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.

See note to 263.14, citing Mortgage Associates v. Monona Shores, 47 W. (2d) 171, 177 N.W. (2d) 340.

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.

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
V.
Defendant
NOTICE OF TRIAL
CERTIFICATE OF READINESS
NOTE OF ISSUE
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 pretrial 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 ..... (Law or Fact) for ..... (Court or Jury)
Issues joined ..... 19 ..

..... Attorney

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 AND TRAFFIC CASES. Criminal cases and prosecutions for violations of traffic regulations as defined in s. 345.20 and of municipal ordinances and appeals thereof from county and municipal courts 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, (b) prosecutions for violations of traffic regulations as defined in s. 345.20 and municipal ordinances and appeals thereof from county and municipal courts to the circuit courts, (c) civil jury issues, (d) issues of fact for court, and (e) issues of law in the order in which notice of trial was filed. 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: 1971 c. 278

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, traffic regulations under s. 345.20 and 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.

(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: 1971 c. 278, 298

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.

270.165 Jury fees; discretion of court. The court shall have discretionary authority in any civil or criminal action or proceeding triable by jury to assess the entire cost of one day's juror fees for a jury of 6 or 12, whichever is demanded, including all mileage costs, against either the plaintiff or defendant or to divide the cost and assess same against both plaintiff and defendant, or additional parties plaintiff or defendant, if a jury demand has been made in any case and in the event a jury demand is later withdrawn within 48 hours prior to the time set by the court for the commencement of the trial. The party assessed shall be required to make payment to the clerk of circuit court within a prescribed period and the payment thereof shall be enforced by contempt proceedings.

History: 1971 c. 297

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.

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.

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.

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.

After an attorney has stated to the court he has no further questions of an adverse witness, he may nevertheless have a limited right to recall such witness if he has good reason to do so, the exercise of such right, however, being subject to the discretion of the trial court, but after an adverse witness has been excused, the attorney has no right to recall him to continue general cross-examination State v. Cassel, 48 W (2d) 619, 180 NW (2d) 607.

Plaintiff's counsel could use an adverse examination of his witness, taken when the witness was an adverse party, to show a variation from testimony at the trial, since this is an exception to the rule against impeaching your own witness. Tills v. Elmbrook Memorial Hospital, 48 W (2d) 665, 180 NW (2d) 699.

In determining whether to order a mistrial for improper argument the court should consider the nature of the case, the emphasis on the argument, its relationship to the entire argument and the likely effect on the jury. Rodriguez v. Slattery, 54 W (2d) 165, 194 NW (2d) 817.

Counsel may use a chart in tabular form detailing a claimed loss of wages if based on proper testimony. Johnson v. Heintz, 61 W (2d) 585, 213 NW (2d) 85.

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.

A party that acquiesces without objection to the inclusion of a portion of the instructions cannot later be heard to object on appeal. Schroeder v. Northern States Power Co. 46 W (2d) 637, 176 NW (2d) 336.

It is not error to refuse the absent witness instruction where neither party knew where the witness was, nor to refuse it as to a witness equally available to both parties. Capello v. Janeczko, 47 W (2d) 76, 176 NW (2d) 395.

Requested instruction by plaintiff's counsel that the insurer was in fact his client's insurer (by reason of the uninsured-motorist clause) was properly refused, for if intended to show that the other driver was an irresponsible person because he drove an uninsured car, the instruction would be patently improper, and conversely, if the jury assumed that the insurer was the other driver's own insurer, that impression could not have adversely affected the plaintiff. Capello v. Janeczko, 47 W (2d) 76, 176 NW (2d) 395.

It is error to use the standard instruction referring to "special circumstances brought about by weather or traffic" when neither was a factor in the case. It is error to refer to "loss of wages"; the reference should be to "loss of earning capacity". A court should grant a request in the instruction as to lookout of some reference to the distraction of merchandise displays where the injury results from a fall in a store. Carlson v. Drews of Hales Corners, Inc. 48 W (2d) 408, 180 NW (2d) 546.

