No. 2007-1529

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. CA-06-088573

MONICA FLETCHER, Individually and as
Administratrix of the Estate of Victor Shaw, Deceased,
Plaintiff-Appellee,

v.

UNIVERSITY HOSPITALS OF CLEVELAND, et al.,
Defendants-Appellants.

BRIEF OF AMICUS CURIAE OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS IN SUPPORT OF APPELLANTS

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I. INTEREST OF THE AMICUS CURIAE

The Ohio Association of Civil Trial Attorneys ("OACTA") is a statewide organization comprised of approximately 700 attorneys and supervisory or managerial employees of insurance or other corporations who devote a substantial portion of their time to the defense of civil damage suits. OACTA has an abiding interest in the fair and efficient application of the Ohio Rules of Civil Procedure to cases throughout the state. The appealed decision fails to distinguish between the separate and distinct purposes of Rules 10(D)(1) and 10(D)(2),[1] and requires medical defendants sued in the Eighth District to engage in meaningless and unnecessary motions "for more definite statement" to challenge a fatally flawed complaint asserting malpractice. Because that interpretation of the civil rules is unworkable and contrary to the history and public policy behind Civ.R. 10(D)(2), OACTA urges this Court to reverse and establish the appropriate pleading practice for all Ohio appellate districts.

II. STATEMENT OF FACTS

OACTA concurs in the Statement of the Case and Facts contained in the Appellants' Merit Brief. The critical facts for the appealed issue are:

- More than 18 months after she first filed her Complaint, and at a time when the medical expert disclosure date had expired and a motion for summary judgment was pending, Plaintiff-Appellee Monica Fletcher voluntarily dismissed her medical malpractice claim.

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[1] All cited rules are attached in the Appendix ("Appx.") at 1-5.

- When she refiled her Complaint one year later, Ms. Fletcher made no effort to comply with Civ.R. 10(D)(2). She neither attached an Affidavit of Merit to her Complaint, nor requested an extension of time to file an Affidavit of Merit.

- In her response to the motion to dismiss the Complaint for failure to state a claim filed by Appellee University Hospitals of Cleveland, Ms. Fletcher again failed to proffer an Affidavit of Merit or seek an extension of time to do so.

These facts present a textbook example of a plaintiff's inability to state a medical negligence claim for which relief can be granted. The appellate court's conclusion that Civ.R. 12(B)(6) motions may not be filed to challenge a facially inadequate medical malpractice Complaint, and that *only* an irrelevant and inappropriate motion for more definite statement (Civ.R. 12(E)) may be filed, serves no other purpose than to extend the time and expense required to defend a frivolous suit. Even though the Eighth District itself has implicitly conceded that its rule defies practical workability (see *Chromik v. Kaiser Permanente*, 8th Dist. No. 89088, 2007-Ohio-5856, purporting to "distinguish" the unworkable *Fletcher* rule), at least one other district has adopted it (*Stewart v. Forum Health*, 7th Dist. No. 06-MA-120, 2007-Ohio-6922). The resulting uncertainty and confusion require this Court's intervention.

III. ARGUMENT

Proposition of Law No. 1

A motion for failure to state a claim upon which relief can be granted pursuant to Civil Rule 12(B)(6) is the proper procedure for challenging the failure to file an Affidavit of Merit in accordance with Ohio Civ.R. 10(D)(2).

The fundamental error in the decision below is its assumption that Civ.R. 10(D)(1) and 10(D)(2) are "analogous" simply because both are part of Civ.R. 10 and both require an attachment to a complaint. The two rules have distinct purposes and are supported by different public policies.

Civ.R. 10(D)(1) addresses breach of contract claims that are based upon "an account or other written instrument." (Appx. at 1.) A copy of that account or other written instrument must be attached to the pleading to give notice to the other side of the specific terms of the written promise allegedly breached.

Civ.R. 10(D)(2) is not designed to give "notice" of contractual duties allegedly breached; it combines verification requirements with a heightened pleading requirement to promote the expeditious disposition of unsupported medical malpractice actions.

