

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45. *Greene v. Rothschild*, 60 Wn. 2d 508, 374 P.2d 566 (1962).

46. *Brink v. Griffith*, 65 Wn. 2d 253, 396 P.2d 793 (1964).

47. *Hill v. Hill*, 3 Wn. App. 783, 477 P.2d 931 (1970).

48. *See Melby v. Hawkins Pontiac, Inc.*, 13 Wn. App. 745, 537 P.2d 807 (1975).

49. *See Pearson v. Vandermay*, 67 Wn. 2d 222, 407 P.2d 143 (1965); *Palmer v. Glens Falls Ins. Group*, 58 Wn. 2d 88, 360 P.2d 742 (1961).

50. *Reed v. Streib*, 65 Wn. 2d 700, 399 P.2d 338 (1965).

51. WASH. SUPER. CT. CIV. R. 9(1).

party.<sup>52</sup> This is so because in the ordinary case there is no issue as to such matters and any such averments would be purely formal in nature. Consequently, if there is an issue, it is to be raised by a "specific negative averment which shall include such supporting particulars as are peculiarly within the pleader's knowledge." Ordinarily, such a negative averment will be included in the defendant's answer.<sup>53</sup> The issue may, however, be raised by a motion to dismiss.<sup>54</sup>

Instances in which specificity is required involve averments of fraud or mistake. The circumstances constituting either must be stated with particularity, though it is not necessary that the words themselves be used if the pleading is otherwise satisfactory.<sup>55</sup> Presumably, some of the reasons for requiring specificity are the generality of meaning of such terms, the ease of making such allegations, and the possible harm to the adversary simply by virtue of the allegation, particularly in the case of fraud. On the other hand, conditions of mind of a person, such as malice, intent and knowledge, may be averred generally.<sup>56</sup> Presumably, this is because of the difficulty in describing such conditions specifically in words and the belief that adequate notice is given by the more general allegation.

Generality in pleading is also permitted as to conditions precedent. It is sufficient to plead generally that such conditions have been performed or have occurred.<sup>57</sup> This does not excuse the complete absence of reference to such conditions if they are essential to the statement of a claim.<sup>58</sup> If the adversary wishes to raise an issue about the alleged performance or occurrence, he is to do so by a specific denial of the particular condition or conditions. As previously noted, Civil Rule 9 is not intended to alter the burden of proof. Consequently, the burden of establishing the performance or occurrence of the particular conditions precedent, once identified, will rest with the proponent.<sup>59</sup>

Several subsections of Civil Rule 9 seem to have generated no problems. These include the provisions that in pleading an official document

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52. WASH. SUPER. CT. CIV. R. 9(a).

53. *Reese Sales Co. v. Gier*, 16 Wn. App. 664, 557 P.2d 1326 (1977) (the negative averment of plaintiffs' capacity was in a trial amendment; held there was "substantial compliance" with Civil Rule 9(a)).

54. *Roth v. Drainage Improvement Dist. No. 5*, 64 Wn. 2d 586, 392 P.2d 1012 (1964).

55. *McInnis & Co. v. Western Tractor & Equip. Co.*, 63 Wn. 2d 652, 388 P.2d 562 (1964). *See also Viewcrest Coop. Ass'n v. Deer*, 70 Wn. 2d 290, 422 P.2d 832 (1967).

56. WASH. SUPER. CT. CIV. R. 9(b).

57. WASH. SUPER. CT. CIV. R. 9(c).

58. It is not necessary to plead procedural conditions precedent. *Goodner v. Chicago, Mil., St. P. & Pac. R. R.*, 61 Wn. 2d 12, 377 P.2d 231 (1962) (filing of claim against county).

59. *Multi-Products Eng'r Co. v. Bellingham Steel Prods., Inc.*, 66 Wn. 2d 82, 401 P.2d 329 (1965); *Ross v. Harding*, 64 Wn. 2d 231, 391 P.2d 526 (1964). *See also Jenson v. Richens*, 74 Wn 2d 41, 442 P.2d 636 (1968).

or act, it is sufficient to aver that the document was issued or the act done in compliance with law<sup>60</sup> and that it is sufficient to aver a judgment or decision of a judicial body, domestic or foreign, without setting forth matter showing there was jurisdiction.<sup>61</sup> Also seemingly creating no problem is the provision that for the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.<sup>62</sup> This does not mean that such averments are always required, but rather that when the substantive law requires their pleading to state a claim, they shall be considered material.<sup>63</sup> Lastly in this context, no significant cases have arisen under the provision that items of special damage must be specifically stated.<sup>64</sup> Consequently, former case law continues to govern.<sup>65</sup>

Special provision is made for the pleading of law in certain instances. In pleading an ordinance it is said to be sufficient to state the title of such ordinance and the date of its passage, whereupon the court is directed to take judicial notice of the existence of the ordinance and its tenor and effect.<sup>66</sup> A failure to meet this minimum pleading requirement, either originally or by amendment, has resulted in refusals by trial and appellate courts to take judicial notice.<sup>67</sup> A recent Washington Supreme Court decision emphasizes again, however, that every effort is to be made to avoid disposing of litigation on technical, procedural considerations.<sup>68</sup> Consequently, it was held to be error to dismiss an action against a city because of the failure to plead the pertinent city ordinance. The court said that it was proper to consider the plaintiff's allegations of fact made initially on appeal in determining whether there was any state of facts supporting a valid claim. The end result was that while the plaintiff's failure to plead the ordinance by title and date would presumably preclude the court from taking judicial notice of it, the failure did not preclude the plaintiff from having stated a claim which required disposition on the merits rather than on a technical pleading violation. At the time of ruling on the motion directed at the pleading, the plaintiff was to be given the benefit of the

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60. WASH. SUPER. CT. CIV. R. 9(d).

61. WASH. SUPER. CT. CIV. R. 9(e).

62. WASH. SUPER. CT. CIV. R. 9(f).

63. See L. ORLAND, 3 WASHINGTON PRACTICE 694-95 (2d ed. 1968).

64. WASH. SUPER. CT. CIV. R. 9(g).

65. See *Pitts v. Spokane Chronicle Co.*, 63 Wn. 2d 763, 388 P.2d 976 (1964) (libelous per se publication allows recovery without alleging special damages).

66. WASH. SUPER. CT. CIV. R. 9(i). Subsection (h) is similar in providing that in the pleading of the existence of a city or town in Washington, it is sufficient to state that the city or town exists and is incorporated or organized under Washington law.

67. *State v. Martin*, 14 Wn. App. 717, 544 P.2d 750 (1976); *Gabl v. Alaska Loan & Inv. Co.*, 6 Wn. App. 880, 496 P.2d 548 (1972).

68. *Halverson v. Dahl*, 89 Wn. 2d 673, 574 P.2d 1190 (1978).

doubt that he would be able to prove at trial his right to recover because of the alleged failure of city officials to enforce building, housing and safety codes. Presumably, similar construction will be given to the provision that in the pleading of a private statute, or right thereunder, it is sufficient to refer to the statute by title and date of passage and that the court shall thereupon take judicial notice thereof.<sup>69</sup>

A subject necessitating some extended treatment is the pleading of foreign (state and country) law. Nothing directly is stated about the matter in Civil Rule 9, the rule dealing with most specialized pleading matters. Instead there is simply a reference in subsection (k) to RCW 5.24.010-.070, the Washington version of the Uniform Judicial Notice of Foreign Laws Act. This statute was adopted in 1941 and, despite the possible suggestion in the title, applies only to the law of other states of the United States, not to the law of foreign countries. As indicated by the title to the Uniform Act, it is principally concerned with specifying the circumstances and manner in which judicial notice of other states' law is to be taken.<sup>70</sup> As related to the subject of this article, the principal provision is the directive that the chapter is not to be construed to relieve a party of the duty of pleading other states' laws as required under the law and practice of this state.<sup>71</sup>

Generally this means that if one wishes to rely upon the law of another state, one must plead it.<sup>72</sup> A failure to do so results in a presumption that

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69. WASH. SUPER. CT. CIV. R. 9(j).

