CHAPTER 803

CIVIL PROCEDURE — PARTIES

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NOTE: Chapter 803 was created by Sup. Ct. Order, 67 Wis. 2d 585, 638 (1975), which contains explanatory notes. Statutes prior to the 1983−84 edition also contain these notes.

803.01 Parties plaintiff and defendant; capacity.

(1) REAL PARTY IN INTEREST. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(2) REPRESENTATIVES. A personal representative, guardian, bailee, or trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in the party's name without joining the person for whose benefit the action is brought. A partner asserting a partnership claim may sue in the partner's name without joining the other members of the partnership, but the partner shall indicate in the pleading that the claim asserted belongs to the partnership.

(3) MINORS OR INDIVIDUALS ALLEGED OR ADJUDICATED INCOMPETENT. (a) *Appearance by guardian or guardian ad litem.* If a party to an action or proceeding is a minor, or if a party is adjudicated incompetent or alleged to be incompetent, the party shall appear by an attorney, by the guardian of the estate of the party who may appear by attorney, or by a guardian ad litem who may appear by an attorney. A guardian ad litem shall be appointed in all cases in which the minor or individual alleged to be incompetent has no guardian of the estate, in which the guardian fails to appear and act on behalf of the ward or individual adjudicated incompetent, or in which the interest of the minor or individual adjudicated incompetent is adverse to that of the guardian. Except as provided in s. 807.10, if the guardian does appear and act and the interests of the guardian are not adverse to the minor or individual adjudicated incompetent, a guardian ad litem may not be appointed. Except as provided in s. 879.23 (4), if the interests of the minor or individual alleged to be or adjudicated incompetent are represented by an attorney of record, the court shall, except upon good cause stated in the record, appoint that attorney as the guardian ad litem.

(b) *Guardian ad litem.* 1. The guardian ad litem shall be appointed by a circuit court of the county where the action is to be commenced or is pending, except that the guardian ad litem shall be appointed by a circuit court commissioner of the county in actions to establish paternity that are before the circuit court commissioner.

2. When the plaintiff is a minor 14 years of age or over, the guardian ad litem shall be appointed upon the plaintiff's application or upon the state's application under s. 767.407 (1) (c); or if the plaintiff is under that age or is adjudicated incompetent or alleged to be incompetent, upon application of the plaintiff's guardian or of a relative or friend or upon application of the state under s. 767.407 (1) (c). If the application is made by a relative, a friend, or the state, notice thereof must first be given to the guardian if the plaintiff has one in this state; if the plaintiff has none, then to the person with whom the minor or individual adjudicated incompetent resides or who has the minor or individual adjudicated incompetent in custody.

3. When the defendant is a minor 14 years of age or over, the guardian ad litem shall be appointed upon the defendant's 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 adjudicated incompetent or alleged to be incompetent, then upon the court's own motion or upon the application of any other party or any relative or friend or the defendant's guardian upon such notice of the application as the court directs or approves.

4. If the appointment, for a plaintiff or a defendant, is after the commencement of the action, it shall be upon motion entitled in the action. If the appointment is for a plaintiff and is made before the action is begun, the petition for appointment shall be entitled in the name of the action proposed to be brought by the minor or individual adjudicated incompetent or alleged to be incompetent, and the appointment may be made before the summons is served. Upon the filing of a petition for appointment before summons, the clerk may impose the fee required for the commencement of an action, but in that event no additional commencement fee may be imposed when the summons is filed.

5. The motion or petition under subd. 4. shall state facts showing the need and authority for the appointment. The hearing on the motion or petition under subd. 4., if made by a minor or an individual adjudicated incompetent or alleged to be incompetent for the minor's or individual's guardian ad litem, may be held without notice and the appointment made by order. If the motion or petition is made for a minor or an individual adjudicated incompetent or alleged to be incompetent who is an adverse party, the hearing shall be on notice.

6. If a compromise or a settlement of an action or proceeding to which an unrepresented minor or individual adjudicated incompetent or alleged to be incompetent is a party is proposed, a guardian ad litem shall be appointed, upon petition in a special proceeding, to protect the interest of the minor or individual even though commencement of an action is not proposed. Any compromise or settlement shall be subject to s. 807.10.

