CHAPTER 805

CIVIL PROCEDURE — TRIALS

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NOTE: This chapter was created by Sup. Ct. Order, 67 Wis. 2d 585, 688 (1975), which contains explanatory notes. Statutes prior to the 1983−84 edition also contain these notes.

805.01 Jury trial of right. (1) RIGHT PRESERVED. The right of trial by jury as declared in article I, section 5, of the constitution or as given by a statute and the right of trial by the court shall be preserved to the parties inviolate.

(2) DEMAND. Any party entitled to a trial by jury or by the court may demand a trial in the mode to which entitled at or before the scheduling conference or pretrial conference, whichever is held first. The demand may be made either in writing or orally on the record.

(3) WAIVER. The failure of a party to demand in accordance with sub. (2) a trial in the mode to which entitled constitutes a waiver of trial in such mode. The right to trial by jury is also waived if the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

History: Sup. Ct. Order, 67 Wis. 2d 585, 689 (1975); 1975 c. 218; Sup. Ct. Order, 112 Wis. 2d xi (1983); 1983 a. 192.

Judicial Council Committee Note, 1983: The time deadline for demanding a jury trial is the scheduling conference where that occurs before or in lieu of the pretrial conference because knowledge of the mode of trial is required for proper scheduling. [Re Order effective July 1, 1983]

A legal counterclaim in an equitable action does not necessarily entitle the counterclaimant to a jury trial. An amendment by the plaintiff from equity to law does not necessarily entitle the defendant to a jury trial if the equitable action was brought in good faith. Tri−State Home Improvement Co. v. Mansavage, 77 Wis. 2d 648, 253 N.W.2d 474 (1977).

A party is entitled, as a matter of right, to a jury trial on a question of fact if that issue is retried, regardless of an earlier waiver. Tesky v. Tesky, 110 Wis. 2d 205, 327 N.W.2d 706 (1983).

When collateral estoppel compels raising a counterclaim in an equitable action, that compulsion does not result in the waiver of the right to a jury trial. Norwest Bank v. Plourde, 185 Wis. 2d 377, 518 N.W.2d 265 (Ct. App. 1994).

Absent an unambiguous declaration that a party intends to bind itself for future fact−finding hearings or trials, a jury waiver applies only to the fact−finding hearing or trial pending at the time the stipulation is made. Walworth County Department of Health & Human Services v. Roberta J.W., 2013 WI App 102, 349 Wis. 2d 691, 836 N.W.2d 860, 12−2387.

A pre−litigation jury waiver provision in a contract was enforceable. A motion to strike a demand for a jury trial based on the contract was not a demand for a trial to the court that is subject to waiver under sub. (3). Parsons v. Associated Banc−Corp., 2017 WI 37, 374 Wis. 2d 513, 893 N.W.2d 212, 14−2581.

The New Wisconsin Rules of Civil Procedure: Chapters 805−807. Graczyk. 59 MLR 671 (1976).

NOTE: See also the notes to article I, section 5, of the Wisconsin Constitution.

805.02 Advisory jury and trial by consent. (1) In all actions not triable of right by a jury, the court upon motion or on its own initiative may try any issue with an advisory jury.

(2) With the consent of both parties, the court may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

History: Sup. Ct. Order, 67 Wis. 2d 585, 690 (1975).

805.03 Failure to prosecute or comply with procedure statutes. For failure of any claimant to prosecute or for failure of any party to comply with the statutes governing procedure in civil actions or to obey any order of court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under s. 804.12 (2) (a). Any dismissal under this section operates as an adjudication on the merits unless the court in its order for dismissal otherwise specifies for good cause shown recited in the order. A dismissal on the merits may be set aside by the court on the grounds specified in and in accordance with s. 806.07. A dismissal not on the merits may be set aside by the court for good cause shown and within a reasonable time.

History: Sup. Ct. Order, 67 Wis. 2d 585, 690 (1975).

In order to demonstrate that a dismissal order based on failure to prosecute was an abuse of discretion, the aggrieved party must show a clear and justifiable excuse for the delay. Trispel v. Haefer, 89 Wis. 2d 725, 279 N.W.2d 242 (1979).

A judgment dismissing an action was void for lack of advance actual notice of dismissal that defined the "failure to prosecute" standard. Neylan v. Vorwald, 124 Wis. 2d 85, 368 N.W.2d 648 (1985).

Dismissal for failure to prosecute within a year of filing required actual or constructive notice of the applicable standards. Rupert v. Home Mutual Insurance Co., 138 Wis. 2d 1, 405 N.W.2d 661 (Ct. App. 1987).

Dismissal under this section is presumptively with prejudice. When the plaintiff failed to show "good cause" for delay, the appeals court erred in dismissing without prejudice. Marshall−Wisconsin Co. v. Juneau Square Corp., 139 Wis. 2d 112, 406 N.W.2d 764 (1987).

The court of appeals' remand "for trial" after reversal of a summary judgement order did not mandate the court to schedule and hold a trial. Dismissal for failure to prosecute was not an abuse of discretion. Prahl v. Brosamle, 142 Wis. 2d 658, 420 N.W.2d 372 (Ct. App. 1987).

When conduct in failing to comply with a court order is egregious and without clear and justifiable excuse, the court may, in its discretion, order dismissal. Johnson v. Allis Chalmers Corp., 162 Wis. 2d 261, 470 N.W.2d 859 (1991).

Ordering a criminal defendant to pay the state's trial expenses upon mistrial for violation of a pretrial order was authorized by this section. State v. Heyer, 174 Wis. 2d 164, 496 N.W.2d 779 (Ct. App. 1993).

In cases that do not fit squarely within this statute, a trial court has certain inherent powers to sanction the parties including the awarding of attorney fees. Schaefer v. Northern Assurance Co. of America, 182 Wis. 2d 148, 513 N.W.2d 16 (Ct. App. 1994).

A party's failure to appear at a scheduled hearing, after writing the court indicating that unless it heard otherwise from the court it would consider itself excused, was insufficient to excuse the party's appearance and was grounds for dismissal of the party under this section. Buchanan v. General Casualty Co., 191 Wis. 2d 1, 528 N.W.2d 457 (Ct. App. 1995).

The trial court erred in not considering other less severe sanctions before dismissing an action for failure to comply with a demand for discovery when no bad faith was found. Hudson Diesel, Inc. v. Kenall, 194 Wis. 2d 532, 535 N.W.2d 65 (Ct. App. 1995).

Default judgment entered as a sanction is not governed by s. 806.02 and does not require a full evidentiary hearing if damages are contested. The proper form of hearing on damages is left to the trial court's discretion. Chevron Chemical Co. v. Deloitte & Touche LLP, 207 Wis. 2d 43, 557 N.W.2d 775 (1997), 94−2827.

This section and s. 802.10 (7) apply in criminal cases. A court has power to sanction a tardy attorney under these sections. Failure to delineate the reasons for the sanctions is an erroneous exercise of discretion. Anderson v. Circuit Court for Milwaukee County, 219 Wis. 2d 1, 578 N.W.2d 633 (1998), 96−3281.

Counsel's egregious acts may be imputed to the client. Smith v. Golde, 224 Wis. 2d 518, 592 N.W.2d 287 (Ct. App. 1998), 97−3404.

If the constitution or statutes require proof before the circuit court can enter a particular judgment or order, the court cannot enter the judgment or order without the appropriate showing. The circuit court may determine that a party's action or inaction provides adequate cause for sanctions against that party. But that does not allow the court to dispense with any constitutional or statutory burden of proof that must be satisfied prior to entering a judgment or order. Evelyn C.R. v. Tykila S., 2001 WI 110, 246 Wis. 2d 1, 629 N.W.2d 768, 00−1739.

The trial court abused its discretion by ordering the defendant in a civil suit to forego its rights to insurance coverage for punitive damages when the issue of rights to insurance coverage was not before the court. City of West Allis v. Wisconsin Electric Power Co., 2001 WI App 226, 248 Wis. 2d 10, 635 N.W.2d 873, 99−2944.

Circuit courts have inherent authority to sanction by dismissal a party who has attempted to suborn perjury from a witness. In assessing the severity of the misconduct and need for an appropriate sanction, a trial court was within its authority to consider a previous attempt to suborn perjury in another case, in addition to the attempt in the case before it. Schultz v. Sykes, 2001 WI App 255, 248 Wis. 2d 746, 638 N.W.2d 604, 00−0915.

The American Rule does not bar courts from exercising their inherent power to assess attorney fees, and when a court does so, the limitations of fee awards under former s. 814.025, 1997 stats., do not control. Schultz v. Sykes, 2001 WI App 255, 248 Wis. 2d 746, 638 N.W.2d 604, 00−0915.

Because a guardian ad litem's allegedly contumacious act or omission had nothing to do with the violation of a pretrial, scheduling, or procedural order, the circuit court's authority to sanction the guardian ad litem for noncompliance with its substantive order directing the disposition of a minor's settlement proceeds was more firmly grounded in s. 785.03 (1) (a). Reed v. Luebke, 2003 WI App 207, 267 Wis. 2d 596, 671 N.W.2d 304, 02−2211.

It is an erroneous exercise of discretion for a circuit court to enter a sanction of dismissal with prejudice, imputing the attorney's conduct to the client, if the client is blameless. Industrial Roofing Services, Inc. v. Marquardt, 2007 WI 19, 299 Wis. 2d 81, 726 N.W.2d 898, 05−0189.

There is no requirement that conduct must be persistent in order to be egregious. When a defendant in a medical malpractice case destroyed all of his medical records in a single act, the magnitude of the loss under the circumstances was sufficient to constitute egregious conduct. Morrison v. Rankin, 2007 WI App 186, 305 Wis. 2d 240, 738 N.W.2d 588, 06−0980.

In light of the facts and the need of circuit courts to control their calendars to ensure the orderly administration of justice, the circuit court did not erroneously exercise its discretion when it determined that a civil defendant's violation of a scheduling order was "egregious" and grounds for entering default judgment when the defendant failed to attend the scheduling conference, file his witness list, file an itemization of damages in connection with his counterclaim, file a pretrial report, and attend the pretrial conference. East Winds Properties, LLC v. Jahnke, 2009 WI App 125, 320 Wis. 2d 797, 772 N.W.2d 738, 08−2453.