70. The background and effect of the Act are discussed in Comment, *Judicial Notice of Foreign Law*, 38 WASH. L. REV. 802 (1963). Earlier discussions of the subject of judicial notice may be found in Falknor, *Evidence*, 16 WASH. L. REV. 66 (1941) and 14 WASH. L. REV. 222 (1939).

A comment to Rule 201 of the Washington Rules of Evidence, prepared by the Judicial Council Task Force on Evidence, states that RCW 5.24.010 is not in conflict with and is not superseded by Rule 201, which relates to judicial notice of adjudicative facts.

71. RCW 5.24.040, when adopted in 1941, provided as follows: "*Necessity of pleading foreign laws. This chapter shall not be construed to relieve any party of the duty of hereafter pleading such laws where required under the law and practice of this state immediately prior to the enactment hereof.*"

During the 1981 legislative session, the legislature amended the statute by striking the last phrase, "immediately prior to the enactment hereof." See Senate Committee Amendment to Substitute House Bill No. 601.

It is not immediately apparent what the ramifications of the amendment may be. One possible effect is to enable the adoption of a court rule modifying the present pleading requirements, perhaps along the line of Civil Rule 44.1(a), which applies to the law of a foreign country.

The textual discussion of the subject is based upon the available authorities which preceded the adoption of the 1981 statutory amendment.

72. Comment, *supra* note 70, at 804-05, suggests two narrow exceptions to the rule that the law of other states must be pleaded, namely, (1) when suit is brought on a judgment of another state and there is a question whether the other court had personal jurisdiction over the defendant based on that state's law as to service of process, and (2) when a party relies on another state's law and is then stopped from objecting to the adversary's reliance on such law.

the law of the other state is the same as that in Washington.<sup>73</sup> This presumption has been applied most often in the context of case law, but also applies to statutory law.<sup>74</sup> Even if the parties specify the application of the law of a particular state in a contract, that law will be considered to be the same as Washington law if the other state's law is not pleaded.<sup>75</sup>

One might expect that this means that in the event of a failure to plead, the court is not compelled to take judicial notice of the foreign state's law but might exercise discretion to do so. There is authority, however, that the court is precluded from taking judicial notice.<sup>76</sup>

With such strong emphasis upon the necessity of pleading, the manner of doing so becomes of prime consequence. Unfortunately, there is some lack of clarity as to what is required. With respect to statutes, authority is divided as to whether they may be stated in substance<sup>77</sup> or must be set forth verbatim.<sup>78</sup> As to case law, no definitive statement of method has been found.<sup>79</sup> The argument in favor of allowing for a general allegation of the foreign state law, whether case or statute, is the purpose of modern pleading, namely, to give fair notice to the adversary and the court. An argument in favor of more detailed pleading in this particular instance is to aid the court in ascertaining the content of the foreign state law in order that it might be applied.<sup>80</sup> This objective could be accomplished, however, by means other than a full recitation in the pleadings.

In the final analysis the question becomes one of what prudent counsel should do. The advisable approach as to statutes is to cite and quote them verbatim and as to case law to concisely summarize it and cite the supporting authority.<sup>81</sup>

As noted, the Uniform Act previously discussed does not apply to the law of foreign countries. That subject is now governed by a court rule adopted in 1977 which provides that a party who intends to raise an issue

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73. *Investment Serv. Co. v. LaLonde*, 63 Wn. 2d 834, 389 P.2d 414 (1964); *Lappin v. Lucurell*, 13 Wn. App. 277, 534 P.2d 1038 (1975); *Save-Way Drug, Inc. v. Standard Inv. Co.*, 5 Wn. App. 726, 490 P.2d 1342 (1971).

74. *Nissen v. Gatlin*, 60 Wn. 2d 259, 373 P.2d 491 (1962) (presumption that Alaska had a statute similar to that in Washington).

75. *Granite Equip. Leasing Corp. v. Hutton*, 84 Wn. 2d 320, 525 P.2d 223 (1974).

76. *Allen v. Saccomanno*, 40 Wn. 2d 283, 242 P.2d 747 (1952).

77. *Allard v. La Plain*, 147 Wash. 497, 266 P. 688 (1928).

78. *Martin Bros. v. Nettleton*, 138 Wash. 102, 244 P. 386 (1926).

79. *But see Byrne v. Cooper*, 11 Wn. App. 549, 523 P.2d 1216 (1974), a case involving the law of a foreign nation (England), in which it was said that decisional law should be "concisely recapitulated." The *Byrne* opinion, incidentally, seems to mistakenly rely upon RCW 5.24.040 as governing the pleading of foreign country law, though RCW ch. 5.24 is directed only at foreign state law.

80. *See Edlin v. Edlin*, 42 Wn. 2d 445, 256 P.2d 283 (1953).

81. See the recommended forms in L. ORLAND & D. REAUGH, 9 WASHINGTON PRACTICE 244 (1971).

concerning the law of a foreign country shall give notice in the pleadings or other reasonable written notice.<sup>82</sup>

If such reasonable notice is not given, presumably the effect will be in accordance with prior authority. While the court will presume the unknown law of another state to be the same as Washington, such apparently is not true with the law of foreign countries, at least if the other country is not a common-law country. This was the result reached in a claim based upon the law of Japan. The Japanese law was neither pleaded nor proved and consequently the claim was dismissed.<sup>83</sup> Had the claim been based upon the law of Oregon, the presumption would have resulted in applying Washington law.

If the claim is based upon the common law of another country, there is some basis to believe that such law will be presumed to be the same as that in Washington.<sup>84</sup> If the claim has a statutory base, there is reason to doubt that it will be presumed that another common-law country has the same statutes as Washington with the result that a claim based thereon might be dismissed.<sup>85</sup>

It seems appropriate to suggest that if the court is prepared to presume that Alaska has adopted similar statutes,<sup>86</sup> a similar presumption might be made as to British Columbia. There seems to be no justifiable basis to

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82. WASH. SUPER. CT. CIV. R. 44.1(a). Subsection (b) simply refers to RCW 5.24. Subsection (c) then provides:

*Other Jurisdictions.* The court, in determining the law of any jurisdiction other than a state, territory, or other jurisdiction of the United States, may consider any relevant written material or other source, including testimony, having due regard for their trustworthiness, whether or not submitted by a party and whether or not admissible under the rules of evidence. If the court considers any material or source not received in open court, prior to its determination the court shall:

- (1) Identify in the record such material or source;
- (2) Summarize in the record any unwritten information received; and
- (3) Afford the parties an opportunity to respond thereto. The court's determination shall be treated as a ruling on a question of law.

83. *Toshoku, Ltd. v. Blackmar*, 72 Wn. 2d 10, 431 P.2d 599 (1967). The court relied upon *Philp v. Macri*, 261 F.2d 945 (9th Cir. 1958), in which the Washington-based federal court refused to presume the defamation law of Peru to be the same as that in Washington.

