

CHAPTER 331.

MISCELLANEOUS GENERAL PROVISIONS.

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331.01 What actions survive. In addition to the actions which survive at common law the following shall also survive: Actions for the recovery of personal property or the unlawful withholding or conversion thereof, for the recovery of the possession of real estate and for the unlawful withholding of the possession thereof, for assault and battery, false imprisonment or other damage to the person, for all damage done to the property rights or interests of another, for goods taken and carried away, for damages done to real or personal estate, equitable actions to set aside conveyances of real estate, to compel a reconveyance thereof, or to quiet the title thereto, and for a specific performance of contracts relating to real estate. Actions for wrongful death shall survive the death of the wrongdoer whether or not the death of the wrongdoer occurred before or after the death of the injured person.

An action for breach of contract for support and to set aside a conveyance of real estate survives even though the contract provides that it is to be deemed satisfied on filing of a death certificate and conclusively presumed that the support was furnished. The contract creates only a true presumption, rebuttable by clear and convincing proof. State Department of Public Welfare v. LeMere, 19 W (2d) 412, 120 NW (2d) 695.

331.02 Measure of damages against executor. When any action mentioned in section 331.01 shall be prosecuted to judgment against the executor or administrator the plaintiff shall be entitled to recover only for the value of the goods taken or for the damages actually sustained, without any vindictive or exemplary damages or damages for alleged outrage to the feelings of the injured party.

331.03 Recovery for death by wrongful act. Whenever the death of a person shall be caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured; provided, that such action shall be brought for a death caused in this state.

331.031 Recovery from estate of wrongdoer. Whenever the death of a person shall be caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then in every such case, the wrongdoer who would have been liable if death had not ensued, although such wrongdoer shall die prior to the time of death of such injured person, shall be liable to an action for damages notwithstanding his prior death and notwithstanding the death of the person injured; provided that such action

shall be brought for a death caused in this state. Any right of action which may accrue by such injury to the person of another although the death of the wrongdoer occurred prior thereto shall be enforced by bringing an action against the executor or administrator or personal representative of such deceased wrongdoer.

331.035 Parental liability for acts of minor child. (1) The parent or parents having legal custody of an unemancipated minor child, in any circumstances where he or they may not be otherwise liable under the common law, may nevertheless for cause shown and in the discretion of the court be held liable for damages to property not to exceed \$300, in addition to taxable costs and disbursements directly attributable to any wilful, malicious or wanton act of the child.

(2) Maximum recovery from any parent or parents of any child may not exceed the limitation provided in sub. (1) for any one wilful, malicious or wanton act of such child and if 2 or more children of the same parent or parents having legal custody commit the same act the recovery may not exceed the aggregate \$300, in addition to taxable costs and disbursements.

(3) This section shall not limit the amount of damages recoverable by an action against the child or children except that any amount so recovered shall be reduced and apportioned by the amounts received from the parent or parents under this section.

331.04 Plaintiff in wrongful death action; damages limited. (1) An action for wrongful death may be brought by the personal representative of the deceased person or by the person to whom the amount recovered belongs.

(2) If the deceased leaves surviving a spouse, and minor children under 18 years of age with whose support he was legally charged, the court before whom the action is pending, or if no action is pending, any court of record, in recognition of the duty and responsibility of a parent to support his minor children, shall determine the amount, if any, to be set aside for the protection of such children after considering the age of such children, the amount involved, the capacity and integrity of the surviving spouse, and any other facts or information it may have or receive, and such amount may be impressed by creation of an appropriate lien in favor of such children or otherwise protected as circumstances may warrant, but such amount shall not be in excess of 50 per cent of the net amount received after deduction of costs of collection. If there are no such surviving minor children, the amount recovered shall belong and be paid to the spouse of the deceased; if no spouse survives, to the deceased's lineal heirs as determined by s. 237.01; if no lineal heirs survive, to the deceased's brothers and sisters. If any such relative dies before judgment in the action, the relative next in order shall be entitled to recover for the wrongful death. A surviving nonresident alien wife and minor children shall be entitled to the benefits of this section. In cases subject to s. 102.29 this subsection shall apply only to the surviving spouse's interest in the amount recovered. If the amount allocated to any child under this subsection is less than \$1,500, s. 269.80 may be applied. Every settlement in wrongful death cases in which the deceased leaves minor children under 18 years of age shall be void unless approved by a court of record authorized to act hereunder.

(3) If separate actions are brought for the same wrongful death, they shall be consolidated on motion of any party. Unless such consolidation is so effected that a single judgment within the limits hereinafter provided may be entered protecting the defendant or defendants and so that satisfaction of such judgment shall extinguish all liability for the wrongful death, no action shall be permitted to proceed except that of the personal representative.