When the trial court imposed sanctions because it found that a party had brought what was essentially a motion for reconsideration without any new evidence or evidence of manifest error of law by the trial court, that was a basis for the court to deny the motion for reconsideration. It was not a basis for an award of attorney fees without a finding of bad faith or egregious conduct. No statute authorizes sanctions for bringing a motion for reconsideration, and the trial court made no finding of misconduct nor does the record reveal misconduct. Lee v. Geico Indemnity Co., 2009 WI App 168, 321 Wis. 2d 698, 776 N.W.2d 622, 08−3125.

Dismissal for failure to prosecute violated due process requirements when the petitioner had no actual or constructive notice that the petitioner's conduct might result in dismissal before the motion to dismiss for failure to prosecute was filed. More than notice of a motion to dismiss for failure to prosecute and a hearing are required to provide due process. Before imposing a sanction as drastic as dismissal, advanced notice is required that a party's conduct might result in dismissal to satisfy due process requirements. Theis v. Short, 2010 WI App 108, 328 Wis. 2d 162, 789 N.W.2d 585, 09−1591.

When a circuit court concludes that a party's failure to follow court orders, although unintentional, is "so extreme, substantial and persistent" that the conduct may be considered egregious, the circuit court may make a finding of egregiousness. Conversely, a party may also act in bad faith, which by its nature cannot be unintentional conduct. To find that a party acts in bad faith, the circuit court must find that the noncomplying party "intentionally or deliberately" delayed, obstructed, or refused to comply with the court order. Dane County Department of Human Services v. Mable K., 2013 WI 28, 346 Wis. 2d 396, 828 N.W.2d 198, 11−0825.

805.04 Voluntary dismissal: effect thereof. (1) BY PLAINTIFF; BY STIPULATION. An action may be dismissed by the plaintiff without order of court by serving and filing a notice of dismissal at any time before service by an adverse party of responsive pleading or motion or by the filing of a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is not on the merits, except that a notice of dismissal operates as an adjudication on the merits when filed by a plaintiff who has once dismissed in any court an action based on or including the same claim.

(2) BY ORDER OF COURT. Except as provided in sub. (1), an action shall not be dismissed at the plaintiff's instance save upon order of court and upon such terms and conditions as the court deems proper. Unless otherwise specified in the order, a dismissal under this subsection is not on the merits.

(3) COUNTERCLAIM, CROSS CLAIM AND 3RD−PARTY CLAIM. This section applies to the voluntary dismissal of any counterclaim, cross claim, or 3rd−party claim. A voluntary dismissal by the claimant alone shall be made before a responsive pleading is served, or if there is none, before the introduction of evidence at the trial or hearing.

(4) COSTS OF PREVIOUSLY DISMISSED ACTION. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it deems proper and may stay proceedings in the action until the plaintiff has complied with the order.

History: Sup. Ct. Order, 67 Wis. 2d 585, 691 (1975); 2005 a. 253; 2007 a. 20, 97; 2015 a. 55.

Assessment of attorney fees as a condition of voluntary dismissal without prejudice was within the trial court's discretion. Dunn v. Fred A. Mikkelson, Inc., 88 Wis. 2d 369, 276 N.W.2d 748 (1979).

Voluntary dismissal with prejudice rarely entitles the defendant to an award of fees and costs. Bishop v. Blue Cross & Blue Shield United of Wisconsin, 145 Wis. 2d 315, 426 N.W.2d 114 (Ct. App. 1988).

A condemnee may voluntarily dismiss an appeal to a circuit court under this section without court order. Dickie v. City of Tomah, 160 Wis. 2d 20, 465 N.W.2d 262 (Ct. App. 1990).

If any adverse party to an action files a responsive pleading prior to the time that the plaintiff attempts to dismiss the action under sub. (1), a voluntary dismissal without prejudice is no longer obtainable. Gowan v. McClure, 185 Wis. 2d 903, 519 N.W.2d 692 (Ct. App. 1994).

The trial court did not abuse its discretion in granting the plaintiff's motion for dismissal without prejudice in order that the plaintiff could refile in an attempt to take advantage of a new statutory enactment. The prejudice this section protects against is that of putting the defendant through the expense of a lawsuit without being able to obtain a final determination on the merits, not from being disadvantaged by a legislative policy change. Estate of Engebose v. Morraine Ridge Limited Partnership, 228 Wis. 2d 860, 598 N.W.2d 584 (Ct. App. 1999), 98−3019.

This section only applies to dismissals; it does not address vacating judgments. Once judgment is entered, there is no action to dismiss. Bank One Wisconsin v. Kahl, 2002 WI App 312, 258 Wis. 2d 937, 655 N.W.2d 525, 02−0835.

Sub. (1), the voluntary dismissal statute, does not apply in a CHIPS proceeding because it is different from and inconsistent with s. 48.24 (4), which is construed to provide that a district attorney may withdraw a CHIPS petition only with the approval of the court. Kenneth S. v. Circuit Court for Dane County, 2008 WI App 120, 313 Wis. 2d 508, 756 N.W.2d 573, 08−0147.

If doubt exists regarding the finality of an order of dismissal, the court may look beyond the words "with prejudice" to determine if the dismissal was meant to be conclusive. Brye v. Brakebush, 32 F.3d 1179 (1994).

805.05 Consolidation; separate trials. (1) CONSOLIDATION. (a) When actions which might have been brought as a single action under s. 803.04 are pending before the court, it may order a joint hearing or trial of any or all of the claims in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) When actions which might have been brought as a single action under s. 803.04 are pending before different courts, any such action may be transferred upon motion of any party or of the court to another court where the related action is pending. A conference involving both judges and all counsel may be convened on the record as prescribed by s. 807.13 (3). Transfer under this paragraph shall be made only by the joint written order of the transferring court and the court to which the action is transferred.

(2) SEPARATE TRIALS. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition or economy, or pursuant to s. 803.04 (2) (b), may order a separate trial of any claim, cross claim, counterclaim, or 3rd−party claim, or of any number of claims, always preserving inviolate the right of trial in the mode to which the parties are entitled.

History: Sup. Ct. Order, 67 Wis. 2d 585, 692 (1975); Sup. Ct. Order, 141 Wis. 2d xiii (1987); 2005 a. 253; 2007 a. 97.

Judicial Council Note, 1988: Sub. (1) (b) is amended by allowing conferences regarding consolidation of actions to be conducted by telephone conference. [Re Order effective Jan. 1, 1988]

The trial court's order to bifurcate the issues of liability and damages and to try the separate issues before separate juries contravened sub. (2) and cannot be reconciled with the requirement of s. 805.09 (2) that the same five−sixths of the jury must agree on all questions necessary to sustain a verdict. Waters v. Pertzborn, 2001 WI 62, 243 Wis. 2d 703, 627 N.W.2d 497, 99−1702.

805.06 Referees. (1) A court in which an action is pending may appoint a referee who shall have such qualifications as the court deems appropriate. The fees to be allowed to a referee shall be fixed by the court and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court, as the court may direct. The referee shall not retain the referee's report as security for compensation; but if the party ordered to pay the fee allowed by the court does not pay it after notice and within the time prescribed by the court, the referee is entitled to a writ of execution against the delinquent party.

(2) A reference shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

(3) The order of reference to the referee may specify or limit the referee's powers and may direct the referee to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the referee's report. Subject to the specifications and limitations stated in the order, the referee has and shall exercise the power to regulate all proceedings in every hearing before the referee and to do all acts and take all measures necessary or proper for the efficient performance of duties under the order. The referee may require the production of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. The referee may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may personally examine them and may call the parties to the action and examine them upon oath. When a party so requests, the referee shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as a court sitting without a jury.

(4) (a) When a reference is made, the clerk shall forthwith furnish the referee with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the referee shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the referee to proceed with all reasonable diligence. Any party, on notice to the parties and the referee, may apply to the court for an order requiring the referee to speed the proceedings and to make the report. If a party fails to appear at the time and place appointed, the referee may proceed ex parte or may adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(b) The parties may procure the attendance of witnesses before the referee by the issuance and service of subpoenas. If without adequate excuse a witness fails to appear to give evidence, the witness may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in ss. 885.11 and 885.12.

(c) When matters of accounting are in issue, the referee may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the referee may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as the referee directs.

(5) (a) The referee shall prepare a report upon the matters submitted by the order of reference and, if required to make findings of fact and conclusions of law, the referee shall set them forth in the report. The referee shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(b) In an action to be tried without a jury the court shall accept the referee's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice. The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instruction.

(c) In an action to be tried by a jury the referee shall not be directed to report the evidence. The referee's findings upon the issues submitted are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(d) The effect of a referee's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a referee's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

History: Sup. Ct. Order, 67 Wis. 2d 585, 693 (1975); 1975 c. 218.

The findings of a referee have the effect of findings of fact by a trial court and are to be upheld unless they are contrary to the great weight and clear preponderance of the evidence. Thus, in this case, the trial court properly refused to admit additional evidence on an issue of fact that the referee was appointed to resolve. Kleinstick v. Daleiden, 71 Wis. 2d 432, 238 N.W.2d 714 (1976).

The order of reference in this case impermissibly delegated to the referee judicial power vested by article VII, section 2, of the Wisconsin Constitution in Wisconsin's unified court system. Constitutional judges can take no power from the legislature to subdelegate their judicial functions. Referees may share in judicial labor but cannot assume the place of the judge. Universal Processing Services v. Circuit Court of Milwaukee County, 2017 WI 26, 374 Wis. 2d 26, 892 N.W.2d 267, 16−0923.

Article VII, section 8, of the Wisconsin Constitution provides that "the circuit court shall have . . . such appellate jurisdiction in the circuit as the legislature may prescribe by law." The legislature has not granted the circuit courts appellate jurisdiction over rulings by referees. A provision in a circuit court order of reference that the circuit court's review of the referee's rulings be based on the referee's erroneous exercise of discretion contravened the constitution, statutes, and rules regarding circuit court and appellate court authority and practice. Insofar as the order of reference authorized the referee to supervise pretrial discovery disputes, the order did not contravene the state constitution's vesting of judicial power in a unified court system. Universal Processing Services v. Circuit Court of Milwaukee County, 2017 WI 26, 374 Wis. 2d 26, 892 N.W.2d 267, 16−0923.

