CHAPTER 270.

ISSUES, TRIALS AND JUDGMENTS.

270.01 Kinds of issue. Issues arise upon the pleadings when a fact or conclusion of law is maintained by one party and controverted by the other; they are of two kinds:

(1) Of law.

(2) Of fact.

270.02 Issue of law. An issue of law arises upon a demurrer to the complaint, answer or reply or to some part thereof.

270.03 Issue of fact defined. An issue of fact arises:

(1) Upon a material allegation in the complaint, controverted by the answer; or

(2) Upon a material allegation of any counterclaim in the answer, controverted by the reply; or

(3) Upon a material allegation of new matter in the answer, not requiring a reply, unless an issue of law is joined thereon; or

(4) Upon a material allegation of new matter in the reply, unless an issue of law is joined thereon.

270.04 Issues of law; trial. When issues both of law and of fact arise upon the pleadings, the issue of law must be first tried unless the court otherwise direct.

270.05 Feigned and special issues. Feigned issues are abolished, and instead thereof, when a question of fact not put in issue by the pleadings is to be tried by a jury, an order for trial may be made, stating distinctly and plainly the question of fact to be tried.

270.06 Trial defined. A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact.

270.07 Issues, by whom tried, when tried. (1) An issue of fact in an action for the recovery of money only, or of real or personal property or for divorce or legal separation on the ground of adultery, must be tried by a jury except as otherwise provided in this chapter and except that equitable defenses or counterclaims are triable by the court. Every other issue must be tried by the court, but the court may order the whole issue or any specific question of fact involved therein to be tried by a jury; or may refer an issue as provided in s. 270.34.

(2) When any matter in abatement of any action triable by jury is set up, which involves the finding of any fact, the same shall be found by a special verdict of a jury, unless a trial by jury be waived; and when there is any other issue of fact in the action, the same may be submitted to the same jury at the same time; otherwise the issue in abatement shall first be tried. When the issues of fact are triable by the court, any issue in abatement may be tried at the same time as the other issues of fact.

History: 1961 c. 336.

270.08 Order of trial; separate trials. When issues arise triable by a jury and other issues triable by the court, the court shall, in its discretion, direct the trial of the one or the other to be first had, according to the nature of the issues and the interests of justice, and judgment shall be given upon both the verdict and the finding of the court, when both shall be found. But no issue need be tried, the disposition of which is not necessary to enable the court to render the appropriate judgment. A separate trial between the plaintiff and any of the several defendants may be allowed by the court whenever in its opinion justice will be thereby promoted.

270.11 Hearing on demurrer or motion. Any issue of law, including a demurrer, may be brought on for hearing by motion and notice.

History: 1964 Sup. Ct. Order, 25 W (2d) vii.

270.115 Notice of trial and certificate of readiness. (1) Every issue of fact may be noticed for trial by service of notice of trial and certificate of readiness on the opposite party at any time after 40 days have elapsed following expiration of the time for joinder of issues between all parties. The time for service shall be extended pending determination of any timely motion for summary judgment. In certiorari and appeals the date of filing the return is the date of issue. The notice of trial and certificate of readiness, with proof of service endorsed thereon or attached thereto shall be filed with the clerk by the serving party within 20 days after service on the first party served or the notice is void. Such notice of trial and certificate of readiness shall state that the action will be placed on the calendar for trial at the time and in the manner prescribed by s. 270.12. It shall contain the title of the action, the names of the attorneys, the time when issue was joined, and state whether the issue is triable by the court or by the jury. Service of such notice shall be deemed a certification by the party serving it that he is ready for trial. Every other party is deemed to be ready for trial 30 days after such service unless, on motion and for cause, such party has been granted an extension of time. If such notice of trial and certificate of readiness so filed fails to comply in any respect with the requirements of this section the presiding judge in his discretion, if satisfied that the opposite party has not been misled or prejudiced thereby, may direct the action to be placed on the calendar as hereinafter provided.

(2) The notice of trial and certificate of readiness shall be in substantially the following form:

STATE OF WISCONSIN, In ..... COURT, For ..... COUNTY

	Plaintiff	NOTICE OF TRIAL CERTIFICATE OF READINESS NOTE OF ISSUE
v.		
	Defendant	

TO: _____

Attorney for .....

PLEASE TAKE NOTICE that the above entitled action is at issue; THAT 30 DAYS FROM DATE OF SERVICE OF THIS NOTICE, YOU ARE DEEMED READY

FOR TRIAL: that this action will be placed on the calendar for trial at the time and in the manner prescribed by Wisconsin Statutes, Section 270.12.

CERTIFICATE OF READINESS FOR TRIAL

The undersigned hereby certifies that:

1. All pleadings have been served, and the issues are joined.
2. All his depositions and other pre-trial steps now known to be necessary have been completed.
3. He is now ready for trial.

Dated ..... 19.....

NOTE OF ISSUE IN ABOVE ENTITLED CAUSE

.....Plaintiff....Attorney....
.....Defendant....Attorney....

Issue of ..... for .....
(Law or Fact) (Court or Jury)
Issues joined ..... 19.....

.....
.....Attorney

History: Sup. Ct. Order, 25 W (2d) vii; Sup. Ct. Order, 29 W (2d) vii.

270.12 Calendar. (1) TIME OF ARRANGEMENT. When the notice of trial is filed with the clerk he shall place issues on the calendar as follows:

(a) Issues of fact triable by the court shall be placed on the calendar of the current term when 30 days have elapsed after filing of notice of trial and certificate of readiness.

(b) Issues of fact triable by the jury shall be placed on the calendar of the next term if notice of trial and certificate of readiness is filed 30 days or more before commencement of such term. If such notice is filed less than 30 days before commencement of the next term, issues shall be placed on the calendar of the term following the next one provided, however, that the presiding judge may in his discretion direct that any case be placed on the calendar after 30 days have elapsed, after filing notice of trial and certificate of readiness.

(1m) CRIMINAL CASES. Criminal cases and prosecution for violations of municipal ordinances shall be placed on the calendar of the current term.

(2) ADVANCEMENT OF ISSUES. The court may, on motion of any party, or on its own motion, after hearing, place on the calendar or advance for trial any action which is at issue.

(3) PENDING MATTERS CONTINUED. All matters pending and undisposed of at the end of a term are continued to the next term and shall be placed upon the calendar of the next term in accordance with their nature and date of filing notice of trial.

(4) CLERK TO PREPARE. The clerk shall prepare a calendar for each term of the circuit court of all actions which are for trial as shown by the notices filed including those covered by sub. (3), containing the title of each action and the names of the attorneys, and arranged as follows: (a) criminal cases in the order of filing, (ab) prosecutions for violations of municipal ordinances and appeals thereof from county and municipal courts to the circuit courts, (b) civil jury issues, and (c) issues of fact for court. The calendar shall be disposed of in the above order unless for convenience of parties, the dispatch of business, or the prevention of injustice, the presiding judge otherwise directs.

(5) LARGE CALENDARS. In circuit courts having 1,000 or more causes on the term calendar, the clerk may, with the approval of the court, arrange the causes according to the date of filing the complaint, petition or other pleading necessary to commence the action or special proceeding or of the return on appeal and the serial record number of every cause shall be its calendar number.

(6) CONDITIONS PRECEDENT. The clerk shall not place any cause upon the calendar unless the state tax and the proper amount of clerk's fees shall have been paid and summons and complaint or copies thereof shall have been filed in his office.

(8) CALENDARS DISTRIBUTED. When the calendar for any term is printed, a copy thereof shall be mailed or delivered to the presiding judge and to the reporter and to each attorney appearing thereon in any cause, at least 4 days before the term.

(9) CALL OF CALENDAR. The presiding judge may, in his discretion, order a formal call of the calendar at such times as he directs. If a call is ordered, the judge must be present.

History: 1961 c. 495; Sup. Ct. Order, 25 W (2d) vii, viii; Sup. Ct. Order, 29 W (2d) viii; 1967 c. 276 s. 40.

270.125 Order of business. (2) JURY TRIALS FIRST. On the first day of the term,

unless otherwise ordered, the jury shall be called, and the trial of jury causes shall proceed.

(3) DAY CALENDAR. The criminal cases, ordinance violation cases and appeals thereof from county and municipal courts and the first 6 civil cases on the calendar shall be subject to call for trial upon the first day of the term. The clerk shall each day make up the following day's calendar, upon which he shall place such cases as the presiding judge directs.

(4) NOTICE TO PRISONERS. The district attorney shall, at least ten days before each general term of the court, inform prisoners awaiting trial of their right to counsel and to compulsory process to procure the attendance of witnesses.

(5) APPLICATIONS PUBLICLY ANNOUNCED. All applications to the court for orders or judgments, whether ex parte or otherwise, shall be publicly announced by the attorney making the application, and the clerk shall enter a brief statement thereof, with the action of the court thereon, in his minute book; and no court order shall be operative unless and until such entry is made, or unless the order shall be reduced to writing and signed.

History: 1961 c. 495; Sup. Ct. Order, 25 W (2d) viii; 1967 c. 276 s. 40.

The failure of the district attorney to give a prisoner the information required by (4) is harmless where the prisoner is represented by counsel. Gaertner v. State, 35 W (2d) 159, 150 NW (2d) 370.

270.13 Who may bring cause to trial. Either party may bring all the issues in an action to trial at any term at which the same are triable when a notice of trial has been duly served by either, and unless the court, for good cause, otherwise direct may, in the absence of the adverse party, proceed with his case and take a dismissal of the action or a verdict or judgment, as the case may require. No inquest shall hereafter be taken in any action.

270.14 Demurrers and motions, when heard. When, in any action noticed for trial, there shall be pending a demurrer to any pleading or a motion to strike out a pleading or any part thereof, or to make it more definite and certain, and the court shall think any such proceeding by either party may have been taken for delay or that for any reason justice requires a more speedy disposition of the action the demurrer or motion may be disposed of at the commencement of the term and the action be tried at the same term, short leave to amend or plead over being given when necessary; and a continuance be granted only upon good cause shown, which the court may in discretion require to be such as is usually required to obtain a second continuance in other actions.

270.145 Continuances. (1) Motions for continuances (except from day to day or to some day during the term) shall be made on the first day of the term unless the cause alleged therefor occur or be discovered thereafter. No cause noticed for trial shall be continued without the consent of the parties or cause shown.

(2) An affidavit for a continuance shall state that the moving party has a valid cause of action or a defense, in whole or in part, and if in part it shall specify what part; that the case has been fully and fairly stated to his counsel, giving the name and place of residence of such counsel, and that upon the statement thus made he is advised by his counsel that he has a cause of action or defense to the cause in whole or in part; and that he has used due diligence to prepare for trial, and the nature and kind of diligence used. If the application is based on the absence of a witness or document the affidavit shall state the name of the absent witness and his residence, if known, or the nature of any document wanted, and where the same can be found; that no other evidence is at hand or witness is in attendance or known to him whose testimony could have been procured in time, that the party can safely rely upon to prove the facts which he expects and believes can be proved by such absent witness or document; that the party is advised by his counsel, and believes, that he cannot safely go to trial without such evidence, that such witness is not absent by his consent, connivance or procurement, and the endeavors that have been used for the purpose of procuring such evidence; and particularly the facts which the absent document or witness is expected to prove, with the ground of such expectation.

(3) If the adverse party admits in writing or in open court that the witness, if present, would testify as stated in the affidavit for continuance, the application for a continuance may be denied, and the statement of facts aforesaid may be read as evidence, but the adverse party may controvert such statements, and such statements shall be subject to objection the same as a deposition.

(4) Where an application for a continuance is made by a party whose affidavit states that he has a valid defense to some part only of the other party's cause of action or demand, which he desires time to obtain testimony to establish, the application shall be denied if the other party withdraws or abandons that part of his cause of action or demand.

(5) When it shall appear to the court that the absent witness or desired evidence with reasonable diligence may be procured before the close of the term, the court may grant a

continuance of the action from day to day or to some certain day in the term, upon the payment of such costs as it may deem just and proper.

(6) No continuance by the court or referee shall be granted unless by consent of parties except upon immediate payment of the fees of witnesses in actual attendance and reasonable attorney's fees. Costs of continuance shall be taxed by the clerk immediately and without notice.

270.15 Drawing of petit jury. (1) At every term of any court for which jurors are drawn as provided in s. 255.04 the clerk shall place in a tumbler only the names of the petit jurors in attendance who have been drawn and summoned according to law for service at such term. The names shall be written upon separate cards and enclosed in opaque envelopes as required by s. 255.04 (2) (b).

(2) When a jury issue is to be tried the clerk shall, in the presence and under the direction of the court, openly draw out of the tumbler, one at a time, as many envelopes containing cards as are necessary to secure a jury. Before drawing each card he shall close the tumbler and rotate it.

(3) The jury may consist of any number of persons less than 12 that the parties agree upon. If there be no such agreement it shall consist of 12 persons so drawn who are not lawfully challenged and who are approved as indifferent between the parties.

(4) During the trial the cards containing the names of the jurors shall be kept separately until the jury is discharged, and then they shall be returned, properly enclosed in envelopes, to the tumbler, and the same course shall be taken as often as a jury is required.

(5) The card containing the name of the juror who is set aside or excused for any cause shall be replaced in its envelope and returned to the tumbler as soon as the jury is sworn.

(6) If a jury issue is brought to trial while a jury is trying another cause, the court may order a jury for the trial of the former to be drawn out of the tumbler in the ordinary way; but in any other case all the cards containing the names of the petit jurors, returned at and attending the term, shall be placed in the tumbler before a jury is drawn.

270.16 Qualifications of jurors; examination. The court shall, on request of either party, examine on oath any person who is called as a juror therein to know whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein, and the party objecting to the juror may introduce any other competent evidence in support of the objection, and if it shall appear to the court that the juror does not stand indifferent in the cause another shall be called and placed in his stead for trial of that cause; provided, that nothing contained in this section shall be construed as abridging in any manner the right of either party in person or through his attorneys to examine any person so called in regard to his qualifications as fully as if this section did not exist. Every person summoned as a juror for any term shall be paid and discharged whenever it appears that he is a party to any action triable by jury at such term.

Questioning of jurors as to stock ownership or office in insurance company discussed. Filipiak v. Plombon, 15 W (2d) 484, 113 NW (2d) 365.

270.17 Newspaper information does not disqualify. It shall be no cause of challenge to a juror that he may have obtained information of the matters at issue through newspapers or public journals, if he shall have received no bias or prejudice thereby; or that he is an inhabitant of or liable to pay taxes in a county interested in the action.

270.18 Number of jurors drawn; peremptory challenges. A sufficient number of jurors shall be called in the action so that twelve shall remain after the exercise of all peremptory challenges to which the parties are entitled as hereinafter provided. Each party shall be entitled to three such challenges which shall be exercised alternately, the plaintiff beginning; and when any party shall decline to challenge in his turn, such challenge shall be made by the clerk by lot. The parties to the action shall be deemed two, all plaintiffs being one party and all defendants being the other party, except that in case where two or more defendants have adverse interests, the court, if satisfied that the due protection of their interests so requires, in its discretion, may allow to the defendant or defendants on each side of said adverse interests, not to exceed three such challenges.

Where cases are consolidated for trial and there is no adverse interest between the plaintiffs, they may be restricted to a total of 3 peremptory challenges. Keplin v. Hardware Mut. Casualty Co. 24 W (2d) 319, 129 NW (2d) 321, 130 NW (2d) 3.