(4) Judgment for damages for pecuniary injury from wrongful death shall not exceed \$22,500. Additional damages not to exceed \$3,000 for loss of society and companionship may be awarded to spouse, unemancipated or dependent children or parents of deceased. In any case where a decedent leaves a dependent child under 18 years of age, the above maximum limit for pecuniary loss recoverable shall be increased \$2,000 on account of each child but not exceeding a total increase of \$10,000.

(5) If the personal representative brings the action he may also recover funeral expenses, including the reasonable cost of a cemetery lot, grave marker and perpetual care of such lot, not exceeding \$1,000. If a relative brings the action he may recover such funeral expenses on behalf of himself or of any relative specified in this section who has paid or assumed liability for such expenses.

(6) Where the wrongful death of a person creates a cause of action in favor of the decedent's estate and also a cause of action in favor of a spouse or relatives as provided in this section, such spouse or relatives may waive and satisfy the estate's cause of action

in connection with or as part of a settlement and discharge of the cause of action of the spouse or relatives.

(7) Damages found by a jury in excess of either maximum amount specified above shall be reduced by the court to such maximum. The aggregate of such maximum amounts shall be diminished under the provisions of section 331.045 if the deceased or person entitled to recover is found negligent.

History: 1961 c. 285, 649.

The wrongful-death statute creates a new cause of action, not for the injury to decedent, but for the loss sustained by the beneficiaries because of the death, and such cause of action is distinct from any cause of action which the deceased might have had if he had survived. *Truesdill v. Roach*, 11 W (2d) 492, 105 NW (2d) 871.

Both father and mother are united in interest in a wrongful death action within the meaning of 260.12, and where the defendant's answer included a plea in abatement in an action by the father alone, the defect of parties could not then be cured by an assignment of the mother's interest to the father and a consent by her to be bound by the judgment. *Truesdill v. Roach*, 11 W (2d) 492, 105 NW (2d) 871.

(5) authorizes the recovery of \$1,900 funeral expenses, including crypt burial, where the jury found the expenses reasonable and compatible with the financial status of the parents. *Gustafson v. Bertschinger*, 12 W (2d) 630, 108 NW (2d) 273.

Actions for wrongful death as between personal representative and beneficiary discussed. The action is not limited to the personal representative if an action for pain and suffering also survives. Recovery for wrongful death belongs to the beneficiary. *Nichols v. United States Fidelity & Guaranty Co.* 13 W (2d) 491, 109 NW (2d) 131.

The cause of action for wrongful death in favor of deferred beneficiaries under 331.04 is not the cause of action of a surviving spouse as a preferred beneficiary under 331.031, but is a new cause of action given by the statute. On the death of a preferred beneficiary a new right is vested in the deferred beneficiaries to recover for the wrongful death, and it is not the same right that the surviving spouse had during his lifetime. [So far as certain language in *Lasecki v. Kabara*, 235 W 645, might be considered inconsistent with language in later decisions, it is withdrawn.] *Krause v. Home Mut. Ins. Co.* 14 W (2d) 666, 112 NW (2d) 134.

331.045 Contributory negligence; when bars recovery. Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

Cross Reference: See 328.44 for conclusive presumption that child under seven cannot be guilty of contributory negligence.

In comparing the negligence of two or more persons the jury is to consider both the elements of negligence and of causation, but the supreme court will not attempt to lay down any formula for determining how much weight is to be accorded to the element of negligence and how much to that of causation. *Kohler v. Dumke*, 13 W (2d) 211, 108 NW (2d) 581.

The comparison of negligence in a multiple-defendant case is required by the comparative-negligence statute to be made between the plaintiff and the individual defendants, and hence the trial court in the instant case erred in combining the negligence of the two defendants for purposes of the jury's comparison with that of the plaintiff. *Schwenn v. Loraine Hotel Co.* 14 W (2d) 601, 111 NW (2d) 495.

Assumption of risk doctrine abolished; such conduct may be contributory negligence. *McConville v. State Farm Mut. Auto Ins. Co.* 15 W (2d) 374, 113 NW (2d) 14.

331.37, providing that the abrogation of the defense of assumption of risk shall not apply to farm labor, and 331.045, constituting the comparative-negligence statute, must be construed together, and thereunder any conduct of a farm laborer, which evinces want of ordinary care for his own safety, constitutes contributory negligence and is subject to comparison under the latter section, thereby having the effect of largely, if not entirely, abrogating in farm-labor cases the defense of assumption of

risk as an absolute bar to recovery where the conduct alleged falls short of express consent to assume a particular risk. *Colson v. Rule*, 15 W (2d) 387, 113 NW (2d) 21.

The doctrine of gross negligence is abolished in negligence cases and in contribution cases. *Bielski v. Schulze*, 16 W (2d) 1, 114 NW (2d) 105.