A referee's fees increase the costs of litigation and may have a chilling effect on litigants. A reference to a referee in effect requires litigants to pay for the court system twice—once through the tax system and a second time by paying fees to a referee for resolution of their suit. Referee fees may offend constitutional mandates "if they chill advocacy severely enough to 'effectively end the litigation' or impose 'an intolerable burden on a losing litigant.'" Appointment of a referee is for the exceptional case; it is not the general rule. Universal Processing Services v. Circuit Court of Milwaukee County, 2017 WI 26, 374 Wis. 2d 26, 892 N.W.2d 267, 16−0923.

While a referee's conclusion on a legal issue is a recommendation only, the referee's challenged findings of fact are to be accepted unless clearly erroneous. Because, in this case, the evidentiary record supporting the amended report was not provided to the circuit court, the court was unable to determine whether the referee's amended findings were against the great weight and clear preponderance of the evidence. Thus, the circuit court erred when it spontaneously accepted the referee's amended report without addressing the defendant's objection or even considering the referee's findings of fact or reviewing the factual evidence supporting those findings. Associated Bank, N.A. v. Brogli, 2018 WI App 47, 383 Wis. 2d 756, 917 N.W.2d 37, 16−1443.

805.07 Subpoena. (1) ISSUANCE AND SERVICE. Subpoenas shall be issued and served in accordance with ch. 885. A subpoena may also be issued by any attorney of record in a civil action or special proceeding to compel attendance of witnesses for deposition, hearing or trial in the action or special proceeding.

(2) SUBPOENA REQUIRING THE PRODUCTION OF MATERIAL. (a) A subpoena may command the person to whom it is directed to produce the books, papers, documents, electronically stored information, or tangible things designated therein. A subpoena may specify the form or forms in which electronically stored information is to be produced. A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding party to permit inspection, copying, testing, or sampling of the materials.

(b) Notice of a 3rd−party subpoena issued for discovery purposes shall be provided to all parties at least 10 days before the scheduled deposition in order to preserve their right to object. If a 3rd−party subpoena requests the production of books, papers, documents, electronically stored information, or tangible things that are within the scope of discovery under s. 804.01 (2) (a), those objects shall not be provided before the time and date specified in the subpoena. The provisions under this paragraph apply unless all of the parties otherwise agree.

(c) If a subpoena does not specify a form for producing electronically stored information, the person responding shall produce it in a form or forms in which it is ordinarily maintained or

in a reasonably usable form or forms. The person responding need not produce the same electronically stored information in more than one form.

(d) If information inadvertently produced in response to a subpoena is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(3) PROTECTIVE ORDERS. Upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, the court may (a) quash or modify the subpoena if it is unreasonable and oppressive or (b) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things designated therein.

(4) FORM. (a) The subpoena shall be in the following form:

SUBPOENA

STATE OF WISCONSIN

.... County

THE STATE OF WISCONSIN, TO ....:

Pursuant to section 805.07 of the Wisconsin Statutes, you are hereby commanded to appear in person before [.... designating the court, officer, or person and place of appearance], on [.... date] at .... o'clock ...M., to give evidence in an action between ...., plaintiff, and ...., defendant. [Insert clause requiring the production of material, if appropriate]. Failure to appear may result in punishment for contempt which may include monetary penalties, imprisonment and other sanctions. Issued this .... day of ...., ... (year)

[*Handwritten Signature*]

Attorney for [identify party]

(or other official title)

[Address]

[Telephone Number]

(b) For a subpoena requiring the production of material, the following shall be inserted in the foregoing form: You are further commanded to bring with you the following: [describing as accurately as possible the books, papers, documents or other tangible things sought].

(5) SUBSTITUTED SERVICE. A subpoena may be served in the manner provided in s. 885.03 except that substituted personal service may be made only as provided in s. 801.11 (1) (b) and except that officers, directors, and managing agents of public or private corporations or limited liability companies subpoenaed in their official capacity may be served as provided in s. 801.11 (5) (a).

(6) MOTION HEARING PROCEDURE. Motions under sub. (3) may be heard as prescribed in s. 807.13.

History: Sup. Ct. Order, 67 Wis. 2d 585, 697 (1975); 1979 c. 110; Sup. Ct. Order, 141 Wis. 2d xiii (1987); 1987 a. 155; 1993 a. 112; Sup. Ct. Order No. 95–09, 195 Wis. 2d xiii (1996); 1997 a. 250; 1999 a. 85; 2005 a. 253; Sup. Ct. Order No. 09–01, 2010 WI 67, filed 7–6–10, eff. 1–1–11; Sup. Ct. Order No. 12–03, 2012 WI 114, 344 Wis. 2d xxi.

Judicial Council Note, 1988: Sub. (6) [created] allows motions for protective orders to be heard by telephone conference. [Re Order effective Jan. 1, 1988]

Judicial Council Note, 1995: Sub. (2) (b) requires notice of third–party discovery subpoenas in order to preserve the right of other parties to move to quash them.

Judicial Council Note, 2010: The amendments to s. 805.07 (2) are modeled on F.R.C.P. 45(a) and (d). Portions of the Committee Note of the federal Advisory Committee on Civil Rules are pertinent to the scope and purpose of s. 805.07 (2): Rule 45 is amended to conform the provisions for subpoenas to changes in other discovery rules, largely related to discovery of electronically stored information.

Rule 45(a)(1)(B) is also amended, as is Rule 34(a), to provide that a subpoena is available to permit testing and sampling as well as inspection and copying. As in Rule 34, this change recognizes that on occasion the opportunity to perform testing or sampling may be important, both for documents and for electronically stored information. [Re Order effective Jan. 1, 2011]

Judicial Council Note, 2012: Sup. Ct. Order No. 12–03 states that "the Judicial Council Notes to Wis. Stat. ss. 804.01 (2) (c), 804.01 (7), 805.07 (2) (d), and 905.03 (5) are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule."

Sub. (2) (d) is modeled on Fed. R. Civ. P. 45(d)(2)(B), which was amended in 2007 to adopt the wording of Rule 26(b)(5)(B), the so–called "clawback" provision of the federal rules.

Sub. (3) only authorizes the court to quash a subpoena to compel production of tangible things, not a subpoena to compel attendance of a witnesses. State v. Gilbert, 109 Wis. 2d 501, 326 N.W.2d 744 (1982).

805.08 Jurors. (1) QUALIFICATIONS, EXAMINATION. The court shall examine on oath each person who is called as a juror to discover whether the juror is related by blood, marriage or adoption to any party or to any attorney appearing in the case, or has any financial interest in the case, or has expressed or formed any opinion, or is aware of any bias or prejudice in the case. If a juror is not indifferent in the case, the juror shall be excused. Any party objecting for cause to a juror may introduce evidence in support of the objection. This section shall not be construed as abridging in any manner the right of either party to supplement the court's examination of any person as to qualifications, but such examination shall not be repetitious or based upon hypothetical questions.

(2) NUMBER OF JURORS. A sufficient number of jurors shall be summoned in the action so that the number applicable under s. 756.06 remains after the exercise of all peremptory challenges to which the parties are entitled under sub. (3). The court may order that additional jurors be selected. In that case, if the number of jurors remains more than required at the time of the final submission of the cause, the court shall determine by lot which jurors shall not initially participate in deliberations. The court may hold the additional jurors until the verdict is rendered or discharge them at any time.

(3) PEREMPTORY CHALLENGES. Each party shall be entitled to 3 peremptory challenges which shall be exercised alternately, the plaintiff beginning; and when any party declines to challenge in turn, the challenge shall be made by the clerk by lot. The parties to the action shall be deemed 2, all plaintiffs being one party and all defendants being the other party, except that in a case where 2 or more defendants have adverse interests, the court, if satisfied that the due protection of their interests so requires, in its discretion, may allow peremptory challenges to the defendant or defendants on each side of the adverse interests, not to exceed 3. Each side shall be entitled to one peremptory challenge in addition to those otherwise allowed by law if additional jurors are to be selected under sub. (2).

(4) JURY VIEW. On motion of any party, the jury may be taken to view any property, matter or thing relating to the controversy between the parties when it appears to the court that the view is necessary to a just decision. The moving party shall pay the expenses of the view. The expenses shall afterwards be taxed like other legal costs if the party who incurred them prevails in the action.

History: Sup. Ct. Order, 67 Wis. 2d 585, 698 (1975); 1975 c. 218; 1977 c. 318; 1977 c. 447 s. 210; 1983 a. 226; Sup. Ct. Order No. 96–08, 207 Wis. 2d xv (1997); 1999 a. 162.

Judicial Council Note, 1983: Sub. (2) is amended by replacing the concept of "alternate" jurors with a provision allowing the court to order the impaneling of additional jurors. The panel is then reduced to the proper size by lot immediately prior to final submission of the cause. These changes are intended to promote an attentive attitude and a collegial relationship among the members of the jury.

The first sentence of prior sub. (3) is moved to sub. (2) for more logical placement in the statutes. The reference to "alternate" jurors in the final sentence is changed to "additional" jurors to reflect the modification of sub. (2). [Bill 320S]

Judicial Council Note, 1996: This proposal changes "impaneled" to "selected" whenever a statute refers to choosing jurors or prospective jurors, for statutory uniformity. Adding the last sentence [to (2)] is intended to allow courts to keep additional jurors to replace any juror who might not be able to complete deliberations. Deliberations would begin anew with the additional juror in place [Re SCO No. 96–08 eff. 7–1–97].

The mere expression of a predetermined opinion of guilt during voir dire does not disqualify the juror per se. Hammill v. State, 89 Wis. 2d 404, 278 N.W.2d 821 (1979).

The disproportionate representation of a group in one array is insufficient to establish systematic exclusion. State v. Pruitt, 95 Wis. 2d 69, 289 N.W.2d 343 (Ct. App. 1980).

Unless the defendant consents, it is reversible error for the trial court to substitute an alternate juror for a regular juror after jury deliberations have begun. State v. Lehman, 108 Wis. 2d 291, 321 N.W.2d 212 (1982).

The trial court's deliberate, though well−intended, removal of a class or group for cause without examination of individuals in the group was improper. State v. Chosa, 108 Wis. 2d 392, 321 N.W.2d 280 (1982).

