# CHAPTER 269.

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**269.01 Agreed case; affidavit; judgment.** Parties to a controversy which might be the subject of a civil action, may agree upon a verified case containing the facts upon which the controversy depends and submit the same to any court which would have jurisdiction if an action were brought. The court shall, thereupon, render judgment as in an action. Judgment shall be entered and docketed as other judgments and with like effect, but without costs for any proceeding prior to the trial.

In an action to recover on an insurance policy for medical expenses incurred by the insured as a result of an automobile collision and for damages to the insured's automobile, the defendant insurance company was not estopped from appealing the judgment against it by the fact that it had neither served an answer to the complaint nor responded to the plaintiff's trial brief, since the action had been submitted by stipulation of the parties as an agreed case and it was therefore not necessary that the defendant serve an answer. Mueller v. American Indemnity Co. 19 W (2d) 349, 120 NW (2d) 89.

**269.02 Offer of judgment or damages: effect.** (1) After issue is joined but before the trial the defendant may serve upon the plaintiff a written offer to allow judgment to be taken against him for the sum, or property, or to the effect therein specified, with costs. If the plaintiff accepts the offer and serves notice thereof in writing, before trial and within 10 days, he may file the offer, with proof of service of the notice of acceptance, and the clerk must thereupon enter judgment accordingly, provided the summons and complaint have been filed. If notice of acceptance is not given, the offer cannot be given as evidence nor mentioned on the trial. If the offer of judgment is not accepted and the plaintiff fails to recover a more favorable judgment, he shall not recover costs but defendant shall recover costs to be computed on the demand of the complaint.

(2) After issue is joined but before trial the defendant may serve upon the plaintiff a written offer that if he fails in his defense the damages be assessed at a specified sum. If the plaintiff accepts the offer and serves notice thereof in writing before trial and within 10 days, and prevails upon the trial, either party may file proof of service of the offer and acceptance and the damages will be assessed accordingly. If notice of accept-

ance is not given the offer cannot be given as evidence nor mentioned on the trial. If the offer is not accepted and if damages assessed in favor of the plaintiff do not exceed the damages offered, neither party shall recover costs.

(3) Subs. (1) and (2) shall apply to offers which may be made by any party to any other party who demands a judgment or set-off against the offering party.

**History:** 1966 Sup. Ct. Order, effective July 1, 1966.

**Cross Reference:** For tender of payment, see 895.14 to 895.171.

269.05 **Consolidation of actions.** When two or more actions are pending in the same court, which might have been joined, the court or a judge, on motion, shall, if no sufficient cause be shown to the contrary, consolidate them into one by order.

269.06 **Court may order delivery of property.** When it is admitted by the pleading or examination of a party that he has in his possession or under his control any money or other thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party or which belongs or is due to another party the court may order the same to be deposited in court or delivered to such party with or without security, subject to the further direction of the court.

269.07 **Refusal to deliver property; title passed by judgment.** When a court shall have ordered the deposit, delivery or conveyance of property and the order is disobeyed, the court may order the sheriff to take the property and deliver, deposit or convey it in conformity with the direction of the court and the court may pass title by its judgment.

269.08 **Summons to joint debtors not originally summoned.** When a judgment shall be recovered against one or more of several persons jointly indebted upon a contract, by proceeding as provided in section 270.55, those who were not originally summoned to answer the complaint may be summoned to show cause why they should not be bound by the judgment in the same manner as if they had been originally summoned. The summons shall be subscribed by the judgment creditor, his representatives or attorneys, shall describe the judgment and require the person summoned to show cause, within twenty days after the service of the summons, and shall be served in like manner as the original summons. The summons shall be accompanied by an affidavit of the person subscribing it that the judgment has not been satisfied to his knowledge or information and belief, and specifying the amount due thereon.

269.09 **Parties may defend.** The party summoned may answer within the time specified and may make any defense which he might have originally made to the action, and may deny the judgment or make any defense which may have arisen subsequently.

269.10 **Pleadings and trial.** The party issuing the summons may demur or reply to the answer and the party summoned may demur to the reply, and the issues may be tried and judgment may be given in the same manner as in an action and enforced by execution or the application of the property charged to the payment of the judgment be compelled by attachment, if necessary.