270.19 Preliminary jury instructions. The judge may give preliminary instructions to the jury which instructions may again be covered in the charge at the close of the case.

History: 1964 Sup. Ct. Order, 25 W (2d) viii.

270.20 Jury may view premises, etc. The jury may, in any case, at the request of either party, be taken to view the premises or place in question or any property, matter or thing relating to the controversy between the parties, when it shall appear to the court that such view is necessary to a just decision; provided, the party making the motion shall advance a sum sufficient to defray the expenses of the jury and the officers who attend them in taking the view; which expenses shall afterwards be taxed like other legal costs if the party who advanced them shall prevail in the action.

270.202 Identification of photographs. Unless deemed impracticable by the trial judge, each photograph received in evidence shall have either upon its face or upon its reverse side or upon a slip attached to it a statement of the position of the camera, the distance from the object photographed, the direction in which the camera was pointed and such further information as may be appropriate.

History: 1963 Sup. Ct. Order, 17 W (2d) xx.

270.205 Examination of witnesses; arguments. On the trial not more than one attorney on each side shall examine or cross-examine a witness and not more than two attorneys on each side shall sum up to the jury, unless the judge shall otherwise order. The party having the affirmative shall be entitled to the opening and closing argument, and in the opening the points relied on shall be stated. The waiver of argument by either party shall not preclude the adverse party from making any argument which he would otherwise have been entitled to make. The court may before the argument is begun, limit the time of argument.

The supreme court disapproves of the practice of permitting counsel for the plaintiff in argument to the jury, either orally or by the use of a blackboard or a chart, to present to the jury a mathematical formula setting forth on a per diem basis the amount determined by the plaintiff as his or her damages for pain and suffering, the use of such a formula being pure speculation by counsel, not supported by the evidence, and presenting matters which do not appear in the record. There is, so far as the objectionability thereof is concerned, no difference between using a mathematical formula for illustrative purposes and using it to determine the reasonableness of the amount sought as damages for pain and suffering. Affett v. Milwaukee & S. T. Corp. 11 W (2d) 604, 106 NW (2d) 274.

Counsel for both the plaintiff and the defendant may properly make an argumentative suggestion in summation from the evidence of a lump-sum dollar amount for pain and suffering which they believe the evidence will fairly and reasonably support, but counsel may not properly argue that such amount was arrived at or explained by a mathematical formula or on a per day, per month, or on any other time-segment basis. Affett v. Milwaukee & S. T. Corp. 11 W (2d) 604, 106 NW (2d) 274.

A statement of the plaintiff's counsel to the jury, on the subject of damages for personal injuries, "I am asking you to consider $25,000," was not improper argument. Walker v. Baker, 13 W (2d) 637, 109 NW (2d) 499.

It was proper for plaintiff's counsel to urge on the jurors such lump-sum figure for pain and suffering as counsel considered to be fairly supported by the evidence, and it was not proper for the trial judge to rule that counsel was entitled to argue for only such lump-sum as the trial judge deemed to be supported by the evidence. Halsted v. Kosnar, 18 W (2d) 348, 118 NW (2d) 864.

Hypothetical questions discussed. Sharp v. Milwaukee & S. T. Corp. 18 W (2d) 467, 118 NW (2d) 905.

As to an alleged improper argument to a jury which was not recorded, objection must be made at the time the statement is made. The supreme court will not entertain questions based on affidavits as to what was said. State ex rel. Sarnowski v. Fox, 19 W (2d) 68, 119 NW (2d) 451.

To be used in helping to clarify and explain the testimony of a medical witness, a chart of the muscles of the body and a skeleton of the spinal column made out of plastic were not inadmissible in evidence by reason of the fact that neither was an exact reproduction of the plaintiff's anatomy; and it would have been preferable for the trial court to have permitted the use of the chart and skeleton, but its refusal to do so was not prejudicial. Hernke v. Northern Ins. Co. 20 W (2d) 352, 122 NW (2d) 395.

Where during the course of trial plaintiff's counsel requested the production of statements given to the defendant by certain witnesses, which counsel used for purposes of cross examination but did not read any of such statements into the record, the trial court was not obliged to admit such statements, and its ruling excluding them did not constitute error. Merlino v. Mutual Service Casualty Ins. Co. 23 W (2d) 571, 127 NW (2d) 741.

Where there are 2 or more distinct items of injuries, it is proper for the trial court to permit argument whereby a separate sum is urged upon the jury for each such injury. Doolittle v. Western States Mut. Ins. Co. 24 W (2d) 135, 128 NW (2d) 403.

Even if this section applies in a criminal case, if the defendant does not object he waives his right to assert error on appeal. Dascenzo v. State, 26 W (2d) 225, 132 NW (2d) 231.

An assertion made by counsel in opening statement or in closing argument need not be founded upon direct evidence, provided that the facts so asserted may be inferred from the evidence, and reasonable latitude should be allowed to counsel in the oral argument even after the evidence is in. Kink v. Combs, 28 W (2d) 65, 135 NW (2d) 789.

If improper argument is made, a motion for a mistrial must be made before the jury returns its verdict or the objection is waived. Every party requesting the reporter to take down arguments should make this request part of the trial record so that opposing counsel will know of it and may make a similar request. Zweifel v. Milwaukee Automobile Mut. Ins. Co. 28 W (2d) 249, 137 NW (2d) 6.

The immunity of the attorney's work product in respect to a written statement ceases to exist when the person making the statement is placed on the stand as a witness at the trial, for by becoming a witness the person subjects himself to the risks of impeachment and the attorney has had the benefit of his work product. Shaw v. Wuttke, 28 W (2d) 448, 137 NW (2d) 649.

Trial judge should not prevent an attorney from suggesting a sum as damages even if he feels the amount is unreasonable and could not be sustained. Fischer v. Fischer, 31 W (2d) 293, 142 NW (2d) 857.

Cross-examination of a witness not a party may go beyond the direct examination when its purpose is to bring out facts referred to in the opening statement by op-

posing counsel. Seitz v. Seitz, 35 W (2d) 282, 151 NW (2d) 86.

Argument as to damages for each separate injury. 48 MLR 423.

270.21 Charge to jury; how given. The judge shall charge the jury and all such and subsequent instructions shall, unless a written charge be waived by counsel at the commencement of the trial be reduced to writing before being delivered or the same shall be taken down by the official reporter of the court. Each instruction asked by counsel to be given the jury shall be given without change or refused in full. If any judge shall violate any of the foregoing provisions or make any comments to the jury upon the law or facts without the same being so reduced to writing or taken down, the verdict shall be set aside or the judgment rendered thereon reversed unless at the time of submission to the jury there was no jury issue upon the evidence. The reporter shall take down all that the judge says during the trial to the jury or in their presence of or concerning such cause. Requests for instructions to the jury must be submitted in writing before the argument to the jury is begun, unless in the opinion of the trial judge, special circumstances excuse failure to so submit such requests.

Although the problem of whether the jury, in comparing the negligence of the parties, will give great weight to a finding by the trial court, is inherent in a situation where the court is compelled to make a finding, the problem can and should be met by instructions making it clear that no greater weight should be given to such a finding than should be given to a finding made by the jury. Field v. Vinograd, 10 W (2d) 500, 103 NW (2d) 671.

Where the trial court gave a requested instruction that the court, in finding that the plaintiff 12-year-old pedestrian was causally negligent in failing to yield the right of way to the defendant motorist, was not finding that the defendant was or was not negligent, and that the determination of the other questions in the special verdict was for the jury, including the apportionment of the negligence, and the court then gave instructions, among others, that a driver owes a special responsibility of care and safety as to children and a higher degree of care toward children than toward adults, that a child is held to a lesser degree of care than is an adult, and that in comparing the negligence the jury should take into consideration that the defendant was an adult and the plaintiff a child, the first-mentioned instruction was not inadequate because of being placed in the early part of the instructions, and the remaining instructions were not prejudicial to the plaintiff as placing undue emphasis on the court's finding on the plaintiff's failure to yield the right of way because of again referring in certain places to such finding. Field v. Vinograd, 10 W (2d) 500, 103 NW (2d) 671.

Instructions as to burden of proof in undue influence cases discussed. Kuehn v. Kuehn, 11 W (2d) 15, 104 NW (2d) 138.

There is negligence on the part of the driver of an automobile when he proceeds at a speed at which he cannot stop his vehicle within the distance that he can see ahead of him. Any person whose negligence contributes to or helps to create an emergency is not entitled to the benefit of the emergency rule, and the jury in many cases should be so advised. Lentz v. Northwestern Nat. Casualty Co. 11 W (2d) 462, 105 NW (2d) 759.

The rule, that failure to give a proper requested instruction in an automobile collision case is not error where it affects both drivers in the same way and to the same degree, would apply to a failure to give a proper instruction on the emergency rule which was not requested but which should have been included in the charge. Pagel v. Holewinski, 11 W (2d) 634, 106 NW (2d) 425.

The emergency rule is directed to the question of negligence rather than to the question of causation. Kuentzel v. State Farm Mut. Automobile Ins. Co. 12 W (2d) 72, 106 NW (2d) 324.

Instruction as to negligence of child criticized. Rasmussen v. Garthus, 12 W (2d) 203, 107 NW (2d) 264.

Under evidence that on a snowy morning plaintiff entered a store and slipped on a puddle of water near the entrance, plaintiff should have anticipated the likelihood of a slippery floor and maintained a lookout. Instruction on ordinary care approved. Mondl v. F. W. Woolworth Co. 12 W (2d) 571, 107 NW (2d) 472.

Instructions concerning negligence of driver and pedestrian run over while lying on road at night discussed. Gilberg v. Tisdale, 13 W (2d) 249, 108 NW (2d) 515.

Instruction as to duty of driver meeting a car which is signaling for a left turn approved. Walker v. Baker, 13 W (2d) 637, 109 NW (2d) 499.

Where the trial court instructed the jury as to the life expectancy of the plaintiff, but neglected to instruct also that in making a present award for a period of future years the jury should determine the present value of such award, but the defendant made no request for such instruction it was not prejudicial error on the part of the trial court in failing to include and give such instruction. Walker v. Baker, 13 W (2d) 637, 109 NW (2d) 499.

Failure to reduce speed after a dangerous situation has been sighted is properly a matter of management and control and not speed. Bartz v. Braun, 14 W (2d) 425, 111 NW (2d) 431.

Before an instruction on the duty of a physically handicapped motorist should be given to the jury, there must be a foundation in the evidence for a jury finding that there is some element of negligence to which the handicap relates, and the mere fact that a defendant motorist, here one partially disabled from polio, is physically handicapped does not justify giving such an instruction. In order to attain the required standard of ordinary care, a physically handicapped motorist must do more to exercise ordinary care than would be required if he were not handicapped, but the greater effort to compensate for his handicap should not be characterized either expressly or impliedly in instructions to the jury as requiring an exercise of a greater degree of care. Lisowski v. Milwaukee Automobile Mut. Ins. Co. 17 W (2d) 499, 117 NW (2d) 666.

Where there was no evidence of negligence as to management and control, deviating from a traffic lane or yielding a right of way, it was error to instruct on these points, but where no questions concerning them were submitted, the errors were not prejudicial. United States F. & G. Co. v. Milwaukee & S. T. Corp. 18 W (2d) 1, 117 NW (2d) 708.

Instruction that before jury could find causation it must find that the injury would not have occurred "but for" the accident discussed. Chapnitsky v. McClone, 20 W (2d) 453, 122 NW (2d) 400.

Where a boy was struck as he crossed a highway at a private driveway running from the house to the barn on opposite sides of the road it was error to instruct as to his duties in crossing at a marked or unmarked crosswalk. The jury should have been instructed that there was no crosswalk present. Rossow v. Lathrop, 20 W (2d) 658, 123 NW (2d) 523.

Suggested instruction as to negligence in a safe-place case. Petoskey v. Schmidt, 21 W (2d) 323, 124 NW (2d) 1.

Instructions given on the question of damages, listing several items for possible consideration, are deemed not objectionable as allowing a double recovery for a single item of damage, in view of the fact that a general verdict on damages was used. Spleas v. Milwaukee & S. T. Corp. 21 W (2d) 635, 124 NW (2d) 593.

The trial court did not commit prejudicial error in refusing to instruct the jury that the driver had the right to rely upon the assumption that pedestrians on the sidewalk would observe the rules of the road, since the driver was obligated to maintain an efficient lookout from a point where his view was unobstructed, and his duty to yield the right-of-way to pedestrians as defined in 346.47 (1) could not be lessened by an assumption that users of the sidewalk would obey the rules of the road, and more specifically, that children playing on a toy bicycle would not violate 346.88, relating to obstructing the operator's view or driving mechanism, or would not drive at unreasonable speeds, the only rules of the road relevant here. Bey v. Transport Indemnity Co. 23 W (2d) 182, 127 NW (2d) 251.

A refusal to submit certain questions inquiring whether the passenger was causally negligent with respect to lookout, did not constitute error, although her testimony would have supported a finding that she was negligent in not having seen the headlights of the oncoming northbound vehicle long before she did, where there was no evidence upon which to base the finding that this negligence was causal, since in the absence of evidence that she had an opportunity to warn the host driver of the danger of impending collision, she could not have been found guilty of causal negligence as to lookout. Jensen v. Heritage Mut. Ins. Co. 23 W (2d) 344, 127 NW (2d) 228.

Although the trial court, in submitting the case to the jury upon an ultimate fact verdict, included in its instruction as to the negligence of the drivers, failure to dim headlights, and under the state of the evidence such failure could not be causal in view of the other dominant aspects of causal negligence present, the error was not prejudicial, since the causation question, as well as the negligence question, was submitted to the jury under proper instructons. Wanserski v. State Farm Mut. Auto. Ins. Co. 23 W (2d) 368, 127 NW (2d) 264.

A contention that the trial court erred in extending the benefit to the plaintiff of the emergency doctrine in its instructions, because no emergency is created in a head-on collision situation where the time span is such that the confronted driver has time for considered action, must be rejected, where the testimony indicated that until the cars were about one-eighth of a mile apart the southbound driver would return to his own lane, and thus under the circumstances plaintiff would have had less than 5 seconds in which to react. Wanserski v. State Farm Mut. Auto. Ins. Co. 23 W (2d) 368, 127 NW (2d) 264.

A refusal to give specific instructions as to the degree of care a cab driver owed the passenger as a common carrier was not error, where such an instruction would not assist the jury in deciding the sole issue of consequence, i.e., who closed the door on plaintiff's thumb, and the instruction given in effect told the jury that whatever the degree of care, the driver was negligent if the jury found that he closed the door. Fleischman v. Holz, 23 W (2d) 415, 127 NW (2d) 9.

A defendant is not entitled to the benefit of the emergency rule where he has failed as to lookout, but where there is a jury question as to lookout, the application of the emergency rule is for the jury. A party who does not claim to have acted or failed to act in the situation in response to a sudden emergency is not entitled to the instruction. Misiewicz v. Waters, 23 W (2d) 512, 127 NW (2d) 776.

Even though the court instructed the jury that "you may" find defendant negligent if he violated safety statutes, this was not prejudicial where the jury was also told that a violation of the motor vehicle code constitutes negligence. Willenkamp v. Keeshin Transport System, Inc. 23 W (2d) 523, 127 NW (2d) 804.

The court will not extend the concept of duplicity to the area of instructions. Merlino v. Mutual Service Casualty Ins. Co. 23 W (2d) 571, 127 NW (2d) 741.

