TITLE XXV.

Procedure in Civil Actions.

CHAPTER 260.

CIVIL ACTIONS, AND PARTIES THERETO.

260.01 Scope of title XXV. Title XXV relates to civil actions in the circuit courts and other courts of record, having concurrent jurisdiction therewith to a greater or less extent, in civil actions, and to special proceedings in such courts except where its provisions are clearly inapplicable or inappropriate to special proceedings.

260.02 Remedies divided. Remedies in the courts of justice are divided into:

(1) Actions.

(2) Special proceedings.

260.03 Action defined; special proceeding. An action is an ordinary court proceeding by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. Every other remedy is a special proceeding.

Matters in probate are special proceedings. Estate of Stoeber, 36 W (2d) 448, 153 NW (2d) 599.

260.05 Kinds of actions. Actions are of two kinds, civil and criminal. A criminal action is prosecuted by the state against a person charged with a public offense, for the punishment thereof. Every other is a civil action.

260.08 One form of action; designation of parties. The distinction between actions at law and suits in equity, and the forms of all such actions and suits, have been abolished and there is but one form of action for the enforcement or protection of private rights and the redress or prevention of private wrongs, which is denominated a civil action. The party complaining is the plaintiff and the adverse party is the defendant.

260.10 Who may be joined as plaintiffs. All persons having an interest in the subject of the action or in obtaining the relief demanded may be joined as plaintiffs.

Where defendant allegedly made the same fraudulent misrepresentations to 2 individuals at different times, they cannot join their causes of action under 260.10 nor were they united in interest under 260.12. Hartwig v. Bitter, 29 W (2d) 653, 139 NW (2d) 644.

260.11 Who as defendants. (1) Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein. A plaintiff may join as defendants persons against whom the right to relief is alleged to exist in the alternative, although recovery against one may be inconsistent with recovery against the other; and in all such actions the recovery of costs by any of the parties to the action shall be in the discretion of the court. In any action for damages caused by the negligent operation, management, control, maintenance, use or defective

construction of a motor vehicle, any insurer of motor vehicles, which has an interest in the outcome of such controversy adverse to the plaintiff or any of the parties to such controversy, or which by its policy of insurance assumes or reserves the right to control the prosecution, defense or settlement of the claim or action of the plaintiff or any of the parties to such claim or action, or which by its policy agrees to prosecute or defend the action brought by the plaintiff or any of the parties to such action, or agrees to engage counsel to prosecute or defend said action, or agrees to pay the costs of such litigation, is by this section made a proper party defendant in any action brought by plaintiff in this state on account of any claim against the insured. If the policy of insurance was issued or delivered outside the state of Wisconsin, the insurer is by this section made a proper party defendant only if the accident or injury occurred in the state of Wisconsin.

(2) If an insurer is made a party defendant pursuant to this section and it appears at any time before or during the trial that there is or may be a cross issue between the insurer and the insured or any issue between any other person and the insurer involving the question of the insurer's liability if judgment should be rendered against the insured, the court may, upon motion of any defendant in any such action, cause the person who may be liable upon such cross issue to be made a party defendant to said action and all the issues involved in said controversy determined in the trial of said action or any third party may be impleaded as provided in s. 260.19 (1). Nothing herein contained shall be construed as prohibiting the trial court from directing and conducting separate trials on the issue of liability to the plaintiff or other party seeking affirmative relief and on the issue of whether the insurance policy in question affords coverage. Any party may move for such separate trials and if the court orders separate trials it shall specify in its order the sequence in which such trials shall be conducted.

History: Sup. Ct. Order, 16 W (2d) ix; 1967 c. 14; Sup. Ct. Order, 35 W (2d) vi.

Cross References: As to insurers being made defendants, see 204.30 (4).
See 285.10, providing that the state may be made a party in an action to quiet title to land.

Comment of Judicial Council, 1963: The amendment makes the general procedure for impleading parties set forth in s. 260.19 applicable to the situation covered in this subsection. [Re Order effective May 1, 1963]

Legislative Council Note, 1967: These amendments overturn two recent cases interpreting Wisconsin's direct action statute. Sections 204.30 (4) and 260.11 (1) are made coextensive so that in all cases where the insurer is directly liable to the injured party, direct action against the insurance company will be proper. *Frye v. Angst,* 28 Wis. 2d 575 (1965), held that direct action was improper for negligent *maintenance* of an automobile, even though s. 204.30 (4) made the insurance company liable for negligent maintenance.