A refusal to instruct was proper where the question of whether a piece of marble on hotel steps, on which plaintiff fell, came from surrounding walls, where there was no evidence of improper or defective construction. Frederick v. Hotel Investments, Inc. 48 W (2d) 429, 180 NW (2d) 562.

It is not error to refuse to instruct as to a driver's deviation from his lane where the deviation occurred in the process of making a left turn. Kenwood Equipment, Inc. v. Aetna Ins. Co. 48 W (2d) 472, 180 NW (2d) 750.

Failure to transcribe instructions which were reread to the jury, where they were identical to those given earlier, and were transcribed after the trial, does not require reversal in the absence of prejudice. Lampkins v. State, 51 W (2d) 564, 187 NW (2d) 164.

Instruction as to standard of care required of fire chief crossing a highway in response to a fire call when he is preoccupied or his attention is diverted, discussed. Knutter v. Bakalarski, 52 W (2d) 751, 191 NW (2d) 235.

Wis. civil instruction 1051 approved where workman failed to notice platform supports had been removed. Bourassa v. Gateway Erectors, Inc. 54 W (2d) 176, 194 NW (2d) 602.

The record must show precisely what instruction or portion thereof is requested, or a party on appeal will not be heard to complain that his requested instruction was refused. Holzem v. Mueller, 54 W (2d) 388, 195 NW (2d) 635.

In libel actions malice must be proved, and therefore no instruction on conditional privilege is proper because if there is malice there is no privilege. Polzin v. Helmbrecht, 54 W (2d) 578, 196 NW (2d) 685.

Question of whether a res ipsa loquitur instruction should be qualified or unqualified discussed. Turtenwald v. Aetna Casualty & Surety Co. 55 W (2d) 659, 201 NW (2d) 1.

The absent-witness instruction discussed. Thoreson v. Milwaukee & S. Transport Corp. 56 W (2d) 231, 201 NW (2d) 745.

It is error to give an instruction on management and control where defendant testifies he never saw the injured person. Grube v. Moths, 56 W (2d) 424, 202 NW (2d) 261.

In medical malpractice cases the jury is to be instructed that a qualified practitioner is subject to liability if he fails to exercise that degree of care and skill which is exercised by the average practitioner in the class to which he belongs, acting in the same or similar circumstances; geographical area and lack of facilities being circumstances which can be considered if appropriate. Shier v. Freedman, 58 W (2d) 269, 206 NW (2d) 166.

Instructions in a case involving alleged negligence by a hospital and malpractice by a doctor discussed. Wills v. Regan, 58 W (2d) 328, 206 NW (2d) 398.

It is not error to reject a requested instruction which is too broad in scope, even though academically correct, but a properly requested instruction must be given in substantially the form requested. An instruction referring to the danger involved in a gas appliance was properly refused where a fire was not caused by explosion or the gas connection. West Bend Mut. Ins. Co. v. Christensen, 58 W (2d) 395, 206 NW (2d) 202.

An instruction that "harm to another must be reasonably foreseen as probable by a person of ordinary prudence under like circumstances" is correct. McLoone Metal Graphics, Inc. v. Robers Dredge, 58 W (2d) 704, 207 NW (2d) 616.

One exception to the rule that a party waives objection to an instruction unless objection is timely made is where the instruction is a misstatement of the law Johnson v Heintz, 61 W (2d) 585, 213 NW (2d) 85

Where counsel requests instructions and then participates in a conference at which the instructions were drafted, he concurs in the instructions given unless he makes his objection clear. Bohlman v American Family Mut Ins Co 61 W (2d) 718, 214 NW (2d) 52

Where an erroneous instruction as to the five-sixths verdict is given, the error is immaterial where the verdict is unanimous Bohlman v. American Family Mut Ins Co 61 W (2d) 718, 214 NW (2d) 52

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.