The trial court, sitting as the trier of fact, committed an error of law in making and relying on an unrequested, unannounced, unaccompanied, and unrecorded view of an accident scene in assessing evidence produced at trial. American Family Mutual Insurance Co. v. Shannon, 120 Wis. 2d 560, 356 N.W.2d 175 (1984).

When a juror incompletely responds to material questions on voir dire, a new trial is warranted if it is shown that it is more likely than not that the juror was biased against the moving party. State v. Wyss, 124 Wis. 2d 681, 370 N.W.2d 745 (1985). But see State v. Faucher, 227 Wis. 2d 700, 596 N.W.2d 770 (1999), 97−2702, for a review of this case to apply new terminology regarding juror bias.

Law enforcement officers should not be automatically excused for cause from venire on grounds of implied bias. State v. Louis, 156 Wis. 2d 470, 457 N.W.2d 484 (1990). But see State v. Faucher, 227 Wis. 2d 700, 596 N.W.2d 770 (1999), 97−2702, for a review of this case to apply new terminology regarding juror bias.

Prospective jurors related to a state witness by blood or marriage to the third degree must be struck from the jury panel. State v. Gesch, 167 Wis. 2d 660, 482 N.W.2d 99 (1992). But see State v. Faucher, 227 Wis. 2d 700, 596 N.W.2d 770 (1999), 97−2702, for a review of this case to apply new terminology regarding juror bias.

The verdict of a 13−member jury panel agreed to by the defense and prosecution was valid. State v. Ledger, 175 Wis. 2d 116, 499 N.W.2d 199 (Ct. App. 1993).

An appellate court should overturn a circuit court's determination that a prospective juror can be impartial only if the juror's bias is manifest, and not when there is a reasonable suspicion of bias. Stating the test for manifest bias. State v. Ferron, 219 Wis. 2d 481, 579 N.W.2d 654 (1998), 96−3425. But see State v. Faucher, 227 Wis. 2d 700, 596 N.W.2d 770 (1999), 97−2702, for a review of this case to apply new terminology regarding juror bias.

Juror bias may be actual, implied, or inferred. Inferred bias is a factual finding requiring evaluation of the facts and circumstances including those surrounding the juror's incomplete or incorrect response to questions during voir dire. Truthful responses do not prevent finding inferred bias. State v. Delgado, 223 Wis. 2d 270, 588 N.W.2d 1 (1999), 96−2194. But see State v. Faucher, 227 Wis. 2d 700, 596 N.W.2d 770 (1999), 97−2702, for a review of this case to apply new terminology regarding juror bias.

Adopting the terms "statutory bias," "subjective bias," and "objective bias" as the proper terms for referring to types of jury bias, replacing the terms "implied bias," "subjective bias," and "objective bias." State v. Faucher, 227 Wis. 2d 700, 596 N.W.2d 770 (1999), 97−2702.

Statutory bias refers to those situations described in sub. (1); a person falling within one of the sub. (1) descriptions may not serve regardless of the ability to be impartial. State v. Faucher, 227 Wis. 2d 700, 596 N.W.2d 770 (1999), 97−2702.

Subjective bias is revealed through the words and demeanor of the prospective juror as revealed on voir dire; it refers to the juror's state of mind. State v. Faucher, 227 Wis. 2d 700, 596 N.W.2d 770 (1999), 97−2702.

Objective bias focuses on whether a reasonable person in the individual prospective juror's position could be impartial; the circuit court is particularly well positioned to determine objective bias. State v. Faucher, 227 Wis. 2d 700, 596 N.W.2d 770 (1999), 97−2702.

Wyss, 124 Wis. 2d 681 (1985), *Louis*, 156 Wis. 2d 470 (1990), *Gesch*, 167 Wis. 2d 660 (1992), *Messelt,* 185 Wis. 2d 255 (1994), *Ferron*, 219 Wis. 2d 481 (1998), *Delgado*, 223 Wis. 2d 270 (1999), and *Broomfield,* 223 Wis. 2d 465 (1999), are cases through which jury bias jurisprudence has evolved; considering where each would fall given the new bias terminology adopted in this case. State v. Faucher, 227 Wis. 2d 700, 596 N.W.2d 770 (1999), 97−2702.

There is no automatic disqualification of potential jurors who have been convicted of crimes. State v. Mendoza, 227 Wis. 2d 838, 596 N.W.2d 736 (Ct. App. 1998), 97−0952.

A prospective juror who is the brother−in−law of a state witness is a relative by marriage to the third degree under *Gesch*, 167 Wis. 2d 660 (1992), and must be struck for cause as the relationship constitutes statutory bias. Failure to do so is grounds for reversal and a new trial. State v. Czarnecki, 231 Wis. 2d 1, 604 N.W.2d 891 (Ct. App. 1999), 98−2406.

In deciding subjective bias, the particular words of the juror are not the focus. A prospective juror need not respond in voir dire with unequivocal declarations of impartiality. State v. Oswald, 2000 WI App 3, 232 Wis. 2d 103, 606 N.W.2d 238, 97−1219. But see Oswald v. Bertrand, 374 F.3d 475 (2003).

Objective bias requires a direct, critical, personal connection between the individual juror and crucial evidence or a dispositive issue in the case, or the juror's intractable negative attitude to the justice system in general. A reasonable person can be impartial despite a relationship to a police officer or past experience as an officer. State v. Oswald, 2000 WI App 3, 232 Wis. 2d 103, 606 N.W.2d 238, 97−1219. But see Oswald v. Bertrand, 249 F. Supp 2d 1078 (2003).

Peremptory challenges may not be exercised, and therefore not changed, after the parties have accepted the jury, even if the jury has not yet been sworn. State v. Nantelle, 2000 WI App 110, 235 Wis. 2d 91, 612 N.W.2d 356, 99−2159.

A party who during voir dire neither requests further questioning nor objects to the seating of a juror may not later allege error in the trial court's failure to act sua sponte in regard to a juror who may not be impartial. State v. Williams, 2000 WI App 123, 237 Wis. 2d 591, 614 N.W.2d 11, 99−0812.

The court's finding that a murder trial juror was not objectively biased was reasonable. Although the juror had a business and social relationship with the victim, the juror did not have a personal connection to crucial evidence or a dispositive issue in the case, a negative attitude toward the justice system, or such a close relationship with the victim that no reasonable person in the juror's position could not be impartial. State v. Lindell, 2000 WI App 180, 238 Wis. 2d 422, 617 N.W.2d 500, 99−2704.

A prospective juror who openly admits bias and is never questioned about his or her partiality is subjectively biased as a matter of law. State v. Carter, 2002 WI App 55, 250 Wis. 2d 851, 641 N.W.2d 517, 01−2303.

An administrative assistant employed by the county district attorney's office was not objectively biased because she worked for the same entity as the prosecuting attorney. The court declines to create a per se rule that excludes potential jurors for the sole reason that they are employed by the district attorney's office. State v. Smith, 2006 WI 74, 291 Wis. 2d 569, 716 N.W.2d 482, 04−2035.

A demonstration of a juror's specific bias is not needed to remove a juror from deliberations when there are 12 other jurors whose impartiality is not in question. The trial court properly exercised its discretion when it designated a juror as an alternate based on its concern regarding her potential impartiality. The trial court has a duty to ensure that the impaneled jury is impartial; that is free of bias or prejudice. While the trial court in this case did not determine by lot which jurors would not participate in deliberations, this was appropriate, notwithstanding sub. (2), as the trial court has the discretion to remove a juror for cause during a trial proceeding. State v. Gonzalez, 2008 WI App 142, 314 Wis. 2d 129, 758 N.W.2d 153, 07−2160.

As a matter of law, a reasonable presiding judge could not reach any other conclusion than to excuse his mother from sitting on the jury. State v. Tody, 2009 WI 31, 316 Wis. 2d 689, 764 N.W.2d 737, 07−0400.

The defendant was not entitled to a new trial even though she used a peremptory challenge to remove the judge's daughter−in−law from the jury. Because the defendant did not claim the jury was unfair or partial, a new trial was not required under the circumstances of the case. The defendant did not show that the presence of the challenged juror in the pool of potential jurors affected the defendant's substantial rights. State v. Sellhausen, 2012 WI 5, 338 Wis. 2d 286, 809 N.W.2d 14, 10−0445.

An appellate court should not give deference to a postconviction court's finding of subjective bias because the postconviction court did not preside over the trial and thus could not have observed the demeanor and disposition of a juror as the trial court did. Findings of fact regarding a trial, made at a hearing by a postconviction court that did not preside over the trial, are reviewed de novo. State v. Tobatto, 2016 WI App 28, 368 Wis. 2d 300, 878 N.W.2d 701, 15−0254.

Prospective jurors need not respond to voir dire questions with unequivocal declarations of impartiality. A juror's honest answers at times can be expected to be less than unequivocal. State v. Tobatto, 2016 WI App 28, 368 Wis. 2d 300, 878 N.W.2d 701, 15−0254.

A prospective juror must be able to set aside any opinion he or she might hold and decide the case on the evidence, but, as a general matter, a circuit court need not use or obtain any magic words in determining whether this requirement has been met. State v. Lepsch, 2017 WI 27, 374 Wis. 2d 98, 892 N.W.2d 682, 14−2813.

A defendant's right to be present at a critical stage of the defendant's proceedings, right to a public trial, and right to a jury properly sworn to be impartial were not violated because the clerk of circuit courts administered the oath to the prospective jurors outside of the defendant's presence. State v. Lepsch, 2017 WI 27, 374 Wis. 2d 98, 892 N.W.2d 682, 14−2813.

Guarantees of open public proceedings in criminal trials includes voir dire examination of potential jurors. Press−Enterprise Co. v. Superior Court of California, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984).

No new trial was required when a juror's failure to disclose during voir dire was harmless. McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984).

The use of peremptory challenges by a private litigant in a civil action to exclude potential jurors solely because of race violates the equal protection clause. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991).

If the issue of jury bias surfaces during or before trial, it is the trial judge's responsibility to conduct an adequate investigation, given the unsatisfactory character of an inquiry into jury bias after the trial is over and the defendant convicted. The question is whether, given the indications of jury bias, the judge's inquiry was adequate. Adequacy is a function of the probability of bias; the greater that probability, the more searching the inquiry needed to make reasonably sure that an unbiased jury is impaneled. Oswald v. Bertrand, 374 F.3d 475 (2004).