These different purposes implicate different motions under Civ.R. 12. Because the purpose of Civ.R. 10(D)(1) is to give notice of the specific terms of the parties' contract, a Civ.R. 12(E) "motion for more definite statement" is appropriate when the plaintiff fails to attach the edifying account or written instrument to the Complaint. Because the purpose of Civ.R. 10(D)(2) is to incorporate verified expert opinion testimony as an essential part of the pleading, a Civ.R. 12(B)(6) motion to dismiss for failure to state a

claim for which relief can be granted is appropriate when the plaintiff fails to attach the Affidavit of Merit or file a properly supported motion for additional time. A medical malpractice complaint that does not comply with Civ.R. 10(D)(2) is equivalent to an unsigned complaint. And "an unsigned complaint is merely a piece of paper. It does not acquire the essential characteristic of a written allegation of wrongdoing until someone signs it ...." *State v. Mays* (1995), 104 Ohio App.3d 241, 246-247.

A. A Motion for More Definite Statement Under Civ.R. 12(E) Is Appropriate When the Allegations of the Complaint Are Too Vague to Give Adequate Notice of the Nature of the Duties Allegedly Breached.

In a breach of contract action, the parties' mutual duties are defined by the terms of their agreement or contract. A copy of the document defining those duties is therefore necessary *before* a court can determine whether the allegations of the complaint state a claim for which relief can be granted. Civ.R. 12(E) provides the appropriate vehicle for a defendant to obtain a court order requiring the plaintiff to incorporate the written instrument into the pleading, as mandated by Civ.R. 10(D)(1). When the motion is granted and the written instrument is attached to an amended complaint, a 12(B)(6) motion may then be filed, if appropriate.

The correct application of this two-step motion procedure is illustrated in *Keenan v. Adecco Employment Services, Inc.*, 3rd Dist. No. 1-06-10, 2006-Ohio-3633. The plaintiff in *Keenan* filed a complaint alleging that the defendant had breached certain guarantees in the parties' subcontracting agreements. Because the agreements were not attached to the complaint, the defendant filed, and the trial court granted, a Rule 12(E)

motion for more definite statement. Id., ¶ 3. After the plaintiff filed an amended complaint with the agreements attached, the defendant filed a motion to dismiss under Civ.R. 12(B)(6), on the grounds that "the agreements attached to the complaint specifically disavowed any guarantee ***." Id., ¶ 4. The trial court agreed and dismissed the action.

On appeal, the court rejected plaintiffs' argument that Civ.R. 8(A) requires only "'a short and plain statement of the claim showing that the party is entitled to relief.'" Id., ¶ 8. That argument "ignored" Civ.R. 10(D), which requires a plaintiff to attach of the allegedly breached agreements to the complaint, thereby making those written instruments "part" of the complaint for pleading purposes. Id. As a result, a court determining "whether the claimant has brought a legally sufficient action," will look to the written instruments as well as the pleadings. Id., ¶ 8. The *Keenan* defendant's 12(E) motion produced the written agreements, and the written agreements revealed the absence of any guarantee language. Thus:

> [T]he written instruments attached to the amended complaint provide an insuperable bar to recovery on the sole claim asserted by the appellants in the complaint. Therefore, the trial court correctly dismissed the complaint under Civ.R. 12(B)(6).

Id., ¶ 13.

If the defendant in the *Keenan* case had *not* filed a 12(E) motion, the documents revealing the absence of a guarantee would not have been before the trial court and the court *could not have* properly granted a 12(B)(6) motion to dismiss for failure to state a claim. See, e.g., *National Check Bureau v. Buerger*, 9th Dist. No. 06CA008882, 2006-

Ohio-6673. The plaintiff in *Buerger* sought to recover a debt due on a credit card account. Id., ¶ 2. The defendant filed a motion for dismissal under Civ.R. 12(B)(6), alleging that the attachments were inadequate to establish the "account" required by Rule 10(D)(1). Id., ¶ 4-6. The trial court granted the motion and the Ninth District reversed, concluding that although the plaintiff's failure to attach all portions of the account violated Civ.R. 10(D)(1), it did not justify a dismissal under Civ.R. 12(B)(6):