The last sentence of s. 260.11 (1) has been deleted and a new provision added to change the result in *Miller v. Wadkins,* 31 Wis. 2d 281 (1966).

Prior to the 1959 amendment (stricken language, lines 17-24, page 2) direct action could be brought against an insurance company if the policy was issued in Wisconsin, even though the accident occurred outside the state. See *Oertel v. Fidelity & Casualty Co.,* 214 Wis. 68 (1934).

In *Ritterbusch v. Sexmith,* 256 Wis. 507 (1950), which was substantially confirmed in *Schultz v. Hastings,* 5 Wis. 2d 265 (1958), the court held that where the policy was issued outside Wisconsin, containing a clause prohibiting direct action, the insurance company could not be sued directly, even if the accident occurred in Wisconsin.

The 1959 amendment said that direct action could be brought whether the policy was issued or delivered within or without the state—*provided the accident or injury occurred in the state of Wisconsin.* In the *Miller* case, the court held that the last phrase (italicized) applied to the whole 1959 amendment, with the result that direct action is possible only when the accident occurs in Wisconsin.

This bill, by striking the 1959 amendment, is intended to revive the case law in *Oertel* permitting direct action on a policy issued in Wisconsin, where the accident occurs outside the state. The new language should permit direct action where the policy is issued or delivered outside Wisconsin, if the accident occurs in the state. (Bill No. 10-A)

Where the injury was caused by the operation of a crane fixed to a truck, but during use the truck was immobilized, the insurer could not be joined as defendant under this section or 204.30 (4). Smedley v. Milwaukee Automobile Ins. Co. 12 W (2d) 460, 107 NW (2d) 625.

The fact that a third person can sue an insurer directly does not enlarge the insurance coverage or increase the insurer's liability beyond the policy limits. Nichols v. United States Fidelity & Guaranty Co. 13 W (2d) 491, 109 NW (2d) 131.

In an action for injuries sustained in diving into shallow water at a public bathing beach, a complaint making the city a party defendant on the basis of having allegedly violated the safe-place statute and also making a city lifeguard and the recreational director parties defendant for their own negligence, was not demurrable by the city on the ground of misjoinder of causes of action, it being considered, among other things, that 260.11 (1), providing that any person may be made a defendant who has an interest in the controversy adverse to the plaintiff, prevails over the limitation of 263.04 which demands that a cause of action united in a complaint must affect all parties to the action, if these two statutes conflict. Rogers v. Oconomowoc, 16 W (2d) 621, 115 NW (2d) 635.

See note to 204.30, citing Snorek v. Boyle, 18 W (2d) 202, 118 NW (2d) 132.

See note to 204.30, citing Rice v. Gruetzmacher, 27 W (2d) 46, 133 NW (2d) 401.

An airplane in flight is not a motor vehicle for purposes of direct action against an insurer. Newberger v. Pokrass, 27 W (2d) 405, 134 NW (2d) 495.

A backhoe excavator completely self-powered by means of a hydraulic device which activated the scoop, which unit was mounted on a truck used merely for transportation and shut off once the unit was stabilized for excavating purposes was not when so immobilized and positioned for operation a "motor vehicle" within the direct-action statutes. Neumann v. Wisconsin

Natural Gas Co. 27 W (2d) 410, 134 NW (2d) 474.

Although the forklift which was frequently used on the highway was required to be registered as a motor vehicle under 341.05 (12), it did not thereby become a motor vehicle within the meaning of the direct-action statute since the registration exemption statute has no relationship to whether a vehicle is a motor vehicle for purposes of the direct-action statute. D'Angelo v. Cornell Paperboard Products Co. 33 W (2d) 218, 147 NW (2d) 321.

Direct action against an insurer can be maintained where an insured tractor is used to pull a wagon onto a highway and the wagon is left parked on the roadway. Hakes v. Paul, 34 W (2d) 209, 148 NW (2d) 699.