Analyzing Juror Bias Exhibited During Voir Dire in Wisconsin: How to Lessen the Confusion. Raissi. 84 MLR 517 (2000).

State v. Louis: A Missed Opportunity to Clarify when Law Enforcement Officials May Serve as Petit Jurors in Criminal Trials. Anderson. 1992 WLR 751.

NOTE: See also the notes to article I, section 7, of the Wisconsin Constitution.

805.09 Juries of fewer than 12; five−sixths verdict.

(1) JURY. The jury shall consist of a number of persons determined under s. 756.06 (2) (b).

(2) VERDICT. A verdict agreed to by five−sixths of the jurors shall be the verdict of the jury. If more than one question must be answered to arrive at a verdict on the same claim, the same five−sixths of the jurors must agree on all the questions.

History: Sup. Ct. Order, 67 Wis. 2d 585, 700 (1975); 1977 c. 318; 1977 c. 447 s. 210; Sup. Ct. Order No. 96−08, 207 Wis. 2d xv (1997).

Five−sixths jury agreement is not required on all questions on the verdict, but on all questions necessary to support a judgment on a particular claim. A verdict must be reviewed on a claim−by−claim basis rather than as a whole. Giese v. Montgomery Ward, Inc., 111 Wis. 2d 392, 331 N.W.2d 585 (1983).

The trial court's order to bifurcate the issues of liability and damages and to try the separate issues before separate juries contravened s. 805.05 (2) and cannot be reconciled with the requirement of sub. (2) that the same five−sixths of the jury must agree on all questions necessary to sustain a verdict. Waters v. Pertzborn, 2001 WI 62, 243 Wis. 2d 703, 627 N.W.2d 497, 99−1702.

805.10 Examination of witnesses; arguments.

Unless the judge otherwise orders, not more than one attorney for each side shall examine or cross−examine a witness and not more than 2 attorneys on each side shall sum up to the jury. The plaintiff shall be entitled to the opening and final rebuttal arguments. Plaintiff's rebuttal shall be limited to matters raised by any adverse party in argument. Waiver of argument by either party shall not preclude

the adverse party from making any argument which the adverse party would otherwise have been entitled to make. Before the argument is begun, the court may limit the time for argument.

History: Sup. Ct. Order, 67 Wis. 2d 585, 701 (1975); 1975 c. 218.

An attorney's concession during closing argument that the attorney's client was negligent could not be construed as a binding admission. Kuzmic v. Kreutzmann, 100 Wis. 2d 48, 301 N.W.2d 266 (Ct. App. 1980).

This section authorizes judges to allow more than two attorneys on each side to sum up to the jury, but a judge may not limit to fewer than two the number of attorneys arguing on each side. Waukesha County Department of Social Services v. C.E.W., 124 Wis. 2d 47, 368 N.W.2d 47 (1985).

805.11 Objections; exceptions. (1) Any party who has fair opportunity to object before a ruling or order is made must do so in order to avoid waiving error. An objection is not necessary after a ruling or order is made.

(2) A party raising an objection must specify the grounds on which the party predicates the objection or claim of error.

(3) Exceptions shall never be made.

(4) Evidentiary objections are governed by s. 901.03.

History: Sup. Ct. Order, 67 Wis. 2d 585, 701 (1975); 1975 c. 218.

805.12 Special verdicts. (1) USE. Unless it orders otherwise, the court shall direct the jury to return a special verdict. The verdict shall be prepared by the court in the form of written questions relating only to material issues of ultimate fact and admitting a direct answer. The jury shall answer in writing. In cases founded upon negligence, the court need not submit separately any particular respect in which the party was allegedly negligent. The court may also direct the jury to find upon particular questions of fact.

(2) OMITTED ISSUE. When some material issue of ultimate fact not brought to the attention of the trial court but essential to sustain the judgment is omitted from the verdict, the issue shall be deemed determined by the court in conformity with its judgment and the failure to request a finding by the jury on the issue shall be deemed a waiver of jury trial on that issue.

(3) CLERK'S ENTRIES AFTER VERDICT. Upon receiving a verdict, the clerk shall make an entry on the minutes specifying the time the verdict was received and the court's order setting time for motions after verdict under s. 805.16. The verdict and special findings shall be filed.

History: Sup. Ct. Order, 67 Wis. 2d 585, 702 (1975); 1975 c. 218.

If the court can find as a matter of law that a party is causally negligent, contrary to the jury's answer, and the jury attributes some degree of comparative negligence to that party, the court should change the causal negligence answer and permit the jury's comparison to stand. Ollinger v. Grall, 80 Wis. 2d 213, 258 N.W.2d 693 (1977).

If the answer to one material question shows that the jury answered perversely, the court should set aside the entire verdict unless it is satisfied that the other questions were not affected by the perversity. Fouse v. Persons, 80 Wis. 2d 390, 259 N.W.2d 92 (1977).

When the verdict form did not contain a special fact question regarding the major issue of the case, real issues had not been tried. Schulz v. St. Mary's Hospital, 81 Wis. 2d 638, 260 N.W.2d 783 (1978).

If evidence conflicts and inconsistent theories on the cause of the event are advanced, instructions on both theories should be given. Sentell v. Higby, 87 Wis. 2d 44, 273 N.W.2d 780 (Ct. App. 1978).

An inconsistent verdict, if not timely remedied by reconsideration by the jury, must result in a new trial unless the party injured by the inconsistency waives the portion of its damage claim and the waiver does not result in a change of the prevailing party as found by the jury. Westfall v. Kottke, 110 Wis. 2d 86, 328 N.W.2d 481 (1983).

Ambiguities in jury questions were "omitted issues" under sub. (2) and properly determined by the trial court. Badtke v. Badtke, 122 Wis. 2d 730, 364 N.W.2d 547 (Ct. App. 1985).

A special verdict must cover material issues of ultimate fact. The form of a special verdict is discretionary with the trial court, and an appellate court will not interfere as long as all material issues of fact are covered by appropriate questions. Industrial Risk Insurers v. American Engineering Testing, Inc., 2009 WI App 62, 318 Wis. 2d 148, 769 N.W.2d 82, 08–0484.

The trial court cannot submit a case on one theory and resort to sub. (2) to dispose of it on another theory. Under s. 805.13 (3), the parties confer, with the trial court's supervision, on the instructions and special verdict that will go to the jury. If a party has an objection, the party must voice it or it will be waived. If the special verdict leaves out an essential material issue of ultimate fact of a cause of action pled and presented to the jury, and the jury's answers define, by necessary implication, what the missing issue should be, then, under sub. (2) the trial court may "fill in" this missing issue. But the trial court cannot "fill in" a missing cause of action. Hansen v. Texas Roadhouse, Inc., 2013 WI App 2, 345 Wis. 2d 669, 827 N.W.2d 99, 10–3137.

Special Verdict Formulation in Wisconsin. Decker & Decker. 60 MLR 201 (1977).

Product Liability Verdict Formulation in Wisconsin. Slattery, Terschan, & Griffin. 61 MLR 381 (1978).

805.13 Jury instructions; note taking; form of verdict. (1) STATEMENTS BY JUDGE. After the trial jury is sworn, all statements or comments by the judge to the jury or in their presence relating to the case shall be on the record.

(2) PRELIMINARY INSTRUCTIONS AND NOTE TAKING. (a) After the trial jury is sworn, the court shall determine if the jurors may take notes of the proceedings:

1. If the court authorizes note–taking, the court shall instruct the jurors that they may make written notes of the proceedings, except the opening statements and closing arguments, if they so desire and that the court will provide materials for that purpose if they so request. The court shall stress the confidentiality of the notes to the jurors. The jurors may refer to their notes during the proceedings and deliberation. The notes may not be the basis for or the object of any motion by any party. After the jury has rendered its verdict, the court shall ensure that the notes are promptly collected and destroyed.

2. If the court does not authorize note–taking, the court shall state the reasons for the determination on the record.

(b) The court may give additional preliminary instructions to assist the jury in understanding its duty and the evidence it will hear. The preliminary instructions may include, without limitation, a description of the nature of the case, what constitutes evidence and what does not, guidance regarding the burden of proof and the credibility of witnesses, and directions not to discuss the case until deliberations begin. Any such preliminary jury instructions may be given again in the charge at the close of the evidence. The additional preliminary instructions shall be disclosed to the parties before they are given and either party may object to any specific instruction or propose instructions of its own to be given prior to trial.

(3) INSTRUCTION AND VERDICT CONFERENCE. At the close of the evidence and before arguments to the jury, the court shall conduct a conference with counsel outside the presence of the jury. At the conference, or at such earlier time as the court reasonably directs, counsel may file written motions that the court instruct the jury on the law, and submit verdict questions, as set forth in the motions. The court shall inform counsel on the record of its proposed action on the motions and of the instructions and verdict it proposes to submit. Counsel may object to the proposed instructions or verdict on the grounds of incompleteness or other error, stating the grounds for objection with particularity on the record. Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict.

(4) INSTRUCTION. The court shall instruct the jury before or after closing arguments of counsel. Failure to object to a material variance or omission between the instructions given and the instructions proposed does not constitute a waiver of error. The court shall provide the jury with one complete set of written instructions providing the burden of proof and the substantive law to be applied to the case to be decided.

(5) REINSTRUCTION. After the jury retires, the court may reinstruct the jury as to all or any part of the instructions previously given, or may give supplementary instructions as it deems appropriate.

History: Sup. Ct. Order, 67 Wis. 2d 585, 703 (1975); 1975 c. 218; 1979 c. 128; 1981 c. 358; Sup. Ct. Order, 130 Wis. 2d xi (1987).

Judicial Council Note, 1986: Sub. (2) (b) is amended to provide that preliminary instructions may include a description of the nature of the case, what constitutes evidence and what does not, guidance regarding the burden of proof and the credibility of witnesses, and directions not to discuss the case until deliberations begin.

Sub. (4) is amended to required that the court provide the jury one written copy of its instructions regarding the burden of proof. [Re Order eff. 7–1–86]

Specific evidentiary facts may be incorporated into an instruction provided they do not lead the jury to believe that the court has prejudged the evidence. State v. Dix, 86 Wis. 2d 474, 273 N.W.2d 250 (1979).