> While Appellant's failure to attach the supplemental folder containing the rates at issue is a violation of Civ.R. 10(D), this does not mean that Appellant did not state a claim under Civ.R. 12(B)(6). *** [B]ecause Appellant could prove a set a facts entitling it to the requested relief, in spite of the Civ.R. 10(D) violation, the trial court erred in dismissing the complaint for failure to state a claim.
>
> This Court would first note that a motion to dismiss for failure to state a claim under Civ.R. 12(B)(6), a motion for more definite statement pursuant to Civ.R. 12(E), and the requirement to attach the written contract to the complaint when the claim is founded on that written contract under Civ.R. 10(D) are all separate and distinct procedural rules under the Ohio Civil Rules. A violation of one is not necessarily indicative of a violation of another.
>
> * * *
>
> It does not follow that because Appellant violated Civ.R. 10(D), its complaint did not state a claim upon which relief could be granted.

Id., ¶ 10, 11, 14. Far from requiring a dismissal *on the basis* of the missing supplemental folder, the 12(B)(6) standard required the court to presume that the allegations of the complaint regarding the supplemental folder *were correct*:

> [T]he trial court was required to presume all factual allegations as true and view all reasonable inferences in the

> light most favorable to Appellant. The trial court "must assume the missing attachment would entitle [Appellant] to relief."

Id., ¶ 15 (citation omitted).

Similarly, a 12(B)(6) motion to dismiss a complaint that wholly fails to attach *any* account or written instrument forming the basis of the complaint must be denied, because the court must assume the truth of the allegations regarding the missing document. See *McCamon-Hunt Ins. Agency, Inc. v. Medical Mut. of Ohio*, 7th Dist. No. 02CA23, 2003-Ohio-1221, ¶ 5, 10 (when a Rule 12(B)(6) motion is filed regarding a complaint that does not attach the contract or written instrument as required under Civ.R. 10(D), the court must "presume the language in the missing document would entitle [plaintiff] to the requested relief"); *National Check Bureau*, supra, at ¶ 10 (while the failure to attach a written instrument "is a violation of Civ.R. 10(D), this does not mean that [plaintiff] did not state a claim under Civ.R. 12(B)(6)"). See, also, *General Tire Sales, Inc. v. Nick Van Gelow*, 10th Dist. No. 75AP-635, 1976 WL 189730, at *2 (Whiteside, J., concurring):

> Under modern pleading, plaintiff does not lose his case because he used the word, "account," rather than "contract." Civ.R. 10(D) provides that, when a claim is based upon "an account or other written instrument, a copy thereof must be attached to the pleading." This plaintiff did, giving defendant full notice of that upon which the claim is founded. This is the purpose of the pleading under the Civil Rules – to give notice to the adverse party. See Civ.R. 8(A), (E), and (F). Even assuming the complaint herein is subject to a motion, it would be a motion to strike or a motion for a more definite statement, not summary judgment predicated solely upon the pleadings, making it the equivalent of a motion for judgment on the pleadings or a motion to dismiss.

As these cases make clear, the purpose of Civ.R. 10(D)(1) is to provide notice to the adverse party of the specific terms of an allegedly breached agreement, and the remedy for a violation of Civ.R. 10(D)(1) is a motion under Civ.R. 12(E) to compel the plaintiff to provide the document defining the parties' mutual duties and obligations.

As explained below, and more fully in Appellant's Merit Brief, the purpose of Civ.R. 10(D)(2) is not to provide notice or clarify vague or ambiguous allegations regarding the parties' legal duties. Rather, it is a verified, heightened pleading requirement enacted for the purpose of weeding out frivolous medical claims at the earliest possible stage of the proceedings.

B. A Motion to Dismiss Under Civ.R. 12(B)(6) Is Appropriate When a Complaint Fails to Meet the Heightened Pleading and Verification Requirements Imposed by Law or Rule.