269.12 **Summons where no jurisdiction.** When judgment shall have been entered in an action against any defendant upon whom service was attempted, but whereby jurisdiction was not acquired, such defendant may be summoned to show cause why he should not be bound by the judgment in the same manner as if he had been originally summoned. The summons shall be like that provided in s. 269.08, with a like accompanying affidavit when the judgment is for a sum of money. It may be served in any manner as an original summons might be. Proceedings thereon shall be had as prescribed in ss. 269.09 and 269.10, and judgment upon default or otherwise be entered, as the nature of the case demands. This section shall apply to minors and incompetents.

269.13 **When action not to abate.** An action does not abate by the occurrence of any event if the cause of action survives or continues.

269.14 **Continuance if interest transferred, etc.** In case of a transfer of interest or devolution of liability the action may be continued by or against the original party, or the court may direct the person to whom the interest is transferred or upon whom the liability is devolved to be substituted in the action or joined with the original party, as the case requires.

269.15 **Action by officer, receiver, etc., not to abate.** When an action or special proceeding is lawfully brought by or in the name of a public officer or by a receiver or by any trustee appointed by virtue of any statute his death or removal shall not abate the same, but it may be continued by his successor, who may be substituted therefor by order of the court or a judge.

**269.16 Death or disability of party.** In case of the death or disability of a party, if the cause of action survives, the court may order the action to be continued by or against his representatives or successor in interest.

**269.17 Joint actions not abated by death; liability of estate.** Where there are several plaintiffs or defendants in any action, if any of them shall die and the cause of action survives to or against the others the action may proceed, without interruption, in favor of or against the survivors. If all the plaintiffs or defendants shall die before judgment the action may be prosecuted or defended by the executor or administrator of the last surviving plaintiff or defendant, as the case may be. But the estate of a party jointly liable upon contract with others shall not be discharged by his death, and the court may, by order, bring in the proper representative of the deceased defendant, when it is necessary so to do, for the proper disposition of the matter; and where the liability is several as well as joint may order a severance of the action so that it may proceed separately against the representative of the decedent and against the surviving defendants.

**269.18 Death of parties; effect on action.** In case of the death of any of several plaintiffs or defendants, if part only of the cause of action or part or some of two or more distinct causes of action survives to or against the others the action may proceed without bringing in the successor to the rights or liabilities of the deceased party, and the judgment shall not affect him or his interest in the subject of the action. But when it appears proper the court may order the successor brought in.

**269.19 Action to recover real property.** (1) DEATH OF PLAINTIFF. In an action for the recovery of real property if any plaintiff shall die before judgment his heir or devisee or his executor or administrator, for the benefit of the heir, devisee or creditors, may be admitted to prosecute the action in his stead.

(2) DEATH OF A DEFENDANT. When there are several defendants and any of them shall die before judgment the action may be prosecuted against the surviving defendants for so much of the premises as they shall hold or claim.

**269.20 Same.** If the interest of the deceased party passes to the surviving plaintiffs, or if there be no motion for the admission of another person as heir, executor or administrator within the time allowed by the court for that purpose, the surviving plaintiffs may prosecute the action for so much of the premises in question as may be claimed by them.

**269.22 Death after verdict or findings; practice.** After an accepted offer to allow judgment to be taken, or after a verdict, report of a referee or finding by the court in any action the action does not abate by the death of any party, but shall be further proceeded with in same manner as if the cause of action survived by law; or the court may enter judgment in the names of the original parties if such offer, verdict, report or finding be not set aside. But a verdict, report or finding rendered against a party after his death is void.

**269.23 Proceedings to revive action.** Whenever any person shall be entitled to continue any action or proceeding interrupted by death, removal from a trust or other disability he may file with the clerk a petition setting out the necessary facts and thereupon give notice to the other party of the time and place of such filing, and that unless he shows cause by affidavit within twenty days after service of such notice on him, exclusive of the day of service, why such action or proceeding should not be revived the same will stand revived according to such petition. Such notice may be served in the same manner as a summons. Upon filing such notice with proof of service and that no affidavit has been received the court or a judge shall order the action or proceeding revived. An affidavit showing cause against such revivor may be served on the party subscribing such notice as a pleading is served; and the court shall make such order as the circumstances may require.

