

## CHAPTER 807

## CIVIL PROCEDURE — MISCELLANEOUS PROVISIONS

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**807.01 Settlement offers. (1)** After issue is joined but at least 20 days before the trial, the defendant may serve upon the plaintiff a written offer to allow judgment to be taken against the defendant for the sum, or property, or to the effect therein specified, with costs. If the plaintiff accepts the offer and serves notice thereof in writing, before trial and within 10 days after receipt of the offer, the plaintiff may file the offer, with proof of service of the notice of acceptance, and the clerk must thereupon enter judgment accordingly. If notice of acceptance is not given, the offer cannot be given as evidence nor mentioned on the trial. If the offer of judgment is not accepted and the plaintiff fails to recover a more favorable judgment, the plaintiff shall not recover costs but defendant shall recover costs to be computed on the demand of the complaint.

**(2)** After issue is joined but at least 20 days before trial, the defendant may serve upon the plaintiff a written offer that if the defendant fails in the defense the damages be assessed at a specified sum. If the plaintiff accepts the offer and serves notice thereof in writing before trial and within 10 days after receipt of the offer and prevails upon the trial, either party may file proof of service of the offer and acceptance and the damages will be assessed accordingly. If notice of acceptance is not given, the offer cannot be given as evidence nor mentioned on the trial. If the offer is not accepted and if damages assessed in favor of the plaintiff do not exceed the damages offered, neither party shall recover costs.

**(3)** After issue is joined but at least 20 days before trial, the plaintiff may serve upon the defendant a written offer of settlement for the sum, or property, or to the effect therein specified, with costs. If the defendant accepts the offer and serves notice thereof in writing, before trial and within 10 days after receipt of the offer,

the defendant may file the offer, with proof of service of the notice of acceptance, with the clerk of court. If notice of acceptance is not given, the offer cannot be given as evidence nor mentioned on the trial. If the offer of settlement is not accepted and the plaintiff recovers a more favorable judgment, the plaintiff shall recover double the amount of the taxable costs.

**(4)** If there is an offer of settlement by a party under this section which is not accepted and the party recovers a judgment which is greater than or equal to the amount specified in the offer of settlement, the party is entitled to interest at the annual rate of 12% on the amount recovered from the date of the offer of settlement until the amount is paid. Interest under this section is in lieu of interest computed under ss. 814.04 (4) and 815.05 (8).

**(5)** Subsections (1) to (4) apply to offers which may be made by any party to any other party who demands a judgment or setoff against the offering party.

**History:** Sup. Ct. Order, 67 W (2d) 741; Sup. Ct. Order, 67 W (2d) x; 1975 c. 218; 1979 c. 271; 1981 c. 314.

**Cross Reference:** For tender of payment, see 895.14 to 895.171.

**Judicial Council Committee's Note, 1974:** Section 269.02, renumbered. [Re Order effective Jan. 1, 1976]

Sub. (3) applies to cases of both liquidated and unliquidated damages. *Graves v. Travelers Ins. Co.* 66 W (2d) 124, 224 NW (2d) 398.

The new Wisconsin rules of civil procedure: Chapters 805—807. Graczyk, 59 MLR 671.

**807.02 Motions, where heard; stay of proceedings.** Motions in actions or proceedings in the circuit court must be heard within the circuit where the action is triable. Orders out of court, not requiring notice, may be made by the presiding judge of the court in any part of the state. No order to stay proceedings after a verdict, report or finding in any circuit court may be made by a court commissioner. No stay of proceedings for more than 20 days may be

granted except upon previous notice to the adverse party.

**History:** Sup. Ct. Order, 67 W (2d) 742; 1977 c. 449.

**Judicial Council Committee's Note, 1974:** This section is generally equivalent to s. 269.27. Sec. 269.27 requires motions in circuit court to be "made" within the circuit. Sec. 807.02 requires that such motions be "heard" within the circuit. Sec. 269.27 also prohibited ex parte stays of proceedings for more than 20 days only if the stay was ordered by a judge out of court. Sec. 807.02 makes the prohibition apply even to a judge acting as the court.

Stays of proceeding to enforce judgments are governed by s. 806.08. [Re Order effective Jan. 1, 1976]

**807.03 Orders, how vacated and modified.** An order made out of court without notice may be vacated or modified without notice by the judge who made it. An order made upon notice shall not be modified or vacated except by the court upon notice, but the presiding judge may suspend the order, in whole or in part, during the pendency of a motion to the court to modify or vacate the order.

**History:** Sup. Ct. Order, 67 W (2d) 743.

**Judicial Council Committee's Note, 1974:** Section 269.28, renumbered. [Re Order effective Jan. 1, 1976]

**807.04 Proceedings, where held; restriction as to making orders.** All trials, and all hearings at which oral testimony is to be presented, shall be held in open court. The court may make any order which a judge or court commissioner has power to make. Court commissioners shall have the powers provided in ch. 753 or by other statute.