It is not error to refuse to give preliminary instructions to the jury prior to the admission of evidence. Keplin v. Hardware Mut. Casualty Co. 24 W (2d) 319, 129 NW (2d) 321, 130 NW (2d) 3.

Where evidence is introduced which would support a jury finding contrary to the presumption that a deceased person or one who has suffered amnesia exercised due care for his own safety, the presumption is eliminated and drops out of the case entirely and no instruction upon that subject should be given to the jury. Brunette v. Dade, 25 W (2d) 617, 131 NW (2d) 340.

When proof of negligence is offered in a case where res ipsa loquitur may be applicable, the trial judge must evaluate the testimony to determine if there has been such substantial proof of negligence as to render superfluous the giving of an instruction on res ipsa loquitur; sometimes the question as to adequacy of the proof of negligence will be a close one; it will be within the sound discretion of the trial court to determine whether the giving of the instruction will be redundant. Fehrman v. Smirl, 25 W (2d) 645, 131 NW (2d) 314.

The trial court is under no duty where it finds one party negligent as a matter of law, sua sponte to caution the jury, in connection with instructions relating to the comparative-negligence question, not to give greater or lesser importance or weight to its finding than to similar finding made by the jury. Moritz v. Allied American Mut. Fire Ins. Co. 27 W (2d) 13, 133 NW (2d) 235.

An instruction that a child's violation of a safety statute is negligence is proper. Shaw v. Wuttke, 28 W (2d) 448, 137 NW (2d) 649.

Before a party is entitled to the benefits of the emergency doctrine he must be free from negligence which contributed to the creation of the emergency. If there is a factual dispute as to such negligence and assuming the time element is so short as to make the doctrine otherwise applicable, a person is entitled to the emergency-doctrine instruction and it is for the jury to determine its application. If, however, it can be held a person was negligent as a matter of law and such negligence contributed to the emergency, then such person is not entitled to the emergency-doctrine instruction. Shaw v. Wuttke, 28 W (2d) 448, 137 NW (2d) 649.

Unless a request is made for an instruction on a lesser included criminal offense it is not error for the trial court not to give the instruction on its own motion even though the evidence would sustain it. Neuenfeldt v. State, 29 W (2d) 20, 138 NW (2d) 252.

In the absence of testimony of a medical expert qualified to express such an opinion the jury should be instructed that no damages may be allowed for future pain and suffering. It is also error to refuse to instruct the jury regarding the absence of any permanent injuries where the record was devoid of medical proof that plaintiff's injuries would be permanent. Huss v. Vande Hey, 29 W (2d) 34, 138 NW (2d) 192.

The emergency instruction should be given only when a driver's management and control is in question, not when his only negligence is with respect to lookout. Where the court finds negligence as a matter of law, it is not error to refuse to instruct the jury that it should give this finding no more importance than its own findings; such an

instruction is proper, however. Schmit v. Sekach, 29 W (2d) 281, 139 NW (2d) 88.

Denial of a request to instruct the jury with respect to plaintiff's failure to produce the testimony of his dentist who performed dental surgery upon him following the accident that they could infer that the witness' testimony would be unfavorable could not constitute a basis for error, where the parties had stipulated that the dentist's bills could be received in evidence without further proof, that they were reasonable, and the services performed necessary, for by stipulating to the reasonableness of the bills and their admission, defendants conceded that the dental services listed thereon were made necessary by the accident. Lundquist v. Western Casualty & Surety Co. 30 W (2d) 159, 140 NW (2d) 241.

An instruction given the jury that they could consider impairment of claimant's future earning capacity as an element of damages was erroneous, where the evidence disclosed that the only aftereffect of the injury sustained was discomfort following surgery, but no explanation was offered as to how this affected his employment and the record otherwise indicated that plaintiff returned to work 3 months after the accident, and worked steadily from that time until the date of trial. Lundquist v. Western Casualty & Surety Co. 30 W (2d) 159, 140 NW (2d) 241.

Contention that sua sponte cautionary instructions should have been given because an alleged coconspirator witness invoked his privilege had no merit, for whether or not such instructions should be asked for in a case is a matter of trial strategy and the trial court at the risk of error is not required to give such instruction sua sponte. State v. Yancey, 32 W (2d) 104, 145 NW (2d) 145.

Where plaintiff adduced direct expert testimony of negligent conduct of the attending physicians which, if accepted by the jury, would have been sufficient to sustain the verdict, res ipsa loquitur instructions were unnecessary and if given would have been superfluous. Carson v. Beloit, 32 W (2d) 282, 145 NW (2d) 112.

Where defendant requested a criminal case instruction by number and after the jury had been instructed objected to part of it, his objection was timely but was deficient because his objection was not specific and did not include his suggested language. State v. Halverson, 32 W (2d) 503, 145 NW (2d) 739.

An emergency instruction may not be refused because the trial court feels a party was not free from negligence. The party's negligence may be a jury issue. Even an ultimate finding of negligence does not justify a refusal, since the instruction might have affected the finding. Geis v. Hirth, 32 W (2d) 580, 146 NW (2d) 459.

Wis J I—Civil, 1280, on skidding is a correct statement of the law, and should be used in proper cases. Abbott v. Truck Ins. Exchange Co. 33 W (2d) 671, 148 NW (2d) 116.

A trial court is not required to give a requested instruction unless the evidence reasonably requires it, even though the requested instruction asserts a correct rule of law. Belohlavek v. State, 34 W (2d) 176, 148 NW (2d) 665.

Error cannot be predicated upon failure of a trial court to instruct the jury to disregard certain testimony which had been objected to in the absence of a request for such instruction. Whitty v. State, 34 W (2d) 278, 149 NW (2d) 557.

It is proper to give the "absent witness" instruction as applied to a party who claims amnesia but does not call his doctor to support the claim, since his claim prevented his adverse examination and cross-examination. Schemenauer v. Travelers Indemnity Co. 34 W (2d) 299, 149 NW (2d) 644.

A driver who slows to 5 miles per hour at night without using his brakes when not required to do so by conditions present, is negligent for failing to keep a lookout to the rear. Under this state of facts the court may also instruct as to 346.59 (1). Bentzler v. Braun, 34 W (2d) 362, 149 NW (2d) 626.

The trial court did not err in omitting to instruct the jury that the plaintiff, who claimed retrograde amnesia, was entitled to the presumption that at the time of the accident he was exercising due care, where there was no medical testimony that the plaintiff had amnesia, that the injury sustained by the plaintiff caused any amnesia, or that, to a reasonable degree of medical probability, such amnesia would be the likely result of the injuries sustained. Ernst v. Greenwald, 35 W (2d) 763, 151 NW (2d) 706.

It was error for the trial court to give the Wis. J I—Criminal, Part I, 255 instruction where two of the offenses charged occurred very close to each other in time and there was general testimony to the effect that acts of intercourse occurred several times, for it allowed the jury to dispel any doubts it may have had by believing that at some time, although not necessarily on the precise dates charged, defendant had sexual relations with his daughter on three occasions. Jensen v. State, 36 W (2d) 598, 153 NW (2d) 566.

270.22 Charge to jury filed. As soon as any charge has been given to the jury it shall be placed and remain on file among the papers of the case. When delivered orally the reporter shall immediately transcribe the same in longhand and file it, without special compensation therefor.

270.23 Jury may be reinstructed. When a jury, after due and thorough deliberation upon any cause, shall return into court without having agreed on a verdict the court may state anew the evidence or any part of it and may explain to them anew the law applicable to the case, and may send them out again for further deliberation; but if they shall return a second time, without having agreed on a verdict, they shall not be sent out again without their own consent unless they shall ask from the court some further explanation of the law.

Where the jury's first return to the courtroom was merely for purposes of obtaining clarification on answering certain submitted questions, and did not in any way indicate an inability to reach a verdict, and the jury later returned with a proposed verdict listing 4 dissenting jurors, and the trial court sent the jury back to the jury room for further deliberation after advising that the proposed verdict was defective, the practice thus employed by the court was entirely appropriate. La Vallie v. General Ins. Co. 17 W (2d) 522, 117 NW (2d) 703.

Error cannot be predicated upon failure of the trial court to reread instructions on a matter not the subject of the jury request; hence where following initial deliberation the jury returned requesting clarification of a limited portion of the instructions, the trial court fulfilled its responsibility upon complying therewith to the jury's satisfaction. State v. Morrissy, 25 W (2d) 638, 131 NW (2d) 366.

In furnishing additional instructions the trial court is not obliged to frame the same in the precise words earlier employed. Fehrman v. Smirl, 25 W (2d) 645, 131 NW (2d) 314.

Although it is common and desirable practice to agree after the jury has retired

for deliberation to give counsel reasonable notice of the jury's return for reinstructions or to render its verdict, the court is under no legal duty to do so. Behling v. Lohman, 30 W (2d) 519, 141 NW (2d) 203.

270.24 No nonsuit after argument. The plaintiff shall have no right to submit to a nonsuit after the argument of the cause to the jury shall have been concluded or waived.

This section does not overcome the well-settled rule that voluntary nonsuit is discretionary and neither by negative inference gives the plaintiff an absolute right to a nonsuit up until the argument to the jury nor reserves to the trial court jurisdiction during appeal to grant one. State ex rel. Freeman Printing Co. v. Luebke, 36 W (2d) 298, 152 NW (2d) 861.

270.25 Verdicts; five-sixths; directed. (1) A verdict agreed to by five-sixths of the jurors shall be the verdict of the jury. If more than one question must be answered to arrive at a verdict on the same cause of action, the same five-sixths of the jurors must agree on all such questions.

(2) When the court directs a verdict, it shall not be necessary for the jury to give their assent to the verdict but the clerk shall enter it as directed by the court as the verdict of the jury.

The trier of fact may base a finding of fact with respect to an issue of negligence in an automobile accident case on a reasonable inference drawn from the physical facts, thereby rejecting the testimony of the only eyewitness, even though such physical facts are capable of permitting more than one inference to be deduced therefrom. (Rule laid down in certain prior cases, modified.) Pagel v. Holewinski, 11 W (2d) 634, 106 NW (2d) 425.

Where, in actions arising out of a collision between 2 automobiles, 10 jurors agreed that both drivers were causally negligent, but only 9 of those 10 agreed on the comparison, the verdict was defective under (1), since it is necessary for at least the same 10 jurors to agree on every question that it is necessary for them to consider in answering the question of comparative negligence, and the same 10 jurors must agree as to the items of causal negligence found and the comparative effect of the causal negligence of the parties in producing the resulting damages. Strupp v. Farmers Mut. Automobile Ins. Co. 14 W (2d) 158, 109 NW (2d) 660.

It is permissible for the trial court to cure an inconsistent special verdict by changing answers, as long as the evidence establishes the change as a matter of law. Wendel v. Little, 15 W (2d) 52, 112 NW (2d) 172.

Where 10 jurors agreed that the driver of the turning automobile involved in the instant collision was not guilty of any negligence, this made a complete verdict as to her, and the dissents of the remaining 2 jurors were immaterial on an issue of whether a new trial should be granted because the special verdict was not agreed to by five-sixths of the jurors as required by (1). United States F. & G. Co. v. Milwaukee & S. T. Corp. 18 W (2d) 1, 117 NW (2d) 708.

Juries will not be allowed to impeach their verdicts by asserting improper recording of the answer (prior cases overruled). Ford Motor Credit Co. v. Amodt, 29 W (2d) 441, 139 NW (2d) 6.

A verdict could not be impugned as invalid on the theory that the same 10 jurors were not in agreement upon all issues because one juror dissented both as to the finding of causal negligence on the part of decedent and also to the 95% assessment to the host driver, while 2 different jurors dissented to the amount determined as pecuniary loss, since the verdict as a whole was for the plaintiff, and dissent as to the negligence of the deceased could only be interpreted as evincing a belief that the verdict should have been for the plaintiff only more so, i.e., that the 95% negligence assessed against the driver should have been increased to 100%; hence the dissent was not essential to support the verdict for the plaintiff and the verdict was complete and defendant in no way prejudiced thereby. Vogt v. Chicago, M., St. P. & P. R. Co. 35 W (2d) 716, 151 NW (2d) 713.

270.26 Motion for directed verdict waives jury trial. Whenever in a jury trial all the parties, without reservation, move the court to direct a verdict, such motions, unless otherwise directed by the court before discharge of the jury, constitute a stipulation waiving a jury trial and submitting the entire case to the court for decision.

The fact that the parties remaining in a lawsuit move for a directed verdict, and the court accepted the motions as a waiver of a jury, would not prevent one of the parties from assigning as error the fact that the court had earlier granted a third party's motion for directed verdict and dismissed the action as to him. Peterson v. Wingertsman, 14 W (2d) 455, 111 NW (2d) 436.

270.27 Special verdicts. The court may, and when requested by either party, before the introduction of any testimony in his behalf, shall direct the jury to find a special verdict. Such verdict shall be prepared by the court in the form of written questions, relating only to material issues of fact and admitting a direct answer, to which the jury shall make answer in writing. It shall be discretionary with the court whether to submit such questions in terms of issues of ultimate fact, or to submit separate questions with respect to the component issues which comprise such issues of ultimate fact. In cases founded upon negligence, the court may submit separate questions as to the negligence of each party, and whether such negligence was a cause without submitting separately any particular respect in which the party was allegedly negligent. The court may also direct the jury, if they render a general verdict, to find upon particular questions of fact.

History: Sup. Ct. Order, 11 W (2d) v.

It is not necessary for a question on fraud to be separated into the 4 elements constituting actionable fraud. Rud v. McNamara, 10 W (2d) 41, 102 NW (2d) 248.

In a head-on collision case, where both drivers had the same opportunity of lookout, were driving at the same speed and faced with the same road conditions, the

trial court could submit only a question as to position on the highway, and did not err in refusing to submit a question on management and control of one of the drivers. Koruc v. Schroeder, 10 W (2d) 185, 102 NW (2d) 390.

The evidence warranted an instruction given to the jury, referring to testimony relating to a "stinging" sensation on the side of the plaintiff's head, and stating that some of the testimony on this subject consisted of medical opinion based on statements of the plaintiff, and that the jury should consider this opinion evidence with caution and scrutiny, and should make no award of damages based on guess, speculation, or conjecture. Field v. Vinograd, 10 W (2d) 500, 103 NW (2d) 671.

In an action for injuries where plaintiff was forcibly removed from a council meeting by a police officer, it was error to submit the case on a comparative negligence basis. The only question is whether excessive force was used and whether this caused the injury. Schulze v. Kleeber, 10 W (2d) 540, 103 NW (2d) 560.

Where the issue of racing on the highway was pleaded in only one of 3 cases consolidated for trial, but evidence was presented on the question, the pleadings should have been amended under 269.44 and the issue submitted in the special verdict. A new trial will be ordered under 251.09,. Giemza v. Allied American Mut. Fire Ins. Co. 10 W (2d) 555, 103 NW (2d) 538.

Questions submitted to the jury both as to management and control and as to the manner in which the driver of one car passed another car, and which the jury answered in the affirmative, were duplicitous. Giemza v. Allied American Mut. Fire Ins. Co. 10 W (2d) 555, 103 NW (2d) 538.

A question submitted to the jury, asking whether at or prior to a collision between two cars the driver of another car was negligent in respect to the manner "in which he passed" one of such cars, was defective as assuming that he had passed the car prior to the collision, when the testimony on this point was in conflict and unresolved. Giemza v. Allied American Mut. Fire Ins. Co. 10 W (2d) 555, 103 NW (2d) 538.