**269.24 Action dismissed if not revived.** At any time after the death of the plaintiff the court may, upon notice to such persons as it shall direct and on the application of the adverse party or of a person whose interest is affected, order the action dismissed unless continued by the proper parties within the time therein specified; and unless so continued within such time the same shall stand dismissed.

**269.25 Dismissal for delay.** The court may without notice dismiss any action or proceeding which is not brought to trial within five years after its commencement.

This section applies to all actions pending for more than 5 years after commencement, whether or not issue has been joined. Unless the trial court abused his discretion, the supreme court will not reverse. Neuhaus v. Clark County, 14 W (2d) 222, 111 NW (2d) 180.

**269.27 Motion defined; when and where made; stay of proceedings.** An application for an order is a motion. Motions in actions or proceedings in the circuit court must be made within the circuit where the action is triable; in other courts, within their territorial jurisdiction. Orders out of court, without notice, may be made by the presiding judge of the court in any part of the state; and they may also be made by a county judge or court commissioner of the county where the action is triable. No order to stay proceedings after a verdict, report or finding in any circuit court shall be made by a county judge or court commissioner, or in any county court by a court commissioner. No stay of proceedings for a longer time than twenty days shall be granted by a judge out of court except upon previous notice to the adverse party.

**269.28 Orders, how vacated and modified.** An order made out of court without notice may be vacated or modified without notice by the judge who made it. An order made upon notice shall not be modified or vacated except by the court upon notice, but the presiding judge may suspend the order, in whole or in part, during the pendency of a motion to the court to modify or vacate the order.

Where the court had dismissed an action for divorce on its own motion without notice, it could reinstate the action without notice. Vishnevsky v. Vishnevsky, 11 W (2d) 259, 105 NW (2d) 314.

**269.29 Restriction as to making orders; review by court.** Where an order or proceeding is authorized to be made or taken by the court it must be done by the court in session; where an order or proceeding is authorized to be made or taken by the presiding judge or the circuit or county judge, using such words of designation, no court commissioner can act. Except as so provided or otherwise expressly directed a county judge or court commissioner may exercise within his county the powers and shall be subject to the restrictions thereon of a circuit judge at chambers but such orders of a court commissioner may be reviewed by the court. The court may make any order which a judge or court commissioner has power to make.

**History:** 1961 c. 495.

**269.30 Motions, how heard if judge disqualified.** Where a motion is made to be heard before the court or the presiding judge thereof and such judge is disqualified to hear the motion it may be transferred by his order to some court having concurrent jurisdiction of the subject of the action or it may be so transferred by the written stipulation of the parties. The court so designated shall make the proper order for the determination thereof and carrying the same into execution, which shall be transmitted to and entered by the clerk of the court where the action is pending and have the same effect as if made by that court.

**269.31 Time of notice of motion.** When a notice of motion is necessary, unless the time be fixed by statute or the rules of court, it must be served eight days before the time appointed for the hearing; but the court or judge may, by an order to show cause, prescribe a shorter time.

Where on motion after verdict the full time limit of motions was not given to plaintiffs' counsel because the date of hearing was set by the trial judge, who was from another circuit, plaintiffs could not claim prejudice where, although refusing to argue, their counsel filed motions after verdict, thereby waiving the defect of short notice. Keplin v. Hardware Mut. Casualty Co. 24 W (2d) 319, 129 NW (2d) 321, 130 NW (2d) 3.

**269.32 Motions and orders; service of papers.** (1) All such motions shall be brought to hearing on written notice or order to show cause. Such notice of motion or order to show cause shall state the nature of the order or relief applied for, and if based on irregularity, it shall specify the irregularities complained of.

(2) Copies of all records and papers upon which a motion or order to show cause is founded, except such as have been previously filed or served in the same action or proceeding, shall be served with the notice thereof or the order to show cause, and shall be plainly referred to therein. Papers already filed or served shall be referred to as papers theretofore filed or served in the action. The moving party may be allowed to present upon the hearing, records, affidavits or other papers, not served with the motion papers, but only upon condition that opposing counsel be given reasonable time in which to meet such additional proofs, should request therefor be made.