Treatment of negligence, causation and comparative negligence questions where a guest is involved discussed. *Theisen v. Milwaukee Automobile Mut. Ins. Co.* 18 W (2d) 91, 118 NW (2d) 140, 119 NW (2d) 393.

The element of freedom from contributory negligence is not a requirement for the application of *res ipsa loquitur* in this state, and if the defendant is found negligent, the plaintiff's contributory negligence, if any, goes to the question of comparison of negligence as between the plaintiff and the defendant. *Turk v. H. C. Prange Co.* 18 W (2d) 547, 119 NW (2d) 365.

Developments in tort law. *Fairchild*, 46 MLR 1.

Abolition of assumption of risk doctrine. 46 MLR 119.

Attractive nuisance and contributory negligence doctrines compared. 1960 WLR 692.

Negligence and contributory negligence in dog bite cases. 1961 WLR 673.

Problems of consolidating assumption of risk and contributory negligence. 1961 WLR 677.

331.048 Recovery by auto or motorboat owner limited. The owner of a motor vehicle or motorboat which, while being operated by the spouse or minor child of such owner, is damaged as the result of an accident involving another vehicle or boat, may not recover from the owner or operator of such other vehicle or boat for such damages, if the negligence of such spouse or minor child exceeds that of the operator of such other vehicle or boat. In the event that it is judicially determined that a spouse or minor operator of the motor vehicle or motorboat is found to be guilty of less than 50 per cent of the causal negligence involved in an accident, then in that event the owner of the motor vehicle or motorboat involved shall be entitled to recover in accordance with the contributory negligence principles as laid down in s. 331.045. For the purposes of recovery of

damages by the owner under s. 331.048, and for this purpose only, the negligence of the spouse or minor operator shall be imputed to the owner.

331.05 Damages in actions for libel. (1) The proprietor, publisher, editor, writer or reporter upon any newspaper published in this state shall not be liable in any civil action for libel for the publication in such newspaper of a true and fair report of any judicial, legislative or other public official proceeding authorized by law or of any public statement, speech, argument or debate in the course of such proceeding. This section shall not be construed to exempt any such proprietor, publisher, editor, writer or reporter from liability for any libelous matter contained in any headline or headings to any such report, or to libelous remarks or comments added or interpolated in any such report or made and published concerning the same, which remarks or comments were not uttered by the person libeled or spoken concerning him in the course of such proceeding by some other person.

(2) Before any civil action shall be commenced on account of any libelous publication in any newspaper, magazine or periodical, the libeled person shall first give those alleged to be responsible or liable for the publication a reasonable opportunity to correct the libelous matter. Such opportunity shall be given by notice in writing specifying the article and the statements therein which are claimed to be false and defamatory and a statement of what are claimed to be the true facts. The notice may also state the sources, if any, from which the true facts may be ascertained with definiteness and certainty. The first issue published after the expiration of one week from the receipt of such notice shall be within a reasonable time for correction. To the extent that the true facts are, with reasonable diligence, ascertainable with definiteness and certainty, only a retraction shall constitute a correction; otherwise the publication of the libeled person's statement of the true facts, or so much thereof as shall not be libelous of another, scurrilous, or otherwise improper for publication, published as his statement, shall constitute a correction within the meaning of this section. A correction, timely published, without comment, in a position and type as prominent as the alleged libel, shall constitute a defense against the recovery of any damages except actual damages, as well as being competent and material in mitigation of actual damages to the extent the correction published does so mitigate them.

331.052 Defamation by radio and television. The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employes of any such owner, licensee or operator, shall not be liable in damages for any defamatory statement published or uttered in, or as a part of, a visual or sound broadcast by a candidate for political office in those instances in which, under the acts of congress or the rules and regulations of the federal communications commission, the broadcasting station or network is prohibited from censoring the script of the broadcast.

331.055 Gaming contracts void. All promises, agreements, notes, bills, bonds, or other contracts, mortgages, conveyances or other securities, where the whole or any part of the consideration of such promise, agreement, note, bill, bond, mortgage, conveyance or other security shall be for money or other valuable thing whatsoever won or lost, laid or staked, or betted at or upon any game of any kind or under any name whatsoever, or by any means, or upon any race, fight, sport or pastime, or any wager, or for the repayment of money or other thing of value, lent or advanced at the time and for the purpose, of any game, play, bet or wager, or of being laid, staked, betted or wagered thereon shall be absolutely void; provided, however, that contracts of insurance made in good faith for the security or indemnity of the party insured shall be lawful and valid.

