

CHAPTER 263.

PLEADINGS.

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263.01 Forms. The forms of pleading in civil actions in courts of record and the rules by which the sufficiency of the pleadings are determined are prescribed by chapters 260 to 297.

263.02 Complaint. The first pleading on the part of the plaintiff is the complaint.

263.03 Complaint, contents. The complaint shall contain:

(1) The title of the cause, specifying the name of the court in which the action is brought, the name of the county designated by the plaintiff as the place of trial and the names of the parties to the action.

(2) A plain and concise statement of the ultimate facts constituting each cause of action, without unnecessary repetition.

(3) A demand of the judgment to which the plaintiff supposes himself entitled; if the recovery of money be demanded, the amount thereof shall be stated.

(4) In an action by or against a corporation the complaint must aver its corporate existence and whether it is a domestic or a foreign corporation.

Cross Reference: For effect of demand for judgment or want of such demand in the complaint in case of judgment by default, see 270.57.
As to the effect of not denying an allegation in the complaint of corporate or partnership existence, see 328.29 and 328.31.

263.04 Uniting causes of action. The plaintiff may unite in the same complaint several causes of action, whether they be such as were formerly denominated legal or equitable or both. But the causes of action so united must affect all the parties to the action and not require different places of trial, and must be stated separately.

An heir's personal causes of action against a former administrator and the estate's cause of action against the former administrator could not be united under this section since neither the estate nor the new administrator had any interest in nor were affected by the heir's personal causes of action, and they were triable in the circuit court, while the estate's cause of action was maintainable only by the new administrator, for the general benefit of creditors and the heirs of the estate, and was triable solely in the county court. *Kontominas v. Popp*, 256 W 169, 40 NW (2d) 512.

A complaint of a co-operative association against a cannery company, alleging a cause of action for breach of contract based on 185.08 (5), and also alleging a cause of action in tort based on 185.08 (6), was not subject to demurrer on the ground of improper joinder of causes of action, where such causes of action affected the same parties, who constituted all of the parties to the action, and did not require different places of trial and were stated separately. *Cash Crops Co-operative v. Minnesota Valley C. Co.* 257 W 619, 44 NW (2d) 563.

263.05 Pleadings by defendant. The only pleading on the part of the defendant is either a demurrer or an answer. It must be served within twenty days after the service of the copy of the complaint.

263.06 Demurrer to complaint. The defendant may demur to the complaint when it shall appear upon the face thereof either:

- (1) That the court has no jurisdiction of the person of the defendant or the subject of the action; or
- (2) That the plaintiff has not legal capacity to sue; or
- (3) That there is another action pending between the same parties for the same cause;

or

- (4) That there is a defect of parties, plaintiff or defendant; or
- (5) That several causes of action have been improperly united; or
- (6) That the complaint does not state facts sufficient to constitute a cause of action; or
- (7) That the action was not commenced within the time limited by law.

In pleading negligence and setting forth the facts constituting the alleged negligence, only ultimate facts and not matters of evidence should be pleaded; but the pleading is sufficient if it fairly informs the opposite party of what he is called on to meet by alleging the specific acts which resulted in injury, and includes a general statement that the defendant negligently performed the acts complained of. In actions against an em-

ployer and his employees for injuries sustained by the owner of a residence in falling when a porch railing which the defendant employer had contracted to repair broke and gave way, the complaint in each case sufficiently stated a cause of action in tort, although some of the allegations were on information and belief. *Colton v. Foulkes*, 259 W 142, 47 NW (2d) 901.

263.07 General demurrer limited. In case of a general demurrer to a complaint, if upon the facts stated, construing the pleading as provided in section 263.27, plaintiff is entitled to any measure of judicial redress, whether equitable or legal and whether in harmony with the prayer or not, it shall be sufficient for such redress.

263.08 Demurrer to whole or part. The demurrer may be taken to the whole complaint or to any of the alleged causes of action therein; and the defendant may demur to one or more of the several causes of action stated in the complaint and answer the residue.

263.09 Ground of demurrer to be stated. The demurrer shall distinctly specify the grounds of objection to the complaint, in the language of the subdivision of section 263.06 relied upon, adding, if based upon the second or fourth subdivision, a particular statement of the defect, and if based upon the seventh, a reference to the statute claimed to limit the right to sue. Unless it do so the demurrer may be stricken out.

263.10 Amended complaint to be served. If the complaint be amended a copy thereof must be served and the defendant must demur or answer thereto within twenty days thereafter or the plaintiff, upon filing proof of service thereof and of the defendant's omission, may obtain judgment in the manner provided for a failure to answer in the first instance.

263.11 Answer may state grounds of demurrer. When any of the matters enumerated in section 263.06 do not appear upon the face of the complaint the objection may be taken by answer; and the objection that the action was not commenced within the time limited by law may in any case be taken by answer.