When the jury asked for additional instructions and the court asked whether it wished to hear more, and then read all of the negligence instructions, this was not reversible error, although not proper. Thoreson v. Milwaukee & S. Transport Corp. 56 W (2d) 231, 201 NW (2d) 745

It is not error for a court, in sending a jury which reports it cannot agree back to try to reach agreement, to tell the jury that if it does not agree the case would have to be re-tried Madison v State, 61 W (2d) 333, 212 NW (2d) 150

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.

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.

Where 10 jurors agreed that the negligence should be apportioned 80-20 in favor of defendant, the fact that a different juror dissented from the finding of negligence by the defendant makes no difference. Lorbecki v. King, 49 W (2d) 463, 182 NW (2d) 226

If a disputed fact is not determinative of the issue, its existence does not prevent direction of a verdict. Eden v. La Crosse Lutheran Hospital, 53 W (2d) 186, 191 NW (2d) 715.

A verdict awarding a husband damages for medical expenses for his wife but denying her any damages, where 2 different jurors dissented as to each question, must be set aside. Utecht v. Steinagel, 54 W (2d) 507, 196 NW (2d) 674

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.

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.

An erroneous failure of a trial court to find a party negligent as a matter of law in one aspect whether or not evidence as to other aspects of negligence is adduced is cured by a jury finding in an ultimate fact verdict that the party was causally negligent in part and assessing him accordingly. Kamp v. Curtis, 46 W (2d) 423, 175 NW (2d) 267.

Where the jury found that a door had not malfunctioned, and this was the only basis for a finding of negligence, any finding of negligence is inconsistent and should be stricken. The finding cannot be sustained on the basis of res ipsa loquitur since that doctrine requires that there be unexplained negligence. Dahl v. K-Mart, 46 W (2d) 605, 176 NW (2d) 342

Parties who have been dismissed because of settlement with the plaintiff should still be included in the special verdict for apportionment purposes. Payne v. Bilco Co. 54 W (2d) 424, 195 NW (2d) 641

In a products liability case, when several defendants might be found liable, the verdict must require a comparison of negligence. City of Franklin v. Badger Ford Truck Sales, 58 W (2d) 641, 207 NW (2d) 866

Special verdict formulation in comparative negligence cases. Aiken, 53 MLR 293.

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.

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.

Proof of loss of earning capacity by a 3-year-old approved Thoreson v. Milwaukee & S Transport Corp. 56 W (2d) 231, 201 NW (2d) 745.

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.

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.

(c) Construction lien law foreclosures under s. 289.09.

(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 proceeding 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.

History: 1971 c. 191

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.

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.

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.

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

To properly apply the Powers rule on motions after verdict where the trial court determines a damage award is excessive, the order should grant a new trial unless within a given time the plaintiff is willing to accept the reduced amount and file a remittitur, and not, as in the instant case, reduce the damages and give the plaintiff an election to accept judgment in the reduced sum or in the alternative a new trial. Breunig v. American Family Ins. Co. 45 W (2d) 536, 173 NW (2d) 619.

Having properly granted a new trial on the issue of liability, the trial court did not err in failing to apply the Powers rule to implement its finding that the damage award was made by the jury "from feelings of liberality," for where an error in law requires reversal or the granting of a new trial in the interest of justice, the Powers rule will not be applied to the excessive damages, but the issue of damages retried with the issue of liability. Martin v Allstate Ins. Co. 45 W (2d) 657, 173 NW (2d) 646.

The trial court did not abuse its discretion when on motions after verdict it reduced under the Powers rule a $16,000 jury award for loss of consortium between the date of the accident and the date of decedent's death 15 months thereafter (leaving unaffected jury awards to the widow for pecuniary loss and loss of consortium after death reduced to the statutory maximum as to each), where after meticulous examination of the evidence the trial court found the $16,000 award beyond the range of reasonableness substantiated by proof of decedent's prior work activity (holding down 3 jobs with little time left to perform any services for his wife), which award, eliminating the item of loss of support, overlapped the jury award for loss of consortium after the date of decedent's death. Schramski v Hanson, 45 W (2d) 698, 173 NW (2d) 655.