(c) *Procedure for unrepresented person.* 1. If at any time prior to the entry of judgment or final order, the court finds that either a minor, or a person believed by the court to be mentally incompetent to have charge of his or her affairs, has not been represented in the action or proceeding as provided in par. (a), there shall be no further proceedings until a guardian ad litem is appointed. In making such appointment, the court shall fix a reasonable time within which the guardian ad litem may move to vacate or strike any order entered or action taken during the period when a guardian ad litem was required; and as to all matters to which objection is not made, the guardian ad litem and the ward shall be bound. Any such motion by a guardian ad litem shall be granted as a matter of right.

2. If the court finds after the entry of judgment or final order that a person, who at the time of entry of judgment or final order was a minor or an individual adjudicated or alleged to be incompe-

tent, was not represented in the action or proceeding by an attorney of record or otherwise represented as provided in par. (a) the judgment or order shall be vacated on motion of:

a. The minor or individual adjudicated or alleged to be incompetent, for whom no appointment was made, at any time prior to the expiration of one year after the disability is removed; or

b. The personal representative of the minor or individual adjudicated or alleged to be incompetent at any time prior to the expiration of one year after the death of the minor or individual.

History: Sup. Ct. Order, 67 Wis. 2d 585, 638 (1975); 1975 c. 218; 1977 c. 299, 449; 1981 c. 317; 1993 a. 481; 1997 a. 35; 2001 a. 61, 102; 2005 a. 387; 2005 a. 443 s. 265; 2009 a. 276.

The county in which proceedings are brought must pay the fee of the appointed guardian ad litem. Romasko v. Milwaukee, 108 Wis. 2d 32, 321 N.W.2d 123 (1982).

Sub. (3) (a) requires that, in all cases, a minor who is a party to an action must have a court−appointed general guardian of the property or a guardian ad litem. To be general guardians, parents must to be appointed by the court. The parent's attorney does not represent the minor unless the attorney has also been appointed guardian ad litem or general guardian. Jensen v. McPherson, 2002 WI App 298, 258 Wis. 2d 962, 655 N.W.2d 487, 01−2912.

803.02 Joinder of claims and remedies. (1) A party asserting a claim to relief as an original claim, counterclaim, cross claim, or 3rd−party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, as the party has against an opposing party.

(2) Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the 2 claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to the plaintiff, without first having obtained a judgment establishing the claim for money.

History: Sup. Ct. Order, 67 Wis. 2d 585, 642 (1975); 1975 c. 218; 2005 a. 253; 2007 a. 97.

803.03 Joinder of persons needed for just and complete adjudication. (1) PERSONS TO BE JOINED IF FEASIBLE. A person who is subject to service of process shall be joined as a party in the action if:

(a) In the person's absence complete relief cannot be accorded among those already parties; or

(b) The person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may:

1. As a practical matter impair or impede the person's ability to protect that interest; or

2. Leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his or her claimed interest.

(2) CLAIMS ARISING BY SUBROGATION, DERIVATION AND ASSIGNMENT. (a) *Joinder of related claims.* A party asserting a claim for affirmative relief shall join as parties to the action all persons who at the commencement of the action have claims based upon subrogation to the rights of the party asserting the principal claim, derivation from the principal claim, or assignment of part of the principal claim. For purposes of this section, a person's right to recover for loss of consortium shall be deemed a derivative right. Any public assistance recipient or any estate of such a recipient asserting a claim against a 3rd party for which the public assistance provider has a right of subrogation or assignment under s. 49.89 (2) or (3) shall join the provider as a party to the claim. Any party asserting a claim based upon subrogation to part of the claim of another, derivation from the rights or claim of another, or assignment of part of the rights or claim of another shall join as a party to the action the person to whose rights the party is subrogated, from whose claim the party derives his or her rights or claim, or by whose assignment the party acquired his or her rights or claim.

(b) *Options after joinder.* 1. Any party joined pursuant to par. (a) may do any of the following:

a. Participate in the prosecution of the action.

b. Agree to have his or her interest represented by the party who caused the joinder.

c. Move for dismissal with or without prejudice.

2. If the party joined chooses to participate in the prosecution of the action, the party joined shall have an equal voice with other claimants in the prosecution.

3. Except as provided in par. (bm), if the party joined chooses to have his or her interest represented by the party who caused the joinder, the party joined shall sign a written waiver of the right to participate that shall express consent to be bound by the judgment in the action. The waiver shall become binding when filed with the court, but a party may withdraw the waiver upon timely motion to the judge to whom the case has been assigned with notice to the other parties. A party who represents the interest of another party and who obtains a judgment favorable to the other party may be awarded reasonable attorney fees by the court.