84. See, e.g., *Pitt v. Little*, 58 Wash. 355, 108 P. 941 (1910).

85. *Philp v. Macri*, 261 F.2d 945, 948 (9th Cir. 1958), contains the following passage:

We hold that the instant case is controlled by the principles set forth by Justice Holmes in *Cuba R. Co. v. Crosby*, 1912, 222 U.S. 473, 32 S.Ct. 132, 56 L.Ed. 274. There, the Court was unwilling to assume that the law of Cuba (*locus delicti*) was the same as the common law. Thus, as the law of Cuba had not been pleaded or proved, the judgment entered for plaintiff in the trial court was reversed. Holmes pointed out that while it might be reasonable to presume that as between two common law countries, the common law of one was the same as that of another: that even as between two such countries there would be no such presumption where a statute was involved; i.e., a statute of one would not be presumed to be a statute of the other; and where both were not common law countries, the limits of the presumption would be narrower still.

86. This occurred in *Nissen v. Gatlin*, 60 Wn. 2d 259, 373 P.2d 491 (1962).

distinguish between statutory and case law when the two countries have comparable legal principles and systems.<sup>87</sup>

Because of the potential hazards, the better practice with foreign countries as with foreign states is to cite and set forth statutes verbatim and to summarize the case law with citation to appropriate authority.<sup>88</sup> It may be expected that in the foreign country context strict pleading requirements will more often create a problem than is true with foreign state law because of the frequent need to include translations and interpretations of the foreign country's law. If the court is not flexible in imposing controls, the result may be unduly voluminous complaints and answers, which in turn will necessitate extensive research and expense before preparing a pleading. It is most important to keep in mind that fair notice is the primary consideration at this point in the process and that Civil Rule 44.1 itself allows for other "reasonable" written notice.<sup>89</sup> That same "reasonable" construction should be applied to pleadings. Lastly, if such "reasonable" construction is appropriate for pleading the law of a foreign country, it ought to be appropriate for foreign state law as well.

### III. FORM AND SIGNING OF PLEADINGS

Civil Rule 10 sets forth general guidelines and recommendations with respect to the form to be followed in preparing pleadings. No particular problems seem to have arisen with respect to these matters.

Perhaps the most important provision to note is subdivision (b) which relates to paragraphing and separation of statements. It will be recalled that a party may set forth as many separate claims or defenses as the party has regardless of consistency and may also set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or separate counts or defenses.<sup>90</sup>

Civil Rule 10(b) is intended to provide guidance in how these, and comparable matters, should be stated. Each statement of a claim or defense is to be made in numbered paragraphs with the contents of each paragraph limited "as far as practicable" to a statement of a single set of circumstances. Further, each claim based upon a separate transaction or

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87. See L. ORLAND, 3 WASHINGTON PRACTICE 698-99 (2d ed. 1968).

88. See *Byrne v. Cooper*, 11 Wn. App. 549, 523 P.2d 1216 (1974), decided before the adoption of Civil Rule 44.1.

89. After the adoption in 1977 of WASH. SUPER. CT. CIV. R. 44.1, the Washington State Judicial Council opened a file with respect to a proposal to amend Civil Rule 9 on the subject of pleading foreign law. The minutes of the Council meeting of April 25, 1980 indicate the file was closed because "the current law is not sufficiently troublesome to justify the development of a new court rule." Minutes of the Washington State Judicial Council at 6 (Apr. 25, 1980).

90. WASH. SUPER. CT. CIV. R. 8(e)(2).



occurrence, and each defense other than denials, is to be stated in a separate count or defense "whenever a separation facilitates the clear presentation of the matters set forth."

The important consideration is clarity and this should be the objective of the pleader. But, as the quoted qualifications suggest, neither the parties nor the courts should concern themselves unduly with matters of form. If the objective of fair notice is accomplished, that should suffice. If that is kept in mind, the process will not become burdened with motions and rulings relating to form, and the merits will be more readily reached and resolved. The lack of appellate opinions involving questions under Civil Rule 10 suggests this is being accomplished to the credit of all concerned.

With respect to the signing of pleadings, it has been provided since the original enactment of the pleading rules in 1960 that every pleading in which the party is represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name.<sup>91</sup> Changes have occurred over the years, however, with respect to the circumstances under which a party must sign and/or verify a pleading.

The federal rule in 1960 required the signing of pleadings by an attorney and dispensed with verification by the party except in a few cases in which verification was otherwise specifically required by a rule or statute. When Washington adopted a comparable rule, the provision requiring signing by the attorney was included, but the provision with respect to verification by the party was deleted. Thus the requirement that pleadings be verified in the manner and to the extent required by the then-existing Washington statute continued. This meant that many pleadings had to be signed by the attorney and verified by the party.<sup>92</sup> In 1967, Civil Rule 11 was amended, and while it differed in a few ways from the federal rule, it basically adopted the federal position whereby pleadings were to be signed by the attorney and no verification by the party was required.

The last amendment of the rule occurred in 1974. It continued the basic policy of requiring signing by the attorney but no verification by the party. It added the following language, however: "Petitions for dissolution of marriage, separation, declarations concerning the validity of a marriage, custody, and modification of decrees issued as a result of any of the foregoing petitions shall be verified. Other pleadings need not, but may be, verified or accompanied by affidavit."<sup>93</sup>

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91. WASH. SUPER. CT. CIV. R. 11.

92. R. MEISENHOLDER, *supra* note 3, at 24-25.

93. WASH. SUPER. CT. CIV. R. 11. The reason stated for the verification requirement in the specified instances was to impress upon the parties the seriousness of the proceedings. One wonders why these are more serious than other proceedings. Civil Rule 23.1 continues to require verification of a

The end result of these changes is that, except for domestic relations litigation, in the ordinary case in which a party is represented by an attorney, there will be no verification but rather simply the signature of the attorney.<sup>94</sup> The signature constitutes a certificate that the attorney (or the party if such be the case) has read the pleading, that to the best of the attorney's knowledge, information and belief there is good ground to support it, and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of the rule, it may be stricken as sham and false.<sup>95</sup> Further, a willful violation of the rule may subject the attorney to appropriate action as for contempt.<sup>96</sup>

#### IV. DEFENSES AND OBJECTIONS

The general guidelines for the statement of claims and defenses have been discussed. There is the additional matter of how one goes about attacking the adversary's averments. It will be recalled that ordinarily the attack will be by the defendant directed against the plaintiff's assertions since it is most unusual for the plaintiff to be obligated (or even permitted) to attack the defendant's averments. Consequently, the principal concern in this section will be with the problems generated when the defendant raises defenses and objections to the plaintiff's statement of a claim.<sup>97</sup>

The defendant may, of course, assert his defenses in the answer. Defenses of every type may be asserted therein including those which go to the merits, such as contentions of failure to state a claim, denials and affirmative defenses, and in addition defenses which related to procedural considerations, such as lack of jurisdiction over the person or subject matter, improper venue and questions relating to joinder of persons and claims. In the ordinary case the time for answer is twenty days if service is made within the state and sixty days if service is by publication or is made in accordance with the long-arm statute or non-resident motorist statute.<sup>98</sup>

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complaint in a shareholder's derivative action. The 1974 amendment to Civil Rule 11 also added the requirement that all pleadings be dated in order to facilitate review of the record.

94. If a party is not represented by an attorney, the party must, of course, sign and date the pleading.

95. An instance in which a complaint was stricken under Civil Rule 11 as sham and false is *McFerran v. Sanwick*, 61 Wn. 2d 123, 377 P.2d 405 (1962). It was held that since the order did not dismiss the action it was not an appealable order. *Id.* at 125, 377 P.2d at 406.