(3) When a notice of a motion for an order has been served either party may take depositions, on notice, to be used on the hearing of such motion. Testimony may be taken on the hearing and such testimony shall be transcribed, certified and filed at the expense of the party offering the same unless otherwise ordered.

(4) All orders shall refer to the records and papers used, and the testimony taken upon the application for the order.

Under (3), applying to motions generally, and providing that on a motion for an order testimony "may" be "taken" on the hearing, the movant has no absolute right to present testimony but, instead, the court is thereunder authorized to take testimony on a motion at its discretion. Bloomquist v. Better Business Bureau, 17 W (2d) 101, 115 NW (2d) 545.

**269.33 Papers to be legible.** Every paper in any action or proceeding and copies thereof shall be legible and on substantial paper and shall have indorsed thereon the title of the action or proceeding and character of the paper and serial record number of the action if filed after the clerk had given the action a number, and if not so prepared and indorsed, the clerk may refuse to file the paper and the party to be served need not receive it. The clerk shall indorse on all papers filed the date of filing.

**269.34 Service of papers; personal and by mail.** (1) The service of papers may be personal by delivery of a copy of the paper to be served to the party or attorney on whom the service is to be made.

(2) Service upon an attorney may be made during his absence from his office by leaving such copy with his clerk therein or with a person having charge thereof; or, when there is no person in the office, by leaving it in a conspicuous place in the office; or, if it be not open then by leaving it at the attorney's residence with some person of suitable age and discretion. If admission to the office cannot be obtained and there is no person in the attorney's residence upon whom service can be made, it may be made by mailing him a copy to the address designated by him upon the preceding papers in the action; or where he has not made such a designation, at his place of residence or the place where he keeps an office, according to the best information which can conveniently be obtained concerning the same.

(3) Service upon a party may be made by leaving the copy at his residence between the hours of six in the morning and nine in the evening, with some person of suitable age and discretion.

(4) Service may be made by mailing such copy where the person making the service and the person on whom it is made reside in different places between which there is a communication by mail. Service by mail is complete upon mailing. The copy of the paper to be served must be properly enclosed in a postpaid envelope and must be addressed to the person on whom it is to be served at his proper post-office address. The envelope may bear the sender's name and address and a request to the postal officers for the return thereof in case of nondelivery to the person addressed.

**269.36 Mail service increases time allowed.** If a certain time before an act to be done is required for the service of any paper and if, after service of any paper, a specified time is allowed a party to do an act in answer to or in consequence of such service, service by mail shall increase by 5 days the time required or allowed to do such act in case of personal service.

**Cross References:** See 32.05 (4) for exception to provision for added time in case of mailing.

See 251.42 for provision for service by mail in cases before supreme court.

**269.37 Service on attorney; when service not required.** When a party to an action or proceeding shall have appeared by an attorney the service of papers shall be made upon the attorney. When a defendant shall not have appeared in person or by attorney service of notice or papers in the ordinary proceedings in an action need not be made upon him unless he be imprisoned for want of bail.

**Cross Reference:** See 326.12 (4) for provision requiring service of notice of taking deposition on the parties or their attorneys.

**269.38 Service of papers dispensed with.** When a party's residence and post office are not known and neither can with due diligence be learned and he has designated no place for service of papers upon him, service of notice and other papers on him is dispensed with unless there is a special rule requiring publication of notice, in which case the special rule shall be observed.

**269.39 Applicability of service provisions.** The provisions of ss. 269.34, 269.37 and 269.38 shall not apply to the service of a summons or other process, or of any paper to bring a party into contempt.

**269.41 Sheriff's certificate as evidence; proof of service.** When service of a notice or paper in an action or proceeding is authorized to be made by the sheriff his certificate of service shall be evidence thereof. Proof of service of notices and papers where no special mode of proof is provided may be made as provided by s. 891.18.

**269.42 Papers, where filed.** All affidavits and papers used on any motion shall be filed with the clerk of the court or with the judge by whom the motion is heard, and the

judge shall, after decision thereof, file all such papers with the clerk. All undertakings given in actions or proceedings must be filed with the clerk unless otherwise directed by these statutes or the court expressly provides for a different disposition thereof.