A trial court may properly order a new trial because trial was conducted on the wrong theory and important evidence was not produced. Lien v Pitts, 46 W (2d) 35, 174 NW (2d) 462.

The established rule pursuant to statutory mandate, 270.49 (2), which requires a trial court in granting a new trial in the interest of justice to state the reasons therefor, is not satisfied by a mere statement that the jury's finding was against the great weight of the evidence or combining the same with a further statement that a new trial must be ordered in the interest of justice, for such a statement constitutes an ultimate conclusion and does not allow the supreme court to effectively review the trial court's order. Tuschel v Haasch, 46 W (2d) 130, 174 NW (2d) 497.

Where a trial judge changed answers as to damages on the ground that they were inadequate, but found no perversity, his action will be sustained where the jury also found no negligence on the part of the defendant. Dahl v K-Mart, 46 W (2d) 605, 176 NW (2d) 342.

An oral motion for new trial which generally stated alleged errors is not a substantial compliance with the requirement of a written motion. Appeal without the filing of a written motion for a new trial might be waived by participation in the appeal by respondent, but participation does not waive the rule that errors are not reviewable unless a motion for a new trial is made where the errors could have been corrected by granting a new trial. Kiefer v State Highway Comm. 47 W (2d) 155, 177 NW (2d) 66.

Where the question of punitive damages relates to the making of a contract, the evidence of vindictiveness, malice or wanton disregard of duty must relate to the time of contracting. Mid-Continent Refrigerator Co. v Straka, 47 W (2d) 739, 178 NW (2d) 28.

Punitive damages in breach of automotive-dealership contract discussed. Entzminger v Ford Motor Co. 47 W (2d) 751, 177 NW (2d) 899.

Amount of personal injury award reviewed. Gervais v Kostin, 48 W (2d) 190, 179 NW (2d) 828.

An order for a new trial in the interest of justice will be reversed where it was given orally, did not specify the grounds, and where the transcript of the decision was not made and filed for 6 weeks. Schrank v Allstate Ins. Co. 50 W (2d) 247, 184 NW (2d) 127.

While the award by a trial court of a new trial in the interest of justice will be affirmed unless there is a clear showing of abuse of discretion, a trial judge cannot substitute his judgment for the trier of fact; hence the fact

that the trial judge may not concur in the jury's verdict or that a different jury might reach a different conclusion is not grounds for the granting of a new trial. Bartell v Luedtke, 52 W (2d) 372, 190 NW (2d) 145

A verdict finding defendant not negligent but apportioning 10% of the causal negligence to him is inconsistent but may be cured where the defendant waives the inconsistency and elects to accept 90% of his damages. A failure to award damages to a plaintiff for personal injuries is not perverse when the evidence of injury was slight and the jury apportioned 90% of the negligence to plaintiff. A verdict is not inconsistent because it allows damages for medical expenses and denies recovery for personal injury or pain and suffering. Jahnke v. Smith, 56 W (2d) 642, 203 NW (2d) 67.

Since punitive damages are assessed for punishment only, in an assault and battery action it is relevant to compare the verdict with the maximum fine provided for the offense in the criminal code. Meke v. Nicol, 56 W (2d) 654, 203 NW (2d) 129.

A trial judge may order a new trial in the interest of justice when he feels the jury may have been misled by the form of the verdict, even though no objection was made by a party. Behning v. Star Fireworks Mfg. Co. 57 W (2d) 183, 203 NW (2d) 655.

The trial court did not abuse his discretion for denying a motion for a new trial based on a document discovered by the party in his own files where he had previously denied the existence of such a document. Sheldon v. Singer, 61 W (2d) 443, 213 NW (2d) 5.

Impeachment of jury verdicts. 53 MLR 258.

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.

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.

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.

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 4 years.

An order is not an interlocutory judgment where it only strikes affirmative defenses, leaving negligence issues still to be tried. Glens Falls Ins. Co. v. Concrete Research, 57 W (2d) 744, 205 NW (2d) 165.