4. If the party joined moves for dismissal without prejudice as to his or her claim, the party shall demonstrate to the court that it would be unjust to require the party to prosecute the claim with the principal claim. In determining whether to grant the motion to dismiss, the court shall weigh the possible prejudice to the movant against the state's interest in economy of judicial effort.

(bm) *Joinders because of implication of medical assistance.* If the department of health services is joined as a party pursuant to par. (a) and s. 49.89 (2) because of the provision of benefits under subch. IV of ch. 49, the department of health services need not sign a waiver of the right to participate in order to have its interests represented by the party that caused the joinder. If the department of health services makes no selection under par. (b), the party causing the joinder shall represent the interests of the department of health services and the department of health services shall be bound by the judgment in the action.

(c) *Scheduling and pretrial conferences.* At the scheduling conference and pretrial conference, the judge to whom the case has been assigned shall inquire concerning the existence of and joinder of persons with subrogated, derivative or assigned rights and shall make such orders as are necessary to effectuate the purposes of this section. If the case is an action to recover damages based on alleged criminally injurious conduct, the court shall inquire to see if an award has been made under subch. I of ch. 949 and if the department of justice is subrogated to the cause of action under s. 949.15.

(3) DETERMINATION BY COURT WHENEVER JOINDER NOT FEASIBLE. If any such person has not been so joined, the judge to whom the case has been assigned shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If a person as described in subs. (1) and (2) cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include:

(a) To what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties;

(b) The extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided;

(c) Whether a judgment rendered in the person's absence will be adequate; and

(d) Whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(4) PLEADING REASONS FOR NONJOINDER. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subs. (1) and (2) who are not joined, and the reasons why they are not joined.

(5) EXCEPTION OF CLASS ACTIONS. This section is subject to s. 803.08.

History: Sup. Ct. Order, 67 Wis. 2d 585, 643 (1975); 1975 c. 218; 1979 c. 189, 221; 1983 a. 192; 1985 a. 29; 1989 a. 31; 1995 a. 27; 1997 a. 35; 1999 a. 9; 2001 a. 103; 2005 a. 253; 2007 a. 20 ss. 3752, 9121 (6) (a).

When the constitutionality of a statute is challenged in an action other than a declaratory judgment action, the attorney general must be served, but failure to do so at the trial level was cured by service at the appellate level. In Matter of Estate of Fessler, 100 Wis. 2d 437, 302 N.W.2d 414 (1981).

Sub. (2) (b) requires a subrogated party to choose one of the listed options or risk dismissal with prejudice. Radloff v. General Casualty Co. 147 Wis. 2d 14, 432 N.W.2d 597 (Ct. App. 1988).

The mere presence of a party does not constitute "participation" under sub. (2) (b). A subrogated insurer who exercises none of the 3 options under sub. (2) (b) must pay its fair share of attorney fees and costs if it has notice of and does nothing to assist in the prosecution of the action. Ninaus v. State Farm Mutual Automobile Insurance Co. 220 Wis. 2d 869, 584 N.W.2d 545 (Ct. App. 1998), 97−0191.

Failure to comply with the technical requirement under sub. (2) (b) that a joined party must file a written waiver of the right to participate in the trial does not prevent the joined party's assertion that it had a representation agreement with the joining party. Gustafson v. Physicians Insurance Co. 223 Wis. 2d 164, 588 N.W.2d 363 (Ct. App. 1998), 97−3832.

Whether a party is an "indispensable party" requires a 2−part inquiry. First it must be determined if the party is "necessary" for one of the 3 reasons under sub. (1). If not, the party cannot be "indispensable" under sub. (3). If the party is found necessary, then, whether "in equity and good conscience" the action should not proceed in the absence of the party must be determined. Dairyland Greyhound Park, Inc. v. McCallum, 2002 WI App 259, 258 Wis. 2d 210, 655 N.W.2d 474, 02−1204.

If a person has no right of intervention under s. 803.09 (1), the courts have no duty to join that person *sua sponte* as a necessary party under sub. (1) (b) 1. The inquiry of whether a movant is a necessary party under sub. (1) (b) 1. is in all significant respects the same inquiry under s. 803.09 (1) as to whether a movant is entitled to intervene in an action as a matter of right, including the requirement that the interest of the movant is adequately represented by existing parties. A movant who fails to meet that requirement for intervention as of right may not simply turn around and force its way into the action by arguing that the court must join the movant, *sua sponte*, as a necessary party under s. 803.03 (1) (b) 1. Helgeland v. Wisconsin Municipalities, 2008 WI 9, 307 Wis. 2d 1, 745 N.W.2d 1, 05−2540.

