CHAPTER 274.

WRITS OF ERROR AND APPEALS.

Cross Reference: See 251.251 to 251.66 (Rules 1 to 66) for rules of practice in supreme court.

274.01 Supreme court; writs of error and appeals; when taken. (1) Except as otherwise specially provided, the time within which a writ of error may be issued or an appeal taken to obtain a review by the supreme court of any judgment or order in any civil action or special proceeding in a court of record is limited to 6 months from the date of the entry of such judgment or order, but if the person against whom a judgment is rendered is, at the time of the rendition thereof, either a minor or insane, or imprisoned on a criminal sentence, the time during which such disability shall continue except as to writs of error or appeals taken in actions authorized by sections 75.39 to 75.50, inclusive, not exceeding 10 years, shall not be reckoned a part of said 6 months; said 6 months shall begin to run immediately from the entry of such judgment or order.

(2) When a party to an action or special proceeding dies during the period allowed for appeal to the supreme court from an order or the judgment therein, the time for such appeal by or against his executor or administrator and for the service of appeal papers by or upon his executor or administrator shall continue at least 4 months after his death. If no executor or administrator of his estate qualifies within 60 days after his death, any appellant may have an administrator of said estate appointed as provided by section 311.02.

Cross Reference: Exceptions to the general rule limiting time for appeal will be found in the following sections: 89.15, 89.27 (18), 102.25, 111.07 (7), 146.11 (5), 227.21, 227.26, 247.37, 289.29. There may be other exceptions.

History: 1951 c. 342.

After the time has expired within which the trial court can modify its judgment or appeal can be taken, provisions disposing of property can be reached only by an attack on the judgment itself. Dunn v. Dunn, 258 W 188, 45 NW (2d) 727.

274.02 Dismissal of writs of error and appeals; not a bar. No discontinuance or dismissal of a writ of error or an appeal shall preclude the party from suing out another writ or taking another appeal within the time limited by law.

[*274.03 Stats. 1933 repealed by 1935 c. 541 s. 279*]

274.04 Appeals from orders. The time within which an appeal may be taken directly from an order is further limited to 90 days from the date of the service by either party upon the other of notice of the entry of the order.

274.05 Writs of error. Writs of error may issue of course out of the supreme court at any time to review the order or judgment of any court discharging or remanding a person brought up by writ of habeas corpus and to review final judgments in actions triable

by jury. The proceedings and judgment upon such writs shall be according to the course of the common law and the rules and practice of the supreme court, except as modified by this chapter. But no writ of error shall issue or appeal lie to review an order or judgment on habeas corpus remanding to custody a prisoner committed for trial pursuant to section 354.13 unless allowed by one of the justices of the supreme court upon a finding that the writ or appeal is not sought for dilatory purposes, after reasonable notice of application for the writ or for leave to appeal and opportunity to be heard to the attorney-general and the district attorney of the county involved.

274.06 Undertaking on writ of error. No writ of error shall be effectual for any purpose unless the plaintiff in error shall, at or before the time of filing the return thereof, file in the office of the clerk of the supreme court an undertaking executed on his part to the defendant in error, by at least two sureties, in the sum of at least two hundred and fifty dollars, conditioned that the plaintiff in error will pay all costs and damages which may be awarded against him on the writ of error, or shall deposit that sum of money with such clerk to abide the event of such writ, or file the undertaking mentioned in section 274.07 unless such undertaking or deposit be waived in writing by the defendant in error. The sureties shall justify their responsibility in the same manner as to an undertaking on appeal.

274.07 Undertaking to stay execution. No writ of error shall operate to stay or supersede the execution in any civil action unless the plaintiff in error or some person in his behalf shall give undertaking to the defendant in error, in double the amount of the judgment of the court below, with one or more sufficient sureties, conditioned that the plaintiff in error shall prosecute his action to effect, and pay all costs and damages which may be awarded against him therein, and in case the judgment of the court below is affirmed will pay the amount thereof with costs, unless such undertaking be waived, in writing, by defendant in error. The sufficiency of such undertaking or sureties thereto shall be determined in any case by any justice or the clerk of the supreme court.