The failure of the jury to answer questions of the special verdict as to whether a motorist involved in a collision was negligent with respect to position on the highway and lookout was tantamount to a negative answer in each of these particulars. Rude v. Algiers, 11 W (2d) 471, 105 NW (2d) 825.

A verdict is not duplicitous which asks both as to negligence in making a left turn and lookout. Rasmussen v. Garthus, 12 W (2d) 203, 107 NW (2d) 264.

The duty created by 346.34 (1), prohibiting a left turn into a private driveway unless and until such turn can be made with reasonable safety, should not be broken down into lookout and management and control as separate acts of negligence, the rule applicable thereto being that, when an inquiry is made in the form of the special verdict of a statutory duty which includes several elements of conduct, one of those elements should not also be made the subject of a separate inquiry. Grana v. Summerford, 12 W (2d) 517, 107 NW (2d) 463.

Where the trial court answered a question as to negligence of one party as a matter of law and failed to do so as to the other party, but left the question of causation to the jury under proper instructions, the supreme court will refuse to believe that the jury gave disproportionate weight to the court's answer in the absence of clear indication that it did so. Niedbalski v. Cuchna, 13 W (2d) 308, 108 NW (2d) 576.

A verdict cannot be sustained where the jury apparently gave the husband an award for personal injuries when he had none and nothing for loss of consortium although his wife was injured. Jennings v. Safeguard Ins. Co. 13 W (2d) 427, 109 NW (2d) 90.

Where the issue of whether the accident in question caused the amputation of the plaintiff's osteomyelitic leg was in no sense evidentiary but rather one of ultimate fact, and where, aside from the questions of negligence, it was the single critical issue in the case, and all of the medical expert opinion evidence was directed to it, it was proper to include in the special verdict a question asking whether such accident was a cause of the amputation. Chapnitsky v. McClone, 20 W (2d) 453, 122 NW (2d) 400.

Where the damage question of the special verdict was so framed that the jury was not required to answer any subdivision thereof unless it answered "Yes" to a prior question asking whether the accident in question was a cause of the amputation of plaintiff's leg, and the plaintiff, after objecting to the submission of such prior question, then consented to the framing of the damage question as submitted, he thereby waived the right to object later to the form of the damage question. Chapnitsky v. McClone, 20 W (2d) 453, 122 NW (2d) 400.

A question of the special verdict in a safe-place case involving a temporary condition inquiring as to the negligence of the defendants "at the time and place" of the injury was not objectionable for not stating at "and prior to" the time of the injury, it being deemed that the language selected by the trial court was reasonably calculated to obtain a meaningful response from the jury. Petoskey v. Schmidt, 21 W (2d) 323, 124 NW (2d) 1.

Where there would be no negligence on the part of the defendant bus company if the jury believed the testimony of the defendant's bus driver, and there could be no negligence on the part of the plaintiff, who fell while trying to board a bus, if his version were adopted, the trial court properly declined to submit a question on contributory negligence of the plaintiff. Spleas v. Milwaukee & S. T. Corp. 21 W (2d) 635, 124 NW (2d) 593.

Proper manner of submitting a case for contribution between 2 tortfeasors discussed. Milwaukee Auto. M. I. Co. v. Nat. F. U. P. & C. Co. 23 W (2d) 662, 128 NW (2d) 12.

This section, making it mandatory for the trial court in a civil action to submit a special verdict to the jury if requested by any party prior to the introduction of any testimony on his behalf is inapplicable to a forfeiture action, since the procedural aspects are criminal in nature and the submission of a verdict which inquires as to the defendants' being guilty or not guilty is an appropriate means of obtaining the jury's decision upon a denial of guilt. Milwaukee v. Wuky, 26 W (2d) 555, 133 NW (2d) 356.

The use of the omnibus form of verdict is not precluded by the fact that one party is found negligent as a matter of law while the other is not. Moritz v. Allied American Mut. Fire Ins. Co. 27 W (2d) 13, 133 NW (2d) 235.

There was no duplicity in the jury verdict finding defendant negligent as to speed and lookout as well as management and control, where the record disclosed that defendant, proceeding at an excessive speed, entered the highway making so wide a turn as to cross the highway into plaintiff's lane of traffic, along which he continued for some distance prior to impact, and failed to observe the stopped vehicle with its directional lights activated. Zartner v. Scopp, 28 W (2d) 205, 137 NW (2d) 107.

Background of rule change (1961) in form of verdict discussed. A verdict which combines negligence, causation and comparison in a single question is improper, but parties can stipulate to such a form. Baierl v. Hinshaw, 32 W (2d) 593, 146 NW (2d) 433.

It was improper for the trial court to include the passive negligence of the 2 guest-passengers in the same comparative-negligence question with the active negligence of the host and thus require the jury to assume the total of the negligence, active and passive, of all the parties constituted 100%. Vroman v. Kempke, 34 W (2d) 680, 150 NW (2d) 423.

270.28 Submission to jury; omitted essential fact. When some controverted matter of fact not brought to the attention of the trial court but essential to sustain the judgment is omitted from the verdict, such matter of fact shall be deemed determined by the court in conformity with its judgment and the failure to request a finding by the jury on such matter shall be deemed a waiver of jury trial pro tanto.

The provision that when a controverted matter of fact not brought to the attention of the trial court but essential to sustaining a judgment is omitted from the verdict the question of fact shall be deemed determined by the trial court in conformity with the judgment, was not applicable where the court did not enter a judgment but, instead, declined to rule on the question of fact, stated that he could not decide the issue as matter of law, and granted a new trial. Garcia v. Samson's, Inc. 10 W (2d) 515, 103 NW (2d) 565.

270.29 Jury to assess damages, judgment on the pleadings. When a verdict is for the plaintiff in an action for the recovery of money, or for the defendant when a counterclaim is established beyond the amount of the plaintiff's claim as established, the jury must assess the amount of the recovery. The jury may also, under direction of the court, assess the amount of the damages where the court orders judgment on the pleadings.

270.30 Verdict, entry of; special finding governs. Every verdict and special finding of facts shall be entered on the minutes and when in writing be filed with the clerk. When a special finding of facts shall be inconsistent with the general verdict the former shall control the latter, and the court shall give judgment accordingly.

270.31 Entry by clerk as to trial and judgment. Upon receiving a verdict the clerk shall make an entry on his minutes specifying the time and place of the trial, the names of the jurors and witnesses, the verdict, and either the judgment rendered thereon or an order that the cause be reserved for argument or further consideration. If a different direction be not given by the court the clerk must enter judgment in conformity with the verdict. If a counterclaim, established at the trial, exceed the plaintiff's demand so established judgment for the defendant must be given for the excess; or if it appears that defendant is entitled to any other affirmative relief judgment must be given accordingly.

270.32 Jury trial, how waived. Trial by jury may be waived by the several parties to an issue of fact by failing to appear at the trial; or by written consent filed with the clerk; or by consent in open court, entered in the minutes.

270.33 Trial by court; findings, judgment. Except in actions and proceedings under ch. 299, upon a trial of an issue of fact by the court, its decision shall be given in writing and filed with the clerk within 60 days after submission of the cause, and shall state separately the facts found and the conclusions of law thereon; and judgment shall be entered accordingly.

History: 1963 c. 37.

In proceedings on motions after judgment granting a divorce to a wife on the ground of cruel and inhuman treatment, the trial court had the power to amend its findings of fact and conclusions of law nunc pro tunc. Hirmer v. Hirmer, 10 W (2d) 365, 103 NW (2d) 55.

See note to 270.25, citing Pagel v. Holewinski, 11 W (2d) 634, 106 NW (2d) 425.

Where the formal findings of fact by the trial court do not cover a point, a statement covering the point in the memorandum opinion of the court has the weight of a finding of fact. Morn v. Schalk, 14 W (2d) 307, 111 NW (2d) 80.

It was improper procedure for the trial county court to fail to render a written opinion and to approve new findings of fact and conclusions of law prepared by the defendant, without motion or hearing, following a reversal by the appellate circuit court. Wisconsin Dairy Fresh v. Steel & Tube Prod. Co. 20 W (2d) 415, 122 NW (2d) 361.

A dismissal of a complaint on the ground of insufficiency of the evidence requires findings to be made even though a literal reading thereof might indicate to some that findings and conclusions need only be made when there is a dispute in the evidence. Findings in special proceedings are now required. State ex rel. Skibinski v. Tadych, 31 W (2d) 189, 142 NW (2d) 838.

Any inconsistency between the findings of fact and the judgment must be resolved in favor of the judgment. Giertsen Co. v. State, 34 W (2d) 114, 148 NW (2d) 741.

270.34 Trial by referee. (1) Except in actions for divorce or annulment of marriages all or any of the issues in the action may be referred, upon the written consent of the parties. The court may upon application of either party or of its own motion, direct a reference of all or any of the issues in the following cases:

(a) When the trial of an issue of fact shall require the examination of a long account; in which case the referee may be directed to hear and decide the whole issue or to report upon any specific question of fact involved therein; or

(b) When the taking of an account shall be necessary for the information of the court before judgment or for carrying a judgment or order into effect.

(2) When a reference has been ordered, either party may deliver to the referee a certified copy of the order of reference, and the referee shall thereupon appoint a time and place for the trial, and give notice thereof to the parties; such time to be not less than ten nor more than thirty days after the delivery of the copy of such order, unless the proceed-

ing before the referee be ex parte or some other time be appointed by written stipulation of the parties, with the assent of the referee, or unless the court shall otherwise order.

(3) All action upon a referee's report shall be upon notice.

270.35 Powers of referee. The trial by referee shall be conducted in the same manner as a trial by the court. They shall have the same power to grant adjournments and allow amendments to any pleadings as the court upon such trial, upon the same terms and with the like effect. They shall also have the same power to preserve order and punish all violations thereof upon such trial, and to compel the attendance of witnesses before them by attachment and to punish them as for a contempt for nonattendance or refusal to be sworn or testify, as is possessed by the court; and they shall give to the parties or their attorneys at least 8 days' notice of the time and place of trial; they must state the facts found and conclusions of law separately and report their findings, together with all the evidence taken by them and all exceptions taken on the hearing, to the court; and the court may review such report and on motion enter judgment thereon or set aside, alter or modify the same and enter judgment upon the same so altered or modified, and may require the referees to amend their report when necessary. The judgment so entered by the court may be appealed from as in other cases, and the report of the referees shall be incorporated in the appeal record. When the reference is to report the facts the report shall have the effect of a special verdict.

History: 1963 c. 429.

This section does not authorize appeal from an intermediate order of the trial court not otherwise appealable under 274.33.

Herman Andrae Electrical Co. v. Packard Plaza, 16 W (2d) 44, 113 NW (2d) 567.

270.36 Referee, how selected. In all cases of reference the parties, except when an infant may be a party, may agree upon a suitable person or persons, not exceeding three, and the reference shall be ordered accordingly, and if the parties do not agree the court shall appoint one or more referees, not exceeding three, who shall be free from exception.

270.37 Proceedings if referee's report not filed. If neither party move for a judgment within one year from the date of the referee's report the action shall be dismissed or a new trial ordered, on motion of any party, provided, such motion shall not be made until two terms of court shall have been held subsequent to the date of such report.

270.39 Exceptions. In any trial before the court, with or without a jury, or before a referee, exceptions are deemed taken to all adverse rulings and orders made in the course of the trial; no express exceptions shall be made. It is not necessary to file exceptions to the judge's charge to the jury or to his refusal to instruct the jury as requested, or to any orders, or to the findings of fact and conclusions of law made by the court, and the same may be reviewed by the appellate court without exceptions; but any party who expressly requests any finding of fact, conclusion of law, instruction to the jury or ruling or order shall not be heard to question its correctness on appeal. This shall not, however, limit the power of the supreme court under s. 251.09.

History: 1963 Sup. Ct. Order, 17 W (2d) xxi.

Comment of Judicial Council, 1963: The making of exceptions is not only unnecessary, but now forbidden. [Re Order effective Sept. 1, 1963]

270.49 Motion for new trial. (1) A party may move to set aside a verdict and for a new trial because of errors in the trial or because the verdict is contrary to law or to the evidence, or for excessive or inadequate damages or in the interest of justice; but such motion must be made and heard within 2 months after the verdict is rendered, unless the court by order made before its expiration extends such time for cause. Such motion, if not decided within the time allowed therefor, shall be deemed overruled. In case judgment is entered without deciding a pending motion for a new trial, the supreme court may direct the trial court to determine such motion within 2 months after filing the remittitur in the trial court.

(2) Every order granting a new trial shall specify the grounds therefor. In the absence of such specification, the order shall be deemed granted for error on the trial. No order granting a new trial in the interest of justice shall be valid or effective, unless the reasons that prompted the court to make such order are set forth in detail therein or the memorandum decision setting forth such reasons is incorporated by reference in such order. The court may grant or deny costs to either party.

(3) All motions for new trials shall be reduced to writing and filed before being heard.

History: 1961 c. 494; 1963 Sup. Ct. Order, 17 W (2d) xxi.

Cross Reference: For limitation on granting of new trials, see 274.37.

The written decision of the trial court, which stated that the court was of the opinion that the jury, which apportioned 50 per cent of the causal negligence to the injured child, did not understand the lower standard of care required of a child who was less than one month over 6 years of age at the time of the accident, and which decision summarized the pertinent evidence, sufficiently stated the reasons for granting a new trial in the interest of justice to comply with the requirements of (2). Bair v. Staats, 10 W (2d) 70, 102 NW (2d) 267.

Where an excessive verdict is not due to perversity or prejudice, and is not the result of error occurring during the course of trial, the plaintiff should be granted the option of remitting the excess over and above such sum as the court determines is the reasonable amount of the plaintiff's damages, or of having a new trial on the issue of damages. [Heimlich v. Tabor, 123 W 565, and Campbell v. Sutliff, 193 W 370, so far as holding that such a rule violates the defendant's constitutional right to a trial by jury, overruled.] Powers v. Allstate Ins. Co. 10 W (2d) 78, 102 NW (2d) 393.

The jury could consider that what pain, if any, a party suffered was not sufficient to be compensated with money, and the jury's finding to such effect did not render the verdict perverse or the result of passion or prejudice, bearing in mind also that the jury did recognize the party's damages for loss of earnings and discriminated between the damage questions, and was uninfluenced by its answers to the negligence questions. When a jury has absolved a defendant of causal negligence, which finding is supported by credible evidence, the denial of damages or the granting of inadequate damages to the plaintiff does not necessarily show prejudice or render the verdict perverse. Dickman v. Schaeffer, 10 W (2d) 610, 103 NW (2d) 922.

An award of $6,500 to a husband, 56 years old, as pecuniary loss for the death of his wife, 51 years old, who helped with the work on their farm, and who also worked out, mainly to contribute money for a son to go to college, and whose outside earnings averaged $1,400 per year during the last 5 calendar years of her life, was not generous, but was not so inadequate as to require a new trial. Martell v. Klingman, 11 W (2d) 296, 105 NW (2d) 446.

An award of $8,100, approved by the trial court, to a school teacher who suffered severe injuries with resulting permanent injuries consisting of a scar extending through both of her eyebrows and across the bridge of her nose, and a thickening at the point of juncture of her broken cleft clavicle and sternum, is deemed not excessive although high. Itching and irritation at a place on her left forehead, resulting from her scar injury, could not be considered as of a permanent nature for the purpose of awarding damages, in the absence of any medical testimony that this was permanent. Rude v. Algiers, 11 W (2d) 471, 105 NW (2d) 825.