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.

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 such defendant was acting within the scope of his employment 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, when it does not provide legal counsel to the defendant officer or employe, 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 within the scope of his employment. Failure by the officer or employe to give notice to his department head of action or special proceeding commenced against him as soon as reasonably possible shall be a bar to recovery by the officer or employe from the state or political subdivision of reasonable attorney's fees and costs of defending the action. Such attorney's fees and expenses shall not be recoverable if the state or political subdivision offers the officer or employe legal counsel and such offer is refused by 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: 1973 c 333.

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

See note to 260.11, citing Anderson v. Green Bay Hockey, Inc. 56 W (2d) 763, 203 NW (2d) 79.

Highway commission supervisors who were responsible for the placement of highway warning signs may be sued if a sign is not placed in accordance with commission rules. They cannot claim the state's immunity from suit. Chart v Dvorak, 57 W (2d) 92, 203 NW (2d) 673.

(1) does not prevent a state official from asserting "good faith" as a defense to a charge of infringement of civil rights. Clarke v Cady, 358 F Supp. 1156.

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.

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.

While under 263.05, Stats. 1969, potential grounds for a default judgment exist when a party has failed to join issue by service of a responsive pleading within the 20-day period required by the statute, a defendant's failure to join issue within 20 days does not automatically entitle the plaintiff, as a matter of right, to a default judgment, since by 270.62 the question of whether a default judgment should be granted is within the trial court's discretion. Production Credit Asso. v Goede, 50 W (2d) 509, 184 NW (2d) 830.

Where defendant made a motion to strike part of the complaint but did not answer otherwise, when the court denied the motion it has to allow defendant time to answer under 263.43. Production Credit Asso. v Goede, 50 W (2d) 509, 184 NW (2d) 830.

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 summary 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.

In an action for libel against a union local by a nonmember who continued to work during a strike, where the union circulated to its members a newsletter describing a "scab" in opprobrious terms, and mailed letters to plaintiff's neighbors advising them that plaintiff was a "scab", whose scabbing activities prolonged the strike, thereby adversely affecting his family, his fellow workers, and the town—the trial court properly ruled on defendant's motion for summary judgment that it could not be determined as a matter of law that the communications were incapable of defamatory meaning. Wozniak v. Local 1111 of UE, 45 W (2d) 588, 173 NW (2d) 596.

See note to 204.30, citing Herbst v. Hansen, 46 W (2d) 697, 176 NW (2d) 380.

Where a legal question of first impression in this state is presented, and the trial judge feels that all relevant facts had not been presented, he may deny summary judgment even though the affidavits present no factual dispute. United Farm Agency, Inc. v. Niemuth, 47 W (2d) 1, 176 NW (2d) 328.

Where defendant moved for an enlargement of time to move for summary judgment, plaintiff cannot object on the ground of lack of cause for the first time on appeal. Sambs v. Nowak, 47 W (2d) 158, 177 NW (2d) 144.

Where there was a dispute as to whether the driver had permission to operate the vehicle, the trial court properly denied summary judgment. Schultz v. Tobin, 47 W (2d) 230, 177 NW (2d) 128.

Denial of motion for summary judgment by the father's insurer on the ground that a factual issue of reformation remained to be tried was error because the complaint did not seek reformation and the affidavits in opposition did not set forth facts showing a mutual mistake or promise by the insurer to issue a policy to the son or to modify the present policy, thus the question of reformation was not in issue and the policy as written did not extend coverage to the son on the facts pleaded. Gray v. Rural Casualty Ins. Co. 47 W (2d) 663, 177 NW (2d) 817.

Motion papers must contain facts which entitle either party to judgment. Pleadings are ineffective as proof because facts stated in an affidavit take precedence over inconsistent allegations in a pleading. American M. L. Ins. Co. v. St. P. F. & M. Ins. Co. 48 W (2d) 305, 179 NW (2d) 864.