The Affidavit of Merit requirement of Civ.R. 10(D)(2) has one common element with the attachment requirement of Civ.R. 10(D)(1) – both rules incorporate an attachment into the pleadings. The Affidavit of Merit requirement, however, is not imposed for the purpose of notifying the adverse party of the exact nature of the contractual duty that has allegedly been breached. Nor is it a necessary predicate for a motion under 12(B)(6). Rather, the Affidavit is required to demonstrate that a complaint is appropriate *at all.*

Because it requires expert medical opinion to be incorporated into a sworn affidavit attached to a pleading, Rule 10(D)(2) is an exception to the rule that pleadings need not be verified. See Civ.R. 11:

> *** Except when otherwise specifically provided by these rules, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or *pro se* party constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay.

(Appx. at 3.) The affidavit required by Rule 10(D)(2), however, goes beyond verification that "good grounds" support the allegations of the complaint. Rule 10(D)(2) requires the affiant to comply with specific qualifications, and attest that he or she has reviewed plaintiff's reasonably available medical records, is familiar with the applicable standard of care, and holds the expert medical opinion that the standard of care was breached and that the breach caused injury. Because these attestations are attached to, and become part of, the pleading, Rule 10(D)(2) effectively establishes a heightened pleading requirement for medical malpractice claims.

Heightened pleading requirements are imposed when "important public policies warrant a limitation on the number of claims" filed. *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 60. Such requirements are imposed on negligent hiring claims asserted against a religious institution to avoid First Amendment entanglements (id. at 61); on intentional tort claims against employers due to "the need to deter the number of baseless claims against employers, the importance of preventing every workplace injury from being converted into an intentional tort claim, and the goal of facilitating the efficient administration of justice" (id. at 60); and fraud claims "to protect defendants from unfounded charges of wrongdoing which may injure their reputations." Id. at 61. Each

of these claims must be pled with greater specificity – "the mere incantation of an abstract legal standard" is insufficient to withstand dismissal. Id. at 60.

Here, 20 years of legislation articulate the strong public policy supporting heightened pleading requirements for medical malpractice actions. See generally, Amicus Brief of the Ohio Hospital Association, et al. Because the very purpose of heightened pleading requirements is to raise the bar for surviving a 12(B)(6) motion, any rule prohibiting the filing of such motions – such as that adopted by the court below – is contrary to the public policy supporting Civ.R. 10(D)(2).

Not surprisingly, Rule 12(B)(6) motions are the motion of choice for challenging complaints subject to a heightened pleading requirement. See, e.g., *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 193 (affirming 12(B)(6) dismissal of complaint where plaintiff's "[u]nsupported conclusions" did not satisfy heightened pleading requirements for an intentional tort against an employer); *Federal Land Bank Ass'n v. Walton*, 3rd Dist. No. 16-94-9, 1995 WL 359856 at *3-*4 (granting motion to dismiss under Rule 12(B)(6) where complaint did not meet standard for asserting actions under § 1983, Title 42, U.S. Code or Ohio's "RICO" statute); *Mitterbach v. Cuyahoga County Probate Court*, 8th Dist. No. 89200, 2007-Ohio-6489, ¶ 15-16 (where affidavit attached to probate filing "does not substantiate the extensive history of psychiatric illness" required under R.C. 5122.11, "the subject matter jurisdiction of the probate court was never invoked, the proceedings against Mitterbach were never properly commenced, and the court's judgment ordering Mitterbach's detention was error"); *Martin v. Ghee*, 10th

Dist. No. 01AP-1380, 2002-Ohio-1621 (affirming 12(B)(6) dismissal of inmate complaint; the affidavit requirements of R.C. 2969.25 are "mandatory" and require "strict compliance").

The decision below cites to no cases involving a verification or heightened pleading requirement to support its conclusion that 12(B)(6) motions may not be filed to challenge the sufficiency of a medical malpractice complaint that wholly fails to comply with Civ.R. 10(D)(2). Cases applying Civ.R. 10(D)(1) do *not* support the court's conclusion; Civ.R. 10(D)(1) does not contain any verification or heightened pleading requirement.