96. Disciplinary action through the state bar association also seems possible. R. MEISENHOLDER, *supra* note 3, at 26.

97. Similar problems arise when defenses are asserted to counterclaims and cross-claims under Civil Rule 13 and to third-party claims under Civil Rule 14.

The defendant may also attack the plaintiff's averments through the use of several motions, the most common of which is a motion to dismiss. The motion should be designated as a motion to dismiss for failure to state a claim rather than for failure to state a cause of action, though any such mislabeling will be ignored.<sup>99</sup>

Beginning with the first cases under the newly adopted rule<sup>100</sup> and continuing through the most recent cases, the court has, commendably, consistently looked with favor upon the pleader. In one of the first cases decided under the rule the approach enunciated was that of a refusal to dismiss a complaint unless it appeared, beyond doubt, that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief.<sup>101</sup> Almost two decades later the court continued to assert this test with the added observation that any hypothetical situation conceivably raised by the complaint defeats a 12(b)(6) motion if it is legally sufficient to support the plaintiff's claim.<sup>102</sup> The legal standard is whether any state of facts supporting a valid claim can be conceived which has even allowed for additional allegations of fact being made initially on appeal.<sup>103</sup> In addition to a willingness to speculate as to the facts that might be presented, the court has sustained a complaint and permitted the presentation of evidence under a theory of recovery though that theory was not specifically identified in the pleadings.<sup>104</sup>

Even with the liberal pleading rule, there will, of course, be times when the conclusion will be that there has been a failure to state a claim. This was true in a taxpayers' action against the state attorney general because of an alleged wrong in the attorney general's failure to seek recovery of funds paid out under an unconstitutional statute,<sup>105</sup> a declaratory judgment action which "seem[ed] to relate" to a grievance concerning surety bonds required of officers of a state-chartered credit union and the expulsion of members from the credit union,<sup>106</sup> and a libel action based upon a press release from the attorney general's office about pending liti-

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98. WASH. SUPER. CT. CIV. R. 12(a). The methods by which actions may be commenced are discussed in Trautman, *Commencement of Actions and Service of Process in Washington*, 16 WIL- LAMETTE L. REV. 87 (1979).

99. *Williamson v. Grant County Pub. Hosp. Dist. No. 1*, 65 Wn. 2d 245, 396 P.2d 879 (1964). Cf. *Sim v. Washington State Parks & Recreation Comm'n.*, 90 Wn. 2d 378, 583 P.2d 1193 (1978) (motion for change of venue mislabeled).

100. WASH. SUPER. CT. CIV. R. 12(b)(6).

101. *Sherwood v. Moxee School Dist. No. 90*, 58 Wn. 2d 351, 363 P.2d 138 (1961).

102. *Halvorson v. Dahl*, 89 Wn. 2d 673, 574 P.2d 1190 (1978).

103. *Id.*

104. *Potter v. Van Waters & Rogers, Inc.*, 19 Wn. App. 746, 578 P.2d 859 (1978).

105. *Berge v. Gorton*, 88 Wn. 2d 756, 567 P.2d 187 (1977) (5-3 decision). See also *Shutt v. Moore*, 26 Wn. App. 450, 613 P.2d 1188 (1980).

106. *Philipp v. State*, 66 Wn. 2d 921, 400 P.2d 769 (1965).

gation when the state official had an absolute privilege.<sup>107</sup> In each instance the conclusion was that the pertinent substantive law did not allow any possibility of recovery and consequently there was no reason to proceed with discovery and trial.

Assuming, however, that the substantive law does provide a basis for recovery, a motion to dismiss for failure to state a claim will result in a construction of the claim in the light most favorable to the pleader.<sup>108</sup> Regardless of the nature of the claim or action, the factual allegations of the complaint will be accepted as true for the purpose of ruling on the motion.<sup>109</sup>

A particularly useful function of the motion to dismiss is as a device to test the validity of a newly asserted substantive claim. Illustrative of this are cases in which the questions posed were whether to allow an action by a minor child for loss of parental "consortium" occasioned by negligent injury to the parent by the defendant,<sup>110</sup> an action against one who had provided liquor to another who later caused injury to the plaintiff,<sup>111</sup> an action for the tort of outrage,<sup>112</sup> and an action against a restaurant on the theories of breach of implied warranty and strict liability for alleged injuries caused by a shattered wine glass.<sup>113</sup> Similarly, the motion may be used to test the question whether an established substantive claim should be abolished due to changing social conditions.<sup>114</sup>

As noted initially, the usual instance for a 12(b)(6) motion is by the defendant directed against the plaintiff's complaint. It is also the appropriate means to test the legal validity of a counterclaim, a cross-claim<sup>115</sup> or a claim in a third-party complaint.<sup>116</sup>

Civil Rule 12(b) contains the additional relevant provision that if, on a motion to dismiss for failure to state a claim, matters outside the pleading

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107. *Gold Seal Chinchillas, Inc. v. State*, 69 Wn. 2d 828, 420 P.2d 698 (1966).

108. *Barnum v. State*, 72 Wn. 2d 928, 435 P.2d 678 (1967) (refusal to dismiss action against state for tortious injury in which state would be immune for "discretionary" actions, but liable for "operational" actions).

109. *Stanard v. Bolin*, 88 Wn. 2d 614, 565 P.2d 94 (1977) (breach of promise to marry); *Hofto v. Blumer*, 74 Wn. 2d 321, 444 P.2d 657 (1968) (automobile accident); *Higgins v. State*, 70 Wn. 2d 323, 422 P.2d 836 (1967) (breach of contract).

110. *Roth v. Bell*, 24 Wn. App. 92, 600 P.2d 602 (1979) (action dismissed).

111. *Halvorson v. Birchfield Boiler, Inc.*, 76 Wn. 2d 759, 458 P.2d 897 (1969) (action dismissed; 5-4 decision).

112. *Corrigan v. Ball & Dodd Funeral Home, Inc.*, 89 Wn. 2d 959, 577 P.2d 580 (1978); *Contreras v. Crown Zellerbach Corp.*, 88 Wn. 2d 735, 565 P.2d 1173 (1977); *Grimsby v. Samson*, 85 Wn. 2d 52, 530 P.2d 291 (1975) (in each instance, motion denied).

113. *Shaffer v. Victoria Station, Inc.*, 91 Wn. 2d 295, 588 P.2d 233 (1978) (action sustained).

114. *Stanard v. Bolin*, 88 Wn. 2d 614, 565 P.2d 94 (1977) (action for breach of promise to marry held not to violate public policy).

115. *McMenamin v. Bishop*, 6 Wn. App. 455, 493 P.2d 1016 (1972).

116. *Higgins v. State*, 70 Wn. 2d 323, 422 P.2d 836 (1967).

are presented and not excluded by the court, the motion shall be treated as one for summary judgment.<sup>117</sup> This necessitates some comparison of the two motions.