331.056 Recovery of money wagered. Any person who, by playing at any game or by betting or wagering on any game, election, horse or other race, ball playing, cock fighting, fight, sport or pastime or on the issue or event thereof, or on any future contingent or unknown occurrence or result in respect to anything whatever, shall have put up, staked or deposited with any stakeholder or third person any money, property or thing in action, or shall have lost and delivered the same to any winner thereof may, within 3 months after such putting up, staking or depositing, sue for and recover the same from such stakeholder or third person whether such money, property or thing in action has been lost or won or whether it has been delivered over by such stakeholder or third person to the winner or not, and may, within 6 months after any such delivery by such person or stakeholder, sue for and recover such money, property or thing in action from the winner thereof if the same has been delivered over to such winner; and if he shall not so sue for and recover such money, property or thing in action within the time above limited then any other person may, in his behalf and in his name, sue for and recover the same for the use and benefit of his family or his heirs, in case of his death, from such stakeholder or third person if the same is still held by him, within 6 months after such putting up, staking or depositing, or from the winner thereof within one year from the delivery thereof to such winner.

331.057 Action against judicial officer for loss caused by misconduct. Any judicial officer who causes to be brought in a court over which he presides any action or proceeding upon a claim placed in his hands as agent or attorney for collection shall be liable in a civil action to the person against whom such action or proceeding was brought for the full amount of damages and costs recovered on such claim.

331.06 Recovery of divisible personalty. When personal property is divisible and owned by tenants in common and one tenant in common shall claim and hold possession of more than his share or proportion thereof his cotenant, after making a demand in writing, may sue for and recover his share or the value thereof; and the court may direct the jury, if necessary, in any such action to find what specific articles or what share or interest belongs to the respective parties, and the court shall enter up judgment in form for one or both of the parties against the other, according to such verdict.

331.07 Set-offs. In the following cases a demand by one party may be set off against and as a defense, in whole or in part, to demands by the other:

(1) It must be a demand arising upon a judgment or upon contract, express or implied, whether such contract be written or unwritten, sealed or without seal; and if it be founded upon a bond or other contract having a penalty the sum equitably due by virtue of its conditions only shall be set off.

(2) It must be due to him in his own right, either as being the original creditor or payee or as being the assignee and owner of the demand.

(3) It must have existed at the time of the commencement of the action, and must then have belonged to the party claiming to set off the same.

(4) It can be allowed only in actions founded upon demands which could themselves be the subject of set-off according to law.

(5) If the action or counterclaim be founded upon a contract, other than a negotiable promissory note or bill of exchange, which has been assigned to the party a demand existing against such party or any assignor of such contract, at the time of his assignment thereof and belonging to the opposite party, in good faith before notice of such assignment, may be set off to the amount otherwise recoverable upon such contract if the demand be such as might have been set off against the party or assignor while the contract belonged to him.

(6) If the action be upon a negotiable promissory note or bill of exchange which has been assigned to the party after it became due a set-off to the extent of the amount otherwise recoverable thereon may be made of a demand existing against any person who shall have assigned or transferred such note or bill after it became due, if the demand be such as might have been set off against the assignor while the note or bill belonged to him.

(7) Judgments for the payment of money may be set off by the court, pro tanto, when the parties in interest are identical, upon motion, in the action in which the mover is the judgment debtor and notice of motion and proof of service thereof filed in said action shall stay execution till the motion is disposed of and any assignment during said time shall not prejudice the rights of any party. If the actions are in different courts, the moving party shall, at or prior to the entry of the order of set-off, tender to the other party a proper satisfaction.

(6) does not apply where the note sued Peoples T. & S. Bank v. Standard Printing Co. 19 W (2d) 27, 119 NW (2d) 378.

331.08 Set-off in actions by trustees, etc. If the party against whom the set-off is claimed be a trustee or a person expressly authorized by statute to sue so much of a demand existing against those whom the party represents or for whose benefit he sues may be set off as will satisfy the claim, if the same might have been set off in an action by those beneficially interested.

331.09 Set-off in actions by executors, etc. In actions brought by executors and administrators demands existing against their testators or intestates, and belonging to the defendant at the time of their death, may be set off by the defendant in the same manner as if the action had been brought by and in the name of the deceased.

331.10 Set-off in actions against same. In actions against executors and administrators and against trustees and others sued in their representative character the defendants may set off demands belonging to their testators or intestates or those whom they represent, in the same manner as the persons so represented would have been entitled to set off the same in an action against them.

331.11 Judgment on set-offs. If the amount of a set-off, duly established, be equal to the plaintiff's debt or demand judgment shall be entered that the plaintiff take nothing

by his action; if it be less than the plaintiff's debt or demand the plaintiff shall have judgment for the residue only.

331.12 Judgment for balance. If there be found a balance due from the plaintiff in the action to the defendant judgment shall be rendered for the defendant to the amount thereof; but no such judgment shall be rendered against the plaintiff for any balance due from any other person.