803.04 Permissive joinder of parties.

(1) PERMISSIVE JOINDER. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(2) NEGLIGENCE ACTIONS: INSURERS. (a) In any action for damages caused by negligence, any insurer 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, or which by its policy agrees to prosecute or defend the action brought by 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 this state, the insurer is by this paragraph made a proper party defendant only if the accident, injury or negligence occurred in this state.

(b) 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 the action, cause the person who may be liable upon such cross issue to be made a party defendant to the action and all the issues involved in the controversy determined in the trial of the action or any 3rd party may be impleaded as provided in s. 803.05. 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.

(3) ACTIONS AFFECTING MARITAL PROPERTY. In an action affecting the interest of a spouse in marital property, as defined under ch. 766, a spouse who is not a real party in interest or a party described under s. 803.03 may join in or be joined in the action.

(4) SEPARATE TRIALS. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom the party asserts no claim and who asserts no claim against the party, and may order separate trials or make other orders to prevent delay or prejudice.

History: Sup. Ct. Order, 67 Wis. 2d 585, 646 (1975); 1975 c. 218; 1985 a. 37.

Cross−reference: See s. 632.24 as to insurers being made defendants.

Cross−reference: See s. 775.10 providing that the state may be made a party in an action to quiet title to land.

In an action for injuries allegedly sustained as a result of 3 separate surgical procedures performed by 2 unassociated doctors residing in different counties, separate places of trial were required and joinder of separate causes of action was improper. Voight v. Aetna Casualty & Surety Co. 80 Wis. 2d 376, 259 N.W.2d 85 (1977).

When an insurer made a good−faith request for a bifurcated trial under sub. (2) (b) on the issue of coverage, the trial court erred in finding that the insurer acted in bad faith by refusing to settle. Mowry v. Badger State Mutual Casualty Co. 129 Wis. 2d 496, 385 N.W.2d 171 (1986).

That a policy is one of indemnity rather than liability does not prevent direct action against the insurer. Decade's Monthly Fund v. Whyte & Hirschboeck, 173 Wis. 2d 665, 495 N.W.2d 335 (1993).

Joinder of one tortfeasor who causes an injury and a successive tortfeasor who aggravates the injury is permitted by this section. Kluth v. General Casualty Co. 178 Wis. 2d 808, 505 N.W.2d 442 (Ct. App. 1993).

There is neither a statutory nor a constitutional right to have all parties identified to a jury, but as a procedural rule, the court should in all cases apprise the jurors of the names of all the parties. Stoppleworth v. Refuse Hideaway, Inc. 200 Wis. 2d 512, 546 N.W.2d 870 (Ct. App. 1996), 93−3182.

If the issue of insurance coverage involves a party not a party to the underlying lawsuit, coverage may be determined by either a bifurcated trial or a separate declaratory judgment action. The plaintiff and any other party asserting a claim in the underlying suit must be named, and consolidation with the underlying action may be required. Fire Insurance Exchange v. Basten, 202 Wis. 2d 74, 549 N.W.2d 690 (1996), 94−3377.

The federal compulsory counterclaim rule precluded an action against an insurer under the state direct action statute when the action directly against the insured was barred by rule. Fagnan v. Great Central Insurance Co. 577 F.2d 418 (1978).

In order to join an insurer under sub. (2) (a), the accident must have occurred in this state or the policy must have been issued or delivered in the state. Utz v. Nationwide Mutual Insurance Co. 619 F.2d 7 (1980).

Sub. (2) (a) is limited to negligence claims, which do not include implied warranty claims. Rich Products Corporation v. Zurich American Insurance Co. 293 F.3d 981 (2002).

A breach of fiduciary duty was negligence for purposes of Wisconsin's direct action and direct liability statutes. Federal Deposit Insurance Corp. v. MGIC Indemnity Corp. 462 F. Supp. 759 (1978).

803.045 Actions to satisfy spousal obligations.

(1) Except as provided in sub. (2), when a creditor commences an action on an obligation described in s. 766.55 (2), the creditor may proceed against the obligated spouse, the incurring spouse or both spouses.

(2) In an action on an obligation described in s. 766.55 (2) (a) or (b), a creditor may proceed against the spouse who is not the obligated spouse or the incurring spouse if the creditor cannot obtain jurisdiction in the action over the obligated spouse or the incurring spouse.