C. Prohibiting 12(B)(6) Motions to Challenge the Sufficiency of a Medical Malpractice That Makes No Effort to Comply with Civ.R. 10(D)(2) Is Contrary to the Language and Public Policy Supporting the Rule.

Civ.R. 10(D)(2) is clear and unambiguous. A complaint alleging medical malpractice must either attach an Affidavit of Merit or be accompanied by a motion demonstrating "good cause" for allowing additional time to file the Affidavit. In *Manley v. Marisco* (2007), 116 Ohio St.3d 85, this Court suggested (in dicta), that trial courts have discretion to determine whether a pleading "error" – such as an untimely filing of an Affidavit of Merit – warrants dismissal. The nature and scope of such discretion is a question for another day.

Here, the issues before this Court are: 1) is a 12(B)(6) motion properly filed in response to a complaint asserting medical malpractice that does not comply with Civ.R. 10(D)(2)? and 2) did the Trial Court correctly dismiss such a complaint when the plaintiff had notice of, and a full opportunity to oppose, the defendant's 12(B)(6) motion, never tendered the required Affidavit, and never sought an extension of time to do so? The court of appeals erred when it concluded that the trial court could not entertain a 12(B)(6) motion, and could only entertain a 12(E) motion.

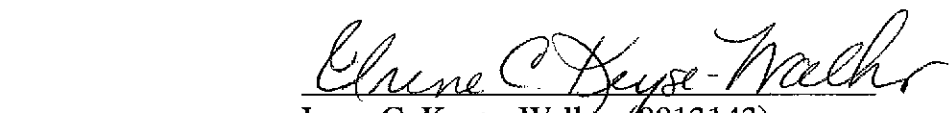
A 12(E) motion is a necessary "middle step" only when a trial court must examine the written instrument that forms the basis of the complaint in order to determine whether the complaint states a claim for which relief can be granted. No such "middle step" is needed when a complaint alleging medical malpractice fails to attach a required Affidavit of Merit. While a complaint on account can assert a claim for breach of contract without the account, a complaint cannot assert a claim for medical malpractice without the verification provided in a properly supported Affidavit of Merit.

IV. CONCLUSION

For all of the reasons stated more fully above, OACTA respectfully seeks reversal of the decision below and clarification by this Court that a Rule 12(B)(6) motion for

failure to state a claim for which relief can be granted is a proper response to a medical malpractice complaint that fails to comply with Civ.R. 10(D)(2).

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing has been served this 6th day of March, 2008, by U.S. Mail, postage prepaid, upon the following:

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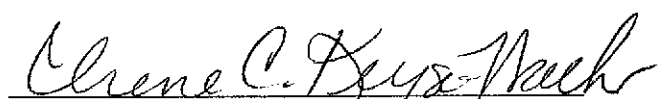

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APPENDIX

RULE 10. Form of Pleadings

(A) Caption; names of parties. Every pleading shall contain a caption setting forth the name of the court, the title of the action, the case number, and a designation as in Rule 7(A). In the complaint the title of the action shall include the names and addresses of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(B) Paragraphs; separate statements. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(C) Adoption by reference; exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument attached to a pleading is a part of the pleading for all purposes.

(D) Attachments to pleadings.

(1) *Account or written instrument.* When any claim or defense is founded on an account or other written instrument, a copy of the account or written instrument must be attached to the pleading. If the account or written instrument is not attached, the reason for the omission must be stated in the pleading.

(2) *Affidavit of merit; medical liability claim.*

(a) Except as provided in division (D)(2)(b) of this rule, a complaint that contains a medical claim, dental claim, optometric claim, or chiropractic claim, as defined in section 2305.113 of the Revised Code, shall include one or more affidavits of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability. Affidavits of merit shall be provided by an expert witness pursuant to Rules 601(D) and 702 of the Ohio Rules of Evidence. Affidavits of merit shall include all of the following:

(i) A statement that the affiant has reviewed all medical records reasonably available to the plaintiff concerning the allegations contained in the complaint;

(ii) A statement that the affiant is familiar with the applicable standard of care;

(iii) The opinion of the affiant that the standard of care was breached by one or more of the defendants to the action and that the breach caused injury to the plaintiff.