If a motion to dismiss or to strike the complaint or for judgment is made and the only matter before the court is the complaint, the motion will be treated as one under Civil Rule 12(b)(6).<sup>118</sup> This is true even if the motion is labeled as one for summary judgment.<sup>119</sup> On the other hand, if the court considers other matters, such as affidavits, depositions, answers to interrogatories and the like, the proceeding may be treated as one for summary judgment.<sup>120</sup>

As Rule 12(b)(6) indicates, the court may if it wishes exclude matters other than the pleading. It seems that ordinarily this would be unwise. If the court considers only the complaint in ruling on the motion, a denial is likely to result in another motion, this time for summary judgment with the accompanying materials. Certainly it is true that the court has in numerous instances admitted other matters and treated the motion as one for summary judgment.<sup>121</sup>

To be compared is the situation in which the content of other matters makes no difference to the disposition of the motion and in which the court can say that as a matter of law, regardless of what is contained in the extraneous material, the plaintiff is not entitled to relief. In such a situation there is no need to convert a 12(b)(6) motion into a motion for summary judgment and thereby allow the non-moving party an opportunity to controvert the matters submitted outside the pleading. Even if the trial court considers the other matters, they are immaterial and not harmful to

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117. For a discussion of summary judgments, see Trautman, *Motions for Summary Judgment: Their Use and Effect in Washington*, 45 WASH. L. REV. 1 (1970).

118. See *Burke & Thomas, Inc. v. International Organization of Masters, Mates & Pilots*, 92 Wn. 2d 762, 600 P.2d 182 (1979); *Lightner v. Balow*, 59 Wn. 2d 856, 370 P.2d 982 (1962).

119. *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 89 Wn. 2d 959, 577 P.2d 580 (1978); *Maki v. Aluminum Bldg. Prods.*, 73 Wn. 2d 23, 436 P.2d 186 (1968). Cf. *Peterson v. Pacific First Fed. Sav. & Loan Ass'n*, 23 Wn. App. 688, 598 P.2d 704 (1979).

120. *Washington Optometric Ass'n v. County of Pierce*, 73 Wn. 2d 445, 438 P.2d 861 (1968).

121. *Highline School Dist. No. 401 v. Port of Seattle*, 87 Wn. 2d 6, 548 P.2d 1085 (1976) (motion for judgment on the pleadings); *Stevens v. Murphy*, 69 Wn. 2d 939, 421 P.2d 668 (1966) (motion for judgment on the pleadings); *Downtown Traffic Planning Comm. v. Royer*, 26 Wn. App. 156, 612 P.2d 430 (1980) (prayer for dismissal in answer); *Vaughn v. Vaughn*, 23 Wn. App. 527, 597 P.2d 932 (1979) (motion for judgment on the pleadings); *Sims v. KIRO, Inc.*, 20 Wn. App. 229, 580 P.2d 642 (1978); *Askin v. Crown Zellerbach, Inc.*, 8 Wn. App. 817, 509 P.2d 379 (1973); *Blakely v. Housing Auth.*, 8 Wn. App. 204, 505 P.2d 151 (1973).

*Puget Sound Bulb Exch. v. Metal Bldgs. Insulation, Inc.*, 9 Wn. App. 284, 513 P.2d 102 (1973). *cert. denied*, 415 U.S. 921 (1974), held that matters outside the pleadings might be presented on a motion to dismiss for lack of jurisdiction over the person under Civil Rule 12(b)(2), and, if not excluded by the court, the motion would be treated as one for a summary judgment. Cf. *In re Estate of Boyd*, 5 Wn. App. 32, 485 P.2d 469 (1971) (motion for summary judgment under Rule 56 should have been treated as one for judgment on the pleadings; label given a motion is unimportant).

the plaintiff since there is no possibility that the plaintiff can recover under his claim.<sup>122</sup>

All of this serves to raise the question of what difference it makes whether disposition of a case is under Civil Rule 12(b)(6) or 56 (the summary judgment rule). In *Brown v. MacPherson's, Inc.*,<sup>123</sup> a five to four decision, the Washington Supreme Court in a footnote stated as follows about “the distinction between motions under CR 12(b)(6) and summary judgment motions under CR 56”:

A summary judgment motion calls upon the court to determine from the pleadings and supporting documents whether any genuine issue of material fact exists requiring a trial. . . . A CR 12(b)(6) motion questions only the legal sufficiency of the allegations in a pleading. But since this legal determination cannot always be made in a vacuum, it may be necessary to postulate factual situations which might form the basis for the pleading. No reason appears why one such “hypothetical” situation should not be that which the complaining party contends actually exists. The court need not find that any support for the alleged “facts” exists or would be admissible at trial, as it should on a summary judgment motion. The question under a CR 12(b)(6) motion is basically a legal one, and the “facts” are considered only as a conceptual backdrop for the legal determination.

Arguably, this statement creates some uncertainty. It can be read to mean that while a motion to dismiss for failure to state a claim raises a question which is “basically a legal one,” the motion for a summary judgment raises a question which is “basically” something else. That, of course, is not true. Both motions, and also a motion for judgment on the pleadings, raise a legal question. The moving party in both instances is asserting that he should prevail as a matter of law. In neither case is it proper to grant the motion unless the court concludes the legal question in favor of the movant.

The difference in the two lies in the basis on which the court determines whether the movant is entitled to judgment. In the instance of the motion to dismiss for failure to state a claim, the court has only the pleading of the plaintiff to consider. The court must look at the asserted facts in the light most favorable to the non-movant to determine whether the movant is entitled to prevail as a matter of law. In the instance of a motion for summary judgment, the parties and the court are not restricted to the pleadings. Looking at materials such as affidavits, depositions and an-

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122. *Ortblad v. State*, 85 Wn. 2d 109, 530 P.2d 635 (1975); *Loger v. Wash. Timber Prods., Inc.*, 8 Wn. App. 921, 509 P.2d 1009 (1973).

123. 86 Wn. 2d 293, 298 n.2, 545 P.2d 13, 17 n.2 (1975).

swers to interrogatories, the court must determine whether there are any genuine issues of fact to be tried, but still the motion cannot be granted unless the moving party is entitled to judgment as a matter of law. Both motions then raise the legal question of recovery or non-recovery. The advantage of the summary judgment procedure is that it may better enable the movant to show, and the court to determine, that there is no genuine issue of fact, thereby entitling the movant to judgment. It is in recognition of this that Civil Rule 12(b)(6) allows for the motion to dismiss to be converted into a motion for summary judgment.<sup>124</sup>

Presumably, this is what the court meant in the *Brown* case. The question raised by both motions is "basically a legal one." The difference is the materials available to the court in resolving the legal question.

Instead of moving to dismiss on the basis of the complaint, the defendant may wait until all the pleadings are completed and then move for judgment on the pleadings.<sup>125</sup> The test to be applied is similar to that for a motion to dismiss. The court will look at the pleadings in the light most favorable to the non-movant to determine whether the movant is entitled to judgment as a matter of law.<sup>126</sup> Also, as with the motion to dismiss, if matters outside the pleadings are presented and not excluded by the court, the motion may be treated as one for summary judgment.<sup>127</sup> In the event of a motion to dismiss for failure to state a claim or for judgment on the pleadings, the motion may be heard before trial or deferred until the trial at the discretion of the trial court.<sup>128</sup>

Another motion which may be directed against a pleading is that it be made more definite. The federal rule limits the use of a motion for a more definite statement to the situation in which the pleading is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading.<sup>129</sup> Thereunder, the motion may not properly be used to obtain information in preparation for trial. That is to be accomplished through the discovery process. At the time of the adoption of the equivalent Washington rule, language was added permitting the motion to be directed against a pleading "if more particularity in that pleading will further the efficient, economical disposition of the action."<sup>130</sup> Concern was expressed that the added language would require more particularity

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124. See J. MOORE, FEDERAL PRACTICE RULES PAMPHLET 480 (Part I 1980).