(3) After obtaining a judgment, a creditor may proceed against either or both spouses to reach marital property available for satisfaction of the judgment.

(4) This section does not affect the property available under s. 766.55 (2) to satisfy the obligation.

History: 1985 a. 37.

803.05 Third−party practice.

(1) At any time after commencement of the action, a defending party, as a 3rd−party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the defending party for all or part of the plaintiff's claim against the defending party, or who is a necessary party under s. 803.03. The

3rd−party plaintiff need not obtain leave to implead if he or she serves the 3rd−party summons and 3rd−party complaint not later than 6 months after the summons and complaint are filed or the time set in a scheduling order under s. 802.10; thereafter, the 3rd−party plaintiff must obtain leave on motion upon notice to all parties to the action. The person served with the summons and 3rd−party complaint, hereinafter called the 3rd−party defendant, shall make defenses to the 3rd−party plaintiff's claim as provided in s. 802.06 and counterclaims against the 3rd−party plaintiff and cross claims against any other defendant as provided in s. 802.07. The 3rd−party defendant may assert against the plaintiff any defenses which the 3rd−party plaintiff has to the plaintiff's claim. The 3rd−party defendant may also assert any claim against the plaintiff if the claim is based upon the same transaction, occurrence or series of transactions or occurrences as is the plaintiff's claim against the 3rd−party plaintiff. The plaintiff may assert any claim against the 3rd−party defendant if the claim is based upon the same transaction, occurrence or series of transactions or occurrences as is the plaintiff's claim against the 3rd−party plaintiff, and the 3rd−party defendant thereupon shall assert defenses as provided in s. 802.06 and counterclaims and cross claims as provided in s. 802.07.

(2) When a counterclaim is asserted against a plaintiff, the plaintiff may cause a 3rd party to be brought in under circumstances which under this section would entitle a defendant to do so.

(3) Oral argument permitted on motions under this section may be heard by telephone under s. 807.13 (1).

History: Sup. Ct. Order, 67 Wis. 2d 585, 648 (1975); 1975 c. 218; Sup. Ct. Order, 82 Wis. 2d ix (1978); Sup. Ct. Order, 141 Wis. 2d xiii (1987); 2005 a. 253; 2007 a. 97.

Judicial Council Committee's Note, 1977: Sub. (1) has been amended to allow a third−party plaintiff to serve the third−party summons and third−party complaint without leave of the court to implead if the third−party summons and third−party complaint are filed not later than 6 months after the summons and complaint in the original action are filed. The new six−month time period has been created since the old time period allowing a third−party plaintiff to file a third−party summons and third−party complaint without the need to obtain leave to implead during the time set in a scheduling order under s. 802.10 can no longer apply in most cases. The use of such a scheduling order is now completely discretionary with the trial judge. [Re Order effective July 1, 1978]

Judicial Council Note, 1988: Sub. (3) [created] allows oral argument permitted on motions under this section to be heard by telephone conference. [Re Order effective Jan. 1, 1988]

The statute of limitations is applicable to a claim made under sub. (1). Strassman v. Muranyi, 225 Wis. 2d 784, 594 N.W.2d 398 (Ct. App. 1999), 98−3039.

803.06 Misjoinder and nonjoinder of parties. (1) Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or on its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately. Oral argument permitted on motions under this subsection may be heard by telephone under s. 807.13 (1).

(2) When it comes to the attention of the court that the summons has not been served upon a named defendant, the court may enter an order on its own initiative, after notice to parties of record, dismissing the action as to that defendant without prejudice.

History: Sup. Ct. Order, 67 Wis. 2d 585, 649 (1975); Sup. Ct. Order, 73 Wis. 2d xxxi (1976); Sup. Ct. Order, 141 Wis. 2d xiii (1987).

Judicial Council Committee's Note, 1976: Sub. (2) establishes an efficient procedure for dismissing an action against a defendant who has not been served. It will help alleviate situations such as clouds on title that could result from a summons that was not served being on file with the clerk of court. [Re Order effective Jan. 1, 1977]

Judicial Council Note, 1988: Sub. (1) is amended to permit oral argument on motions to drop or add parties to be heard by telephone conference. [Re Order effective Jan. 1, 1988]

803.07 Interpleader. Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that the plaintiff is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross claim or counterclaim. The provisions of this section supplement and do not in any way limit the joinder of parties permitted in s. 803.04.

History: Sup. Ct. Order, 67 Wis. 2d 585, 649 (1975); 1975 c. 218; 2007 a. 97.