An award of $2,000 to a school teacher who sustained injuries consisting in part of a cut one and one-half inches in length on her chin and another cut two and one-half inches in length on her left knee, the temporary loosening of three teeth, and bruises and abrasions distributed over her body, with permanent injuries consisting only of the scars on the chin and knee, is deemed not excessive although high. Rude v. Algiers, 11 W (2d) 471, 105 NW (2d) 825.

In an action to recover for personal injuries sustained when a pet monkey owned by the defendant bit the left index finger of the plaintiff, the award of damages of $650 for personal injuries is grossly inadequate. Podoll v. Smith, 11 W (2d) 583, 106 NW (2d) 332.

An award of $16,000 to a man who suffered broken legs and ribs which would cause permanent pain and impede him in his work as an automobile mechanic, a fractured skull, and a permanent limp, and whose life expectancy was 16.40 years at the time of the trial, was not excessive. Bauman v. Gilbertson, 11 W (2d) 627, 106 NW (2d) 298.

If the answer to one material question of a special verdict plainly shows that the jury made the answer perversely, the trial court may well set aside the verdict unless satisfied that the answers to the other questions were not affected by such perversity. Kuentzel v. State Farm Mut. Automobile Ins. Co. 12 W (2d) 72, 106 NW (2d) 324.

Where plaintiff suffered a permanent injury to the back plus wasting of shoulder muscles and limitation of motion in the arm, but the evidence indicated some arthritis and disc degeneration, an award of $2,000 for permanent injuries, while low, was sustained. Konieczki v. Great American Indemnity Co. 12 W (2d) 311. 107 NW (2d) 138.

An award of $18,000, approved by the trial court, to a married woman, 23 years old at the time of the automobile collision in which she received a whiplash injury to her neck, for constant pain which would increase and be permanent, disability to perform the tasks of a housewife, to continue in employment, and to enjoy the activities of which she was formerly capable, is deemed not excessive. Thompson v. Nee, 12 W (2d) 326, 107 NW (2d) 150.

Where plaintiff suffered a crushed vertebra and severe fracture of an ankle resulting in an operation to stiffen the ankle and severe pain for several years, an award of $42,000 was excessive and a reduction to $30,000 reasonable. Burmek v. Miller Brewing Co. 12 W (2d) 405, 107 NW (2d) 583.

Under the evidence in the case, the trial court did not abuse its discretion in determining, on its own motion, that the jury's award of $1,500 for the parents' loss of the society and companionship of their deceased daughter, 20 years of age, was unreasonably low, and increasing the award to $2,000. The evidence would permit a reasonable inference of financial help and assistance that a deceased daughter, after graduation from college, would have made to her parents toward the education of her sister, but the jury's award of $8,000 to the parents for pecuniary loss was excessive under the evidence, and the trial court's reduction of the award to $2,000, together with granting an option for a new trial in the alternative, was proper. Gustafson v. Bertschinger, 12 W (2d) 630, 108 NW (2d) 273.

Where a child, openly associated with defendant and his counsel, was late in the trial discovered to be the child of the foreman of the jury and this fact was reported to the court but no motion for mistrial made, the trial court could properly grant a new trial in the interest of justice after verdict finding no negligence. O'Connor v. Brahmstead, 13 W (2d) 432, 108 NW (2d) 920.

Surprise, as such, is not ground for a new trial in the interest of justice. The plaintiff had no right to rely on the position taken by the defendant on motion for summary judgment which was changed at the trial, and it was not an abuse of discretion by the trial court to refuse a new trial. Becker v. La Crosse, 13 W (2d) 542, 109 NW (2d) 102.

An award of $22,500 to a man for personal injuries which included 2 broken thigh bones, a fractured knee, and a fractured jaw, necessitating extensive surgery, and resulting in a permanent restriction of motion in the knee, limbs of unequal length, and atrophy of one thigh, was not excessive. Walker v. Baker, 13 W (2d) 637, 109 NW (2d) 499.

The rule of Powers v. Allstate Ins. Co. 10 W (2d) 78, applied to compensatory damages, extends to punitive damages, so that a trial court, in case of an excessive award by the jury, has the power to reduce the amount of punitive damages to what the court determines is a fair and reasonable amount for such kind of damages, and to grant to the party entitled to such damages the option to accept such amount or have a new trial. In determining whether punitive

damages assessed by the jury are excessive, consideration should be given to the wrongdoer's ability to pay and the grievousness of his acts, the degree of malicious intention, and potential damage which might have been done by such acts as well as the actual damage. Malco v. Midwest Aluminum Sales, 14 W (2d) 57, 109 NW (2d) 516.

Applicable to error in granting a directed verdict is the rule that no error of the court should be reviewable as a matter of right on appeal without first moving in the trial court for a new trial bottomed on such error, if the error is of a category that a trial court could correct it by granting a new trial. [Reserved for future decision is the question of whether the stated rule should be extended to errors committed by a court in a trial to the court.] Peterson v. Wingertsman, 14 W (2d) 455, 111 NW (2d) 436.

(1), which is limited to setting aside a verdict on specified grounds, is not so restrictive as to preclude a trial court from granting a new trial on other grounds. Peterson v. Wingertsman, 14 W (2d) 455, 111 NW (2d) 436.

Where both plaintiff and defendants summoned a certain person as a witness, and defendants claimed surprise when such person took the stand for the plaintiff and changed his story, but counsel for defendants had an opportunity and did cross-examine such witness, the surprise thus shown by the defendants was not the type of surprise which warrants the granting of a new trial in the interest of justice. Birnamwood Oil Co. v. Arrowhead Asso. 14 W (2d) 657, 112 NW (2d) 185.

Evidence that a woman passenger was thrown into the dash by the collision and the stopping of the car, that she received medical treatment and was in traction for 8 days, that she suffered an intervertebral disc protrusion, and that she was in good health before the accident, but that since that time she had experienced pain in her back and had been unable to perform household duties which she formerly was able to do, was sufficient to support an award of $6,000 for her injuries. Reddick v. Reddick, 15 W (2d) 37, 112 NW (2d) 131.

Where the jury awarded $12,600 for future pain, suffering, and disability, but the plaintiff's only discomfort was that of pain and suffering caused by headaches and she suffered from no other injuries, such award was excessive, and the plaintiff was granted the option of remitting the excess over $3,000 or a new trial. Teufel v. Home Indemnity Co. 15 W (2d) 67, 111 NW (2d) 893.

$5,000 as pecuniary loss to husband for death of 74-year-old wife who did her own housework and $3,000 for loss of society not excessive. Mertens v. Lundquist, 15 W (2d) 540, 113 NW (2d) 149.

An award of $25,000 to a man 21 years of age, who suffered an injury to his left eye resulting in a 95 per cent loss of vision in that eye, and who also suffered a fracture of the right clavicle, a broken kneecap, internal injuries, injuries to his head, neck, and back, and damage to his teeth, is deemed not excessive. DeLong v. Sagstetter, 16 W (2d) 390, 114 NW (2d) 788, 116 NW (2d) 137.

An award of $40,000 to a housewife for injuries consisting in part of head pains, severe headaches, blurring vision, a buzzing in both ears, a hearing impairment, and a permanent partial disability in her right shoulder and arm, is deemed excessive, and the supreme court fixes as a reasonable amount the sum of $30,000, but granting the usual option for a new trial. Freuen v. Brenner, 16 W (2d) 445, 114 NW (2d) 782.

An award of $4,000 to a 7-year-old girl whose nose was broken and right arm broken in 2 places, and who would probably be required to undergo a major operation some 7 or 8 years in the future in order to correct a deviated septum which interfered with the passage of air, is deemed not excessive. Yingling v. Tic, 16 W (2d) 474, 114 NW (2d) 815.

An award of $1,500 to a 3-year-old boy who suffered a broken tibia in his left leg and was placed in a cast extending from the toes up to the mid-thigh with the knee held at 35 degrees flexion, and who suffered a temporary atrophy of muscles as a result of the disuse thereof before the cast was removed, is deemed not excessive. Yingling v. Tic, 16 W (2d) 474, 114 NW (2d) 815.

An award of $3,000 for the pain and suffering of a woman who survived the accident by 72 hours, with a fracture of 9 ribs, a punctured lung, and a fractured hip, is deemed not excessive. Yingling v. Tic, 16 W (2d) 474, 114 NW (2d) 815.

It was not an abuse of discretion for the trial court to grant an extension of time on its own motion within 60 days after rendition of verdict when the court learned that the defendants' brief, though filed with the court, had not been served on the plaintiffs. Harweger v. Wilcox, 16 W (2d) 526, 114 NW (2d) 818.

An award of $6,000 as damages to the plaintiff child for injuries consisting of a fracture of the left femur which healed but resulted in a permanent shortening of the leg by one-half inch, and of a permanent scar on the plaintiff's lip, and a painful infection of the ankle for several months, was not excessive. Lisowski v. Milwaukee Automobile Mut. Ins. Co. 17 W (2d) 499, 117 NW (2d) 666.

An award of $45,000 for "pain, suffering, and disability, past, present, and future," to a man who suffered 9 broken ribs and other chest injuries which included a punctured lung, and who suffered a shortened left leg because of a hip injury, requiring 2 months of hospital treatment with his life in jeopardy twice during that time, and who was on crutches for about 6 weeks after his hospitalization, and who still had pain in his chest and right shoulder at the time of trial, was not excessive. La Vallie v. General Ins. Co. 17 W (2d) 522, 117 NW (2d) 703.

Procedure to be followed where trial judge reduces a verdict discussed. Lucas v. State Farm Mut. Automobile Ins. Co. 17 W (2d) 568, 117 NW (2d) 660.

A trial court can properly grant a new trial in the interest of justice after a high verdict where plaintiff put in evidence of a hearing loss although this was not pleaded or covered by medical reports exchanged. Bublitz v. Lindstrom, 17 W (2d) 608, 117 NW (2d) 636.

A decision on motions after verdict, which is given orally from the bench and then transcribed and filed with the clerk of court as part of the record in the case, constitutes a "memorandum decision" within the meaning of (2), but the memorandum decision must be in existence and on file when the order incorporating the same is entered. Campbell v. Wilson, 18 W (2d) 22, 117 NW (2d) 620.

See note under 269.46, citing Alberts v. Rzeplejewski, 18 W (2d) 252, 118 NW (2d) 172, 119 NW (2d) 441.

Objections to specific prejudicial remarks of counsel to the jury should be pointed out to the trial court on the motion made after verdict for a new trial, and the failure to do so waives the objection. Presser v. Siesel Construction Co. 19 W (2d) 54, 119 NW (2d) 405.

An award of $21,250 for future disability and past and future pain and suffering to a man 45 years of age, who suffered an aggravation of an osteoarthritis condition of the dorsal and lumbar spine as a result of an automobile accident and who could no longer do heavy manual labor such as was involved in his former employment as a car welder in the shops of a railroad company, was not excessive. Rogers v. Adams, 19 W (2d) 141, 119 NW (2d) 349.

An award of $4,500 to a woman who suffered bruises and back and leg injuries, and who still experienced persistent pains in the lower back and legs at the time of trial 18 months after the accident, was not excessive. Dwyer v. Jackson Co. 20 W (2d) 318, 121 NW (2d) 881.

An award of $15,000, where the only permanent injury to the plaintiff's eye was not the loss of sight but the pain and suffering when using the eye for concentrated work such as sewing and looking at television, was excessive, but is deemed not the result of perversity; and the trial court's reduction of the award to $5,000 will not be set aside although it might be considered liberal in view of the evidence. Lee v. Milwaukee Gas Light Co. 20 W (2d) 333, 122 NW (2d) 374.

A trial court has the power to grant a new trial in the interest of justice because the verdict is against the great weight of evidence, even though it cannot be held as a matter of law that a crucial answer to a question of the verdict is wrong in the sense that it is not supported by any credible evidence. Brunke v. Popp, 21 W (2d) 458, 124 NW (2d) 642.

The rule of granting an option to the plaintiff to remit excess damages when the "excessive verdict is not due to perversity or prejudice, and is not the result of error occurring during the course of trial," adopted in Powers v. Allstate Ins. Co. 10 Wis. (2d) 78, is modified by the decision herein to the extent of making the rule applicable also to prejudicial errors directly related to damages. Spleas v. Milwaukee & S. T. Corp. 21 W (2d) 635, 124 NW (2d) 593.

An award of $41,000 to a young child for "pain, suffering and injuries" was not excessive where the child suffered a fracture of the skull, laceration of the scalp, a cut into the brain substance, impairment of the hearing nerve, fracture of the thighbone and of the right forearm, and further disclosed that the child was rendered unconscious for some days, hospitalized for an extended period of time, resulting in permanent disability with respect to leg, hip, and shoulder, as well as substantial permanent hearing loss, chronic headaches, backaches, and diminution of learning proficiency. Allen v. Bonnar, 22 W (2d) 221, 125 NW (2d) 570.

A trial court can, within 60 days after verdict, extend the time for motion and hearing an application for setting aside the verdict and granting a new trial on its own motion without notice to an adverse party and without a supporting affidavit. The cause necessary can be shown by recitation in the order of facts constituting cause. Weihbrecht v. Linzmeyer, 22 W (2d) 372, 126 NW (2d) 44.

A motion for a new trial filed, argued, and orally decided within 60 days of the verdict, although not reduced to writing until some 8 months thereafter, constituted substantial compliance with (1). Flippin v. Turlock, 24 W (2d) 49, 127 NW (2d) 822.

Awards of $7,500 to a man 72 and $45,000 to his wife, aged 70, for personal injuries, pain and suffering resulting from a collision between a vehicle in which they were occupants and another whose driver was found 100 per cent negligent were not excessive. Doolittle v. Western States Mut. Ins. Co. 24 W (2d) 135, 128 NW (2d) 403.

The court will apply the rule of Powers v. Allstate Ins. Co. to a case where the jury awards inadequate damages. Parchia v. Parchia, 24 W (2d) 659, 130 NW (2d) 205.

An order by the trial judge for a new trial in the interests of justice which referred only to possible resentment of the jury to the dismissal of the action as to an insurance company defendant was insufficient. Moldenhauer v. Faschingbauer, 25 W (2d) 475, 131 NW (2d) 290, 132 NW (2d) 576.

If the decision on motion to grant a new trial is not announced in open court within the statutory allotted time, it will not be valid unless the written decision or order of the court deciding such motion either is filed or otherwise authenticated, or all parties adversely affected thereby are notified thereof within such period. Graf v. Gerber, 26 W (2d) 72, 131 NW (2d) 863.

An award of $6,500 for personal injuries sustained by a 68-year-old widow with a life expectancy of about 9 years, whose injuries for the most part were confined to superficial bleeding, muscle spasms, and some intensification of a pre-existing arthritic condition, without evidence of permanent or partial disability or proof as to what extent her activities were curtailed—was excessive in that it was beyond the range of reasonable amounts, and the trial court's finding of $3,500 fixed as reasonable compensation did not constitute an abuse of discretion. Moritz v. Allied American Mut. Fire Ins. Co. 27 W (2d) 13, 133 NW (2d) 235.