331.13 How set-off pleaded. In actions in courts of record a set-off claimed by the defendant shall be pleaded as a counterclaim and regulated by the rules of pleading and practice applicable to counterclaims. When a counterclaim is upon a cause of action derived by assignment a set-off of a demand against the assignor, and set-off which in any case may be made to a counterclaim, shall be pleaded, by reply, as a defense to the counterclaim.

331.14 Tender may be pleaded. The payment or tender of payment of the whole sum due on any contract for the payment of money, although made after the money has become due and payable, may be pleaded to an action subsequently brought in like manner and with the like effect as if such tender or payment had been made at the time prescribed in the contract.

331.15 After action. A tender also may be made after an action is brought on such contract of the whole sum then due thereon, with the legal costs of suit incurred up to the time, at any time before the action is called for trial. It may be made to the plaintiff or his attorney, and if not accepted the defendant may plead the same by answer or supplemental answer, in like manner as if it had been made before the commencement of the action, bringing into court the money so tendered for costs as well as for debt or damages.

331.16 Proceedings on acceptance of tender. If such tender be accepted the plaintiff or his attorney shall, at the request of the defendant, sign a stipulation of discontinuance of the action for such reason and shall deliver it to the defendant; and also a certificate or notice thereof to the officer who has any process against the defendant, if requested; and if any further costs shall be incurred for any service made by the officer after tender accepted and before he receives notice thereof the defendant shall pay the same to the officer or the tender shall be invalid.

331.17 Involuntary trespass. A tender may also be made in all cases of involuntary trespass, except timber trespass as defined in section 26.04, before action is commenced; and when in the opinion of the court or jury a sufficient amount was tendered to the party injured, his agent or attorney for the trespass complained of, judgment shall be entered against the plaintiff for costs; provided, that the defendant kept his tender good by paying the money into court at the trial for the use of the plaintiff.

331.171 Payment into court of tender; record of deposits. (1) When tender of payment in full is made and pleaded, the defendant shall pay the same into court before the trial of the action is commenced and notify the opposite party in writing, or be deprived of all benefit of such tender. When the sum so tendered and paid into court shall be sufficient, the defendant shall recover the taxable costs of the action, if the tender was prior to the commencement of the action; and he shall recover such costs from the time of the tender, if the tender was after suit commenced.

(2) When any party, pursuant to an order or to law, deposits any money or property with the clerk of court, such clerk shall record in the minute book the fact of such deposit, describing the money or property and stating the date of the deposit, by whom made, under what order or for what purpose and shall deliver a certificate of such facts to the depositor, with the volume and page of the record indorsed thereon.

331.28 Remedies not merged. When the violation of a right admits of both a civil and criminal remedy the right to prosecute the one is not merged in the other.

331.29 Process not to be served Sunday. No person shall serve or execute any civil process from midnight preceding to midnight following the first day of the week; and any such service shall be void; and any person serving or executing any such process shall be liable in damages to the party aggrieved in like manner and to the same extent as if he had not had any such process.

331.30 Nor on Saturday, when. Whenever an execution or other final process shall be issued against the property of any person who habitually observes the seventh day of the week, instead of the first, as a day of rest the officer to whom such process shall be directed shall not levy upon or sell any property of any such person on the seventh day of

the week; provided, that said person shall deliver to such officer an affidavit in writing, setting forth the fact that he habitually keeps and observes the seventh day of the week instead of the first, as a day of rest, at any time before such levy or at least two days before such sale, as the case may be; and such sale may, at the time appointed therefor, be adjourned to any day within the life of the execution or such execution may be renewed as in other cases.

331.33 Limitation of surety's liability. Any person may limit the amount of his liability as a surety upon any bond or other obligation required by law or ordered by any court, judge, magistrate or public official for any purpose whatever. The amount of such limited liability may be recited in the body of the bond or stated in the justification of the surety thereto; and in any action brought upon such bond no judgment shall be recovered against such surety for any sum larger than the amount of his liability stated as aforesaid, together with his pro rata share of the costs of said action. And in any such action a surety may deposit in court the amount of his liability, stated as aforesaid, whereupon he shall be discharged and released from any further liability under such bond.

331.34 Renewal of sureties upon becoming insufficient and effects thereof. If any bail bond, recognizance, undertaking or other bond or undertaking given in any civil or criminal action or proceeding, shall become at any time insufficient, the court or judge thereof, justice of the peace or any magistrate before whom such action or proceeding is pending, may, upon notice, require the plaintiff or defendant, as the case may be, to give a new bond, recognizance or undertaking. Every person becoming surety on any such new bond, recognizance or undertaking shall be liable from the time the original was given, the same as if he had been the original surety. If any person shall fail to comply with the order made in such case the adverse party shall be entitled to any order, judgment, remedy or process to which he would have been entitled had no bond, recognizance or undertaking been given at any time.