**History:** Sup. Ct. Order, 67 W (2d) 743; 1977 c. 187 s. 135.

**807.05 Stipulations.** No agreement, stipulation, or consent between the parties or their attorneys, in respect to the proceedings in an action or special proceeding shall be binding unless made in court and entered in the minutes or recorded by the reporter or made in writing and subscribed by the party to be bound thereby or the party's attorney.

**History:** Sup. Ct. Order, 67 W (2d) 744; 1975 c. 218.

**Judicial Council Committee's Note, 1974:** This section is based on s. 269.46 (2), the only change being the addition of the words "or recorded by the reporter". Requiring a minutes entry when an oral stipulation is recorded by the court reporter is duplicative and has been held by the Supreme Court to be unnecessary. See *Czap v. Czap*, 269 Wis. 557, 69 N.W. 2d 488 (1955). [Re Order effective Jan. 1, 1976]

Where stipulation did not satisfy this section, summary judgment was improper. *Wilharms v. Wilharms*, 93 W (2d) 671, 287 NW (2d) 779 (1980).

Oral settlements are not invariably unenforceable. *Glinicki v. Borden, Inc.* 444 F Supp. 619

**807.06 Copy of paper may be used, when.** If any original paper or pleading be lost or withheld by any person the court may authorize a copy thereof to be filed and used instead of the original.

**History:** Sup. Ct. Order, 67 W (2d) 744.

**Judicial Council Committee's Note, 1974:** Section 269.49, renumbered. [Re Order effective Jan. 1, 1976]

**807.07 Irregularities and lack of jurisdiction over the parties waived on appeal; jurisdiction exercised; transfer to proper court.** (1) When an appeal from any court, tribunal, officer or board is attempted to any court and return is duly made to such court, the respondent shall be deemed to have waived all objections to the regularity or sufficiency of the appeal or to the jurisdiction over the parties of the appellate court, unless the respondent moves to dismiss such appeal before taking or participating in any other proceedings in said appellate court. If it appears upon the hearing of such motion that such appeal was attempted in good faith the court may allow any defect or omission in the appeal papers to be supplied, either with or without terms, and with the same effect as if the appeal had been originally properly taken.

(2) If the tribunal from which an appeal is taken had no jurisdiction of the subject matter and the court to which the appeal is taken has such jurisdiction, the court shall, if it appears that the action or proceeding was commenced in the good faith and belief that the first named tribunal possessed jurisdiction, allow it to proceed as if originally commenced in the proper court and shall allow the pleadings and proceedings to be amended accordingly; and in all cases in every court where objection to its jurisdiction is sustained the cause shall be certified to some court having jurisdiction, provided it appears that the error arose from mistake.

**History:** Sup. Ct. Order, 67 W (2d) 744; 1975 c. 218; Sup. Ct. Order, 92 W (2d) xiii.

**Judicial Council Committee's Note, 1974:** Section 269.51, renumbered. [Re Order effective Jan. 1, 1976]

**Judicial Council Committee's Note, 1979:** Sub. (1) is amended to clarify that it addresses jurisdiction over the parties, and not the subject matter jurisdiction of the appellate court. Lack of subject matter jurisdiction of an appellate court cannot be waived. Sub. (1) cannot be used to cure defects concerning subject matter jurisdiction of an appellate court. [Re Order effective Jan. 1, 1980]

Neither this section nor 274.11 (4), Stats. 1971, confers jurisdiction on the court to hear an appeal in a criminal case when the appeal is not timely. *Scheid v. State*, 60 W (2d) 575, 211 NW (2d) 458.

Sub. (2) applies only at the trial court level; it does not confer appellate jurisdiction on the supreme court when an appeal is first mistakenly taken to the circuit court. *State v. Jakubowski*, 61 W (2d) 220, 212 NW (2d) 155.

Mere retention of appellant's brief prior to making a motion to dismiss is not participation in the appeal and does not constitute a waiver of objection to jurisdiction. The holdings in *White and Maas* that mere retention of briefs constitutes participation in the appeal process are overruled. *State v. Van Duyse*, 66 W (2d) 286, 224 NW (2d) 603.

Where claimant timely appealed adverse worker's compensation decision in good faith but erroneously captioned appeal papers, trial court abused discretion by dismissing action. *Cruz v. DILHR*, 81 W (2d) 442, 260 NW (2d) 692.

Section 807.07 (1) does not apply to petitions to appeal under 808.10. *First Wis. Nat. Bank of Madison v. Nicholaou*, 87 W (2d) 360, 274 NW (2d) 704 (1979).