803.08 Class actions. (1) CLASS ACTIONS MAY BE MAINTAINED. When the question before the court 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, except that no claim may be maintained against the state or any other party under this section if the relief sought includes the refund of or damages associated with a tax administered by the state.

(2) DISPOSITION OF RESIDUAL FUNDS. (a) In this subsection:

1. "Residual Funds" means funds that remain after the payment of all approved class member claims, expenses, litigation costs, attorney fees and other court−approved disbursements in an action under this section.

2. "WisTAF" means the Wisconsin Trust Account Foundation, Inc.

(b) 1. Any order entering a judgment or approving a proposed compromise of a class action that establishes a process for identifying and compensating members of the class shall provide for disbursement of any residual funds. In class actions in which residual funds remain, not less than fifty percent of the residual funds shall be disbursed to WisTAF to support direct delivery of legal services to persons of limited means in non−criminal matters. The circuit court may disburse the balance of any residual funds beyond the minimum percentage to WisTAF for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class.

2. This subsection does not prohibit the trial court from approving a settlement that does not create residual funds.

History: Sup. Ct. Order, 67 Wis. 2d 585, 650 (1975); 2011 a. 68; Sup. Ct. Order No. 15−06, 2016 WI 50, filed 6−24−16, eff. 1−1−17.

The class action statute, s. 260.12 [now s. 803.08], is part of title XXV of the statutes [now chs. 801 to 823], and the scope of title XXV is restricted to civil actions in courts of record. The county board is not a court of record. The class action statute can have no application to making claims against a county. Multiple claims must identify each claimant and show each claimant's authorization. Hicks v. Milwaukee County, 71 Wis. 2d 401, 238 N.W.2d 509 (1974). But see also Townsend v. Neenah Joint School District, 2014 WI App 117, 358 Wis. 2d 618, 856 N.W.2d 644, 13−2839.

The trial court did not abuse its discretion in determining that an action for damages caused by the negligent withdrawal of groundwater was not an appropriate class action. Nolte v. Michels Pipeline Const. Inc. 83 Wis. 2d 171, 265 N.W.2d 482 (1978).

The test of common interest to maintain a class action is whether all members of the purported class desire the same outcome that their alleged representatives desire. Goebel v. First Federal Savings & Loan Association, 83 Wis. 2d 668, 266 N.W.2d 352 (1978).

The maintenance of a class action involving nonresident class members does not exceed the constitutional limits of the jurisdiction of the courts of this state. The due process requisites for the exercise of jurisdiction over unnamed nonresident plaintiffs are adequate notice and representation. Schlosser v. Allis−Chalmers Corp. 86 Wis. 2d 226, 271 N.W.2d 879 (1978).

The trial court must decide if the named plaintiffs can fairly represent the common class interest that they share with the represented class and if joinder of all members is impracticable. O'Leary v. Howard Young Medical Center, 89 Wis. 2d 156, 278 N.W.2d 217 (Ct. App. 1979).

To bring a class action: 1) there must be a common or general interest shared by all members of the class; 2) the named parties must represent the interest involved; and 3) it must be impractical to bring all interested parties before the court. Mercury Record v. Economic Consultants, 91 Wis. 2d 482, 283 N.W.2d 613 (Ct. App. 1979).

In addition to considering the *Mercury* factors, the trial court must weigh the advantages of disposing of the entire controversy in one proceeding against the difficulties of combining divergent issues and persons. Cruz v. All Saints Healthcare System, Inc. 2001 WI App 67, 242 Wis. 2d 432, 625 N.W.2d 344, 00−1473.

The trial court did not err when it determined that a proposed class of "tens of thousands of presently and formerly employed hourly paid Wal−Mart employees" should not be certified because, among other reasons, the proposed class would be unmanageable, recognizing that much of the pertinent Wal−Mart payroll records were generated in the first instance by members of the proposed class and that, therefore, Wal−Mart had a right to examine each individual claimant regarding the circumstances of his or her employment, and each instance of missed break time or off−the−clock work. Hermanson v. Wal Mart Stores, Inc. 2006 WI App 36, 290 Wis. 2d 225, 711 N.W.2d 694, 04−2926.

Nothing in Wisconsin law bars class action against a governmental body that is a mass action of named claimants bringing similar claims, provided that each claimant

has complied with s. 893.80. Townsend v. Neenah Joint School District, 2014 WI App 117, 358 Wis. 2d 618, 856 N.W.2d 644, 13−2839.