Failure to file a motion for a new trial in conformity with (3) precludes the defaulting party from urging upon review his entitlement thereto as a matter of right. Medved v. Medved, 27 W (2d) 496, 135 NW (2d) 291.

A new trial in the interest of justice is not precluded because the evidence is sufficient to support the jury's finding, for a trial court has wide discretion to order a new trial in the interest of justice if the verdict is against the great weight and clear preponderance of the evidence, although the evidence is not so insufficient as to justify changing the answers to the special verdict questions. McPhillips v. Blomgren, 30 W (2d) 134, 140 NW (2d) 267.

An order for a new trial will be sustained where the trial court listed several items as grounds therefor and also stated "also on the general grounds of being in the interests of justice". McPhillips v. Blomgren, 30 W (2d) 134, 140 NW (2d) 267.

Where a trial court under the Powers rule reduces a verdict below a figure the supreme court believes reasonable, the supreme court will set a figure at the bottom of the range of reasonableness. This will be done only when the supreme court reviews an adjustment by the trial court but not when either court examines the jury verdict. Moldenhauer v. Faschingbauer, 30 W (2d) 622, 141 NW (2d) 875.

A defendant who fails to move for a new trial or to set aside the verdict on the ground of insufficient evidence is not entitled to review of the evidence by the supreme court. State v. Van Beek, 31 W (2d) 51, 141 NW (2d) 873.

If the verdict is excessive the Powers rule should be applied even though it does not indicate passion and prejudice. Tuttle v. Virginia Surety Co. 32 W (2d) 665, 146 NW (2d) 400.

In determining the reasonableness of an award in a personal-injury action for loss of earnings, the proper test is whether the plaintiff's capacity to earn has been impaired, although the comparison of the earnings before the accident is some measure of earning capacity. Ballard v. Lumbermens Mut. Cas. Co. 33 W (2d) 601, 148 NW (2d) 65.

Where the trial court sustains an award of damages it should state in its memorandum opinion its rationale in doing so; if it does not the party loses the additional weight given to a verdict approved by the trial judge, and the supreme court will review the evidence, giving no weight to the conclusion of the trial judge that the damages are not excessive. Ballard v. Lumbermens Mut. Cas. Co. 33 W (2d) 601, 148 NW (2d) 65.

In evaluating loss of consortium loss of society and companionship is more important than a pecuniary loss or loss of services. Ballard v. Lumbermens Mut. Cas. Co. 33 W (2d) 601, 148 NW (2d) 65.

A new trial was properly ordered by the trial court where the jury disregarded instructions as to negligence and the verdict was defective in that it forced the jury to choose between 2 defendants when both could have been found negligent. Quick v. American Legion 1960 Conv. Corp. 36 W (2d) 130, 152 NW (2d) 919.

Personal injury damage verdicts; supreme court rulings since the Powers case. Wilkie, 47 MLR 368.

New trial, because the verdict is contrary to the evidence or in the interest of justice or both, discussed. 1959 WLR 360.

270.50 Motion for new trial on newly discovered evidence. A motion for a new trial founded upon newly discovered evidence may be heard upon affidavits and the papers in the action. Such a motion may be made at any time within one year from the verdict or finding.

History: 1963 Sup. Ct. Order, 17 W (2d) xxi; 1963 c. 429.

A new trial on the ground of newly discovered evidence may be based on an affiant's admission of perjury as a witness at the trial, if the facts in the affidavit are corroborated by other newly discovered evidence; it is not necessary that all the facts stated to be the truth in the perjuror's affidavit must be corroborated by other newly discovered evidence in order to grant a new trial on this ground, but only that the corroboration extend to some material aspect thereof. It is mandatory that a motion for a new trial founded on newly discovered evidence, when not supported by the papers in the action, must be supported by facts sworn to in a duly executed affidavit. Dunlavy v. Dairyland Mut. Ins. Co. 21 W (2d) 105, 124 NW (2d) 73.

It was not necessary that the affidavits aver that there was no negligence in not discovering the new evidence before trial, since the other facts established by such affidavits tended to negative any negligence, and none of the counter-affidavits showed any lack of due diligence. Dunlavy v. Dairyland Mut. Ins. Co. 21 W (2d) 105, 124 NW (2d) 73.

270.52 Irregularities in venires, etc., immaterial. No irregularity in any writ of venire facias or in the drawing, summoning, returning or impaneling of petit jurors shall be sufficient to set aside a verdict unless the party making the objection was injured by the irregularity or unless the objection was made before the returning of the verdict.

270.53 Judgment and order defined. (1) A judgment is the final determination of the rights of the parties in the action.

(2) Every direction of a court or judge made or entered in writing and not included in a judgment is denominated an order.

Whether a written direction of a court constitutes a judgment or an order is not to be determined by the designation that the court which entered the same may have placed thereon. Distinction between order and judgment discussed. State v. Donohue, 11 W (2d) 517, 105 NW (2d) 844.

As used in (2), denominating an order as being every direction of a court or judge made or entered in writing and not included in a judgment, the word "direction" is not to be construed narrowly so as to be confined as to an express command but, rather, should be interpreted broadly to embrace a ruling or adjudication as well. A memorandum opinion or decision may constitute an order if it in fact constitutes the final ruling of the court, but it is much the preferable practice for trial courts to draft and enter a separate order apart from the memorandum decision embodying the adjudication determined on. Estate of Baumgarten, 12 W (2d) 212, 107 NW (2d) 169.

An order overruling a demurrer and dismissing the complaint amounts to a final determination of the rights of the parties to the action, and therefore is in effect a judgment, and appealable as such. Last v. Puehler, 19 W (2d) 291, 120 NW (2d) 120.

A judgment entered in an action to abate a nuisance granting the requested relief, i.e., that the nuisance be abated—although requiring the taking of testimony 6 months later on the limited issue of whether or not the nuisance had been abated—was a final judgment, since no unresolved questions remained in regard to whether or not there was a nuisance, and hence it fully determined the rights of the parties. Participation in the settling of the transcript does not constitute a waiver of objection to jurisdiction. Rachlin v. Drath, 26 W (2d) 321, 132 NW (2d) 581.

270.535 Notice of entry of order or judgment. After an order is entered or judgment is perfected either party may serve upon the other a written notice of entry.

History: 1963 Sup. Ct. Order, 17 W (2d) xxi.

Comment of Judicial Council, 1963: Eliminates the provision that the time for approving the transcript (formerly settling the bill of exceptions) begins to run from service of notice of entry of judgment. [Re Order effective Sept. 1, 1963]

See note to 269.45, citing Jolitz v. Graff, 12 W (2d) 52, 106 NW (2d) 340.

See note to 269.45, citing Millis v. Raye, 16 W (2d) 79, 113 NW (2d) 820.

270.54 Judgment for or between defendants; interlocutory. Judgment may be given for or against one or more of several defendants or in favor of one or more of several plaintiffs, and it may determine the ultimate rights of the parties on each side, as between themselves, either on cross complaint or equivalent pleadings or otherwise, and may grant to the defendant any affirmative relief to which he may be entitled. In an action against several defendants the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment may be proper. The court may also dismiss the complaint, with costs, in favor of one or more defendants in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants or to proceed in the cause against the defendant or defendants served. In case of a finding or decision substantially disposing of the merits, but leaving an account to be taken, or issue of fact to be decided or some condition to be performed, in order fully to determine the rights of the parties, an interlocutory judgment may be made, disposing of all issues covered by the finding or decision, and reserving further question until the report, verdict or subsequent finding.

Cross Reference: See 269.25 for provision permitting dismissal of action or proceeding not brought to trial in 5 years.

See note to 274.09, citing Dehnart v. Waukesha Brewing Co. 21 W (2d) 583, 124 NW (2d) 664.

270.55 Judgment when all defendants not served. When the action is against two or more defendants and the summons is served on some, but not on all of them, the plaintiff may proceed as follows:

(1) If the action be against several persons jointly indebted he may proceed against the defendant served unless the court shall otherwise direct, and, if he recover judgment, it may be entered in form against all the defendants jointly indebted and may be enforced against the joint property of all and the separate property of the defendant served.

(2) In any action against defendants severally liable he may proceed against the defendants served in the same manner as if they were the only defendants.

(3) A judgment entered under subsection (1) shall not bar an action against the debtors who were not served but judgment in such action shall not be entered until execution has been returned unsatisfied in whole or in part in the prior action and then only for the sum still due the plaintiff on the joint debt.

270.56 Judgment when all not liable. When it shall appear on the trial of an action on contract or tort against several defendants, sought to be charged as jointly or jointly and severally liable, that some were liable and others not judgment may be rendered against either or any of the defendants found liable to the plaintiff at the commencement of the action, and in favor of such as may be found not liable, and costs awarded in the discretion of the court.

270.57 Measure of relief. The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue.

Although Wisconsin is committed to the benefit-of-bargain rule, evidence relating to out-of-pocket damages should be admitted as relevant in fraud cases. Harweger v. Wilcox, 16 W (2d) 526, 114 NW (2d) 818.

See note to 269.44, citing Zelof v. Capital City Transfer, Inc. 29 W (2d) 384, 139 NW (2d) 1.

270.58 State and political subdivisions thereof to pay judgments taken against officers. (1) Where the defendant in any action or special proceeding is a public officer or employe and is proceeded against in his official capacity or is proceeded against as an individual because of acts committed while carrying out his duties as an officer or employe and the jury or the court finds that he acted in good faith the judgment as to damages and costs entered against the officer or employe shall be paid by the state or political subdivision of which he is an officer or employe. Regardless of the results of the litigation the governmental unit shall pay reasonable attorney's fees and costs of defending the action, unless it is found by the court or jury that the defendant officer or employe did not act in good faith, when it does not provide legal counsel to the defendant officer or employe. Deputy sheriffs in those counties where they serve not at the will of the sheriff but on civil service basis shall be covered by this subsection, except that the provision relating to payment of the judgment shall be discretionary and not mandatory. In such counties the judgment as to damages and costs may be paid by the county if approved by the county board.

(2) Any town officer held personally liable for reimbursement of any public funds paid out in good faith pursuant to the directions of electors at any annual or special town meeting shall be reimbursed by the town for the amount of the judgment for damages and costs entered against him.

History: 1961 c. 499; 1965 c. 603.

Cross Reference: See 285.06 for special procedure applying to state law enforcement officers.

270.59 Judgment in replevin. In any action of replevin judgment for the plaintiff may be for the possession or for the recovery of possession of the property, or the value thereof in case a delivery cannot be had, and of damages for the detention; and when the property shall have been delivered to the defendant, under section 265.06, judgment may be as aforesaid or absolutely for the value thereof at the plaintiff's option, and damages for the detention. If the property shall have been delivered to the plaintiff under chapter 265 and the defendant prevails, judgment for the defendant may be for a return of the property or the value thereof, at his option, and damages for taking and withholding the same.

Plaintiff in a replevin action was not precluded from securing a money judgment for the value of the automobile because its amended prayer for relief asked only for possession, where defendant filed a bond pursuant to 265.06 and retained possession thereof, for under 270.59 plaintiff was entitled to the option of a judgment for the recovery of the possession of the property or for the value thereof which could be first exercised when judgment was taken; hence the ad damnum clause did not constitute an election. Associates Discount Corp. v. Mohs Realty, 32 W (2d) 571, 146 NW (2d) 417.

Where defendant retained possession of property by giving a redelivery bond, he cannot bar plaintiff's election to take a money judgment rather than the return of the property by cancelling the bond. Interest will run in such case from the time the defendant denies plaintiff's right to the property. Barclay Brass & Aluminum Foundry v. Resnick, 35 W (2d) 620, 151 NW (2d) 648.

270.60 Judgment in replevin against principal and sureties. The judgment in replevin may be entered both against the principal and the sureties on his bond for a return or delivery of the property, as prescribed in chapter 265; and where the officer, to whom the execution thereon is directed, cannot find sufficient property of the principal to satisfy the same, he shall satisfy it out of the property of such sureties; and the execution shall so direct.

270.61 Damages in actions on bonds, etc. In all actions brought for the breach of the conditions of a bond or to recover a penalty for nonperformance of any covenant or agreement if the plaintiff recover his damages shall be assessed and judgment entered for the amount thereof, and enforced as in other actions upon contract. No such judgment shall conclude any claim upon such bond, covenant or agreement not embraced in the pleadings or be a discharge of the penal sum beyond the amount of damages recovered thereby. This section does not apply to actions regulated by chapter 19.

270.62 Default judgment. (1) NATURE OF DEFAULT. A default judgment may be entered as provided in this section if no issue of law or fact has been joined and if the time for joining issue has expired.

(2) GENERAL. Upon filing with the court the summons and complaint and proof of service of the summons on one or more of the defendants and an affidavit that the defendant is in default according to subsection (1), the plaintiff may apply to the court for judgment according to the demand of the complaint. If taking an account or the proof of any fact is necessary to enable the court to give judgment, a reference may be ordered to take such account or proof and to report the same to the court, and such reference may be executed anywhere in the state; or the court may take the accounts or hear the proof. The court may order damages to be assessed by a jury. If the defendant has appeared in the action, he shall be entitled to notice of the application for judgment.

(3) ACTIONS ON CONTRACT FOR MONEY ONLY. In any action on contract for the recovery of money only, the plaintiff may file with the clerk the summons and complaint, proof of personal service of the summons on one or more of the defendants and an affidavit that the defendant is in default according to subsection (1). The clerk shall thereupon enter judgment for the amount demanded in the complaint against the defendants who are in default. Leaving the summons at the abode of a defendant is not personal service within this subsection.

(4) IN CASE OF PUBLICATION. If service of summons is made without the state or by publication and the defendant is a nonresident, the plaintiff or his agent shall be examined on oath as to any payments that may have been made to or for the plaintiff on account of the demand and the court shall render judgment for the amount which he is entitled to recover but not exceeding the relief demanded in the complaint; and before entering judgment the court may require the plaintiff to file security to abide the order of the court requiring restitution of any property delivered to the plaintiff under the judgment in case the defendant defends the action and succeeds in his defense.

Cross Reference: For time required for notice under (2), see 269.31.

The procedure to be followed in entering a default judgment where the action is one on contract for money only is governed by (3), and no notice of application for judgment is required to be served on the defendants as a condition for entering the default judgment. Even if (2) were applicable and notice of application for judgment were required, failure to give notice would not render the judgment void. Glassner v. Medical Realty, Inc. 22 W (2d) 344, 126 NW (2d) 68.

270.63 Judgment on admitted claim; order to satisfy. In an action arising on a contract for the recovery of money only if the answer admits any part of the plaintiff's claim or if such answer sets up a counterclaim or set-off for an amount less than the plaintiff's claim and contains no other defense to the action the clerk, on the application of the plaintiff and five days' notice to the defendant, shall enter judgment for the amount so admitted or for the amount claimed in the complaint, after deducting the amount of the defendant's counterclaim or set-off. When the defendant admits part of the plaintiff's claim to be just the court may, on motion, order such defendant to satisfy that part of the claim and may enforce the order as it enforces a judgment or provisional remedy.

270.635 Summary judgments. (1) Summary judgment may be entered as provided in this section in any civil action or special proceeding. Notice of motion for sum-

mary judgment and the papers in support thereof shall be served within 40 days after issue is joined, subject to enlargement of time as provided in s. 269.45.