Under sub. (3), a failure to object waives errors of substance as well as of form. Gyldenvand v. Schroeder, 90 Wis. 2d 690, 280 N.W.2d 235 (1979).

It was proper to instruct a jury that it need not consider a lesser offense if it found the defendant guilty of a higher one. State v. McNeal, 95 Wis. 2d 63, 288 N.W.2d 874 (Ct. App. 1980).

Although failure to object at the verdict conference to a substantive defect in the verdict constituted waiver, failure to object did not preclude the court's consideration

of the defect under s. 751.06. Clark v. Leisure Vehicles, Inc., 96 Wis. 2d 607, 292 N.W.2d 630 (1980).

When an objection at the verdict conference was not specific enough to preserve an appeal, the supreme court reversed the trial court under s. 751.06. Air Wisconsin, Inc. v. North Central Airlines, Inc., 98 Wis. 2d 301, 296 N.W.2d 749 (1980).

Under the separation of powers doctrine, sub. (4) and s. 972.10 (5) require submission to the jury of written instructions on the substantive law but do not require an automatic reversal when the trial court fails to do so. Instructions on the burden of proof and presumption of innocence are procedural, not substantive law. E.B. v. State, 111 Wis. 2d 175, 330 N.W.2d 584 (1983).

When an alleged error went to the integrity of the fact−finding process, the trial court exercised its discretion to review the circumstantial evidence instruction irrespective of the defendant's waiver of objection. State v. Shah, 134 Wis. 2d 246, 397 N.W.2d 492 (1986).

It is not error for the trial court to fail to instruct sua sponte on a lesser−included offense. The trial court should not interfere with the parties' trial strategy. State v. Myers, 158 Wis. 2d 356, 461 N.W.2d 777 (1990).

Instructional rulings are to be made at the close of the evidence. A party is not entitled to a mid−trial advisory ruling on whether an instruction will be given. Such a ruling, if given, is nonbinding and not subject to appeal. State v. Sohn, 193 Wis. 2d 346, 535 N.W.2d 1 (Ct. App. 1995).

If an attorney disagrees with an instruction that a judge decides to give during an off−the−record conference, the attorney must object to the instruction on the record to preserve the issue for appeal. Steinberg v. Jensen, 204 Wis. 2d 115, 553 N.W.2d 820 (Ct. App. 1996), 92−2475.

Appellate courts have no power to reach waived issues concerning unobjected to jury instructions. State v. Ward, 228 Wis. 2d 301, 596 N.W.2d 887 (Ct. App. 1999), 98−2530.

A party is not held to a waiver under sub. (3) when a potentially inconsistent verdict is produced by the substance of the jury's verdict, as opposed to the wording of the verdict. LaCombe v. Aurora Medical Group, 2004 WI App 119, 274 Wis. 2d 771, 683 N.W.2d 532, 03−2093.

A party waives all claims of error not raised in motions after verdict although a timely objection was made at trial. This rule applies to an asserted jury instruction error objected to under sub. (3). Suchomel v. University of Wisconsin Hospital & Clinics, 2005 WI App 234, 288 Wis. 2d 188, 708 N.W.2d 13, 04−0363.

A trial court's decision to read jury instructions on damages prior to certain testimony was a proper exercise of discretion and the court properly denied the defendant's motion for mistrial. Because the instructions were not disclosed to the parties before they were read by the court, the reading did not qualify as a preliminary instruction under sub. (2) (b). The trial court has broad discretion over the conduct of litigation and saw a need to orient the jury to the subject matter of the testimony when the evidence was jumping from expert testimony to fact testimony to damage testimony in a long and complex trial. Hegarty v. Beauchaine, 2006 WI App 248, 297 Wis. 2d 70, 727 N.W.2d 857, 04−3252.

A jury instruction that does not accurately state the statutory requirements for the crime charged constitutes an erroneous statement of the law. Harmless error analysis is appropriate when jury instructions include a requirement in addition to that set forth in a statute. The jury instructions cannot provide the proper standard for analysis. A challenge must be reviewed in the context of the statutory requirements. State v. Beamon, 2013 WI 47, 347 Wis. 2d 559, 830 N.W.2d 681, 10−2003.

Defining the meaning of a word in a jury instruction is akin to defining the meaning of a word in a statute. Determining the meaning of the word in a jury instruction is a legal question that appellate courts review de novo. When the word is not defined in the jury instruction, the appellate court will assign the word its common, ordinary, and accepted meaning, which may be ascertained by resort to a dictionary. State v. Bowen, 2015 WI App 12, 359 Wis. 2d 659, 859 N.W.2d 166, 14−0767.

In this case, the defendant waived his objection to the use of a jury instruction by failing to object at the jury instruction and verdict conference as required under sub. (3). The defendant's post−conviction challenge to the jury instruction could have been made at trial, and the fact that law review articles that the defendant claims support his position were published after the defendant's conviction did not render his objection "unknowable" at the time of the conference. State v. Trammell, 2019 WI 59, 387 Wis. 2d 156, 928 N.W.2d 564, 17−1206.

The court of appeals has no power to reach an unobjected−to jury instruction under sub. (3) because the court of appeals lacks a discretionary power of review. However, the supreme court possesses a discretionary power of review that the court may exercise when a matter is properly before the court. State v. Trammell, 2019 WI 59, 387 Wis. 2d 156, 928 N.W.2d 564, 17−1206.

805.14 Motions challenging sufficiency of evidence; motions after verdict.

(1) TEST OF SUFFICIENCY OF EVIDENCE. No motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party.

(2) NONSUIT ABOLISHED; MISDESIGNATION OF MOTIONS. (a) The involuntary nonsuit is abolished. If a motion for involuntary nonsuit is made, it shall be treated as a motion to dismiss.

(b) When a party mistakenly designates a motion to dismiss as a motion for directed verdict, or vice versa; or mistakenly designates a motion to change answer as a motion for judgment notwithstanding the verdict, or vice versa; or otherwise mistakenly designates a motion challenging the sufficiency of evidence as a matter of law, the court shall treat the motion as if there had been a proper designation.

(3) MOTION AT CLOSE OF PLAINTIFF'S EVIDENCE. At the close of plaintiff's evidence in trials to the jury, any defendant may move for dismissal on the ground of insufficiency of evidence. If the court determines that the defendant is entitled to dismissal, the court shall state with particularity on the record or in its order of dismissal the grounds upon which the dismissal was granted and shall render judgment against the plaintiff.

(4) MOTION AT CLOSE OF ALL EVIDENCE. In trials to the jury, at the close of all evidence, any party may challenge the sufficiency of the evidence as a matter of law by moving for directed verdict or dismissal or by moving the court to find as a matter of law upon any claim or defense or upon any element or ground thereof.

(5) MOTIONS AFTER VERDICT. (a) *Motion for judgment.* A motion for judgment on the verdict is not required. If no motion after verdict is filed within the time period specified in s. 805.16, judgment shall be entered on the verdict at the expiration thereof. If a motion after verdict is timely filed, judgment on the verdict shall be entered upon denial of the motion.

(b) *Motion for judgment notwithstanding verdict.* A party against whom a verdict has been rendered may move the court for judgment notwithstanding the verdict in the event that the verdict is proper but, for reasons evident in the record which bear upon matters not included in the verdict, the movant should have judgment.

(c) *Motion to change answer.* Any party may move the court to change an answer in the verdict on the ground of insufficiency of the evidence to sustain the answer.

(d) *Motion for directed verdict.* A party who has made a motion for directed verdict or dismissal on which the court has not ruled pending return of the verdict may renew the motion after verdict. In the event the motion is granted, the court may enter judgment in accordance with the motion.

(e) *Preliminary motions.* It is not necessary to move for a directed verdict or dismissal prior to submission of the case to the jury in order to move subsequently for a judgment notwithstanding the verdict or to change answer.

(f) *Telephone hearings.* Motions under this subsection may be heard as prescribed in s. 807.13.

(6) GROUNDS TO BE STATED WITH PARTICULARITY. In any motion challenging the sufficiency of evidence, the grounds of the motion shall be stated with particularity. Mere conclusory statements and statements lacking express reference to the specific element of claim or defense as to which the evidence is claimed to be deficient shall be deemed insufficient to entitle the movant to the order sought. If the court grants a motion challenging the sufficiency of the evidence, the court shall state on the record or in writing with particularity the evidentiary defect underlying the order.

(7) EFFECT OF ORDER OF DISMISSAL. Unless the court in its order for dismissal otherwise specifies for good cause recited in the order, any dismissal under this section operates as an adjudication upon the merits.

(8) NONWAIVER. A party who moves for dismissal or for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted without having reserved the right to do so and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdict.

(9) INVOLUNTARY DISMISSAL OF COUNTERCLAIM, CROSS CLAIM OR 3RD−PARTY CLAIM. This section applies to counterclaims, cross claims, and 3rd−party claims.

History: Sup. Ct. Order, 67 Wis. 2d 585, 704 (1975); Sup. Ct. Order, 67 Wis. 2d vii (1975); 1975 c. 218; Sup. Ct. Order, 73 Wis. 2d xxxi (1986); Sup. Ct. Order, 118 Wis. 2d xiii (1984); Sup. Ct. Order, 141 Wis. 2d xiii (1987); 2005 a. 253; 2007 a. 97.

Judicial Council Committee's Note, 1976: Sub. (3) applies only to trials to the jury, codifying Household Utilities, Inc. v. Andrews Co., 71 Wis. 2nd 17 (1976). The standard for granting a motion under sub. (3) is found in sub. (1). Motions made by

a defendant for dismissal after a plaintiff has completed presenting his evidence in trials to the court is governed by s. 805.17 (1). [Re Order effective Jan. 1, 1977]

Judicial Council Note, 1984: Sub. (5) (a) is amended by eliminating the requirement for a motion before judgment is entered on a verdict. [Re Order effective July 1, 1984]

Judicial Council Note, 1988: Sub. (5) (f) [created] allows motions after verdict to be heard by telephone conference. [Re Order effective Jan. 1, 1988]

An inconsistent verdict, if not timely remedied by reconsideration by the jury, must result in a new trial unless the party injured by the inconsistency waives that portion of its damage claim and the waiver does not result in a change of the prevailing party as found by the jury. Westfall v. Kottke, 110 Wis. 2d 86, 328 N.W.2d 481 (1983).