A Call to Reform: Wisconsin's Class−Action Statute. Benson, Olson, & Kaplan. Wis. Law. Sept. 2011.

803.09 Intervention. (1) Upon timely motion anyone shall be permitted to intervene in an action when the movant claims an interest relating to the property or transaction which is the subject of the action and the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest, unless the movant's interest is adequately represented by existing parties.

(2) Upon timely motion anyone may be permitted to intervene in an action when a movant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order or rule administered by a federal or state governmental officer or agency or upon any regulation, order, rule, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely motion may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(3) A person desiring to intervene shall serve a motion to intervene upon the parties as provided in s. 801.14. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene.

History: Sup. Ct. Order, 67 Wis. 2d 585, 650 (1975); 1975 c. 218; 2007 a. 20; 2015 a. 55.

A postjudgment applicant for leave to intervene must show sufficient reason for having waited. Milwaukee Sewerage Commission v. DNR, 104 Wis. 2d 182, 311 N.W.2d 677 (Ct. App. 1981).

Intervenors in an action cannot continue their claim once the original action is dismissed. Intervention will not be permitted to breathe life into a nonexistent lawsuit. Fox v. DHSS, 112 Wis. 2d 514, 334 N.W.2d 532 (1983).

A newspaper could intervene to protect the right to examine a sealed court file. State ex rel. Bilder v. Town of Delavan, 112 Wis. 2d 539, 334 N.W.2d 252 (1983).

A newspaper's postjudgment motion to intervene to open sealed court records was timely and proper. C. L. v. Edson, 140 Wis. 2d 168, 409 N.W.2d 417 (Ct. App. 1987).

Motions to intervene are evaluated practically, and not technically, with an eye toward disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process. There is no requirement that the intervenor's interest be judicially enforceable in a separate proceeding. Wolff v. Town of Jamestown, 229 Wis. 2d 738, 601 N.W.2d 301 (Ct. App. 1999), 98−2974.

After intervention, an intervenor's status is the same as all other parties. Once a party intervenes, all claims and defenses against it may be asserted. Kohler Co. v. Sogen International Fund, Inc. 2000 WI App 60, 233 Wis. 2d 592, 608 N.W.2d 746, 99−0960.

A nonparty to a circuit court action may intervene in an appeal brought by another party, even after the time for filing a notice of appeal has passed. City of Madison v. WERC, 2000 WI 39, 234 Wis. 2d 550, 610 N.W.2d 94, 99−0500.

In order to prevail, a prospective intervenor must demonstrate that: 1) the movant claims an interest relating to the property or transaction subject of the action; 2) the disposition of the action may as a practical matter impair or impede the proposed intervenor's ability to protect that interest; 3) the movant's interest will not be adequately represented by existing parties to the action; and 4) the motion to intervene was made in a timely fashion. Motions to intervene must be evaluated with an eye toward disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process. M&I Marshall & Ilsley Bank v. Urquhart Companies, 2005 WI App 225, 287 Wis. 2d 623, 706 N.W.2d 335, 04−2743.

Timeliness is not defined by statute, and there is no precise formula to determine whether a motion to intervene is timely. The question of timeliness is a determination necessarily left to the discretion of the circuit court and turns on whether, under all the circumstances, a proposed intervenor acted promptly and whether intervention will prejudice the original parties. Postjudgment motions for intervention will be granted only upon a strong showing of justification for failure to request intervention sooner. Olivarez v. Unitrin Property & Casualty Insurance Co. 2006 WI App 189, 296 Wis. 2d 337, 723 N.W. 2d 131, 05−2471.

Intervention by the legislature in a case with policy or budgetary ramifications when the executive branch, through the attorney general, fulfills its traditional role defending legislation before the court is not required. Legislators may often have a preference for how the judicial branch should interpret a statute, but such mere preferences do not constitute sufficiently related or potentially impaired interests within the meaning of sub. (1). Helgeland v. Wisconsin Municipalities, 2006 WI App 216, 296 Wis. 2d 880, 724 N.W. 2d 208, 05−2540.
Affirmed on other grounds. 2008 WI 9, 307 Wis. 2d 1, 745 N.W.2d 1, 05−2540.