On motion for summary judgment where movant's affidavit is supported by documentary material, but the opposing party supplies no competing evidentiary facts, the motion should be granted. Fox v. Wand, 50 W (2d) 241, 184 NW (2d) 81.

When the pleadings present no issues of fact summary judgment is proper, but if they do, the moving party must present evidence which, if uncontroverted by the opposing party, would entitle him to judgment if his theory of the law is correct. An affidavit of no merit may not be made by counsel. Younger v. Rosenow Paper & Supply Co. 51 W (2d) 619, 188 NW (2d) 507.

A motion for summary judgment made after a request for a jury trial constitutes a waiver of the jury. Powalka v. State Mut. Life Assurance Co. 53 W (2d) 513, 192 NW (2d) 852.

A summary judgment may not be based on a stipulation allegedly made at a pretrial conference unless the stipulation appears in the record. Village of Fontana-on-Geneva Lake v. Hoag, 57 W (2d) 209, 203 NW (2d) 680.

In using adverse examinations to support or refute a motion for summary judgment, the party using them must specify which portions he deems material and on which he relies. If he does not, his failure shall constitute good cause for the trial or supreme court to disregard the adverse examination. Commercial Disc Corp. v. Milw. Western Bank, 61 W (2d) 671, 214 NW (2d) 33.

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.

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 No judgment without action. Any authorization in a note executed after June 18, 1972, for the creditor, or other person acting on his behalf, to confess judgment for the debtor shall be void and unenforceable.

History: 1971 c 239, 327; 1973 c 261.

Proof of service of the notice required by 270.69 (3), Stats. 1967, need not appear in the record; if the notice was in fact served, the judgment is valid. Home Bank v. Becker, 48 W (2d) 1, 179 NW (2d) 855.

Where notice of entry of a cognovit judgment is not given (Stats. 1969), the judgment is void and plaintiff can obtain a new judgment by confession on the same note. Farmers Grain Exchange v. Crull, 50 W (2d) 161, 183 NW (2d) 41.

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.

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.

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 based upon a claim discharged in bankruptcy shall upon entry of the order of satisfaction 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.

History: 1973 c. 211.

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

A judgment creditor who obtains a lien on the land by docketing his judgment is not a purchaser for value, and the fact that a judgment creditor may be without notice of a prior equitable interest when he dockets is not sufficient to give his lien priority over that of a prior equitable mortgagee, for the failure of notice does not inure to the benefit of a subsequent judgment creditor because he does not part with any value in reliance on the misleading state of his debtor's title. IFC Collateral Corp. v. Commercial Units, Inc. 51 W (2d) 41, 186 NW (2d) 214.

Creditor's rights; after-acquired property. Norman, 56 MLR 137.

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.

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 any judgment rendered void by such order of discharge was entered, for an order to satisfy such judgment. If the court finds that such order of discharge in bankruptcy was duly obtained and that its effect is to render void the judgment sought to be satisfied, it shall declare such judgment to be satisfied and direct satisfaction thereof to be entered on the docket. The entry of such order of satisfaction of judgment shall bar any other action in the courts of this state against such bankrupt person based upon the judgment so satisfied.

History: 1973 c 211

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.

Bankruptcy; effect of the 1970 bankruptcy act amendments on the discharge that never was. Knight, 1971 WLR 1174.

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 between the same parties, without leave of the court, for good cause shown, on notice to the adverse party.

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 of 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".

Cross reference: See 618.61 for provision for reciprocal enforcement of foreign insurance decrees or orders.

The established constitutional principles that (a) without proper service of process no full faith and credit need be accorded a foreign judgment, since the requirements of due process militate against such enforcement; (b) want of jurisdiction is a matter of legitimate inquiry where enforcement of such a judgment is sought; and (c) mere recital of jurisdiction or jurisdictional facts is not sufficient to bar such inquiry, apply to both actions in rem and quasi in rem as well as to personal judgments. Hansen v McAndrews, 49 W (2d) 625, 183 NW (2d) 1.