274.08 Undertaking to be filed; its operation. The undertaking mentioned in section 274.07, if any is given, shall be filed in the office of the clerk of the supreme court for the use of the defendant, and no execution shall be issued thereafter upon the judgment complained of during the pendency of the writ of error, and if execution shall have been already issued the clerk shall make and sign a certificate of the issuing of the writ of error and the filing of the undertaking, and after notice of such certificate to the officer holding the execution all further proceedings thereon shall be stayed.

274.09 Appeals to supreme court, where allowed. (1) Appeals to the supreme court may be taken from the circuit courts unless expressly denied and also from the county courts except where express provision is made for an appeal to the circuit court and from any court of record having civil jurisdiction when no other court of appeal is provided. Appeals may be taken from interlocutory judgments.

(2) Said right of appeal applies to final orders and judgments rendered upon appeals from or reviews of the proceedings of tribunals, boards and commissions, and to final judgments and orders whether rendered in actions or in special proceedings without regard to whether the action or proceeding involves new or old rights, remedies or proceedings and whether or not the right to appeal is given by the statute which creates the right, remedy or proceeding.

Cross Reference: For appellee's review of order or judgment on notice and motion, see 274.12.

274.10 Writ of error not essential, parties defined. Any judgment within section 274.09 or any order defined in section 274.33 may be reviewed before the supreme court upon an appeal by any party aggrieved. A party first appealing is the appellant. All others are respondents.

274.11 Appeal, how taken and perfected; notice; costs. (1) An appeal is taken by serving a notice of appeal signed by the appellant or his attorney on each party adverse to him upon the appeal who appeared in the action or proceeding, and on the clerk of the court in which the judgment or order appealed from is entered, stating whether the appeal is from the whole or from a part thereof, and if from a part only, specifying the part appealed from. On appeals from a judgment the appellant shall serve the notice of appeal upon all parties bound by the judgment who have appeared in the action.

(2) An appeal may embrace two or more orders and may include or omit the judgment. In such case the notice of appeal shall designate with reasonable certainty the orders appealed from, or the part of them or either of them, or of the judgment appealed from. But one undertaking shall be required on such appeals, which shall be in the terms prescribed by subsection (3), except where the conditions thereof may be fixed by the court

or judge, in which case the undertaking shall conform to the order made or directions given. If the appellant shall succeed, in whole or in part, he shall be allowed costs unless the supreme court determines otherwise. An appeal shall be deemed perfected on the service of the undertaking for costs, or the deposit of money instead, or the waiver thereof. When service of such notice and undertaking cannot be made within this state the court may prescribe a mode of serving the same.

(3) The appeal undertaking must be executed on the part of the appellant by at least two sureties, to the effect that he will pay all costs and damages which may be awarded against him on the appeal, not exceeding $250.

Cross Reference: As to perfecting a defective appeal, see 274.32.

Under a statute requiring appeal from an order to be taken within 60 days from entry thereof, where the order was entered October 26, the appeal bond was dated December 20, surety did not justify until January 20, the bond was not filed until January 24, and appellants made no showing that sureties could not have justified at the proper time, or that failure to file the appeal bond in time resulted from mistake or accident, the appeal was dismissed. Will of Stanley, 228 W 530, 280 NW 685.

In an action in which a defendant was represented on his cross complaint against a codefendant only by his personal attorneys, who did not appeal, a notice of appeal by the attorneys for his insurance carrier, stating that he and it appealed from so much of the judgment as adjudged recovery in favor of the plaintiff and against them, and from so much of the judgment as might be adverse to them, cannot be construed to cover that part of the judgment awarding 70 per cent of his damages to such defendant on his cross complaint against such codefendant, and hence that part of the judgment cannot be disturbed although it is determined on appeal that the negligence of such defendant was not a cause but that the negligence of such codefendant was the sole proximate cause of the accident involved. Walton v. Blauert, 256 W 125, 40 NW (2d) 545.