If there is any credible evidence that, under any reasonable view, fairly admits of an inference that supports the jury's finding, the finding may not be overturned. Gen-Star v. Bankruptcy Estate of Lake Geneva Sugar Shack, 215 Wis. 2d 104, 572 N.W.2d 881 (Ct. App. 1997), 96−2156.

A party waives all claims of error not raised in motions after verdict although a timely objection was made at trial. This rule applies to an asserted jury instruction error objected to under s. 805.13 (3). Suchomel v. University of Wisconsin Hospital & Clinics, 2005 WI App 234, 288 Wis. 2d 188, 708 N.W.2d 13, 04−0363.

Generally, when the jury instructions conform to the statutory requirements of that offense, the court reviews the sufficiency of the evidence by comparison to those jury instructions. State v. Coughlin, 2022 WI 43, 402 Wis. 2d 107, 975 N.W.2d 179, 19−1876.

805.15 New trials. (1) MOTION. A party may move to set aside a verdict and for a new trial because of errors in the trial, or because the verdict is contrary to law or to the weight of evidence, or because of excessive or inadequate damages, or because of newly−discovered evidence, or in the interest of justice. Motions under this subsection may be heard as prescribed in s. 807.13. Orders granting a new trial on grounds other than in the interest of justice, need not include a finding that granting a new trial is also in the interest of justice.

(2) ORDER. Every order granting a new trial shall specify the grounds therefor. No order granting a new trial shall be valid or effective unless the reasons that prompted the court to make such order are set forth on the record, or in the order or in a written decision. In such order, the court may grant, deny or defer the awarding of costs.

(3) Except as provided in ss. 974.07 (10) (b) and 980.101 (2) (b), a new trial shall be ordered on the grounds of newly−discovered evidence if the court finds that:

(a) The evidence has come to the moving party's notice after trial; and

(b) The moving party's failure to discover the evidence earlier did not arise from lack of diligence in seeking to discover it; and

(c) The evidence is material and not cumulative; and

(d) The new evidence would probably change the result.

(4) ALTERNATE MOTIONS; CONDITIONAL ORDER. If the court grants a motion for judgment notwithstanding the verdict, or a motion to change answer and render judgment in accordance with the answer so changed, or a renewed motion for directed verdict, the court shall also rule on the motion for new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for new trial. If the motion for a new trial is thus conditionally granted and the judgment has been reversed on appeal, the new trial shall proceed unless the appellate court shall have otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(5) APPEAL. If the court denies a motion for judgment notwithstanding the verdict, or a motion to change answer and render judgment in accordance with the answer so changed, or a renewed motion for directed verdict, the party who prevailed on that motion may, as appellee, assert for the first time, grounds which entitle the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict or motion to change answer and render judgment in accordance with the answer so changed, or a renewed motion for directed verdict. If the appellate court reverses the judgment, nothing in this section precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

(6) EXCESSIVE OR INADEQUATE VERDICTS. If a trial court determines that a verdict is excessive or inadequate, not due to perversity or prejudice or as a result of error during trial (other than an error as to damages), the court shall determine the amount which as a matter of law is reasonable, and shall order a new trial on the issue of damages, unless within 10 days the party to whom the option is offered elects to accept judgment in the changed amount. If the option is not accepted, the time period for petitioning the court of appeals for leave to appeal the order for a new trial under ss. 808.03 (2) and 809.50 commences on the last day of the option period.

History: Sup. Ct. Order, 67 Wis. 2d 585, 708 (1975); 1975 c. 218; 1979 c. 110; 1983 a. 219; Sup. Ct. Order, 141 Wis. 2d xiii (1987); 2001 a. 16.

Judicial Council Note, 1983: Sub. (6) is amended to codify the holding of Wick v. Mueller, 105 Wis. 2d 191, 313 N.W.2d 749 (1982) that orders for new trials under this subsection are not appealable as of right and that the time period for seeking leave to appeal under ss. 808.03 (2) and 809.50, stats., is computed from the last day of the option period set forth in the trial court's order. [Bill 151−S]

Judicial Council Note, 1988: Sub. (1) is amended to allow motions for new trial to be heard by telephone conference. [Re Order effective Jan. 1, 1988]

A statement that the verdict is contrary to the weight of evidence will not support an order granting a new trial in the interest of justice. DeGroff v. Schmude, 71 Wis. 2d 554, 238 N.W.2d 730 (1976).

That an expert listed in a pretrial order was not called as a witness at trial and the expert's report was admitted did not constitute grounds for granting a new trial. Karl v. Employers Insurance of Wausau, 78 Wis. 2d 284, 254 N.W.2d 255 (1977).

If the answer to one material question shows that the jury made its answer perversely, the trial court should set aside the entire verdict unless the court is satisfied that other questions were not affected by the perversity. Fouse v. Persons, 80 Wis. 2d 390, 259 N.W.2d 92 (1977).

If there is a reasonable basis for the trial court's determination under sub. (6) as to proper verdict amount, the decision will be sustained. Koele v. Radue, 81 Wis. 2d 583, 260 N.W.2d 766 (1978).

When a jury award of damages was so inadequate that it indicated prejudice, the trial court did not abuse its discretion by ordering a new trial on all issues. Larry v. Commercial Union Insurance Co., 88 Wis. 2d 728, 277 N.W.2d 821 (1979).

An order for a new trial under sub. (6) is not a final order and is not appealable as of right under s. 808.03 (1). Earl v. Marcus, 92 Wis. 2d 13, 284 N.W.2d 690 (Ct. App. 1979).

Sub. (6) establishes that one who wishes to take an appeal from the interlocutory order issued by the court. Wick v. Mueller, 105 Wis. 2d 191, 313 N.W.2d 799 (1982).

A shockingly low award of damages justified a new trial on that issue. Westfall v. Kottke, 110 Wis. 2d 86, 328 N.W.2d 481 (1983).

A court may order a retrial under sub. (6) on punitive damages alone. Badger Bearing, Inc. v. Drives & Bearings, Inc., 111 Wis. 2d 659, 331 N.W.2d 847 (Ct. App. 1983).

The trial court may not grant a new trial based solely upon unobjected to instructional errors, but may use that error to grant a new trial in the interest of justice. State v. Harp, 150 Wis. 2d 861, 443 N.W.2d 38 (Ct. App. 1989).

A new trial in the interest of justice under sub. (1), when the controversy was not fully tried, is not limited to cases of evidentiary error and does not require a showing of a probable different result in the second trial. State v. Harp, 161 Wis. 2d 773, 469 N.W.2d 210 (Ct. App. 1991).

The standard for granting a new trial in the interest of justice when the verdict is contrary to the great weight of the evidence is less stringent than for granting a motion challenging the sufficiency of the evidence under s. 805.14. Sievert v. American Family Mutual Insurance Co., 180 Wis. 2d 426, 509 N.W.2d 75 (Ct. App. 1993).

A codefendant's testimony that the defendant was aware of at trial, but unable to present because the codefendant refused to testify on 5th amendment grounds, was not newly discovered evidence. State v. Jackson, 188 Wis. 2d 187, 525 N.W.2d 739 (Ct. App. 1994).

805.16 Time for motions after verdict. (1) Motions after verdict shall be filed and served within 20 days after the verdict is rendered, unless the court, within 20 days after the verdict is rendered, sets a longer time by an order specifying the dates for filing motions, briefs or other documents.

(2) The time for hearing arguments on motions after verdict shall be not less than 10 nor more than 60 days after the verdict is rendered, unless enlarged pursuant to motion under s. 801.15 (2) (a).

(3) If within 90 days after the verdict is rendered the court does not decide a motion after verdict on the record or the judge, or the clerk at the judge's written direction, does not sign an order deciding the motion, the motion is considered denied and judgment shall be entered on the verdict.

(4) Notwithstanding sub. (1), a motion for a new trial based on newly discovered evidence may be made at any time within one year after verdict. Unless an order granting or denying the motion

is entered within 90 days after the motion is made, it shall be deemed denied.

(5) The time limits in this section for filing motions do not apply to a motion for a new trial based on newly discovered evidence that is brought under s. 974.06.

History: Sup. Ct. Order, 67 Wis. 2d 585, 711 (1975); Sup. Ct. Order, 118 Wis. 2d xiii (1984); Sup. Ct. Order, 136 Wis. 2d xxv (1987); Sup. Ct. Order 160 Wis. 2d xiii (1991); 2001 a. 16.

Judicial Council Note, 1984: The requirement that the judge set dates for filing and hearing motions after verdict is repealed in favor of a time limit for such motions. The prior rule encouraged frivolous motions and caused unnecessary hearings. [Re Order effective July 1, 1984]

Judicial Council Note, 1986: Sub. (1) specifies that the trial court may allow more than 20 days for motions after verdict to be filed, if a schedule for the filing of motions and supporting materials is ordered within that time.

Sub. (2) clarifies that the time for hearing motions after verdict may be enlarged upon motion and good cause shown. However, any such enlargement does not affect the requirement that the motion be decided within 90 days after the verdict is rendered. See sub. (3) and s. 801.15 (2) (c), Stats.

Sub. (4) is revised to require that a motion for new trial based on newly discovered evidence be decided within 90 days after it is made. The prior statute required such motions to be decided within 30 days after hearing, but did not require the hearing to be held within any specified time. [Re Order eff. 7−1−87]

Judicial Council Note, 1991: Sub. (3) is rewritten to clarify that if a motion after verdict is granted within 90 days, it will not be deemed denied merely because such order is not entered within 90 days after verdict. [Re Order eff. 7−1−91]

Motions for directed verdicts and motions to dismiss made at the close of the plaintiff's case are motions challenging the sufficiency of the evidence under this section. Jos P. Jansen Co. v. Milwaukee Area District Board, 105 Wis. 2d 1, 312 N.W.2d 813 (1981).

Time periods under this section may not be enlarged by showing excusable neglect under s. 801.15 (2) (a). Brookhouse v. State Farm Mutual Insurance Co., 130 Wis. 2d 166, 387 N.W.2d 82 (Ct. App. 1986).

Failure to present timely postverdict motions does not deprive the court of appeals jurisdiction to review a judgment. Hartford Insurance Co. v. Wales, 138 Wis. 2d 508, 406 N.W.2d 426 (1987).