331.345 Justification of individual sureties. (1) This section shall apply to any bond or undertaking in an amount of more than \$1,000 whereon individuals are offered as sureties, which is authorized or required by any provision of the statutes to be given or furnished in or in connection with any civil action or proceeding in any court of record in this state, in connection with which bond or undertaking real property is offered as security.

(2) Before any such bond or undertaking shall be approved, there shall be attached thereto and made a part of such bond or undertaking a statement under oath in duplicate by the surety that he is the sole owner of the property offered by him as security and containing the following additional information:

- (a) The full name and address of the surety.
- (b) That he is a resident of this state.
- (c) An accurate description by lot and block number, if part of a recorded plat, or by metes and bounds of the real estate offered as security.
- (d) A statement that none of the properties offered constitute the homestead of the surety.
- (e) A statement of the total amount of the liens, unpaid taxes and other encumbrances against each property offered.
- (f) A statement as to the assessed value of each property offered, its market value and the value of the equity over and above all incumbrances, liens and unpaid taxes.
- (g) That the equity of the real property is equal to twice the penalty of the bond or undertaking.

(3) This sworn statement shall be in addition to and notwithstanding other affidavits or statements of justification required or provided for elsewhere in the statutes in connection with such bonds and undertakings.

Cross Reference: This section does not apply to bonds of personal representatives. See 310.15.

331.346 Bail, deposit in lieu of bond. When any bond or undertaking is authorized in any civil or criminal action or proceeding, the would-be obligor may, in lieu thereof and with like legal effect, deposit with the proper court or officer cash or certified bank checks or United States bonds in an amount at least equal to the required security; and the receiver thereof shall give a receipt therefor. Section 274.14 shall govern the procedure so far as applicable.

331.35 Expenses in actions against municipal officers. (1) Whenever in any city, town, village, or county charges of any kind shall be filed or an action be brought against any officer thereof in his official capacity, or to subject any such officer, who is being compensated on a salary basis, to a personal liability growing out of the performance of offi-

cial duties, and such charges or such action shall be discontinued or dismissed or such matter shall be determined favorably to such officer, or such officer shall be reinstated, or in case such officer, without fault on his part, shall be subjected to a personal liability as aforesaid, such city, town, village, or county may pay all reasonable expenses which such officer necessarily expended by reason thereof. Such expenses may likewise be paid, even though decided adversely to such officer, where it shall appear from the certificate of the trial judge that the action involved the constitutionality of a statute, not theretofore construed, relating to the performance of the official duties of said officer.

331.36 Process against officer. No process against private property shall issue in an action or upon a judgment against a public corporation or an officer in his official capacity, when the liability, if any, is that of the corporation nor shall any person be liable as garnishee of such public corporation.

331.37 Abrogation of defenses. (1) In any action to recover damages for a personal injury sustained within this state by an employe while engaged in the line of his duty as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of ordinary care of the employer, or of any officer, agent, or servant of the employer, it shall not be a defense:

(a) That the employe either expressly or impliedly assumed the risk of the hazard complained of.

(b) When such employer has at the time of the injury in a common employment three or more employes, that the injury or death was caused in whole or in part by the want of ordinary care of a fellow servant.

(c) When such employer has at the time of the injury in a common employment three or more employes, that the injury or death was caused in whole or in part by the want of ordinary care of the injured employe, where such want of ordinary care was not wilful.

(2) Any employer who has elected to pay compensation as provided in chapter 102 shall not be subject to the provisions of this section.

(3) Subsection (1) (a), (b) and (c) shall not apply to farm labor, except such farm labor as is subject to ch. 102.

(4) No contract, rule, or regulation, shall exempt the employer from any of the provisions of this section.

History: 1961 c. 387.

See note under 331.045, citing Colson v. Rule, 15 W (2d) 387, 113 NW (2d) 21.

331.375 Abrogation of defense that contract was champertous. No action, special proceeding, cross complaint or counterclaim in any court shall be dismissed on the ground that a party to the action is a party to a contract savoring of champerty or maintenance unless the contract is the basis of the claim pleaded.

Where a full assignment of causes of champertous, but public policy prevents the action of an injured party and his workmen's compensation insurer, against an insured and its automobile liability insurer, for the alleged negligence of an employe of the insured in using insured trucks, was made to the insured's comprehensive liability insurer which had paid the injured party \$120,000, such assignment was not

enforcement of the assignee's rights under such assignment for any amount above the \$120,000, and the assignment is void for any amount in excess of \$120,000, but good to the extent of \$120,000. D'Angelo v. Cornell Paperboard Products Co. 19 W (2d) 390, 120 NW (2d) 70.

