

TITLE XXV.
Procedure in Civil Actions.

CHAPTER 260.

CIVIL ACTIONS, AND PARTIES THERETO.

260.01	Scope of Title XXV.	260.15	Nonjoinder of person for whose benefit action brought.
260.02	Remedies divided.	260.17	Joinder of parties to negotiable paper.
260.03	Action defined; special proceeding.	260.18	Defendants in actions on insurance policies.
260.05	Kinds of actions.	260.19	Parties interpleaded.
260.08	One form of action; designation of parties.	260.20	Proceedings after new parties added.
260.10	Who may be joined as plaintiffs.	260.21	Suing by fictitious name or as unknown; partners' names unknown.
260.11	Who as defendants.	260.22	Appearance by guardian or guardian ad litem.
260.12	Parties united in interest to be joined; class actions; alternative joinder.	260.23	Guardian ad litem.
260.13	Real party in interest must prosecute.	260.26	Guardian's bond.
260.14	Assignment of cause of action not to affect set-off.	260.27	Guardian's consent and liability.

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

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

- (1) Actions.
- (2) Special proceedings.

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

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

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

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

Cross Reference: See 285.10, providing that the state may be made a party in an action quiet title to land.

260.11 Who as defendants. (1) Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein. A plaintiff may join as defendants persons against whom the right to relief is alleged to exist in the alternative, although recovery against one may be inconsistent with recovery against the other; and in all such actions the recovery of costs by any of the parties to the action shall be in the discretion of the court. In any action for damages caused by the negligent operation, management or control of a motor vehicle, any insurer of motor vehicles, which has an interest in the outcome of such controversy adverse to the plaintiff or any of the parties to such controversy, or which by its policy of insurance assumes or reserves the right to control the prosecution, defense or settlement of the claim or action of the plaintiff or any of the parties to such claim or action, or which by its policy agrees to prosecute or defend the action brought by the plaintiff or any of the parties to

such action, or agrees to engage counsel to prosecute or defend said action, or agrees to pay the costs of such litigation, is by this section made a proper party defendant in any action brought by plaintiff in this state on account of any claim against the insured. The right of direct action herein given against an insurer against liability for damages to persons other than the insured arising out of the negligent operation, management or control of a motor vehicle shall exist whether the policy of insurance sued upon was issued or delivered in the state of Wisconsin or not and whether or not the policy or contract of insurance contains a provision forbidding such direct action, provided the accident or injury occurred in the state of Wisconsin.

(2) When any insurer shall be made a party defendant pursuant to this section and it shall appear 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 party and the insurer involving the question whether the insurer would be liable if judgment should be rendered against the insured, the court may, upon motion of any defendant in any such action, cause the person, who may be liable upon such cross-issue, to be made a party defendant to said action and all the issues involved in said controversy determined in the trial of said action. Nothing herein contained shall be construed as prohibiting the trial court from directing and conducting first a trial as to whether or not the insured is liable to the plaintiff or other party and directing a separate trial on the issues involving the question whether under its policy the insurer is liable for the payment in whole or in part of any judgment against the insured or the amount of such liability.

Cross Reference: As to insurers being made defendants, see 204.30 (4).

Where the injury was caused by the operation of a crane fixed to a truck, but during use the truck was immobilized, the insurer could not be joined as defendant under this section or 204.30 (4). *Smedley v. Milwaukee Automobile Ins. Co.* 12 W (2d) 460, 107 NW (2d) 625. The fact that a third person can sue an insurer directly does not enlarge the insurance coverage or increase the insurer's liability beyond the policy limits. *Nichols v. United States Fidelity & Guaranty Co.* 13 W (2d) 491, 109 NW (2d) 131.

260.12 Parties united in interest to be joined; class actions; alternative joinder.

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

The question of whether it is impracticable to bring all interested persons before the court is largely a matter of discretion for the trial court. *Lozoff v. Kaisershot*, 11 W (2d) 485, 105 NW (2d) 783. See note to 331.04, citing *Truesdill v. Roach*, 11 W (2d) 492, 105 NW (2d) 871.

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

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

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

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

260.18 Defendants in actions on insurance policies. In an action to recover on property insurance loss by fire, lightning, hail, cyclone or other casualty the plaintiff may join as defendants all of the insurance companies liable for the loss or any part thereof, and

all the issues shall be tried together and the verdict or finding shall fix the amount for which each defendant is liable. If the plaintiff recovers, a separate judgment shall be rendered against each defendant for the sum for which it is liable, together with such proportion of the cost as the court shall determine to be equitable.

260.19 Parties interpleaded. (1) When a complete determination of the controversy in court cannot be had without the presence of other parties, or when persons not parties have such interests in the subject matter of the controversy as require them to be parties for their protection, the court shall order them brought in; and when in an action for the recovery of property a person not a party has an interest therein and makes application to the court to be made a party it may order him brought in.

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

(3) A defendant, who if he be held liable in the action, will thereby obtain a right of action against a person not a party may apply for an order making such person a party defendant and the court may so order.

(4) Application for an order bringing in an additional party shall be made by motion or order to show cause supported by affidavit together with a proposed cross complaint and served on the plaintiff on or before 40 days after the service of the summons and complaint on the applicant. The time limit for the making of such applications may be extended by the court for cause either before or after the expiration of said 40 days.

260.20 Proceedings after new parties added. Where the court orders the addition of another party under s. 260.19, the order shall provide that the summons and the title of the action be amended as necessary, and that the amended summons, together with a copy of the original complaint, the order, and the answer and cross complaint with the title amended, be served by the applicant on the additional party within a prescribed time. The order shall also be served within such time on all other parties to the action. Within 20 days after such service of the order, any party may serve amended or responsive pleadings.

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

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

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

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

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

(2) **FOR PLAINTIFF.** When the plaintiff is a minor 14 years of age, upon his application; or if the plaintiff is under that age or is mentally incompetent, upon application of his guardian or of a relative or friend. If made by a relative or friend, notice thereof must first be given to his guardian if he has one in this state; if he has none, then to the person with whom the minor or mentally incompetent resides or who has him in custody.

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

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

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