In a direct action by a fire insurer seeking subrogation from an automobile liability insurer after having paid a loss caused by fire damage to a home and an attached garage allegedly occasioned when the driver-insured, with knowledge that combustion was taking place in his vehicle (attributed to cigarette smoking) drove and parked the same in the garage, which the smouldering car subsequently ignited, the "no-action" clause in the liability policy did not preclude suit, for the negligence causing the accident (the fire) was reasonably related to the use or operation of the motor vehicle. Farmers Mut. Ins. Co. v Fischer, 34 W (2d) 322, 149 NW (2d) 566.

In personal-injury actions arising out of a single car accident which occurred in Montana (at a date when (1) contained a proviso excepting out-of-state accidents)—where the insurer of the car owner failed to plead in abatement the no-action clause in its policy, answering generally that the policy was subject to its terms, conditions, and endorsements, and that its liability was strictly limited thereby—the company in effect answered on the merits and waived its defense under the no-action clause. Attoe v. State Farm Mut. Auto. Ins. Co. 36 W (2d) 539, 153 NW (2d) 575.

260.12 Parties united in interest to be joined; class actions; alternative joinder. Of the parties to the action those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should be joined as plaintiff cannot be obtained he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest of many persons or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole. And when more than one person makes a separate claim for damage against the same person or persons based upon the same alleged tortious conduct, they may unite in prosecuting their claims in one action.

The question of whether it is impracticable to bring all interested persons before the court is largely a matter of discretion for the trial court. Lozoff v. Kaisershot, 11 W (2d) 485, 105 NW (2d) 783.

See note to 331.04, citing Truesdill v. Roach, 11 W (2d) 492, 105 NW (2d) 871.

The partners of a partnership are not only necessary but indispensable parties to the assertion of a partnership cause of action and the question of nonjoinder of a partner as party plaintiff may be raised at any time during the proceeding while the court retains jurisdiction. Assuming the existence of a partnership, failure to join the wife as party plaintiff should not result in dismissal of the complaint, but if so determined, requires that she be brought in and the pleading amended to afford her the option of accepting the judgment in favor of the partnership. Karp v. Coolview of Wisconsin, Inc. 25 W (2d) 299, 130 NW (2d) 790.

See note to 260.10, citing Hartwig v. Bitter, 29 W (2d) 653, 139 NW (2d) 644.

260.13 Real party in interest must prosecute. Every action must be prosecuted in the name of the real party in interest except as otherwise provided in section 260.15.

Where after appeal from a condemnation award to the circuit court by the condemnee the latter was adjudicated a bankrupt and a trustee appointed, who assigned the chose in action to an intermediate assignee, the latter in turn assigning the same to plaintiff in whose name alone the case was prosecuted, although various lien holders were interpleaded or permitted to intervene, the fact that the case was prosecuted in the assignee's name alone, if error, was not prejudicial, because the sole question for jury determination was limited to fair market value and compensable damages. P. C. Monday T. Co. v. Milwaukee Co. E. Comm. 24 W (2d) 107, 128 NW (2d) 631.

Where an insurer loaned money to its insured to settle claims against him, the loan to be repayable only to the extent of recovery of moneys from other tortfeasors, an action by the insured for such recovery will be dismissed because the insurer is the real party in interest. Kopperud v. Chick, 27 W (2d) 591, 135 NW (2d) 335.

A newspaper publisher is a real party in interest in an action to compel inspection of an alleged public document, as against a contention that the paper itself was the real party in interest. State ex rel. Youmans v. Owens, 28 W (2d) 672, 137 NW (2d) 470, 139 NW (2d) 241.

A collection agency which takes an assignment of an account for purposes of suit is procedurally the real party in interest, but in advising the creditor to make the assignment and obtaining and directing an attorney in handling the suit it is practicing law. State ex rel. State Bar v. Bonded Collections, 36 W (2d) 643, 154 NW (2d) 250.

260.14 Assignment of cause of action not to affect setoff. In case of an assignment of a thing in action the action of the assignee shall be without prejudice to any setoff or other defense existing at the time or before notice of the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange transferred in good faith and upon good consideration before due.

260.15 Nonjoinder of person for whose benefit action brought. An executor or administrator, a trustee of an express trust or a person expressly authorized by statute may sue or be sued without joining with him the person for or against whose benefit the action is prosecuted; a trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another.

260.17 Joinder of parties to negotiable paper. Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, whether the action is brought upon the instrument or by a party thereto to recover against other parties liable over to him, and persons severally liable for the same demand and, without reckoning offsets or counterclaims, in the same amount, although upon different obligations or instruments, may all or any of them be included in the same action at the option of the plaintiff.