331.38 Surety, how discharged. (1) Any surety or the personal representative of any surety upon the bond of any trustee, guardian, receiver, executor, or other fiduciary, may be discharged from liability as provided in this section. On five days' notice to the principal in such bond, application may be made to the court where it is filed, or which has jurisdiction of such fiduciary or to any judge of such court for a discharge from liability as surety, and that such principal be required to account.

(2) Notice of such application may be served personally within or without the state. If it shall satisfactorily appear to the court or the judge that personal service cannot be had with due diligence within the state, the notice may be served in such manner as the court or judge shall direct. Pending such application the principal may be restrained from acting, except to preserve the trust estate.

(3) If at the time appointed the principal shall fail to file a new bond satisfactory to the court or judge, an order shall be made requiring the principal to file a new bond within five days. When such new bond shall be filed, the court or judge shall make an order requiring the principal to account for all his acts to and including the date of the order, and to file such account within a time fixed not exceeding twenty days; and shall discharge the surety making such application from liability for any act or default of the principal subsequent to the date of such order.

(4) If the principal shall fail to file a new bond within the time specified, an order

shall be made removing him from office, and requiring him to file his account within twenty days. If he shall fail to file his account as required, the surety may make and file such account; and upon settlement thereof and upon the trust fund or estate being found or made good and paid over or properly secured, credit shall be given for all commissions, costs, disbursements and allowances to which the principal would be entitled were he accounting.

(5) The procedure for hearing, settling and allowing such account shall be according to the practice prescribed by chapter 317 in the matter of account of executors and administrators. Upon the trust fund or estate being found or made good and paid over or properly secured, such surety shall be discharged from all liability. Upon demand by the principal, the discharged surety shall return the unearned part of the premium paid for the canceled bond.

(6) Any such fiduciary may institute and conduct proceedings for the discharge of his surety and for the filing of a new bond; and the procedure shall in all respects conform substantially to the practice prescribed by this section in cases where the proceeding is instituted by a surety, and with like effect.

331.39 Juror's oath. (1) In every case and in all courts the jurors selected to try the issues in the action or proceeding, civil or criminal, shall be sworn; and the oath may be administered in substantially the following form: Do you and each of you swear (or affirm) that you will well and truly try the issue joined between, plaintiff, and, defendant, and, unless discharged by the court, a true verdict give, according to law and the evidence given in court, so help you God.

(2) The juror's assent to the oath may be manifested by the uplifted hand.

331.40 Oath of officer in charge of jury. When the issues have been submitted to the jury the jurors shall be under the charge of a proper officer until they agree upon a verdict or are discharged by the court; the officer shall be sworn for that purpose and the following oath may be administered to him: You do swear that, unless otherwise ordered by the court, you will, to the utmost of your ability, keep all jurors sworn on this trial together in some private and convenient place, without drink except water, that you will not suffer any person to speak to them or speak to them yourself, except it be to ask whether they have agreed on their verdict, until they have agreed on their verdict or are discharged by the court, and that you will not, before they render their verdict, communicate to any person the state of their deliberations or the verdict they have agreed upon, so help you God.

331.41 Employee's cash bonds to be held in trust; duty of employer; penalty. (1) Where any person, firm or corporation requests any employe to furnish a cash bond, the cash constituting such bond shall not be mingled with the moneys or assets of such person, firm or corporation demanding the same, but shall be deposited by such person, firm or corporation in any bank, trust company or any savings and loan association doing business in this state whose deposits or shares are insured by a federal agency to the extent of \$10,000, as a separate trust fund, and it shall be unlawful for any person, firm or corporation to mingle such cash received as a bond with the moneys or assets of any such person, firm or corporation, or to use the same. No employer shall deposit more than \$10,000 with any one depository. The bank book, certificate of deposit or other evidence thereof shall be in the name of the employer in trust for the named employe, and shall not be withdrawn except after an accounting had between the employer and employe, said accounting to be had within 10 days from the time relationship is discontinued or the bond is sought to be appropriated by the employer. All interest or dividends earned by such sum deposited shall accrue to and belong to the employe and shall be turned over to said employe as soon as paid out by the depository. Such deposit shall at no time and in no event be subject to withdrawal except upon the signature of both the employer and employe or upon a judgment or order of a court of record.

(2) In the event of the failure of any person, firm or corporation, such moneys on deposit shall constitute a trust fund for the benefit of the persons who furnished such bonds and shall not become the property of the assignee, receiver or trustee of such insolvent person, firm or corporation.