Where the plaintiff served notice of appeal from a judgment with an undertaking for the payment of appeal costs and damages, and later took a separate appeal, without any costs undertaking or waiver thereof, from an order denying an extension of time for serving a bill of exceptions, the appeal from the order must be dismissed as not perfected. Berkemeyer v. Milwaukee Automobile Ins. Co. 256 W 386, 41 NW (2d) 303.

On the claimant's appeal from a judgment confirming an order of the industrial commission dismissing his application for workmen's compensation against his employer and the employer's compensation carrier, the interest of the compensation carrier, which appeared in the action, was adverse to the claimant's interest, so that the claimant was required by 274.11 (1) to serve notice of appeal on such adverse party and within the 30-day period allowed by 102.25 (1); since claimant failed to do so, his appeal must be dismissed. Service of notice of appeal within the statutory period allowed therefor is an absolute prerequisite of appeal, and no relief from failure in this respect is authorized by 274.32. Falk v. Industrial Comm. 258 W 109, 45 NW (2d) 161.

Where at the time of an appeal the action had been dismissed by stipulation as to certain defendants, they were no longer parties on whom notice of appeal was required to be served. Central Refrigeration, Inc. v. Monroe, 259 W 23, 47 NW (2d) 438.

274.12 All parties bound by appeal; additional parties; review on behalf of respondent. (1) A respondent adverse to the appellant upon the latter's appeal may have a review of any rulings prejudicial to him by serving upon the appellant at any time before the case is set for hearing in the supreme court a notice stating in what respect he asks for a reversal or modification of the judgment or order or portion thereof appealed from.

(2) A respondent may without serving the notice of review mentioned in subsection (1) have a review of any error, the correction of which would merely support the judgment or order appealed from.

(3) If a respondent who is not adverse to the appellant on his appeal fails to appeal within 30 days after service upon him of notice of appeal or within the extended time therefor allowed by the trial court for cause shown and within the time allowed for appeal by the statute, he thereby waives his right of appeal.

(4) When any respondent desires to review an order, judgment or portion thereof not appealed from, he shall within 30 days after service on him of notice of appeal take and perfect his appeal or be deemed to have waived his right so to appeal.

(5) If a party required by subsection (3) or (4) to take an appeal to save his rights does appeal, he shall be subject in all respects to the same requirements that he would be if he were the original appellant and the rights of those served with his notice of appeal, to review rulings of the trial court by which they consider themselves aggrieved, shall be determined as though he were the original appellant.

(6) The supreme court may order additional parties brought in upon their application or on that of any party to the appeal.

On a timely petition, the defendants-respondents were entitled to have a review of the trial court's rulings which denied affirmative relief demanded in the defendants' answer. Ross v. Kunkel, 257 W 197, 43 NW (2d) 26.

On an appeal from an order overruling demurrers to the plaintiff's amended complaint, the plaintiff-respondent can, without notice, have a review of alleged errors the correction of which would support the order appealed from, but the plaintiff's contention that an order requiring its original complaint to be made more definite and certain was an abuse of discretion is not within the scope of such appeal and cannot be considered. State v. Golden Guernsey Dairy Cooperative, 257 W 254, 43 NW (2d) 31.

274.13 Return on appeal. Upon an appeal being perfected the clerk of the court from which it is taken shall, at the expense of the appellant, forthwith transmit to the su-

preme court, if the appeal is from a judgment, the judgment roll; if it is from an order or orders he shall transmit the order or orders appealed from and the original papers used by each party on the application therefor, and if it is from the judgment and one or more orders he shall transmit the judgment roll and such papers. The court may, however, in each case, direct copies to be sent in lieu of the originals. The clerk shall also, in all cases, transmit to the supreme court the notice of appeal and the undertaking given thereon, and annex to the papers so transmitted a certificate under his hand and the seal of the court from which the appeal is taken, certifying that they are the original papers or copies as the case may be, and that they are transmitted pursuant to such appeal. No further certificate or attestation shall be necessary.