Court of appeals erred in failing to exercise discretion under (1) to permit amendment of notice of appeal. *Northridge Bank v. Community Eye Care Center*, 94 W (2d) 201, 287 NW (2d) 810 (1980).

**807.08 MISCELLANEOUS PROVISIONS**

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**807.08 Borrowing court files regulated.**

The clerk shall not permit any paper filed in his office to be taken therefrom unless upon written order of a judge of the court. The clerk shall take a written receipt for all papers so taken and preserve the same until such papers are returned. Papers so taken shall be returned at once upon request of the clerk or presiding judge, and no paper shall be kept longer than 10 days.

**History:** Sup. Ct. Order, 67 W (2d) 745.

**Judicial Council Committee's Note, 1974:** This section is identical to s. 269.60 except that the last 2 sentences of that statute have been deleted. [Re Order effective Jan. 1, 1976]

Clerks of court may not send original records of criminal cases to public defender prior to appeal unless judge authorizes release. 69 Atty. Gen. 63.

**807.09 Conciliators. (1)** A circuit judge of the circuit court of any county may appoint and remove at any time, any retired or former circuit or county court judge to act, in matters referred by the judge and in conciliation matters. When a matter for conciliation is referred for such purpose, the conciliator shall have full authority to hear, determine and report findings to the court. Such conciliators may be appointed court commissioners as provided in s. 757.68.

**(2)** The circuit judges of such county shall make rules, not inconsistent with law, governing procedure before and pertaining to such conciliators and the county board shall fix and provide for their compensation.

**History:** Sup. Ct. Order, 67 W (2d) 746; 1975 c. 218; 1977 c. 187 s. 135; 1977 c. 323 s. 16.

**Judicial Council Committee's Note, 1974:** This section is substantially identical to s. 269.70 except that a reference to the use of conciliators in pretrial hearings has been deleted as inconsistent with s. 802.10. [Re Order effective Jan. 1, 1976]

**807.10 Settlements in behalf of minors; judgments. (1)** A compromise or settlement of an action or proceeding to which a minor or mentally incompetent person is a party may be made by the general guardian, if the guardian is represented by an attorney, or the guardian ad litem with the approval of the court in which such action or proceeding is pending.

**(2)** A cause of action in favor of or against a minor or mentally incompetent person may, without the commencement of an action thereon, be settled by the general guardian, if the guardian is represented by an attorney, with the approval of the court appointing the general guardian, or by the guardian ad litem with the approval of any court of record. An order approving a settlement or compromise under this subsection and directing the consummation thereof shall have the same force and effect as a judgment of the court.

**(3)** If the amount awarded to a minor by judgment or by an order of the court approving a compromise settlement of a claim or cause of

action of the minor does not exceed \$5,000 (exclusive of interest and costs and disbursements), and if there is no general guardian of the ward, the court may upon application by the guardian ad litem after judgment, or in the order approving settlement, fix and allow the expenses of the action, including attorney fees and fees of guardian ad litem, authorize the payment of the total recovery to the clerk of the court, authorize and direct the guardian ad litem upon the payment to satisfy and discharge the judgment, or to execute releases to the parties entitled thereto and enter into a stipulation dismissing the action upon its merits. The order shall also direct the clerk upon the payment to pay the costs and disbursements and expenses of the action and to dispose of the balance in one of the manners provided in s. 880.04 (2) as selected by the court. The fee for the clerk's services for handling, depositing and disbursing funds under this subsection is prescribed in s. 814.61 (12) (a).

**History:** Sup. Ct. Order, 67 W (2d) 746; 1975 c. 218; 1981 c. 317.

**Cross Reference:** See 880.125 for provision requiring a court approving settlements to be satisfied as to the sufficiency of the guardian's bond.

**Judicial Council Committee's Note, 1974:** Section 269.80, renumbered. [Re Order effective Jan. 1, 1976]

**807.11 Orders: rendition and entry. (1)** An order is rendered when it is signed by the judge.

**(2)** An order is entered when it is filed in the office of the clerk of court.

**History:** Sup. Ct. Order, 67 W (2d) 747.

**Judicial Council Committee's Note, 1974:** New. Cf. s. 806.06. [Re Order effective Jan. 1, 1976]

Oral order of state court that injunction be issued was valid even though case was removed to federal court before order was signed. *Heidel v. Voight*, 456 F Supp. 959 (1978).

**807.12 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, if 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.

**History:** Sup. Ct. Order, 67 W (2d) 748.

**Judicial Council Committee's Note, 1974:** Section 260.21 renumbered. [Re Order effective Jan. 1, 1976]

This section does not authorize judgment against unnamed individual. *Miller v. Smith*, 100 W (2d) 609, 302 NW (2d) 468 (1981).

See note to 893.02, citing *Lak v. Richardson-Merrell, Inc* 100 W (2d) 641, 302 NW (2d) 483 (1981).