(3) In case of the death of such employe before such cash bond is withdrawn in the manner provided in subsection (1) of this section such accounting and withdrawal may be effected not less than five days after such death and before the filing of a petition for letters testamentary or of administration in the matter of the decedent's estate, by the employer with the decedent's surviving spouse; and if there be no surviving spouse with his children; and if he shall leave no children, his father or mother; and if he shall leave no father or mother, his brother or sister, in the same manner and with like effect as if such

accounting and withdrawal were accomplished by and between the employer and employe as provided in subsection (1) of this section. The amount of such cash bond, together with principal and interest, to which the deceased employe would have been entitled had he lived, shall, as soon as paid out by the depository, be turned over to such relative of the deceased employe effecting such accounting and withdrawal with the employer, and such turning over shall be a discharge and release of the employer to the amount of such payment. If no such relatives survive, the employer may apply such cash bond, or so much thereof as may be necessary, to paying creditors of the decedent in the order of preference prescribed in section 313.16 for satisfaction of debts by executors and administrators and the making of payment in such manner shall be a discharge and release of the employer to the amount of such payment.

(4) Any person who shall violate any provision of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine equal to the amount of the bond or by imprisonment in the county jail for not less than ten days nor more than 60 days, or by both such fine and imprisonment.

331.42 Deposit of undistributed money and property by administrators and others.

(1) In case in any proceeding in any court of record it is (a) determined that moneys or other personal property in the custody of or under the control of any administrator, executor, trustee, receiver or other officer of the court, belongs to a natural person if he is alive, or to an artificial person if it is in existence and entitled to receive, otherwise to some other person, and the court or judge making such determination finds that there is not sufficient evidence showing that the natural person first entitled to take is alive, or that the artificial person is in existence and entitled to receive, or (b) in case such money or other personal property, including any legacy or share of intestate property cannot be delivered to the legatee or heir or person entitled thereto because of the fact that such person is a member of the military or naval forces of the United States or any of its allies or is engaged in any of the armed forces abroad or with the American Red Cross society or other body or other similar business, then in either or any of such cases, the court or judge may direct that the officer having custody or control of such money or other personal property, deposit the same in any trust company, or any state or national bank within the state of Wisconsin authorized to exercise trust powers, or with the public administrator, taking its or his receipt therefor, and the said receipt shall, to the extent of the deposit so made, constitute a complete discharge of the said officer in any accounting by him made in said proceeding.

(2) In case such deposit is directed to be made, the court shall require the trust company or bank in which said deposit is ordered to be made, or the public administrator, as a condition of the receipt thereof, to accept and handle, manage and invest the same as trust funds to the same extent as if it or he had received the same as a testamentary trust, unless the court shall expressly otherwise direct, except that the reports shall be made to the court of its or his appointment.

(3) No distribution of the moneys or personal property so deposited shall be made by the depository as such trustee or otherwise without an order of the court on notice as prescribed by section 324.18, and the jurisdiction of the court in the proceeding will be continued to determine, at any time at the instance of any party interested, the ownership of said funds, and to order their distribution.

331.43 Tort actions against political corporations, governmental subdivisions or agencies and officers, agents or employes; notice of claim; limitation of damages and suits.

(1) No action founded on tort, except as provided in s. 345.05, shall be maintained against any volunteer fire company organized under ch. 213; political corporation; governmental subdivision or agency thereof nor against any officer, official, agent or employe of such corporation, subdivision or agency for acts done in their official capacity or in the course of their agency or employment unless within 120 days after the happening of the event causing the injury or damage or death complained of, written notice of the time, place and circumstances of the injury or damage signed by the party, his agent or attorney is served on such volunteer fire company, political corporation, governmental subdivision or agency and on the officer, official, agent or employe under s. 262.06. Failure to give the requisite notice shall not bar action on the claim if the fire company, corporation, subdivision or agency had actual notice of the damage or injury and the injured party shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant fire company, corporation, subdivision or agency, or to the defendant officer, official, agent or employe.

(2) The amount recoverable by any person for any damages, injuries or death in any action founded on tort against any volunteer fire company organized under ch. 213; political corporation, governmental subdivision or agency thereof and against their officers,

officials, agents or employes for acts done in their official capacity or in the course of their agency or employment, whether proceeded against jointly or severally, shall not exceed \$25,000. No punitive damages shall be allowed or recoverable in any such action.

(3) No suit shall be brought against any political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employes nor shall any suit be brought against such fire company, corporation, subdivision or agency or against its officers, officials, agents or employes for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

(4) Except as hereinafter provided, the provisions and limitations of this section shall be exclusive and shall apply to all actions in tort against a volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency or against any officer, official, agent or employe thereof for acts done in an official capacity or the course of his agency or employment. Nothing in this section shall bar an action or impose limitations in any action against any such officer, official, agent or employe individually for intentional torts. When rights or remedies are provided by any other statute against any political corporation, governmental subdivision or agency or any officer, official, agent or employe thereof for injury, damage or death, such statute shall apply and the limitations in sub. (2) shall be inapplicable.

History: 1963 c. 198.