274.14 Appeal; deposit in lieu of undertaking; waiver. (1) When the appellant is required to give undertaking he may, in lieu thereof, and with like legal effect, deposit with the clerk of the trial court (who shall give a receipt therefor), a sum of money, certified check, or United States government bonds at their par value, approved by the court and at least equal to the amount for which such undertaking is required and serve notice of making such deposit. Such deposit shall be held to answer the event of the appeal upon the terms prescribed for the undertaking in lieu of which the same is deposited. Any such undertaking and deposit may be waived in writing by the respondent and such waiver shall have the same effect as the giving of the undertaking would have had.

(2) Upon notice and upon motion of any party, the court in which the judgment or order appealed from is entered may in its discretion order such sum of money to be invested or such United States government bonds or certified check to be held for safe-keeping by the clerk, in such manner as it shall determine or the parties may stipulate. The appellant shall be entitled to any interest, earnings, dividends, bond coupons, profit or income upon or from the money or certified check, investments or United States government bonds, and the clerk shall pay or deliver the same to the appellant without an order of the court, as and when received, or in the case of coupons when they become due and payable.

[*274.15 Stats. 1933 renumbered section 274.11 (3) by 1935 c. 541 s. 286*]

274.16 Undertaking in supreme court, when not required. The undertaking required by section 274.06 on the issuance of a writ of error and by section 274.11 on an appeal shall not be required if the trial judge shall certify that the cause or proceeding necessarily involves the decision of some question of law of such doubt and difficulty as to require a decision by the supreme court or if such judge or any other circuit judge shall certify that the party desiring the writ or to appeal is unable to furnish such undertaking; but such certificate shall be made only upon notice to the parties interested. Such certificates shall be filed with the clerk of the court and be returned with the record to the supreme court with the writ of error or the appeal.

274.17 Undertaking to stay execution on money judgment. If the appeal be from a judgment directing the payment of money it shall not stay the execution of the judgment unless an undertaking be executed on the part of the appellant, by at least two sureties, to the effect that if the judgment appealed from or any part thereof be affirmed the appellant will pay the amount directed to be paid by the judgment or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal.

274.18 Same, if delivery of documents, etc., ordered. If the judgment appealed from direct the assignment or delivery of documents or personal property the execution of the judgment shall not be delayed by the appeal unless the things required to be assigned or delivered be brought into court or placed in the custody of such officer or receiver as the court or presiding judge thereof shall appoint, or unless an undertaking be entered into on the part of the appellant, by at least two sureties, in such sum as the court or presiding judge thereof shall direct, to the effect that the appellant will obey the order of the appellate court on the appeal.

274.19 Same, if conveyance directed. If the judgment appealed from direct the execution of a conveyance or other instrument the execution of the judgment shall not be stayed by the appeal unless the instrument shall have been executed and deposited with the clerk with whom the judgment is entered, to abide the judgment of the appellate court.

274.20 Stay undertaking if sale or delivery of property directed. If the judgment appealed from direct the sale or delivery of real property execution shall not be stayed unless an undertaking be executed on the part of the appellant, by at least two sureties, in such sum as the court or the presiding judge shall direct, to the effect that, during the possession of such property by the appellant, he will not commit or suffer to be committed any waste thereon; and that if the judgment be affirmed he will pay the value of the use

and occupation of the property from the time of the appeal until the delivery of possession thereof, pursuant to the judgment.

274.21 Stay undertaking as to judgments of foreclosure. If the judgment appealed from direct the sale of mortgaged premises the execution thereof shall not be stayed by the appeal unless an undertaking be executed on the part of the appellant, by at least two sureties, conditioned for the payment of any deficiency which may arise on such sale, not exceeding such sum as shall be fixed by the court or the presiding judge thereof, to be specified in the undertaking, and all costs and damages which may be awarded to the respondent on such appeal.

274.22 Same, as to judgment abating nuisance. If the judgment appealed from direct the abatement or restrain the continuance of a nuisance, either public or private, the execution of the judgment shall not be stayed by the appeal unless an undertaking be entered into on the part of the appellant, by at least two sureties, in such sum as the court or the presiding judge thereof shall direct, to the effect that the appellant will pay all damages which the opposite party may sustain by the continuance of such nuisance.