(b) The plaintiff may file a motion to extend the period of time to file an affidavit of merit. The motion shall be filed by the plaintiff with the complaint. For good cause shown and in

accordance with division (c) of this rule, the court shall grant the plaintiff a reasonable period of time to file an affidavit of merit, not to exceed ninety days, except the time may be extended beyond ninety days if the court determines that a defendant or non-party has failed to cooperate with discovery or that other circumstances warrant extension.

(c) In determining whether good cause exists to extend the period of time to file an affidavit of merit, the court shall consider the following:

(i) A description of any information necessary in order to obtain an affidavit of merit;

(ii) Whether the information is in the possession or control of a defendant or third party;

(iii) The scope and type of discovery necessary to obtain the information;

(iv) What efforts, if any, were taken to obtain the information;

(v) Any other facts or circumstances relevant to the ability of the plaintiff to obtain an affidavit of merit.

(d) An affidavit of merit is required to establish the adequacy of the complaint and shall not otherwise be admissible as evidence or used for purposes of impeachment. Any dismissal for the failure to comply with this rule shall operate as a failure otherwise than on the merits.

(e) If an affidavit of merit as required by this rule has been filed as to any defendant along with the complaint or amended complaint in which claims are first asserted against that defendant, and the affidavit of merit is determined by the court to be defective pursuant to the provisions of division (D)(2)(a) of this rule, the court shall grant the plaintiff a reasonable time, not to exceed sixty days, to file an affidavit of merit intended to cure the defect.

(E) Size of paper filed. All pleadings, motions, briefs, and other papers filed with the clerk, including those filed by electronic means, shall be on paper not exceeding 8 1/2 x 11 inches in size without backing or cover.

[Effective: July 1, 1970; amended effective July 1, 1985; July 1, 1991; July 1, 2005; July 1, 2007.]

RULE 11. Signing of Pleadings, Motions, or Other Documents

Every pleading, motion, or other document of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address, attorney registration number, telephone number, telefax number, if any, and business e-mail address, if any, shall be stated. A party who is not represented by an attorney shall sign the pleading, motion, or other document and state the party's address. Except when otherwise specifically provided by these rules, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or *pro se* party constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the document had not been served. For a willful violation of this rule, an attorney or *pro se* party, upon motion of a party or upon the court's own motion, may be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees incurred in bringing any motion under this rule. Similar action may be taken if scandalous or indecent matter is inserted.

[Effective: July 1, 1970; amended effective July 1, 1994, July 1, 1995; July 1, 2001.]

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

(A) When answer presented.

(1) Generally. The defendant shall serve his answer within twenty-eight days after service of the summons and complaint upon him; if service of notice has been made by publication, he shall serve his answer within twenty-eight days after the completion of service by publication.

(2) Other responses and motions. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within twenty-eight days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within twenty-eight days after service of the answer or, if a reply is ordered by the court, within twenty-eight days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (a) if the court denies the motion, a responsive pleading, delayed because of service of the motion, shall be served within fourteen days after notice of the court's action; (b) if the court grants a motion, a responsive pleading, delayed because of service of the motion, shall be served within fourteen days after service of the pleading which complies with the court's order.

(B) How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19 or Rule 19.1. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. Provided however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in Rule 56. All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.

(C) Motion for judgment on the pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.

(D) Preliminary hearings. The defenses specifically enumerated (1) to (7) in subdivision (B) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (C) of this rule shall be heard and determined before trial on application of any party.

(E) Motion for definite statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within fourteen days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(F) Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty-eight days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient claim or defense or any redundant, immaterial, impertinent, or scandalous matter.

(G) Consolidation of defenses and objections. A party who makes a motion under this rule must join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter assert by motion or responsive pleading, any of the defenses or objections so omitted, except as provided in subdivision (H) of this rule.

(H) Waiver of defenses and objections.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (a) if omitted from a motion in the circumstances described in subdivision (G), or (b) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(A) to be made as a matter of course.

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

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

[Effective: July 1, 1970; amended effective July 1, 1983.]