125. WASH. SUPER. CT. CIV. R. 12(c). *Madison v. General Acceptance Corp.*, 26 Wn. App. 387, 612 P.2d 826 (1980), states that a motion to dismiss the complaint following the filing of an answer will be considered as a motion for judgment on the pleadings.

126. See *Pearson v. Vandermay*, 67 Wn. 2d 222, 407 P.2d 143 (1965).

127. See cases cited note 121 *supra*.

128. WASH. SUPER. CT. CIV. R. 12(d).

129. FED. R. CIV. P. 12(e).

130. WASH. SUPER. CT. CIV. R. 12(e).

in pleading claims in Washington than in federal courts<sup>131</sup> and that it might even result in a continuation of the technical requirements of code pleading.<sup>132</sup> Whether this has been so or not is not clear from appellate opinions. There is a complete dearth of authority interpreting the rule. The fact that there is such lack of authority, however, suggests that what would be satisfactory to withstand a motion for a more definite statement in the federal courts will likewise be sufficient in most cases in state courts.<sup>133</sup> This is buttressed by the growing acceptance of general notice pleading with the passage of time and the continuing liberal construction of what constitutes an adequate statement of a claim.<sup>134</sup>

Another motion which has received little construction, thereby suggesting it is little used or allowed, is the motion to strike.<sup>135</sup> It is the appropriate motion by the plaintiff directed against an "insufficient defense" and by either party directed against "redundant, immaterial, impertinent, or scandalous matter." Ordinarily, only the inappropriate matter should be stricken rather than the entire pleading and if the pleading is stricken, leave to amend should be liberally granted.<sup>136</sup>

Generally, if a party makes a motion under Civil Rule 12 and fails to raise other defenses or objections permitted to be raised by motion under the rule, such omitted grounds are waived.<sup>137</sup> If no motion is made, the defenses may be raised in the answer, but, again, those omitted are generally waived.<sup>138</sup>

Two exceptions to such waiver provisions relevant to pleading are the defense of failure to state a claim upon which relief can be granted and the objection of failure to state a legal defense to a claim. Specific provision is made that such matters may be raised later by motion for judgment on the pleadings or at the trial on the merits.<sup>139</sup>

This suggests that it is not timely to raise such matters for the first time after the trial has been completed. This conclusion is also supported by the fact that specific provision is made for raising the defense of lack of

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131. See the excellent discussion of the reason for the insertion of the added language and the expected result in *R. MEISENHOLDER*, *supra* note 3, at 7-9.

132. See *L. ORLAND*, 3 *WASHINGTON PRACTICE* 602 (2d ed. 1968).

133. This is believed to be the situation even though Washington has not adopted the forms which accompany the federal rules and has expressly declined such adoption or approach. See *WASH. SUPER. CT. CIV. R. 8(f)*.

134. See text accompanying notes 100-104 *supra*.

135. *WASH. SUPER. CT. CIV. R. 12(f)*.

136. *Reed v. Streib*, 65 Wn. 2d 700, 399 P.2d 338 (1965).

137. *WASH. SUPER. CT. CIV. R. 12(g)*.

138. *WASH. SUPER. CT. CIV. R. 12(b) & (h)*.

139. *WASH. SUPER. CT. CIV. R. 12(h)(2)*. A similar exception is stated for the defense of failure to join a party indispensable under Civil Rule 19.



jurisdiction of the subject matter at any time.<sup>140</sup> Had it been intended that the same was true with respect to failure to state a claim or a legal defense to a claim, presumably similar provision would have been made rather than restricting the time to that of the trial.

Some confusion is created, however, by a Washington Court of Appeals opinion, *Sparkman & McLean Income Fund v. Wald*.<sup>141</sup> On appeal the plaintiff asserted the argument, not raised in the trial court, that the defendant's counterclaim was not valid in that no law provided a basis for affirmative relief.<sup>142</sup> In effect the contention was that there was a failure to state a claim upon which relief could be granted. The court allowed the issue to be raised for the first time on appeal and held there was error in entering judgment on the counterclaim.

No mention was made of Civil Rule 12(h)(2). Instead the court relied upon a then-existing appellate rule which provided that the objection that "the complaint does not state sufficient facts to constitute a cause of action . . . may be taken at any time."<sup>143</sup> In addition, reliance was placed upon cases decided before the enactment of the present pleading rules.<sup>144</sup>

The appellate rule relied upon in *Sparkman* has since been superseded. There is still some confusion, however, by reason of the pertinent appellate rule enacted since the time of the *Sparkman* case. Rule of Appellate Procedure 2.5(a), which became effective July 1, 1976, states in part:

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court:  
 . . . (2) failure to establish facts upon which relief can be granted. . . .

The Advisory Task Force on Appellate Rules, which drafted the new rules, prepared comments to explain the rules. While the comments were

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140. WASH. SUPER. CT. CIV. R. 12(h)(3) states that the court shall dismiss the action "[w]hensoever it appears . . . that the court lacks jurisdiction of the subject matter."

141. 10 Wn. App. 765, 520 P.2d 173 (1974).

142. In its counterclaim the defendant borrower sought affirmative recovery against the plaintiff lender because of usury. On appeal the plaintiff raised the point that the statute authorizing such relief had not been in existence at the time of the transaction in question and that the statute was not retroactive.

143. CT. APP. R. APP. 43. SUP. CT. R. APP. I-43, in existence at that time, had a similar provision.

144. The court relied upon *Hamilton v. Johnson*, 137 Wash. 92, 96, 241 P. 672, 673 (1925), in which it had been said that "if the complaint shows upon its face that the plaintiff has no cause of action and under no circumstances can have a cause of action, the court will stay the action at the earliest time the matter is brought to its attention." Also cited were *State ex rel. Everett Trust & Sav. Bank v. Pacific Waxed Paper Co.*, 22 Wn. 2d 844, 157 P.2d 707 (1945) and *State ex rel. Walton v. Superior Court*, 18 Wn. 2d 810, 140 P.2d 554 (1943).

not adopted by the supreme court, they are useful in interpreting the rules. The pertinent comment to Rule 2.5(a) states in part:

The rule states the general rule that the court reviews only issues which the record shows have been argued and decided at the trial level. . . . The rule then states the exceptions to the general rule. [Exception] . . . (2) . . . [has] previously been found in ROA I-43. . . . Exception (2) uses the phrase “failure to establish facts” rather than the traditional “failure to state a claim.” The former phrase more accurately expresses the meaning of the rule in modern practice.<sup>145</sup>

Apparently it is not appropriate to raise the contention of failure to state a claim for the first time on appeal. It is appropriate to raise the issue of failure to establish facts upon which relief can be granted. In effect, this is the same thing as the contention that under the law the opposing party cannot prevail. There is the difference, of course, that the one attack is directed at the pleading whereas the other is directed at the evidence. It seems, however, that the contention that one may not prevail as a matter of law is one properly to be raised below, whether the form be a motion to dismiss for failure to state a claim, or for judgment on the pleadings, or for summary judgment, or at the trial or for post-trial relief. If based upon the failure to establish the facts at trial, the appropriate motion should be directed at the sufficiency of the evidence and called to the attention of the trial court. Apparently, however, the appellate rule allows the issue to be raised for the time at the appellate level.

## V. AMENDED AND SUPPLEMENTAL PLEADINGS

Perhaps the best illustration of the modern philosophy of pleading is the approach to the amendment of pleadings. A party may amend a pleading once as a matter of right any time before a responsive pleading is served.<sup>146</sup> If no responsive pleading is permitted and the action has not been placed upon the trial calendar, the right to amend exists within twenty days after service.