(2) The judgment may be entered in favor of either party, on motion, upon the affidavit of any person who has knowledge thereof, setting forth such evidentiary facts, including documents or copies thereof, as shall, if the motion is by the plaintiff, establish his cause of action sufficiently to entitle him to judgment; and, if on behalf of the defendant, such evidentiary facts, including documents or copies thereof, as shall show that his denials or defenses are sufficient to defeat the plaintiff, together with the affidavit of the moving party, either that he believes that there is no defense to the action or that the action has no merit (as the case may be) unless the opposing party shall, by affidavit or other proof, show facts which the court shall deem sufficient to entitle him to a trial.

(3) Upon motion by a defendant, if it shall appear to the court that the plaintiff is entitled to a summary judgment, it may be awarded to him even though he has not moved therefor.

(4) If the proofs submitted, on the motion, convince the court that the only triable issue of fact is the amount of damages for which judgment should be granted, an immediate hearing to determine such amount shall be ordered to be tried by a referee or by the court alone or by the court and a jury, whichever shall be appropriate; and, upon the determination of the amount of damages, judgment shall be entered.

(5) Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court may forthwith order the party employing them to pay the other party double motion costs and the amount of the reasonable expenses which the filing of the affidavits caused him to incur. This subsection shall not be construed as abridging or modifying any other power of the court.

(6) When an answer alleges a defense which is prima facie established by documents or public records, judgment may be entered for the defendant unless the plaintiff shows facts sufficient to raise an issue with respect to the verity or conclusiveness of such documents or records.

(7) This section is applicable to counterclaims the same as though they were independent actions; but the court may withhold judgment on a counterclaim until other issues in the action are determined.

History: Sup. Ct. Order, 11 W (2d) vi.

It is not the duty of one opposing summary judgment to prove his case or to put in all his evidence on summary judgment, and he defeats the motion if he shows by affidavit or other proof that there are substantial issues of fact or reasonable inferences which can be drawn from the evidence. Voysey v. Labisky, 10 W (2d) 274, 103 NW (2d) 9.

Procedure for considering depositions in motion for summary judgment and for including in record on appeal discussed. Kanios v. Frederick, 10 W (2d) 358, 103 NW (2d) 114.

Summary judgment should be denied where facts are in dispute and where there is a jury question whether an uneven sinking of a sidewalk below the bottom of a step leading into a tavern was a sidewalk defect and caused plaintiff's injuries. Goelz v. Milwaukee, 10 W (2d) 491, 103 NW (2d) 551.

It is proper to incorporate parts of an adverse examination into a motion for or against summary judgment, but counsel should specify the parts on which he relies where the deposition is voluminous. Hyland Hall & Co. v. Madison G. & E. Co. 11 W (2d) 238, 105 NW (2d) 305.

Although summary judgment generally goes to the merits, it does not do so when based on a plea in abatement. Truesdill v. Roach, 11 W (2d) 492, 105 NW (2d) 871.

Summary judgment should be granted dismissing an action against an employer whose employe, involved in an accident, was using his own car for his own convenience and not in performing his work, although on the job at the time. Strack v. Strack, 12 W (2d) 537, 107 NW (2d) 632.

In an action for breach of warranty, an affidavit by the supplier of the alleged defective tire that there was no agency relationship between the seller and supplier was a statement of ultimate fact, not an evidentiary fact, and not sufficient, if undisputed, to establish a defense as a matter of law. Wojciuk v. United States Rubber Co. 13 W (2d) 173, 108 NW (2d) 149.

Issue must be joined before a defendant's motion for summary judgment will be permitted, since (2) also requires that the defendant furnish an affidavit showing that his "denials or defenses" are sufficient to defeat the plaintiff, and the quoted statutory words must be construed as necessarily referring to the denials or defenses of the answer. Szuszka v. Milwaukee, 15 W (2d) 241, 112 NW (2d) 699.

Where the question was whether a particular car was covered by a fleet policy, an affidavit to the effect that it was not would not be sufficient, since the policy would be the best evidence. Kubiak v. General Acc. F. & L. Assur. Corp. 15 W (2d) 344, 113 NW (2d) 46.

Plaintiff's counteraffidavit to a motion for summary judgment, made on information and belief and stating nothing not already stated in the complaint, was insufficient. Townsend v. Milwaukee Ins. Co. 15 W (2d) 464, 113 NW (2d) 126.

Where insured knew of accident but made no report to his insurer, and insurer had no notice until served with a summons nearly 3 years later, and the affidavits of insured were silent as to lack of prejudice of the insurer, a summary judgment of dismissal as to the insurer should have been granted. Buss v. Clements, 18 W (2d) 407, 118 NW (2d) 928.

An affidavit in support of a motion for summary judgment for the defendant, stating that the affiant "believes that there is no cause of action," was a sufficient compliance with the requirement of (2), but the substitution of other than the statutory language is disapproved. American Cas. Co. v. Western Cas. & Surety Co. 19 W (2d) 176, 120 NW (2d) 86.

Sufficiency of moving papers and docu-

ments discussed. Dottai v. Altenbach, 19 W (2d) 373, 120 NW (2d) 41.

The requirement of (2) that, where a defendant moves for summary judgment, there must be filed an affidavit "of the moving party" that he believes that the action has no merit, is satisfied, in the case of a corporation defendant, by an affidavit by the defendant's counsel alleging no merit. An affidavit of "no merit" by the defendant's counsel on motion for summary judgment, so far as stating that the affiant "has personal knowledge of some of the facts involved in this litigation and that he has received information with respect to other facts pertinent thereto," was not insufficient under (2), for not stating that the affiant had personal knowledge of all the pertinent facts. Clark v. London & Lancashire Indemnity Co. 21 W (2d) 268, 124 NW (2d) 29.

A statement made in the defendant's motion for summary judgment, that the defendant was grounding the same on the pleadings as well as an affidavit and other papers of record, gave no greater legal effect to the role accorded pleadings on a motion for summary judgment than would be the case if the pleadings had not been mentioned, and such reference to the pleadings was not an admission of the truth of the allegations in the pleadings. Clark v. London & Lancashire Indemnity Co. 21 W (2d) 268, 124 NW (2d) 29.

The purpose of the requirement of (2) that, where "documents or copies thereof" are to be used on a motion for summary judgment, they are to be set forth in an affidavit of a "person who has knowledge thereof," is to establish by affidavit the authenticity of the document, or copy thereof, but this is not necessary in the case of the deposition of an adverse examination, since the authenticity is established by the certificate of the officer before whom taken. Clark v. London & Lancashire Indemnity Co. 21 W (2d) 268, 124 NW (2d) 29.

A party who voluntarily participates in a trial of the action after denial of his motion for summary judgment, without having appealed from the order of denial and without requesting a stay until determination of such appeal, waives his right to appeal from such order, and the same will be dismissed. Richie v. Badger State Mut. Casualty Co. 22 W (2d) 133, 125 NW (2d) 381.

The provision in (1) that notice of motion for summary judgment shall be served within 40 days after joinder of issue, requires the movant to serve such notice within 40 days from the joinder of issue as created by the original pleadings and not from the time of service of an amended pleading raising a different issue. Snowberry v. Zellmer, 22 W (2d) 356, 126 NW (2d) 26.

Summary judgment in action based on written option to buy land should be denied where fraud is alleged to have made the option invalid. State v. Conway, 26 W (2d) 410, 132 NW (2d) 539.

Defendant's motion for summary judgment must be granted where plaintiff's complaint is based on a void oral lease and defendant's affidavits alleging impossibility of performance are not contradicted. Borkin v. Alexander, 26 W (2d) 432, 132 NW (2d) 587.

Where plaintiff made a motion for summary judgment within 40 days and defendant made a similar motion after the 40 days without obtaining an extension of time, but caused no delay in the case, the court could grant defendant's motion. Bornemann v. New Berlin, 27 W (2d) 102, 133 NW (2d) 328.

The procedure for a summary judgment is statutory, and the only acceptable method of raising a factual question entitling a party to trial is the filing of the affidavits or other proof as provided in (2). There is no authority permitting a party opposing a motion for summary judgment to raise a triable issue by motion to strike. Breitenbach v. Gerlach, 27 W (2d) 358, 134 NW (2d) 400.

A party opposing a motion for summary judgment contending that he possesses information from others which raises a triable issue and would defeat the motion, cannot rely on a hearsay affidavit based on information and belief, but must either take the deposition of his informants if they refuse to give affidavits, or set forth in his opposing papers the names of his informants, that these informants refuse to give affidavits, the reason for not taking depositions, and the statements the informants had given, and that it was expected they would give such testimony at the trial. Ranous v. Hughes, 30 W (2d) 452, 141 NW (2d) 251.

Rules governing consideration of motions for summary judgment discussed. Leszczynski v. Surges, 30 W (2d) 534, 141 NW (2d) 261.

Summary judgment is proper where the only issue is the effect to be given a written document; this is a legal rather than a factual issue. Pattermann v. Whitewater, 32 W (2d) 350, 145 NW (2d) 705.

On motion for summary judgment a court can take judicial notice of any matter which could be judicially noticed at the trial, such as other judicial proceedings. The court should not grant a judgment requiring an illegal act such as ordering a conveyance in violation of a zoning ordinance. Venisek v. Draski, 35 W (2d) 38, 150 NW (2d) 347.

The principle that on a motion for summary judgment pleadings containing allegations inconsistent with factual averments in affidavits are ineffectual as proof has no application where no such inconsistency arises; hence recourse to the provisions of the policy (to ascertain the protection afforded the insured) which were set forth in the insurer's answer but not contained in its moving affidavits was not error. Moutry v. American Mut. Liability Ins. Co. 35 W (2d) 652, 151 NW (2d) 630.

270.64 Judgment after law issue tried. When the plaintiff is entitled to judgment after trial upon an issue of law he may proceed in the manner prescribed in section 270.62 or according to such order for judgment as the court may have made. If the defendant be entitled to judgment after a like trial he may proceed according to such order therefor as may have been likewise made and the court may take any account, or hear proof, or order a reference or an assessment of damages by a jury, when necessary to enable the court to complete the judgment.

270.65 Judgment, signing and entry. Except where the clerk is authorized to enter judgment without the direction of the court, the judgment shall be entered by the clerk upon the direction of the court. The judge, or the clerk upon the order of the court, may sign the judgment.

270.66 Costs when taxed; executions. Within 60 days after filing of a verdict on which the clerk is authorized to enter judgment without an order, or within 60 days after an order to enter judgment is filed, the successful party may tax costs and perfect the judgment and cause it to be entered and if he fails so to do the clerk of the court shall

prepare and enter the proper judgment, but without costs. If there be a stay of proceedings after the filing of the findings or verdict, judgment may be perfected at any time within 60 days after the expiration of such stay. If the parties agree to settle all issues but fail to file an order of dismissal the judge may direct the clerk to draft an order dismissing the action. No execution shall issue until the judgment is perfected by the taxation of costs and the insertion of the amount thereof in the judgment or until the expiration of the time for taxing costs.

A memorandum decision on motions after verdict, stating that the plaintiff's motion for judgment on the verdict was to be granted and that the defendant's motion was to be denied, and not specifically directing the entry of judgment, was not an order to enter judgment for the purpose of starting the running of the 60-day period for the taxation of costs. [Any implication to the contrary in Fonferek v. Wisconsin Rapids Gas & Electric Co. 268 W 278, withdrawn.] Dwyer v. Jackson Co. 20 W (2d) 318, 121 NW (2d) 881.

Plaintiff was not precluded from taxing costs within 60 days following entry of the final judgment because more than 60 days had expired from the date of the trial court's prior determination of the issue of entitlement to the chattel, and since resolution of his subsequent motion for judgment for the value of the property rather than its return and for damages required further judicial action, the time for taxation of costs did not commence to run until the judge's decision of the remaining issues. Barclay Brass & Aluminum Foundry v. Resnick, 35 W (2d) 620, 151 NW (2d) 648.

270.67 Restitution in case of reversed judgment; purchaser for value. If any judgment or part of a judgment be collected and such judgment be afterwards set aside or reversed the trial court shall order the same to be restored with interest from the time of the collection, but in case a new trial is ordered the party who has collected such judgment may retain the same pending such new trial, upon giving a bond in such sum and with such sureties as the court shall order, conditioned for the restoration of the amount collected with interest from the time of collection. The order of restitution may be obtained upon proof of the facts upon notice and motion and may be enforced as a judgment. Nothing herein shall affect or impair the right or title of a purchaser for value in good faith without notice.

270.68 Same. Whenever in a civil action on appeal to the supreme court the appellant shall have omitted to stay execution and pending such appeal the sheriff or other officer shall collect all or any part of the judgment appealed from the officer collecting the same shall deposit the amount so collected, less his fees, with the clerk of the court out of which execution issued. In case of reversal on such appeal restitution may be made in accordance with the provisions of section 270.67. In case of affirmance the clerk shall pay over such deposit to the judgment creditor on the filing of the remittitur from the supreme court.

270.69 Judgment without action; warrant of attorney. (1) A judgment upon a bond or promissory note may be rendered, without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant or both, in the manner prescribed in this section.

(2) The plaintiff shall file his complaint and an answer signed by the defendant or some attorney in his behalf, confessing the amount claimed in the complaint or some part thereof, and such bond or note and, in case such answer is signed by an attorney, an instrument authorizing judgment to be confessed. The plaintiff or some one in his behalf shall make and annex to the complaint an affidavit stating the amount due or to become due on the note or bond, or if such note or bond is given to secure any contingent liability the affidavit must state concisely the facts constituting such liability and must show that the sum confessed does not exceed the same. The judgment shall be signed by the court or a judge and shall be thereupon entered and docketed by the clerk and enforced in the same manner as judgments in other cases.

(3) Within 30 days after a judgment is entered under sub. (2) the plaintiff shall, by certified mail, transmit notice of entry thereof to the judgment debtor at his last known address. Failure to transmit such notice shall invalidate the judgment.

History: 1967 c. 36.

270.70 Entry of judgment or order defined. The filing of the judgment or order of either the circuit or county court in the office of the clerk constitutes the entry of the judgment or order.

History: 1961 c. 495.

270.71 Judgment and order; specific requirements; recorded. (1) Each judgment shall specify clearly the relief granted or other determination of the action, and the place of abode of each party to the action and his occupation, trade or profession, as accurately as can be ascertained.

(2) All judgments, orders and reports which purport to finally dispose of an action or proceeding or which the judge orders to be recorded shall be recorded in the judgment book.

270.72 Case file. The clerk, immediately after entering the judgment, shall attach together and file the summons, pleadings and all orders and papers in any way involving the merits and necessarily affecting the judgment.

270.73 Judgments on municipal orders. No judgment shall be rendered in any action brought upon any county, town, city, village or school order, unless the order upon which said action is based is produced in evidence and filed with the court or with the clerk thereof, and the clerk notes upon each order the date of such filing. Any order so filed shall not be removed from the files without an order of the court or presiding judge. Any judgment rendered in violation of this section shall be absolutely void.

270.74 Judgment docket. At the time of entry of a judgment directing in whole or in part the payment of money the clerk shall enter in a judgment docket, either arranged alphabetically or accompanied by an alphabetical index, in books to be provided by the county and kept by him, a docket of such judgment containing:

(1) The name at length of each judgment debtor, with his place of abode and vocation. If the judgment fails to give the place of abode and the vocation of the judgment debtor, the judgment creditor may at any time file with the clerk an affidavit stating, on knowledge or information and belief, such place of abode and vocation; and the clerk shall thereupon enter the facts according to the affidavit in the docket, noting the date and hour of such entry.