274.23 Same, as to other judgments. If the judgment appealed from direct the doing or not doing of any other particular act or thing, and no express provision is made by statute in regard to the undertaking to be given on appeal therefrom, the execution thereof shall not be stayed by an appeal therefrom unless an undertaking be entered into on the part of the appellant, in such sum as the court or the presiding judge thereof shall direct, and by at least two sureties, to the effect that the appellant will pay all damages which the opposite party may have sustained by the doing or not doing the particular act or thing directed to be done or not done by the judgment appealed from, and to such further effect as such court or judge shall in discretion direct.

274.24 Same, on appeals from orders. When the appeal is from an order the execution or performance thereof or obedience thereto shall not be delayed except upon compliance with such conditions as the court or the presiding judge thereof shall direct, and when so required an undertaking shall be executed on the part of the appellant, by at least two sureties, in such sum and to such effect as the court or the presiding judge thereof shall direct; such effect shall be directed in accordance with the nature of the order appealed from, corresponding to the foregoing provisions in respect to appeals from judgments, where applicable, and such provision shall be made in all cases as shall properly protect the respondent; and no appeal from an intermediate order before judgment shall stay proceedings unless the court or the presiding judge thereof shall, in his discretion, so specially order.

274.25 Same, on appeals from attachments, injunctions. When a party shall give immediate notice of appeal from an order vacating or modifying a writ of attachment or from an order denying, dissolving or modifying an injunction he may, within three days thereafter, serve an undertaking, executed on his part by at least two sureties, in such sum as the court or the presiding judge thereof shall direct, to the effect that if the order appealed from or any part thereof be affirmed the appellant will pay all costs and damages which may be awarded against him on the appeal and all which the adverse party may sustain by reason of the continuance of the attachment or the granting or continuance of the injunction, as the case may be. Upon the giving of such undertaking such court or judge shall order the attachment to be continued, and, in his discretion, may order the injunction asked to be allowed or that before granted to be continued until the decision of the appeal unless the respondent shall, at any time pending the appeal, give an undertaking, with sufficient surety in a sum to be fixed by such court or judge, to abide and perform any final judgment that shall be rendered in favor of such appellant in the action; but may at any time subsequently vacate such order if the appeal be not diligently prosecuted.

274.26 When no undertaking required on appeal; security. When the state, or any state officer, or state board, in a purely official capacity, or any town, county, school district or municipal corporation within the state shall take an appeal, service of the notice of appeal shall perfect the appeal and stay the execution or performance of the judgment or order appealed from, and no undertaking need be given. But the appellate court or tribunal may, on motion, require security to be given in such form and manner as it shall prescribe as a condition of the further prosecution of the appeal.

274.27 Appeals, proceeding if sureties insolvent. The supreme court, upon satisfactory proof that any of the sureties to any undertaking given under this chapter has become insolvent or that his circumstances have so changed that there is reason to fear that the undertaking is insufficient security, may require the appellant to file and serve a new

undertaking, with such surety and within such time as shall be prescribed, and that in default thereof the appeal shall be dismissed or the stay of proceedings vacated.

274.28 Undertakings, how executed; stay of proceedings. The undertakings required by this chapter may be in one instrument or several, at the option of the appellant; the original must be filed with the notice of appeal, and a copy, showing the residence of the sureties, must be served with the notice of appeal. When the sum or effect of any undertaking is required under the foregoing provisions to be fixed by the court or judge, at least twenty-four hours' notice of the application therefor shall be given the adverse party. When the court or the judge thereof from which the appeal is taken or desired to be taken shall neglect or refuse to make any order or direction, not wholly discretionary, necessary to enable the appellant to stay proceedings upon an appeal the supreme court or one of the justices thereof shall make such order or direction.