Thereafter, amendment may take place with the written consent of the adversary or, more likely, by leave of court. The guideline for the court is that leave to amend shall be freely given when justice so requires.<sup>147</sup>

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145. See comment accompanying WASH. R. APP. P. 2.5, in Vol. O WASH. REV. CODE (1979).

146. *Violante v. White*, 26 Wn. App. 391, 612 P.2d 828 (1980) (complaint for unlawful detainer amended to request cancellation of real estate earnest money agreement, quieting of title, ejectment and damages).

147. WASH. SUPER. CT. CIV. R. 15(a).

Basically, this means that after the time for right to amend has passed, the matter rests in the discretion of the trial court, subject to review for abuse of discretion.<sup>148</sup> The considerations likely to weigh most heavily with the court are the effect upon the opponent of allowing an amendment, whether an adverse effect can be ameliorated by the grant of a continuance, the reason for the delay in seeking to assert the amended matter, the stage of the proceedings at which the amendment is sought, the number of previous amendments allowed, and, presumably of lesser consequence, the effect the grant of an amendment might have in delaying or disrupting the judicial system itself.

Within that framework, numerous cases have resulted in the allowance of an amendment by the trial court and affirmance by the appellate court<sup>149</sup> or, less frequently, allowance by the appellate court after denial by the trial court.<sup>150</sup> There will, of course, be instances in which denial is appropriate.<sup>151</sup> In the final analysis the test is to do justice, particularly in the sense of deciding litigation on the merits rather than on pleading errors. This will most often be accomplished by a liberal construction in favor of the allowance of amendments.

The propriety of this approach is most severely tested in those instances in which evidence is offered at the trial which is outside the issues raised in the pleadings. If such issues are tried with the express or implied consent of the parties, they are to be treated as if they had been raised in the pleadings.<sup>152</sup> This assumes that there is sufficient evidence to justify an amendment, with that determination resting in the discretion of the court.<sup>153</sup> If there is such evidence, the pleadings may be amended on

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148. *Mullen v. North Pac. Bank*, 25 Wn. App. 864, 610 P.2d 949 (1980) (denial of motion to amend affirmed); *Kiecker v. Pacific Indem. Co.*, 5 Wn. App. 871, 491 P.2d 244 (1971) (grant of trial motion to amend affirmed).

149. *Quackenbush v. State*, 72 Wn. 2d 670, 434 P.2d 736 (1967); *Sanwick v. Puget Sound Title Ins. Co.*, 70 Wn. 2d 438, 423 P.2d 624 (1967); *Costanzo v. Harris*, 64 Wn. 2d 901, 395 P.2d 93 (1964); *Raffensperger v. Towne*, 59 Wn. 2d 731, 370 P.2d 593 (1962); *Guyton v. Temple Motors, Inc.*, 58 Wn. 2d 828, 365 P.2d 14 (1961). *See also* *Navin v. Hall*, 59 Wn. 2d 9, 365 P.2d 594 (1961), in which plaintiff's motion to amend his complaint at the beginning of the trial was denied and then later granted by the trial court after the plaintiff had rested his case and before the defendant's opening statement. Held, that corrected any error and plaintiff could not successfully appeal because of the "disruption of his trial strategy."

150. *Pittman v. Pittman*, 64 Wn. 2d 735, 393 P.2d 957 (1964); *Adams v. Allstate Ins. Co.*, 58 Wn. 2d 659, 364 P.2d 804 (1961); *Tagliani v. Colwell*, 10 Wn. App. 227, 517 P.2d 207 (1973) (two new "causes of action" allowed to be added).

151. *Appliance Buyers Credit Corp. v. Upton*, 65 Wn. 2d 793, 399 P.2d 587 (1965); *Morgan Bros. v. Haskell Corp.*, 24 Wn. App. 773, 604 P.2d 1294 (1979); *Trust Fund Servs. v. Glasscar, Inc.*, 19 Wn. App. 736, 577 P.2d 980 (1978); *General Indus., Inc. v. Eriksson*, 2 Wn. App. 228, 467 P.2d 321 (1970).

152. WASH. SUPER. CT. CIV. R. 15(b).

153. *Balise v. Underwood*, 71 Wn. 2d 331, 428 P.2d 573 (1967); *Dimoff v. Ernie Majer, Inc.*, 55 Wn. 2d 385, 347 P.2d 1056 (1960); *Carlos v. Cain*, 4 Wn. App. 475, 481 P.2d 945 (1971).

motion of a party or on the court's own motion to conform to the evidence.<sup>154</sup> Ordinarily, the court should rule on the motion to amend at the time it is made, though it will usually make no difference if the court waits until the end of the trial.<sup>155</sup> The rule itself allows for the motion at any time, even after judgment.<sup>156</sup>

Much more commonly, there will be no formal motion to amend. Instead, the pleadings will simply be deemed amended to accord with what transpired at trial. This has been the result in diverse contexts such as evidence of a theory of recovery by the plaintiff different from that pleaded,<sup>157</sup> evidence of unpleaded affirmative defenses by the defendant,<sup>158</sup> evidence as to types and amounts of relief not set forth in the complaint<sup>159</sup> and evidence leading to the realignment of the parties.<sup>160</sup> The general liberal willingness to decide the case on the basis of the proof rather than the pleadings emphasizes once again the policy of discouraging excessively formal pleading requirements.<sup>161</sup>

Perhaps the most important considerations are that the court take care that no party is unfairly surprised and that all understand the significance of the evidence and have adequate opportunity to present their cases.<sup>162</sup> If this is the situation and there is no objection to the evidence, it is quite appropriate to regard this as implied consent to the trial of the unpleaded issues.<sup>163</sup>

Even if there is an objection, the rule directs the court to freely allow amendment when the presentation of the merits will be subserved thereby and when the objecting party fails to satisfy the court that the admission of the evidence will prejudice him. The rule appears to place the burden on the objecting party with respect to the prejudice factor and further indi-

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154. *Fisher v. Simmons*, 71 Wn. 2d 777, 431 P.2d 176 (1967); *MacCormack v. Robins Constr.*, 11 Wn. App. 80, 521 P.2d 761 (1974).

155. *Tacoma Commercial Bank v. Elmore*, 18 Wn. App. 775, 573 P.2d 798 (1977).

156. WASH. SUPER. CT. CIV. R. 15(b).

157. *Free Methodist Church Corp. v. Brown*, 66 Wn. 2d 164, 401 P.2d 655 (1965); *Schutz v. Schutz*, 56 Wn. 2d 969, 354 P.2d 694 (1960); *Jensen v. Ledgett*, 15 Wn. App. 552, 550 P.2d 1175 (1976).

158. *Amende v. Pierce County*, 70 Wn. 2d 391, 423 P.2d 634 (1967); *Stueckle v. Sceva Steel Bldgs., Inc.*, 1 Wn. App. 391, 461 P.2d 555 (1969).

159. *Black v. Evergreen Land Developers, Inc.*, 75 Wn. 2d 241, 450 P.2d 470 (1969); *Fenton v. Contemporary Dev. Co.*, 12 Wn. App. 345, 529 P.2d 883 (1974); *Bombardi v. Pochel's Appliance & TV Co.*, 9 Wn. App. 797, 515 P.2d 540 (1973); *Meeker v. Howard*, 7 Wn. App. 169, 499 P.2d 53 (1972).

160. *Harding v. Will*, 81 Wn. 2d 132, 500 P.2d 91 (1972).