(2) The name of the judgment creditor, in like manner.

(3) The name of the attorney for the judgment creditor, if stated in the record.

(4) The date of the entry of the judgment.

(5) The day and hour of entering such docket.

(6) The amount of the debt, damages or other sum of money recovered, with the costs.

(7) If the judgment be against several persons such statement shall be repeated under the name of each person against whom the judgment was rendered, in the alphabetical order of their names, respectively, when the docket is arranged alphabetically, or entered in the index under the name of each such person when the docket is kept with an alphabetical index accompanying.

270.745 Delinquent income tax docket. At the time of filing the warrant provided by section 71.13 (3) or 71.11 (23), the clerk shall enter in the delinquent income tax docket, either arranged alphabetically or accompanied by an alphabetical index, in books to be provided by the county and kept by such clerk, a docket of such warrant containing:

(1) The name at length of each delinquent income tax debtor, with his place of abode, title and trade or profession, if any such be stated in the warrant.

(2) The date of the warrant.

(3) The day and hour of entering such docket.

(4) The amount of delinquent income taxes with interest, penalties and costs as set forth in the warrant.

(5) If the warrant be against several persons such statement shall be repeated under the name of each person against whom the warrant was issued, in the alphabetical order of their names, respectively, when the docket is arranged alphabetically, or entered in the index under the name of each such person when the docket is kept with an alphabetical index accompanying.

270.75 Transcript of municipal justice's judgment. The clerk of the circuit court shall, upon the production to him of a duly certified transcript of a judgment for more than $10, exclusive of costs, rendered by any municipal justice in his county, forthwith file the same and docket such judgment in the docket of the court in the manner prescribed in s. 270.74. When the transcript shall show that execution was stayed in the municipal court, with the name of the surety thereof, the clerk shall docket the judgment against such surety as well as the judgment debtor, and such surety shall be bound thereby as a judgment debtor and his property be subject to lien and be liable thereon to the same extent as his principal. Every such judgment, from the time of such filing of the transcript thereof, shall be deemed the judgment of the circuit court, be equally under the control thereof and be carried into execution, both as to the principal judgment debtor and his surety, if any, in the same manner and with like effect as the judgments thereof, except that no action can be brought upon the same as a judgment of such court nor execution issued thereon after the expiration of the period of the lien thereof on real estate provided by s. 270.79.

History: 1967 c. 276 ss. 39, 40.

270.76 Judgments docketed in other counties. When a judgment is docketed as provided in ss. 270.69, 270.74 and 270.75, or a warrant is docketed as provided in ss. 108.22 (2) and 270.745, it may be docketed in like manner in any other county, upon filing with the clerk of the circuit court thereof a transcript from the original docket, certified to be a true copy therefrom by the clerk of the circuit court having custody thereof.

270.78 Enforcement of real estate judgment in other counties. Whenever a judgment affecting real property is rendered in any county other than that in which such property is situate the trial court may, at any time, order that the judgment with all papers filed and copies of entries, orders and minutes made in the action, shall be by its clerk certified and transmitted to and filed by the clerk of the circuit court of the county where such property is situate; or order that certified copies thereof be so transmitted and filed and upon such filing such judgment may be enforced in such circuit court, with the same force and effect as if such judgment had been originally entered therein. The trial court shall have concurrent jurisdiction to enforce such judgment when certified copies of the papers shall be so transmitted.

270.79 Lien of judgment; priority; statute may be suspended. (1) Every judgment, when properly docketed, and the docket gives the judgment debtor's place of abode and his occupation, trade or profession shall, for 10 years from the date of the entry thereof, be a lien on the real property (except the homestead mentioned in s. 272.20) in the county where docketed, of every person against whom it is rendered and docketed, which he has at the time of docketing or which he acquires thereafter within said 10 years. A judgment discharged in bankruptcy shall upon entry of the order of discharge cease to be and shall not thereafter become a lien on any real property of the discharged person then owned or thereafter acquired.

(2) When the collection of the judgment or the sale of the real estate upon which it is a lien shall be delayed by law, and the judgment creditor shall have caused to be entered on the docket "enforcement suspended by injunction" or otherwise, as the case may be, and such entry dated, the time of such delay after the date of such entry shall not be taken as part of said ten years. And whenever an appeal from any judgment shall be pending and the bond or deposit requisite to stay execution has been given or made, the trial court may, on motion, after notice to the judgment creditor, on such terms as it shall see fit, direct the clerk to enter on the docket that such judgment is "secured on appeal," and thereupon it shall cease during the pendency of such appeal to be a lien.

(3) If the judgment be affirmed on appeal or the appeal be dismissed the clerk shall, on the filing of the remittitur, enter on the docket "lien restored by affirmance" or "lien restored by dismissal of appeal" with the date of such entry, and the lien thereof shall be thereupon restored. Similar entries may be made with the like effect upon the docket of such judgment in any other county upon filing with the clerk of the circuit court thereof a transcript of the original docket.

Cross Reference: See 270.91 (2) for procedure to be followed to obtain satisfaction of judgment discharged in bankruptcy.

270.795 Civil action judgments. All judgments of the civil court of Milwaukee county or of any other court functioning under chapter 254 of the [1959] statutes or of any other court which ceases to function on the first Monday in January, 1962, and which were entered prior to said date shall, as of said date, become judgments of the county court, civil division, in the county where said judgment was entered for all purposes but no such judgment shall have any other effect than when originally entered.

History: 1963 c. 459.

270.80 Supreme court judgment, docketing. The clerk of the supreme court, on demand and upon payment of one dollar, shall furnish a certified transcript of any money judgment of said court which transcript may be filed and docketed in the office of any clerk of the circuit court in the manner that other judgments are docketed and shall then be a like lien and for a like time as circuit court judgments on the real property in the county where docketed. And whenever the supreme court shall remit its judgment for the recovery of money or for costs to the lower court such judgment shall in like manner be docketed by the clerk of said court and shall have the like force and effect as judgments of the circuit court so docketed.

270.81 Docketing federal judgments. Every judgment and decree requiring the payment of money rendered in a district court of the United States within this state shall be, from the docketing thereof in said court, a lien upon the real property of the judgment debtor situated in the county in which it is so docketed, the same as a judgment of the state court. And a transcript of such docket may be filed with the clerk of the circuit court of any other county; and shall be docketed in his office as in the case of judgments and decrees

of the state courts and with like effect, on payment of fees as provided in section 59.42.

270.82 Docket entry of reversal of judgment. Whenever any docketed judgment shall be reversed and the remittitur filed the clerk shall enter on the docket "reversed on appeal."

270.84 Time of docketing; damages. Every clerk who shall docket a judgment or decree and enter upon the docket a date or time other than that of its actual entry or shall neglect to docket the same at the proper time shall be liable to the party injured in treble the damages he may sustain by reason of such fault or neglect.

270.85 Assignment of judgment. When a duly acknowledged assignment of a judgment shall be filed with the clerk he shall note the fact and the date thereof and of filing on the docket. An assignment may be made by an entry on the docket thus: "I assign this judgment to A. B.," signed by the owner, with the date affixed and witnessed by the clerk.

270.86 Satisfaction of judgment by execution. When an execution shall be returned satisfied in whole or in part the judgment shall be deemed satisfied to the extent of the amount so returned unless such return be vacated and the clerk shall enter in the docket that the amount stated in such return has been collected.

270.87 Judgments, how satisfied. A judgment may be satisfied in whole or in part or as to any judgment debtor by an instrument signed and acknowledged by the owner or, at any time within five years after the rendition thereof, (when no assignment has been filed) by his attorney of record, or by an acknowledgment of satisfaction, signed and entered on the docket in the county where first docketed, with the date of entry, and witnessed by the clerk. Every satisfaction of a part of a judgment or as to some of the judgment debtors shall state the amount paid thereon or for the release of such debtors, naming them.

270.88 Satisfaction by attorney not conclusive. No satisfaction by an attorney shall be conclusive upon the judgment creditor in respect to any person who shall have notice of revocation of the authority of such attorney, before any payment made thereon or before any purchase of property bound by such judgment shall have been effected.

270.89 Duty of clerk on filing satisfaction. On filing a satisfaction, duly executed with the clerk he shall enter the same on the court record of the case and shall enter a statement of the substance thereof, including the amount paid, on the margin of the judgment docket with the date of filing the satisfaction.

270.90 Court may direct satisfaction. When a judgment has been fully paid but not satisfied or the satisfaction has been lost the trial court may authorize the attorney of the judgment creditor to satisfy the same or may by order declare the same satisfied and direct satisfaction to be entered upon the docket.

270.91 Judgment satisfied not a lien; partial satisfaction. (1) When a judgment shall have been satisfied in whole or in part or as to any judgment debtor and such satisfaction docketed, such judgment shall, to the extent of such satisfaction, cease to be a lien; and any execution thereafter issued shall contain a direction to collect only the residue thereof, or to collect only from the judgment debtors remaining liable thereon.

(2) Upon proper notice, any person who has secured a discharge in bankruptcy may apply to the court where such judgment was entered, for an order to satisfy such judgment as may have been duly discharged in such order of discharge in bankruptcy and which judgment was duly set forth and included in such schedules of bankruptcy as to the name and address of such judgment holder. If the court is so satisfied that such order of discharge in bankruptcy was duly obtained and that the name and address of such judgment creditor was included in such schedules of bankruptcy, then the court shall declare such judgment to be satisfied and direct satisfaction thereof to be entered on the docket. The order of the court shall fully release the real property of any such bankrupt person from the lien of such judgment. Thereafter the entry of such order of satisfaction of judgment shall be a bar to any other action against the person securing a discharge in bankruptcy by such judgment creditor.

Cross Reference: See 270.79 (1) which provides that a judgment discharged in bankruptcy ceases to be a lien upon entry of the order of discharge.

A judgment against an administrator of an estate based upon his failure to withdraw estate funds from a bank of which he was an officer and director before it failed in 1935 was discharged in bankruptcy since he was guilty of no more than negligence, despite the conclusion in the judgment that he was guilty of a defalcation. Aetna Casualty & Surety Co. v. Lauerman, 12 W (2d) 387, 107 NW (2d) 605.

Where a bankrupt, pursuant to (2), filed a petition praying that a certain outstanding judgment be satisfied, and placed in evidence the order of discharge in bank-

ruptcy, the objecting judgment creditor then had the burden of producing evidence in avoidance of the discharge. In determining whether the liability of a judgment debtor is dischargeable in bankruptcy under 17 (a) of the Bankruptcy Act (11 USCA, sec. 35), Wisconsin follows the liberal practice of permitting a court to look behind a judgment and to consider the entire record, and the actual fact disclosed thereby as the basis for the adjudged liability will govern. Bastian v. LeRoy, 20 W (2d) 470, 122 NW (2d) 386.

(2) does not apply where a cognovit note was listed and discharged in bankruptcy but where the judgment was taken after the discharge and plaintiff took no action for more than one year after knowledge of its entry; nevertheless the judgment will be vacated as being a constructive fraud on the court which entered it. State Central Credit Union v. Bayley, 33 W (2d) 367, 147 NW (2d) 265.

270.92 Filing transcript of satisfaction. When a satisfaction of a judgment has been entered on the docket, in the county where it was first docketed a certified transcript of such docket or a certificate by the clerk, under his official seal, showing such satisfaction, may be filed with the clerk of the circuit court in any county where it is docketed, and he shall thereupon make a similar entry on his docket.

270.93 Satisfaction of judgment. For the purpose of paying any money judgment, the debtor may deposit with the clerk of the court in which the judgment was entered the amount of his liability thereon. The clerk shall give the debtor a certificate showing the date and amount of the deposit and identifying the judgment; and shall immediately note on the docket thereof and on the margin of the judgment journal the amount and date of the deposit. The debtor shall immediately give written notice to the owner of record of the judgment and to his attorney of record, personally or by registered mail, to his last known post-office address, stating the amount, date and purpose of the deposit, and that it is held subject to the order of such judgment owner. Ten days after giving the notice, the clerk shall, upon filing proof of such service, satisfy the judgment of record, unless the trial court shall otherwise order. Acceptance by such owner of the sum deposited shall have the same legal consequences that payment direct by the debtor would have. Payment to the clerk shall include fifty cents clerk's fees.

270.94 Refusal to satisfy judgment. If any owner of any judgment, after full payment thereof, fails for seven days after being thereto requested and after tender of his reasonable charges therefor, to satisfy the judgment he shall be liable to the party paying the same, his heirs or representatives in the sum of fifty dollars damages and also for actual damages occasioned by such failure.

270.95 Action on judgment, when brought. No action shall be brought upon a judgment rendered in any court of this state, except a court of a municipal justice, between the same parties, without leave of the court, for good cause shown, on notice to the adverse party.

History: 1967 c. 276 s. 39.

A judgment creditor was properly granted leave to bring an action on his judgment on a showing that the 20-year period of limitations subsequent to the rendition of the judgment was about to expire, and that the plaintiff thereafter would be barred from obtaining execution or bringing an action on the judgment. First Wisconsin Nat. Bank v. Rische, 15 W (2d) 564, 113 NW (2d) 416.

270.96 Uniform enforcement of foreign judgments act. (1) DEFINITION. In this section "foreign judgment" means any judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state.

(2) FILING AND STATUS OF FOREIGN JUDGMENTS. A copy of any foreign judgment authenticated in accordance with the act of congress or the statutes of this state may be filed in the office of the clerk of circuit court of any county of this state. The clerk shall treat any foreign judgment in the same manner as a judgment of the circuit court of this state. A judgment so filed has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating or staying as a judgment of a circuit court of this state and may be enforced or satisfied in like manner.

(3) NOTICE OF FILING. (a) At the time of the filing of the foreign judgment, the judgment creditor or his lawyer shall make and file with the clerk of court an affidavit setting forth the name and last known post-office address of the judgment debtor and the judgment creditor.

(b) Promptly upon the filing of the foreign judgment and the affidavit, the clerk shall mail notice of the filing of the foreign judgment to the judgment debtor at the address given and shall make a note of the mailing in the docket. The notice shall include the name and post-office address of the judgment creditor and the judgment creditor's lawyer, if any, in this state. In addition, the judgment creditor may mail a notice of the filing of the judgment to the judgment debtor and may file proof by mailing with the clerk. Lack of mailing notice of filing by the clerk shall not affect the enforcement proceedings if proof of mailing by the judgment creditor has been filed.

(c) No execution or other process for enforcement of a foreign judgment filed hereunder shall issue until 15 days after the date the judgment is filed.

(4) STAY. (a) If the judgment debtor shows the court that an appeal from the foreign judgment is pending or will be taken, or that a stay of execution has been granted, the court shall stay enforcement of the foreign judgment until the appeal is concluded, the time for appeal expires, or the stay of execution expires or is vacated, upon proof that the judgment debtor has furnished the security for the satisfaction of the judgment required by the state in which it was rendered.

(b) If the judgment debtor shows the court any ground upon which enforcement of a judgment of any court of this state would be stayed, the court shall stay enforcement of the foreign judgment for an appropriate period, upon requiring the same security for satisfaction of the judgment which is required in this state.

(5) OPTIONAL PROCEDURE. The right of a judgment creditor to bring an action to enforce his judgment instead of proceeding under this section remains unimpaired.

(6) UNIFORMITY OF INTERPRETATION. This section shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

(7) SHORT TITLE. This act may be cited as the "Uniform Enforcement of Foreign Judgments Act."

History: 1965 c. 379.