260.18 Defendants in actions on insurance policies. In an action to recover on property insurance loss by fire, lightning, hail, cyclone or other casualty the plaintiff may join as defendants all of the insurance companies liable for the loss or any part thereof, and all the issues shall be tried together and the verdict or finding shall fix the amount for which each defendant is liable. If the plaintiff recovers, a separate judgment shall be rendered against each defendant for the sum for which it is liable, together with such proportion of the cost as the court shall determine to be equitable.

260.185 Adding new defendants by plaintiffs. In every action, the summons or the summons and complaint may be amended of course, by any plaintiff, without costs, and without prejudice to the proceedings already had by adding other persons as parties defendant and making the proper allegations for such purpose. Service of the amended summons, together with the complaint or a notice of the object of the action, shall be made upon such new defendants and upon existing parties within 10 days thereafter. If it appears to the court that the addition of such party was for the purpose of delay, the service of the amended summons may be set aside upon such terms as the court may deem just.

History: Sup. Ct. Order, 16 W (2d) x.

Comment of Judicial Council, 1963: Moves a joinder provision into ch. 260, and requires that notice of amendment be given to all parties. [Re Order effective May 1, 1963]

Even though plaintiff added and served a new defendant pursuant to a void order of interpleader, the action is good, since plaintiff can amend the summons and complaint without obtaining an order. State ex rel. Nelson v. Grimm, 219 W 630, 263 NW 583.

260.19 Adding new parties by defendants. (1) When a complete determination of the controversy in court cannot be had without the joinder of other parties, the defendant desiring the joinder of such parties shall serve on each of them a third-party summons, third-party complaint and a copy of all prior pleadings. Such parties shall be indicated as third-party defendants.

(2) The proceedings in sub. (1) may be taken without leave of the court within 40 days after issue is joined. Thereafter leave of the court, on notice and hearing, or stipulation of the parties, must be obtained.

(3) Within 10 days after addition of a new party under sub. (1) or (2), the defendant adding such party shall serve copies of the third-party summons, the third-party complaint and order of the court, if any, adding such party, on all other parties to the action.

(4) Within 20 days after service of the third-party complaint on him, the third-party defendant shall serve a copy of his answer on all parties to the action.

(5) A defendant in an action for debt or specific property or for the conversion thereof may, if a person, not a party to the action and without collusion with him, makes against him a demand for the same debt or property, apply and the court may on due application substitute such person in his place and discharge him from liability on his depositing in court the amount of the debt or delivering the property or its value as the court may direct.

(6) A defendant, who if he be held liable in the action, will thereby obtain a right of action against a person not a party may implead such person as provided in sub. (1).

History: Sup. Ct. Order, 16 W (2d) x; Sup. Ct. Order, 29 W (2d) v.

Comment of Judicial Council, 1963: Old 260.19 (2) and (3) are renumbered to be new (5) and (6). Old subs. (1) (to the comma in line 2) and (4) are completely rewritten into the new procedure spelled out in new subs. (1) to (4).

The procedure by which a defendant makes a person a party to the action is, throughout these sections, called impleader, rather than interpleader. Interpleader, as a name, is reserved for the action, historically equitable, in which a party offers to pay a sum or a fund to either of 2 alleged owners. [Re Order effective May 1, 1963]

260.195 Third-party summons. The third-party summons shall be substantially in the following form:

.....Court.....County

A. B., Plaintiff

v.

C. D., Defendant and

Third-Party Plaintiff
v.
E. F., Third-Party Defendant
THE STATE OF WISCONSIN, To said third-party defendant:

You are hereby summoned and required to serve upon the respective attorneys for the parties to this action an answer* to the third-party complaint which is herewith served upon you within 20 days after service, and in case of your failure so to do judgment will be rendered against you according to the demand of the third-party complaint.

C. D.
Third-Party Plaintiff's Attorney
P.O. Address ..... County, Wisconsin

* If the third-party complaint is for contribution only no answer is required by s. 263.15 (3), Wis. Stats.

History: Sup. Ct. Order, 29 W (2d) vi.