161. *Shaffer v. Victoria Station, Inc.*, 18 Wn. App. 816, 572 P.2d 737 (1977), *rev'd on other grounds*, 91 Wn. 2d 295, 588 P.2d 233 (1978).

162. *Harding v. Will*, 81 Wn. 2d 132, 500 P.2d 91 (1972); *O'Kelley v. Sali*, 67 Wn. 2d 296, 407 P.2d 467 (1965).

163. *Moar v. Beaudry*, 62 Wn. 2d 98, 381 P.2d 240 (1963); *Longenecker v. Brommer*, 59 Wn. 2d 552, 368 P.2d 900 (1962); *Jensen v. Ledgett*, 15 Wn. App. 552, 550 P.2d 1175 (1976).

cates that even if there is some initial prejudice, this may at times be removed by granting a continuance to enable the objecting party to meet the evidence.<sup>164</sup>

As a matter of fact, it is necessary that the objecting party move for a continuance in the event a trial amendment is permitted or evidence is admitted over objection that the pleadings did not raise the issue. Failure to so move will preclude the party from urging on appeal that the lower court abused its discretion.<sup>165</sup> Assuming a continuance is sought, there will be times when the objecting party will be deemed able and prepared to meet the new issue, whereby a denial of the requested continuance will not be an abuse of discretion.<sup>166</sup>

There will, of course, be instances in which the trial court will reject the offered evidence as being outside the pleadings. To preserve a basis for assigning error on appeal, the proponent should seek an amendment of the pleadings and make an offer of proof in relation to the rejected evidence.<sup>167</sup>

A peculiar problem arises when a party desires to amend a pleading after the relevant statute of limitations has run. The rule provision is that whenever a claim or defense asserted in the amending pleading arose out of the same conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.<sup>168</sup> By virtue of the relation-back doctrine the effect of the limitation period is avoided.

The rule has received a liberal construction in favor of allowing an amendment to relate back. An excellent recent illustration is *Olson v. Roberts & Schaeffer Co.*<sup>169</sup> The plaintiff instituted a wrongful death action against the defendant who was alleged to be liable because of certain statutory obligations arising as owner of the plant in which the decedent was killed. The defendant's answer denied it was the owner and the plaintiff sought permission to amend the complaint to assert that the defendant was liable because of its participation in the design and construction of the plant. The statute of limitations had run by the time the plaintiff sought to amend. The trial court denied the plaintiff's motion and dismissed her action.

The court of appeals reversed. The court noted that the defendant had

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164. WASH. SUPER. CT. CIV. R. 15(b).

165. *V. C. Edwards Contracting Co. v. Port of Tacoma*, 83 Wn. 2d 7, 514 P.2d 1381 (1973); *Burlingham-Meeker Co. v. Thomas*, 58 Wn. 2d 79, 360 P.2d 1033 (1961); *Waechter v. Carnation Co.*, 5 Wn. App. 121, 485 P.2d 1000 (1971).

166. *Morgan Bros. v. Haskell Corp.*, 24 Wn. App. 773, 604 P.2d 1294 (1979).

167. *Northwest Properties Agency, Inc. v. McGhee*, 1 Wn. App. 305, 462 P.2d 249 (1969).

168. WASH. SUPER. CT. CIV. R. 15(c).

169. 25 Wn. App. 225, 607 P.2d 319 (1980).

relied upon earlier cases holding that an amendment will not relate back if it changes the theory of the pleading or adds a cause of action. The court said those cases no longer represent this state's rule on the relation back of amendments. Since in this instance the plaintiff's amended complaint involved the same occurrence as described in the original complaint and the defendant had not shown that it would be prejudiced by the amendment, the conclusion was that the trial court had abused its discretion in denying the plaintiff's motion to amend.<sup>170</sup>

An added problem arises when the amendment seeks to change a party. The rule provides that an amendment changing the party against whom a claim is asserted relates back if the same conduct, transaction or occurrence is involved and if, in addition, within the period provided by law for commencing the action against him, the party to be brought in (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.<sup>171</sup> The particular provision relating to an improper party has received the same liberal construction on the side of allowance of relation back of an amendment as is true under the rest of the rule.<sup>172</sup> It has been held, however, that a party may not be added for relation-back purposes, if that party was originally purposefully excluded as a product of deliberate strategy.<sup>173</sup>

It should be noted that Civil Rule 15(c) applies only to amendments changing the party "against whom a claim is asserted," ordinarily the defendant. The rule does not apply to an amendment seeking to change the party on whose behalf the action is brought. Ordinarily one would expect the latter situation to be controlled by Civil Rule 17(a) which states that actions shall be brought in the name of the real party in interest. That rule also provides as follows:

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170. Cf. *Grant v. Morris*, 7 Wn. App. 134, 498 P.2d 336 (1972) (the relation-back doctrine may allow the assertion of different rights, but cannot alter facts occurring between the time of the original pleading and the amendment).

171. WASH. SUPER. CT. CIV. R. 15(c). Compare the approach before the adoption of the present rule in *DeSantis v. Angelo Merlino & Sons, Inc.*, 71 Wn. 2d 222, 427 P.2d 728 (1967), and *Hill v. Withers*, 55 Wn. 2d 462, 348 P.2d 218 (1960).

172. See *Lind v. Frick*, 15 Wn. App. 614, 550 P.2d 709 (1976), which listed the requirements for an amendment changing a party to relate back as follows: (1) the amended pleading arose out of the transaction set forth in the original pleading; (2) the new party received notice of the action within the statute of limitations; (3) the new party has received such notice that he will not be prejudiced in maintaining a defense on the merits; and (4) the new party knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

173. *Verdale Valley Citizens' Planning Comm. v. Board of County Comm'rs*, 22 Wn. App. 229, 588 P.2d 750 (1978). But see *G-3 Properties, Inc. v. Board of County Comm'rs*, 27 Wn. App. 625, 620 P.2d 108 (1980).

No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.<sup>174</sup>

As with the other procedural rules relating to amendments, this one has received a favorable construction with a recent case allowing amendment of the complaint through ratification by the real party in interest after the trial on the merits had been completed.<sup>175</sup>

In the event a party wishes to raise matters happening after the date of the original pleadings, a supplemental pleading should be considered.<sup>176</sup> Upon a motion by a party, the court may permit such a pleading to set forth the later transactions, occurrences or events.<sup>177</sup> Permission may be granted even though the original pleading was defective in its statement of a claim or defense.<sup>178</sup>

## VI. CONCLUSION

During the past two decades of interpreting and applying the pleading rules, the appellate courts in Washington in the great majority of instances have kept in mind the objectives of modern pleading. The courts have generally succeeded in avoiding the resolution of cases on the basis of procedural technicalities and have encouraged the trial courts, the parties, and their counsel, to get on with the business of disposing of litigation on the merits. Such an approach encourages the efficient and economical rendition of justice and is to be commended.

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174. WASH. SUPER. CT. CIV. R. 17(a). The meaning of the term "real party in interest" and the application thereto of the relation-back doctrine is discussed in Trautman, *Joinder of Claims and Parties in Washington*, 14 GONZ. L. REV. 103, 108-11 (1978).

175. *Fox v. Sackman*, 22 Wn. App. 707, 591 P.2d 855 (1979).

176. *See Bly v. Pilchuk Tribe No. 42*, 5 Wn. App. 606, 489 P.2d 937 (1971).

177. *See Fanning v. Guardian Life Ins. Co.*, 59 Wn. 2d 101, 366 P.2d 207 (1961).

178. WASH. SUPER. CT. CIV. R. 15(d).