**269.43 Mistakes and omissions.** The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.

This section does not apply to allow assignment of a cause of action to cure a defect of parties after a plea in abatement is served. Truesdill v. Roach, 11 W (2d) 492, 105 NW (2d) 871.

**269.44 Amendments of processes, pleadings and proceedings.** The court may, at any stage of any action or special proceeding before or after judgment, in furtherance of justice and upon such terms as may be just, amend any process, pleading or proceeding, notwithstanding it may change the action from one at law to one in equity, or from one on contract to one in tort, or vice versa; provided, the amended pleading states a cause of action arising out of the contract, transaction or occurrence or is connected with the subject of the action upon which the original pleading is based.

Where, after all the testimony was taken, the defendants moved to amend their answer to allege that the plaintiff was negligent as to lookout, and the trial court allowed it, considering it as one conforming the pleading to the proof, and the only objection which the plaintiff made at the time was that the amendment was not timely but made no claim of surprise, the trial court did not err in allowing the amendment; furthermore, since the alleged error was not raised by the plaintiffs' motions after verdict, the question is not properly raised on appeal. Musha v. United States Fidelity & Guaranty Co. 10 W (2d) 176, 102 NW (2d) 243.

See note to 270.27, citing Giemza v. Allied American Mut. Fire Ins. Co. 10 W (2d) 555, 103 NW (2d) 538.

This section allows amendments of pleadings in civil actions in which a forfeiture is sought for the violation of a municipal or county ordinance. Sauk County v. Schmitz, 12 W (2d) 382, 107 NW (2d) 456.

In an action under the safe-place statute it was error for the trial court to deny the plaintiff's motion to amend the complaint on the ground that the statute of limitations had run on the common-law action for negligence which the plaintiff proposed to allege, since there was but one cause of action, and that was for negligence, which was alleged in the original complaint in terms of a violation of the safe-place statute but necessarily included common-law negligence. Lealiou v. Quatsoe, 15 W (2d) 128, 112 NW (2d) 193.

In a forfeiture action for violation of a municipal ordinance the trial court did not abuse its discretion in amending the complaint at the close of the trial to charge violation of another ordinance based on evidence which incorporated a full inquiry into defendants' conduct, and proof of facts and circumstances relevant to both violations where no new element was introduced by the amendment, no valid claim of surprise was established, and defendants failed to show how they might have defended against the second charge in any other manner than they did against the first. Milwaukee v. Wuky, 26 W (2d) 555, 133 NW (2d) 356.

**269.45 Enlargement of time.** (1) The court or a judge may with or without notice, for cause shown by affidavit and upon just terms and before the time has expired, extend the time within which any act or proceeding in an action or special proceeding must be taken, except the time for appeal.

(2) After the expiration of the specified period or as extended by any previous order, the court may in its discretion, for like cause, upon notice, extend the time where the failure to act was the result of excusable neglect; except the time for appeal.

**Cross Reference:** See 324.05 permitting an extension of time for appeal in probate matters for cause shown.

Where appellant's attorney obtained a transcript but failed to serve it for 170 days after notice of entry of judgment, and claimed press of other business as an excuse, denial of extension of time was proper. Failure to serve notice of entry of judgment on a guardian ad litem does not give the court authority to extend the time. Jolitz v. Graff, 12 W (2d) 52, 106 NW (2d) 340.

Under facts disclosing in part that a transcript of the testimony was delivered to the defendants' counsel on May 31, that the defendants' counsel relied on the court reporter's erroneous statement that the extended time for settling the bill of exceptions would not expire until June 9, that the defendants' counsel was in the trial of an important case at the time of such statement, and that his own files and records were not then available to him, the trial court did not abuse its discretion in granting a second extension of time for serving the bill of exceptions. Hupf v. State Farm Mut. Ins. Co. 12 W (2d) 176, 107 NW (2d) 185.

Where an attorney received a transcript 3 weeks before the final date for service of the bill of exceptions but did not serve it or apply for an extension of time until 14 weeks after the deadline, the trial court properly denied an extension of time for service. The words "excusable neglect" in (2) refer to the failure to apply for an extension of time as well as to the failure to serve. Millis v. Raye, 16 W (2d) 79, 113 NW (2d) 820.