274.29 Sureties on undertakings to justify; may be excepted to. An undertaking upon an appeal shall be of no effect unless it shall be accompanied by the affidavit of the sureties, in which each surety shall state that he is worth a certain sum mentioned in such affidavit, over and above all his debts and liabilities, in property within this state not by law exempt from execution, and which sums so sworn to shall, in the aggregate, be double the amount specified in said undertaking. The respondent may except to the sufficiency of the sureties within twenty days after service of a copy of the undertaking, and unless they or other sureties justify in the manner prescribed in sections 264.17, 264.18 and 264.19, within ten days thereafter, the appeal shall be regarded as if no undertaking had been given. The justification shall be upon a notice of not less than five days.

274.30 Judgment stayed when appeal perfected. Whenever an appeal shall have been perfected and the proper undertaking given or other act done, prescribed by this chapter, to stay the execution or performance of the judgment or order appealed from, all further proceedings thereon shall be thereby stayed accordingly, except that the court below may proceed upon any other matter included in the action, not affected by the judgment or order appealed from, and except that the court or presiding judge thereof may order perishable property, held under the judgment or order appealed from, to be sold, and the proceeds paid into court to abide the event.

274.31 Affirmance; reference to ascertain damages; breach of undertaking; judgment against sureties. (1) When the damages to be paid by the appellant, on affirmance of the judgment or order appealed from, pursuant to any undertaking are not fixed by the supreme court, the trial court may, after the remittitur is filed, assess or order a reference to ascertain such damages, the expense of which shall be included and recoverable with such damages and failure for thirty days to pay the same shall be a breach of the undertaking. A neglect for thirty days after the affirmance on appeal of a money judgment, to pay as directed on such affirmance, shall be a breach of the appeal undertaking.

(2) The dismissal of an appeal or writ of error, unless the court shall otherwise order, shall render the sureties upon any undertaking given under this chapter liable in the same manner and to the same extent as if the judgment or order had been affirmed. Where the supreme court shall give judgment against the appellant or the plaintiff in error upon a money judgment and either party shall have given an undertaking in the court below such judgment shall be entered in such court, on the remittitur being filed, against the appellant or the plaintiff in error and his sureties jointly; but it shall not be collected of the sureties if the officer to whom an execution is directed can find sufficient property of the principal to satisfy the same, and the execution shall so direct.

274.32 Amendments. When a party shall in good faith give notice of appeal and shall omit, through mistake or accident, to do any other act necessary to perfect the appeal or make it effectual or to stay proceedings, the court from which the appeal is taken or the presiding judge thereof, or the supreme court or one of the justices thereof, may permit an amendment or the proper act to be done, on such terms as may be just.

See note to 274.11, citing Falk v. Industrial Comm. 258 W 109, 45 NW (2d) 161.

274.33 Appealable orders. The following orders when made by the court may be appealed to the supreme court:

(1) An order affecting a substantial right, made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken.

(2) A final order affecting a substantial right made in special proceedings, without regard to whether the proceedings involve new or old rights, remedies or proceedings and whether or not the right to appeal is given by the statute which created the right, remedy or proceedings, or made upon a summary application in an action after judgment.

(3) When an order grants, refuses, continues or modifies a provisional remedy or grants, refuses, modifies or dissolves an injunction, or sets aside or dismisses a writ of

attachment, grants a new trial or sustains or overrules a demurrer or denies an application for summary judgment, but no order of the circuit court shall be considered appealable which simply reverses or affirms an order of the civil court of Milwaukee county, unless the order of the civil court grants, refuses, continues, modifies or dissolves a provisional remedy or injunction.

(4) Orders made by the court vacating or refusing to set aside orders made at chambers, where an appeal might have been taken in case the order so made at chambers had been made by the court in the first instance. For the purpose of appealing from an order either party may require the order to be entered by the clerk of record.

An order construing a will after due hearing on a petition for construction is appealable. Estate of Audley, 256 W 433, 41 NW (2d) 378.

An order denying defendants' motion to dismiss an action in the circuit court on the ground that the circuit court should not have assumed jurisdiction, because the county court was competent to render adequate relief, is not appealable. Neitge v. Severson, 256 W 628, 42 NW (2d) 149.

In reviewing a discretionary order, the supreme court does not reverse merely because it might come to a different conclusion on the record before it, but it must clearly appear that there was an abuse of judicial discretion. Popko v. Globe Indemnity Co. 258 W 462, 46 NW (2d) 224.