263.12 Waiver by not demurring or answering. If not interposed by demurrer or answer, the defendant waives the objections to the complaint except the objection to the jurisdiction of the court and the objection that the complaint does not state a cause of action.

263.13 Answer, contents. The answer of the defendant must contain:

- (1) A specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.
- (2) A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition.

The defendants were not required to clearly to be inferred from such allegations plead to a fact which the plaintiffs had not as were made. *Ryan v. Berger*, 256 W 281, 40 NW (2d) 501.

263.14 Counterclaim. (1) A defendant may counterclaim any claim which he has against a plaintiff, upon which a judgment may be had in the action.

(2) The counterclaim must be pleaded as such and the answer must demand the judgment to which the defendant supposes himself entitled upon his counterclaim.

(3) This section does not extend to or include claims assigned to a defendant after he was served with the summons.

263.15 Cross complaint. (1) A defendant or a person interpleaded or intervening may have affirmative relief against a codefendant, or a codefendant and the plaintiff, or part of the plaintiffs, or a codefendant and a person not a party, or against such person alone, upon his being brought in; but in all such cases such relief must involve or in some manner affect the contract, transaction or property which is the subject matter of the action or relates to the occurrence out of which the action arose. Such relief may be demanded in the answer, which must be served upon the party against whom the same is

asked or upon such person not a party, upon his being brought in, or may be by a cross complaint served in like manner or by petition in intervention under section 260.19, or by answer, served in like manner, when new parties are brought in under sections 260.19 and 260.20.

(2) In all cases the court or the judge thereof may make such orders for the service of the pleadings, the bringing in of new parties, the proceedings in the cause, the trial of the issues and the determination of the rights of the parties as shall be just. The party against whom such relief is demanded may demur to the answer or cross complaint, as provided in section 263.17, or may answer, serving such demurrer or answer on the defendant claiming such relief, as well as upon the plaintiff, or he may object thereto at the trial for insufficiency. If he shall serve no answer or demurrer and make no such objection he shall be deemed to have denied the allegations relied on for such relief. Unless such an answer, petition or cross complaint be so served such affirmative relief shall not be adjudged.

Where the vendors' broker was before the trial court as a party plaintiff in their action for specific performance, the defendant purchasers' specific demand in their answer for the return of earnest money deposited by them with the broker was sufficient to entitle them to affirmative relief under (1), and hence the trial court should not have denied such relief on the ground that the purchasers in their answer did not counterclaim for the return of this money. Ross v. Kunkel, 257 W 197, 43 NW (2d) 26. In a replevin action against a plumbing contractor who had removed fixtures which

he had previously installed in the plaintiffs' tourist cabins but for which he had not been paid, wherein the contractor claimed that the plaintiffs and the impleaded defendant bank which was financing the plaintiff had been false and fraudulent representations which induced the defendant to complete the job, the defendant's cause of action was connected with the subject of the action so that he was entitled to assert a cross complaint against the impleaded defendant, as well as to assert a counterclaim against the plaintiffs. Elder v. Sage, 257 W 214, 42 NW (2d) 319.

263.16 Several defenses allowed. The defendant may set forth, by answer, all defenses and counterclaims he has, whether legal or equitable, or both; they must be separately stated.

263.17 Demurrer to answer. The plaintiff may, within twenty days, demur to the answer or any alleged defense therein when it does not state a defense; and to any counterclaim therein where it appears upon the face thereof either that:

- (1) The court has no jurisdiction thereof; or
- (2) The defendant has not legal capacity to maintain the same; or
- (3) Another action is pending between the same parties for the same cause; or
- (4) There is a defect of parties; or
- (5) The counterclaim does not state a cause of action; or
- (6) The cause of action stated is not pleadable as a counterclaim; or
- (7) The counterclaim is barred by the statutes of limitations.

In an action to quiet title, the answer's defense," and hence was not subject to attack denial that the plaintiff was the owner of the premises was a denial of a conclusion of law and was itself a conclusion of law, but it placed in issue the allegations of the complaint alleging ownership by the plaintiff and was not "new matter constituting a de-

fense," and hence was not subject to attack by demurrer to the answer. Neitge v. Sever- son, 256 W 628, 42 NW (2d) 149. See note to 133.01, citing State v. Golden Guernsey Dairy Co-operative, 257 W 254, 43 NW (2d) 31.

263.18 Demurrer may be to whole or part; reply to counterclaim. The plaintiff may demur to one or more of the defenses and counterclaims and reply to the residue of the counterclaims. The demurrer shall specify the grounds of objection and when to a counterclaim, in a similar manner to that required in a demurrer to the complaint; otherwise, it may be stricken out.