The provision in 269.45, that a court may extend the time within which any act or proceeding in an action or special proceeding must be taken, even "after the time has expired," does not apply so as to authorize a court to extend the time for hearing a motion under 270.49 (1) for a new trial on the judge's minutes after that time has expired, but in such case the special provision in 270.49 (1), that the order must be made before the expiration of the time, controls. Harweger v. Wilcox, 16 W (2d) 526, 114 NW (2d) 818.

See note to 269.46, citing Cruis Along Boats, Inc. v. Stand. S. P. Mfg. Co. 22 W (2d) 403, 126 NW (2d) 85.

A showing of excusable neglect is made under (2) where it is shown that a decision of the supreme court rendered after a denial of a prior motion for summary judgment would require the granting of the motion. Shelby Mut. Ins. Co. v. Home Mut. Ins. Co. 25 W (2d) 25, 130 NW (2d) 296.

Where defendant, after expiration of its time to move for summary judgment, applied for an extension, but the adverse party did not oppose the same, he thereby waived objection and could not assert error because the movant had not shown that its failure to act was the result of excusable neglect. Rice v. Gruetzmacher, 27 W (2d) 46, 133 NW (2d) 401.

Granting extension of time to answer after the expiration of the 20 days was not an abuse of discretion where defendant had served a notice of retainer and attempted to examine plaintiff adversely within the 20 days and moved for extension only 10 days after the answer should have been served. Bornemann v. New Berlin, 27 W (2d) 102, 133 NW (2d) 328.

**269.46 Relief from judgments, orders and stipulations; review of judgments and orders.** (1) The court may, upon notice and just terms, at any time within one year after notice thereof, relieve a party from a judgment, order, stipulation or other proceeding against him obtained, through his mistake, inadvertence, surprise or excusable neglect and may supply an omission in any proceeding. In addition to the required affidavits, all motions to vacate a judgment entered upon default or cognovit and to obtain a trial upon the merits shall be accompanied by a proposed verified answer disclosing a defense.

(2) No agreement, stipulation or consent, between the parties or their attorneys, in respect to the proceedings in an action or special proceeding, shall be binding unless made in court and entered in the minutes or made in writing and subscribed by the party to be bound thereby or by his attorney.

(3) All judgments and court orders may be reviewed by the court at any time within 60 days from service of notice of entry thereof, but not later than 60 days after the end of the term of entry thereof.

**History:** 1963 c. 37.

**Cross Reference:** For limitation on power to reverse or set aside a judgment or to grant a new trial, see 274.37.

(1) is a remedial statute which should be liberally construed in favor of such party. The excusable mistake from which the trial court may grant relief under the statute should not be restricted to a mistake of fact as distinguished from a mistake of law. A mistake of law on the part of an attorney may give rise to a case of excusable neglect on the part of his client; a court of equity is not bound to impute to a client everything that his attorney does or omits to do; and the negligence of an attorney is not necessarily imputable to his client so as to bar the client from claiming excusable neglect and being granted relief. Paschong v. Hollenbeck, 13 W (2d) 415, 108 NW (2d) 668.

The provision in (1), that the trial court must act on the motion within the year of the notice of the judgment or order from which relief is sought, does not foreclose the supreme court from deciding an appeal and ordering further proceedings after the year has elapsed, and does not preclude the trial court in such a case from then acting pursuant to the mandate of the supreme court. Paschong v. Hollenbeck, 13 W (2d) 415, 108 NW (2d) 668.

When a judge is attended by the court officials and the parties and their counsel and witnesses and proceeds with the dispatch of judicial business, the court is in session, even if the sitting happens to be in a portion of the building that does not have the word "courtroom" on its doors. Pasternak v. Pasternak, 14 W (2d) 38, 109 NW (2d) 511.

Mere compliance with the formal requirements of an answer and the lack of injustice to the opposing party are not sufficient grounds for granting relief under (1); one must show that the judgment was taken against him through his mistake, inadvertence, surprise, or excusable neglect. It was not an abuse of discretion for the trial court to refuse to vacate a default judgment entered against a defendant who, among other things, had been advised by his original counsel of the necessity of filing an answer. Even a stipulation of the parties to reopen the judgment would not be binding on the court. State v. Omernick, 14 W (2d) 285, 111 NW (2d) 135.