In the context of sub. (2), "defense" conveys that the person seeking to intervene, although not named as a defendant, could be a defendant to a claim in the main action or a defendant to a similar or related claim. Sub. (3) supports this construction of "defense,"conveying that the "claim" or "defense" is more than arguments or issues a non−party wishes to address and is the type of matter presented in a pleading — either allegations that show why a party is entitled to the relief sought on a claim or allegations that show why a party proceeded against is entitled to prevail against the claim. Helgeland v. Wisconsin Municipalities, 2006 WI App 216, 296 Wis. 2d 880, 724 N.W. 2d 208, 05−2540.
Affirmed on other grounds. 2008 WI 9, 307 Wis. 2d 1, 745 N.W.2d 1, 05−2540.

Courts have no precise formula for determining whether a potential intervenor meets the requirements of sub. (1) The analysis is holistic, flexible, and highly fact−specific. Sub. (1) attempts to strike a balance between two conflicting public policies: that the original parties to a lawsuit should be allowed to conduct and conclude their own lawsuit and that persons should be allowed to join a lawsuit in the interest of the speedy and economical resolution of controversies. Despite its nomenclature, intervention "as of right" usually turns on judgment calls and fact assessments that a reviewing court is unlikely to disturb except for clear mistakes. Helgeland v. Wisconsin Municipalities, 2008 WI 9, 307 Wis. 2d 1, 745 N.W.2d 1, 05−2540.

If a person has no right of intervention under sub. (1), the courts have no duty to join that person *sua sponte* as a necessary party under s. 803.03 (1) (b) 1. Whether a movant is a necessary party under s. 803.03 (1) (b) 1. is in all significant respects the same inquiry under sub. (1) as to whether a movant is entitled to intervene in an action as a matter of right, including the requirement that the interest of the movant is adequately represented by existing parties. A movant who fails to meet that requirement for intervention as of right may not force its way into the action by arguing that the court must join the movant, *sua sponte*, as a necessary party under s. 803.03 (1) (b) 1. Helgeland v. Wisconsin Municipalities, 2008 WI 9, 307 Wis. 2d 1, 745 N.W.2d 1, 05−2540.

803.10 Substitution of parties. (1) DEATH. (a) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in s. 801.14 and upon persons not parties in the manner provided in s. 801.11 for the service of a summons. Unless the motion for substitution is made not later than 90 days after the death is suggested on the record by service of a statement of the facts of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

(b) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in the action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(2) INCOMPETENCY. If a party is adjudicated incompetent, the court upon motion served as provided in sub. (1) may allow the action to be continued by or against the party's representative.

(3) TRANSFER OF INTEREST. In case of any transfer of interest, the action may be continued by or against the original party unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in sub. (1).

(4) PUBLIC OFFICERS; DEATH OR SEPARATION FROM OFFICE. (a) When a public officer, including a receiver or trustee appointed by virtue of any statute, is a party to an action in an official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(b) When a public officer sues or is sued in an official capacity, the public officer may be described as a party by the official title rather than by name; but the court may require the officer's name to be added.

(5) DEATH AFTER VERDICT OR FINDINGS. After an accepted offer to allow judgment to be taken or to settle pursuant to s. 807.01, or after a verdict, report of a referee or finding by the court in any action, the action does not abate by the death of any party, but shall be further proceeded with in the same manner as if the cause of action survived by law; or the court may enter judgment in the names of the original parties if such offer, verdict, report or finding be not set aside. But a verdict, report or finding rendered against a party after death is void.

History: Sup. Ct. Order, 67 Wis. 2d 585, 652 (1975); 1975 c. 200, 218; 1993 a. 486; 2005 a. 387.

A letter to the court and opposing counsel stating that the plaintiff had died was not a "suggestion of death" under sub. (1) (a). Wheeler v. General Tire & Rubber Co., 142 Wis. 2d 798, 419 N.W.2d 331 (Ct. App. 1987).

A "suggestion of death" that failed to identify the proper party to substitute for the deceased did not trigger the running of the 90−day period under sub. (1) (a). Wick v. Waterman, 143 Wis. 2d 676, 421 N.W.2d 872 (Ct. App. 1988).

Service of the suggestion of death only on the deceased plaintiff's attorney was insufficient to activate the 90−day period in which a sub. (1) (a) motion for substitution is to be filed. Sub. (1) (a) does not require service of the suggestion of death on all interested nonparties in every case but requires a determination of what nonparties should be served in that case and how burdensome the task will be to protect the interests of all persons and move the litigation toward a fair and expeditious resolution. Schwister v. Schoenecker, 2002 WI 132, 258 Wis. 2d 1, 654 N.W.2d 852, 01−2621.