260.205 Intervention. If in an action for the recovery of property, a person not a party has an interest in the property, or if in any other action, a person not a party has such an interest in the subject matter of the controversy as requires him to be a party for his own protection, and such person applies to the court to be made a party, the court may order him brought in. The motion shall be accompanied by a complaint or answer stating the cause of action or defense desired to be interposed. If the motion is granted the court shall indicate in its order the existing parties on whom the pleading should be served, and the time within which it should be served. If answer or reply is proper, the party served shall have 20 days in which to answer or reply.

History: Sup. Ct. Order, 16 W (2d) xi.

Comment of Judicial Council, 1963: From 260.19 (1), after the comma in line 2. [Re Order effective May 1, 1963]

In construing the former 260.19 (1), the court said that a person who has such an interest as requires him to be a party for his own protection has an absolute right to intervene. Lodge 78, I. A. Of Machinists v. Nickel, 20 W (2d) 42, 121 NW (2d) 297.

260.21 Suing by fictitious name or as unknown; partners' names unknown. (1) When the name or a part of the name of any defendant, or when any proper party defendant to an action to establish or enforce, redeem from or discharge a lien or claim to property is unknown to the plaintiff, such defendant may be designated a defendant by so much of the name as is known, or by a fictitious name, or as an unknown heir, representative, owner or person as the case may require, adding such description as may reasonably indicate the person intended. But no person whose title to or interest in land appears of record or who is in actual occupancy of land shall be proceeded against as an unknown owner.

(2) When the name of such defendant is ascertained the process, pleadings and all proceedings may be amended by an order directing the insertion of the true name instead of the designation employed.

(3) In an action against a partnership, where the names of the partners are unknown to the plaintiff, all proceedings may be in the partnership name until the names of the partners are ascertained, whereupon the process, pleadings and all proceedings shall be amended by order directing the insertion of such names.

260.22 Appearance by guardian or guardian ad litem. When a party to an action or proceeding is a minor, or when the court or judge has reason to believe that a party is mentally incompetent to have charge of his affairs, he must appear either by the general guardian of his property or by a guardian ad litem who is an attorney appointed by the court or by a judge thereof. A guardian ad litem shall be appointed in all cases where the minor or incompetent has no general guardian of his property, or where such general guardian fails to appear on his behalf, or where the interest of the minor or incompetent is adverse to that of such general guardian.

An order approving a settlement of a minor's claim for personal injuries can be set aside where the minor was not represented by a guardian ad litem or general guardian, even though the father was present and the child was represented by an attorney. 269.46 does not apply. Matter of Andresen, 17 W (2d) 380, 117 NW (2d) 360.

A minor must always appear by guardian ad litem, but a mental incompetent can maintain an action until the court becomes aware of his incapacity. Prior proceedings need not be set aside. The burden of informing the court is on the incompetent, not the opposing party. Withers v. Tucker, 32 W (2d) 496, 145 NW (2d) 665.

260.23 Guardian ad litem. (1) APPOINTMENT. The guardian ad litem shall be appointed as provided by this section.

(2) FOR PLAINTIFF. When the plaintiff is a minor 14 years of age, upon his application; or if the plaintiff is under that age or is mentally incompetent, upon application of his guardian or of a relative or friend. If made by a relative or friend, notice thereof

must first be given to his guardian if he has one in this state; if he has none, then to the person with whom the minor or mentally incompetent resides or who has him in custody.

(3) FOR DEFENDANT. When the defendant is a minor 14 years of age, upon his application made within 20 days after the service of the summons or other original process; if the defendant is under that age or neglects to so apply or is mentally incompetent, then upon the court's own motion or upon the application of any other party or any relative or friend or his guardian upon such notice of the application as the court or judge directs or approves.

260.26 Guardian's bond. No guardian appointed under the provisions of this chapter shall be permitted to receive any money or property of the ward, except costs and expenses allowed to the guardian or recovered for his ward, until he has executed to the ward and filed with the clerk a bond, in a sum not less than double the value of the property to be received, with sufficient surety approved by the court or judge, to account for and apply the same, under the direction of the court; except he be also the general guardian of such ward, in which case additional security may be required in the discretion of the court. And the court may, upon application, or upon its own motion at any time, require additional security of any such guardian.

260.27 Guardian's consent and liability. No person shall be appointed but upon his written consent as guardian for a plaintiff; and no guardian of a defendant shall be liable personally for costs unless by special order of the court for some misconduct therein.