263.19 Reply to counterclaim; waiver. When any objection to a counterclaim mentioned in section 263.17 does not appear upon the face of the answer the objection may be taken by reply. If not taken, by demurrer or reply, the plaintiff waives the same, excepting only the objection to the jurisdiction of the court and the objection that the counterclaim does not state a cause of action.

263.20 What to contain. (1) When the answer contains a counterclaim the plaintiff may, within twenty days, if he do not demur thereto, reply to the counterclaim. Such reply must contain:

- (a) A specific denial of each material allegation of the counterclaim controverted by the plaintiff, or of any knowledge or information thereof sufficient to form a belief.
- (b) A statement of any new matter constituting a defense, in ordinary and concise language, without repetition.

(2) The plaintiff may set forth by reply as many defenses to the counterclaims as he may have; they must be separately stated and refer to the counterclaims which they are intended to answer in such manner that they may be intelligibly distinguished.

263.21 Judgment by default on counterclaim. If the answer contains any counterclaim to which the plaintiff fails to reply or demur, within the time prescribed by law, the

defendant may move, on a notice of not less than eight days, for such judgment as he is entitled to upon such counterclaim, and if the case require it an assessment of damages may be made or he may at the trial have the counterclaim treated as established without proof.

263.22 Demurrer to reply. The defendant may, within twenty days, demur to the reply or any defense therein, when, upon the face thereof, it does not state facts sufficient to constitute a defense, stating such grounds.

263.23 Pleadings, how subscribed and filed. Every pleading must be subscribed by the party or his attorney and must be filed not later than ten days after the action is noticed for trial. In case of a failure by either party to file his pleading it may be stricken out, on motion, unless permitted to be filed on such terms as the court shall think proper; or the opposite party may file a copy thereof.

263.24 Verification of pleading. Every pleading, except a demurrer, must be verified; but the verification may be omitted when an admission of the allegations might subject the party to prosecution for felony. No pleading can be used in a criminal prosecution against the party as evidence of a fact admitted or alleged in such pleading. Where service is made either pursuant to section 262.13 or otherwise, no defect or irregularity in a verification shall defeat the jurisdiction of the court but shall be ground for a timely motion to strike the pleading unless amended.

History: Sup. Ct. Order, 238 W v.

Comment of Advisory Committee, 1951: 330.19 (5), the right to sue will be preserved. "Unless amended" is necessary so that where [Re order effective July 1, 1951] the statute of limitations has run, as in

263.25 Form of verification. (1) The verification must be to the effect that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief and as to those matters that he believes it to be true, and must be by the affidavit of the party, or if there be several parties united in interest and pleading together, by one at least of such parties acquainted with the facts, if such party be within the county where the attorney resides and capable of making the affidavit. The affidavit may be made by an agent or attorney if no such party be within the county where the attorney resides, or if the action or defense be founded upon a written instrument in such attorney's possession, or if all the material allegations of the pleading be within his personal knowledge or belief.

(2) When the pleading is verified by any person other than a party he shall set forth in the affidavit his knowledge or the grounds of his belief on the subject and the reason why it is not made by the party, and if made on knowledge shall state that the pleading is true to his knowledge, and if on his belief, that he believes it to be true.

(3) When a corporation is a party the verification may be made by any officer thereof. In actions wherein the state or any officer thereof in his official capacity is a party, verification of pleadings shall not be required by either the state or anyone in its behalf or by any such officer, but all pleadings made by other parties in actions wherein the state or any such officer is a party shall be verified as provided in this section. In all actions wherein the state is the sole party plaintiff and an unverified answer shall be interposed and the demand of the complaint is for money judgment, judgment may be taken by default with the same force and effect and in the same manner as though the complaint were duly verified.

263.26 Admission by not denying. Every material allegation of the complaint, and of a counterclaim not controverted as prescribed, shall, for the purposes of the action, be taken as true. But the allegation of new matter in an answer not pleaded as a part of a counterclaim or of new matter in a reply is deemed controverted.

Where a town's complaint alleged that a part of a counterclaim and was deemed the defendant city had proceeded in annexation proceedings pursuant to the provisions controverted, so that the issue whether 62.07 (1) or 926-2 applied, as well as whether there of 62.07 (1), and the answer denied this and had been compliance with the section in also alleged that the proceedings were taken voked by the city, was made. *Wauwatosa v. Milwaukee*, 259 W 56, 47 NW (2d) 442, pursuant to 926-2, Stats. 1898, the latter was an allegation of new matter not pleaded as

263.27 Pleadings liberally construed. In the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed, with a view to substantial justice between the parties.

263.28 Variances, materiality. (1) No variance between the allegation in a pleading and the proof shall be deemed material unless it misleads the adverse party to his prejudice. Whenever it shall be proved to the satisfaction of the court that a party has been so misled, and in what respect he has been misled, the court may order the pleading amended upon such terms as may be just.