Once the trial court loses authority to set aside a verdict under this section by failing to act within 90 days, it cannot achieve the same result by vacating the judgment under s. 806.07 (1) (h). Manly v. State Farm Fire & Casualty Co., 139 Wis. 2d 249, 407 N.W.2d 306 (Ct. App. 1987).

The trial court is not competent to consider sub. (1) motions if the movant fails to timely file the motions and fails to obtain an extension before expiration of the 20−day period. Ahrens−Cadillac Oldsmobile, Inc. v. Belongia, 151 Wis. 2d 763, 445 N.W.2d 744 (Ct. App. 1989).

Trial court actions under this section permitted pending appeal under s. 808.075 are subject to sub. (1) time limits. Schmidt v. Smith, 162 Wis. 2d 363, 469 N.W.2d 855 (Ct. App. 1991).

This section applies to trial−related motions. An award of attorney fees is not trial−related. Gorton v. American Cyanamid Co., 194 Wis. 2d 203, 533 N.W.2d 746 (1995).

A sexually violent person committed under ch. 980 preserves the right to appeal, as a matter of right, by filing postverdict motions within 20 days of the commitment order. State v. Treadway, 2002 WI App 195, 257 Wis. 2d. 467, 651 N.W.2d 334, 00−2957.

805.17 Trial to the court.

(1) MOTION AT CLOSE OF PLAINTIFF'S EVIDENCE. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his or her evidence, the defendant, without waiving his or her right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff on that ground or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in sub. (2). Unless the court in its order for dismissal otherwise specifies, a dismissal under this section operates as an adjudication upon the merits.

(2) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the ultimate facts and state separately its conclusions of law thereon. The court shall either file its findings and conclusions prior to or concurrent with rendering judgment, state them orally on the record following the close of evidence or set them forth in an opinion or memorandum of decision filed by the court. In granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a referee may be adopted in whole or part as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of ultimate fact and conclusions of law appear therein. If the court directs a party to submit proposed findings and conclusions, the party shall serve the proposed findings and conclusions on all other parties not later than the time of submission to the court. The findings and conclusions or memorandum of decision shall be made as soon as practicable and in no event more than 60 days after the cause has been submitted in final form.

(3) RECONSIDERATION MOTIONS. Upon its own motion or the motion of a party made not later than 20 days after entry of judgment, the court may amend its findings or conclusions or make additional findings or conclusions and may amend the judgment accordingly. The motion may be made with a motion for a new trial. If the court amends the judgment, the time for initiating an appeal commences upon entry of the amended judgment. If the court denies a motion filed under this subsection, the time for initiating an appeal from the judgment commences when the court denies the motion on the record or when an order denying the motion is entered, whichever occurs first. If within 90 days after entry of judgment the court does not decide a motion filed under this subsection on the record or the judge, or the clerk at the judge's written direction, does not sign an order denying the motion, the motion is considered denied and the time for initiating an appeal from the judgment commences 90 days after entry of judgment.

(4) APPEAL. In actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may be raised on appeal whether or not the party raising the question has objected in the trial court to such findings or moved for new trial.

History: Sup. Ct. Order, 67 Wis. 2d 585, 712 (1975); Sup. Ct. Order, 73 Wis. 2d xxxi (1976); Sup. Ct. Order, 107 Wis. 2d xi (1982); Sup. Ct. Order, 130 Wis. 2d xi (1986); Sup. Ct. Order, 160 Wis. 2d xiii (1991); 1993 a. 486.

Judicial Council Committee's Note, 1976: Sub. (1) is based on the language in Federal Rule 41b, and governs how a court as the trier of the facts handles a motion by a defendant for dismissal after the plaintiff has completed the presentation of his evidence. This adoption of the Federal Rule was the approach taken by the Wisconsin Supreme Court in the case of Household Utilities, Inc. v. Andrews Co., 71 Wis. 2nd 17 (1976). [Re Order effective Jan. 1, 1977]

Judicial Council Note, 1982: Sub. (2) has been amended to allow the filing of the findings and conclusions concurrent with the rendering of the judgment. The changes are intended to eliminate doubts as to the propriety of combining the findings, conclusions and judgment in a single document, simplifying paperwork, minimizing storage space requirements and reducing the likelihood of errors. [Re Order effective July 1, 1982]

Judicial Council Note, 1986: Sub. (2) is amended to permit the court to state the findings of fact and conclusions of law on the record in open court, in lieu of filing them. The amendment conforms to the practice authorized under Rule 52 (a), F.R.C.P. [Re Order eff. 7−1−86]

Judicial Council Note, 1991: This section permits motions for reconsideration to be made within 20 days after entry of judgment in actions tried to the court. Such motions are deemed denied if not decided within 90 days after entry of judgment. [Re Order eff. 7−1−91]

Sub. (3) does not limit the trial court's discretion to grant relief from an order or judgment under s. 806.07 (1) (h) when reasons justifying relief are apparent to the court. Grodin v. Smith, 82 Wis. 2d 667, 264 N.W.2d 239 (1978).

Failure to bring a motion under sub. (3) to correct a manifest error constitutes a waiver of the right to have an issue considered on appeal. Schinner v. Schinner, 143 Wis. 2d 81, 420 N.W.2d 381 (Ct. App. 1988).

If a motion is filed under sub. (3), the 45−day time for appeal under s. 808.04 (1) applies beginning upon disposal of the motion. Salzman v. DNR, 168 Wis. 2d 523, 484 N.W.2d 337 (Ct. App. 1992).

In a trial to the court, the court may not base its decision on affidavits submitted in support of a summary judgment. Proof offered in support of summary judgment is for determining if an issue of fact exists. When an issue of fact does, summary judgment proof gives way to trial proof. Berna−Mork v. Jones, 173 Wis. 2d 733, 496 N.W.2d 637 (Ct. App. 1992).

Sub. (3) modifies the deadline for filing appeals only on reconsideration motions after trials to the court. Continental Casualty Co. v. Milwaukee Metropolitan Sewerage District, 175 Wis. 2d 527, 499 N.W.2d 282 (Ct. App. 1993).

Reconsideration assumes a question that has been previously considered. If a party has not appeared and made arguments, the court has not considered the party's arguments in the first instance and reconsideration is improper. O'Neill v. Buchanan, 186 Wis. 2d 229, 519 N.W.2d 750 (Ct. App. 1994).

Although a formal order was subsequently signed, the trial court's letter to the parties informing them that a motion for reconsideration was denied was a denial "on the record" under sub. (3), and the time for filing an appeal commenced on the date of the letter. Orth v. Ameritrade, Inc., 187 Wis. 2d 162, 522 N.W.2d 30 (Ct. App. 1994).

A court's final written findings of fact and conclusions of law take precedence over an earlier written memorandum or an oral finding not repeated in the final order. When there is a conflict between an ambiguous oral pronouncement and the written judgment, it is proper to look to the written judgment to ascertain the court's intent. Jackson v. Gray, 212 Wis. 2d 436, 569 N.W.2d 467 (Ct. App. 1997), 95−3168.

There is no condition precedent under sub. (3) for reconsideration on the court's own motion except that the court must act within 20 days of its original decision. Therefore there is no requirement that the reason for reconsideration must have been a subject of the original hearing. Village of Thiensville v. Olsen, 223 Wis. 2d 256, 588 N.W.2d 394 (Ct. App. 1998), 98−2055.

Sub. (3) does not apply to reconsiderations of summary or default judgments. Teff v. Unity Health Plans Insurance Corp., 2003 WI App 115, 265 Wis. 2d 703, 666 N.W.2d 38, 02−1319.

A tenant in an eviction may move for reconsideration of the eviction judgment under sub. (3) but must take an appeal from the judgment within the time for appeal in s. 799.445. The time for filing an appeal under sub. (3) does not apply. Highland Manor Associates v. Bast, 2003 WI 152, 268 Wis. 2d 1, 672 N.W.2d 709, 02−2799.

To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law or fact. A party may not use a motion for reconsideration to introduce new evidence that could have been introduced at the original summary judgment phase. Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd., 2004 WI App 129, 275 Wis. 2d 397, 685 N.W.2d 397, 03−0773

When evidence in the record consists of disputed testimony and a video recording, the court of appeals will apply the clearly erroneous standard of review when reviewing the trial court's findings of fact based on that recording. State v. Walli, 2011 WI App 86, 334 Wis. 2d 402, 799 N.W.2d 898, 10−1256.

What You Need to Know: New Electronic Discovery Rules. Sankovitz, Grenig, & Gleisner. Wis. Law. July 2010.

805.18 Mistakes and omissions; harmless error. **(1)** The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party.

(2) No judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of selection or misdirection of the jury, or the improper admission of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial.

History: Sup. Ct. Order, 67 Wis. 2d 585, 714 (1975); Sup. Ct. Order No. 96−08, 207 Wis. 2d xv (1997).

For an error to "affect the substantial rights" of a party, there must be a reasonable possibility that the error contributed to the outcome of the action. A reasonable possibility of a different outcome is a possibility sufficient to undermine confidence in the outcome. If the error at issue is not sufficient to undermine the reviewing court's confidence in the outcome of the proceeding, the error is harmless. Evelyn C.R. v. Tykila S., 2001 WI 110, 246 Wis. 2d 1, 629 N.W.2d 768, 00−1739.

Error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. State v. Harvey, 2002 WI 93, 254 Wis. 2d 442, 647 N.W.2d 189, 00−0541.

Section 971.08 (2), requiring vacation of judgment and permission to withdraw a pleas in the event of improper notice of the consequences of a plea on immigration and naturalization, is subject to harmless error analysis under this section and s. 971.26. *Douangmala*, 2002 WI 62, was objectively wrong because it failed to properly consider this section and s. 971.26 and is thus overruled. The mandatory "shall" in sub. (2) did not control as both of the harmless error savings statutes also use the mandatory "shall" language. All of the relevant statutes use "shall," and, accordingly, none is "more mandatory" than any other. This section and ss. 971.08 (2) and 971.26 are most comprehensibly harmonized by applying harmless error analysis. State v. Reyes Fuerte, 2017 WI 104, 378 Wis. 2d 504, 904 N.W.2d 773, 15−2041.