An order refusing to substitute the assignee of a judgment as plaintiff and to permit him to sue over on the judgment, and an order discharging the judgment of record, are appealable. Stanley C. Hanks Co. v. Scherer, 259 W 148, 47 NW (2d) 905.

274.34 Appeals, intermediate orders may be reviewed. Upon an appeal from a judgment, and upon a writ of error, the supreme court may review any intermediate order which involves the merits and necessarily affects the judgment, appearing upon the record.

274.35 Reversal, affirmance or modification of judgment; how remitted, clerk's fees. (1) Upon an appeal from a judgment or order or upon a writ of error the supreme court may reverse, affirm or modify the judgment or order, and as to any or all of the parties; and may order a new trial; and if the appeal is from a part of a judgment or order may reverse, affirm or modify as to the part appealed from. In all cases the supreme court shall remit its judgment or decision to the court below and thereupon the court below shall proceed in accordance therewith.

(2) The clerk of the supreme court shall remit to such court the papers transmitted to the supreme court on the appeal or writ of error, together with the judgment or decision of the supreme court thereon, within sixty days after the same is made, unless there is a motion for a rehearing. In case a motion for a rehearing is denied the papers shall be transmitted within twenty days after such denial.

(3) The clerk of the supreme court shall, except when the order or judgment is affirmed, also transmit with the papers so returned by him a certified copy of the opinion of the supreme court, and his fees for such copy shall be taxed with his other fees in the case.

274.36 Remittitur if new trial ordered; when trial to be had; duty of plaintiff. In every case in error or on appeal in which the supreme court shall order a new trial or further proceedings in the court below, the record shall be transmitted to such court and proceeding had thereon within one year from the date of such order in the supreme court, or in default thereof the action shall be dismissed, unless, upon good cause shown, the court shall otherwise order. It shall be the duty of the losing party in any action or proceeding when a judgment or order in his favor in the court below is reversed by the supreme court on the appeal of the opposing party to pay the clerk's fees on such reversal, procure the record in said cause to be remitted to the trial court and bring the cause to trial within one year after such reversal, unless the same be continued for cause, and if he fail so to do, his action shall be dismissed.

Cross Reference: For disposition after remittitur of pending motion for new trial, see 270.49 (1).
Opinion of supreme court to be sent to trial court in case of reversal, see 251.16.

274.37 Judgments; application to reverse or set aside; new trial; reversible errors. No judgment shall be reversed or set aside or new trial granted in any action or proceeding, civil or criminal, on the ground of misdirection of the jury, or the improper admission of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure the new trial.

Cross Reference: For discretionary reversal by supreme court in interest of justice, see 251.09.

An improper appeal to prejudice because of the wealth of a party, or because it is a corporation or a corporation of a particular class, is a sufficient ground for a new trial. Statements of counsel for the plaintiff in argument to the jury in a death action against a railroad company, containing a strong suggestion of the defendant's wealth, and of negligent acts amounting to murder, which could only have been calculated to distract the jury's attention from the real issue of injury from failure to exercise ordinary care, constituted such an appeal to the prejudice of the jury as to require a new

trial. DeRousseau v. Chicago, St. P. M. & O. R. Co. 256 W 19, 39 NW (2d) 764.

It is not reversible error if the court or counsel inform the jury of the effect of an answer on the ultimate result of the verdict, unless actual, instead of presumed, prejudice resulted to the complaining party. Whether prejudice is found or not, the practice of informing the jury of the effect of an answer is disapproved. Bailey v. Bach, 257 W 604, 44 NW (2d) 631.

Alleged errors in the receipt and rejection of certain evidence relating to the size and storage capacity of the barn and the amount of hay stored therein at the time of the fire are deemed not prejudicial, it not appearing that a different result would have been reached otherwise, or that substantial rights of the defendant insurers were affected by the rulings of the trial court. Widness v. Central States Fire Ins. Co. 259 W 159, 47 NW (2d) 879.