(2) When the variance is not material, the fact shall be found in accordance with the evidence and the court may order an amendment without costs.

[263.29 Stats. 1931 renumbered section 269.44 by Supreme Court Order, effective Jan. 1, 1934]

[263.30 Stats. 1933 renumbered section 263.28 by 1935 c. 541 s. 37]

263.31 When failure of proof. When, however, the allegation of the cause of action, counterclaim or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within section 263.28, but a failure of proof.

263.32 Accounts; bill of particulars. It is not necessary for a party to plead the items of an account but he shall deliver to the adverse party, within ten days after a demand therefor in writing, a copy of the account verified by his oath or that of his agent or attorney, that he believes it to be true, or be precluded from giving evidence thereof. The court, or a judge thereof, may order a further account and may in all cases on notice order a bill of particulars of the claim of either party to be furnished.

263.33 Judgments, how pleaded. In pleading a judgment or other determination of a court or officer of special jurisdiction it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted the party pleading shall be bound to establish on the trial the facts conferring jurisdiction.

263.34 Conditions precedent in contract, how pleaded. In pleading the performance of conditions precedent in a contract it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part; and if such allegation be controverted the party pleading shall be bound to establish on the trial the facts showing such performance.

263.35 Pleading by copy; notes, etc. In an action, defense or counterclaim founded upon an instrument for the payment of money only it shall be sufficient for the party to give a copy of the instrument, and to state that there is due to him thereon, from the adverse party, a specified sum which he claims.

[263.36 Stats. 1933 repealed by 1935 c. 541 s. 38]

263.37 Libel and slander, how pleaded. In an action for libel or slander it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matters out of which the cause of action arose; but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff, and if such allegation be controverted the plaintiff shall be bound to establish on the trial that it was so published or spoken.

263.38 Answer in libel and slander. In an action for libel or slander the defendant may in his answer allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not he may give in evidence the mitigating circumstances.

263.39 Answer in action for distrained property. In an action to recover the possession of property distrained doing damage, an answer that the defendant or person by whose command he acted was lawfully possessed of the real property upon which the distress was made and that the property distrained was at the time doing damage thereon shall be good without setting forth the title to such real property.

263.40 Pleadings in special proceedings. In special proceedings pending on appeal, the court may direct an issue of fact to be made up between the parties by complaint and answer, and such issue shall be tried by the court, or by the jury, as the court shall prescribe.

[263.41 Stats. 1933 repealed by Supreme Court Order, effective Jan. 1, 1936]

263.42 Sham pleadings may be stricken out. A sham or frivolous answer, reply or defense may be stricken out on motion and upon such terms as the court may impose.

263.43 Irrelevant, scandalous and indefinite pleadings. If any pleading contains irrelevant, redundant or scandalous matter it may be struck out, with costs, on motion, and the court may order the attorney who signed the same to pay costs. When a pleading is so indefinite or uncertain that the precise nature of the charge or defense is not apparent the court may on motion order the pleading to be made definite and certain. The time to serve a required responsive pleading is extended 10 days after the service of notice of entry of an order made upon the motion, unless the order fixes a different time.

263.44 Motions to strike out. A party may move upon one notice to strike out an answer or reply as sham, and frivolous, and irrelevant, and the court or presiding judge, on such motion, may strike out any matter or defense as sham, any other as frivolous, or as irrelevant or otherwise, as the pleading shall be found to be.

A motion to strike irrelevant matter from a demurrer, and not on a motion to strike. Portions of a pleading is not the equivalent of a demurrer. The sufficiency of a pleading, 84. In matters of substance, must be tried on de-

263.45 Amendments of course to pleadings. Any pleading may be once amended by the party of course, without costs and without prejudice to the proceedings already had, within twenty days after service thereof. But if it shall appear to the court that such amendment was made for the purpose of delay or that the same was unnecessary and the opposite party will thereby lose the benefit of a term at which the action may be tried, the amended pleading may be stricken out and such terms imposed as may seem just.

See note to 330.19, citing Halvorson v. Tarnow, 258 W 11, 44 NW (2d) 577.

263.46 Proceedings on decision of demurrer. After the decision of a demurrer the court may, in its discretion, if it appear that the demurrer was interposed in good faith, allow the party to plead over or to withdraw the demurrer on such terms as may be just. If a demurrer to a complaint be sustained upon the ground that several causes of action have been improperly united the court may, in its discretion and upon such terms as may be just, order the action to be divided into as many actions as may be necessary to the proper determination of the causes of action therein mentioned.

263.47 Supplemental pleadings. The plaintiff and defendant, respectively, may be allowed, on motion and on such terms as may be just, to make a supplemental complaint, answer or reply alleging facts material to the case occurring after the former complaint, answer or reply, or of which the party was ignorant when his former pleading was made.