See note to 260.22, citing Matter of Andresen, 17 W (2d) 380, 117 NW (2d) 360.

270.49 (1), providing that a motion to set aside a verdict and grant a new trial on the minutes of the judge must be made, heard, and decided within 60 days after the verdict is rendered unless an order extending the time for cause has been made within such period, limits the relief which may be granted under 269.46 (3), providing that judgments and court orders may be reviewed by the court at any time within 60 days from service of notice of entry thereof but not later than 60 days after the term of entry thereof, and prevents the granting of a new trial when more than 60 days have elapsed after verdict without an order having been entered extending the time for deciding motions after verdict. Alberts v. Rzepiejewski, 18 W (2d) 252, 118 NW (2d) 172, 119 NW (2d) 441.

If any agreement of settlement on stated terms was reached by the parties in a pending action, it was void for not having been made in court and entered in the minutes or made in writing and subscribed by the party to be bound thereby or by his attorney, as required by (2), in order to make it binding, and where the plaintiff did not even bring the agreement to the attention of the trial court, did not further prosecute its action, and the action was dismissed as a default, the plaintiff could not enforce such agreement in a new action brought by it for that purpose. [Logemann v. Logemann, 245 W 515, distinguished.] American Cas. Co. v. Western Cas. & Surety Co. 19 W (2d) 176, 120 NW (2d) 86.

A judgment cannot be vacated under (1) after the lapse of 60 days subsequent to the expiration of the term of court at which rendered because of error committed in rendering the judgment, since the power to grant relief more than 60 days after the end of the term is limited by (1) solely to cases of mistake, inadvertence, surprise, or excusable neglect, and even though there had been errors in the judgment which might shock the conscience of the trial court, it is powerless to grant relief from the judgment after the 60-day period has elapsed following the end of the term, absent a proper showing of mistake, inadvertence, surprise, or excusable neglect. Glassner v. Medical Realty, Inc. 22 W (2d) 344, 126 NW (2d) 68.

The press of other trials and business is not such "excusable neglect" as to make it an abuse of discretion not to grant relief under 269.46 (1) and 269.45 (2). Cruis Along Boats, Inc. v. Stand. S. P. Mfg. Co. 22 W (2d) 403, 126 NW (2d) 85.

While an affidavit of meritorious defense is not required if the motion to vacate a default judgment is supported by a verified answer, a proposed answer, verified by attorney and denying liability and damages on information and belief, will not suffice. Cruis Along Boats, Inc. v. Stand. S. P. Mfg. Co. 22 W (2d) 403, 126 NW (2d) 85.

Probate courts are among those subject to (1). They have the same power over their judgments and orders as do courts of equity and law. Estate of Hatzl, 24 W (2d) 64, 127 NW (2d) 782, 129 NW (2d) 249.

Where plaintiff made application to the trial court to modify the judgment by including an additional item of costs which it neglected to include at the time costs were settled and the trial court declined to modify the judgment, the matter being one within that court's discretion, its conclusion will not be disturbed. Zeisler Corp. v. Page, 24 W (2d) 190, 128 NW (2d) 414.

(1), which authorizes the court to relieve a party from a mistake at any time within one year after notice, does not refer to notice of entry of judgment but on the contrary, refers only to notice of judgment. The one-year period starts to run after notice of the judgment or order from which relief is sought, and knowledge is the equivalent of notice. Thorp Small Business Investment Corp. v. Gass, 24 W (2d) 279, 128 NW (2d) 395.

Vacation of order or judgment obtained through mistake of law. 1962 WLR 540.

**269.465 Affidavit of advice of counsel.** Whenever it is necessary in any petition or affidavit to swear to the advice of counsel, a party shall, in addition to what has usually been required, swear that he has fully and fairly stated the case to his counsel and shall give the name and address of such counsel.

**History:** 1963 c. 37.

**269.47 Defense where service by publication.** When service of the summons shall have been made by publication, if the summons shall not have been personally served on a defendant nor received by such defendant through the post office, he or his representative shall, on application and good cause shown, at any time before final judgment, be allowed to defend the action; and, except in an action for divorce or annulment of the marriage contract, the defendant or his representative shall in like manner, upon good cause shown and such terms as shall be just, be allowed to defend after final judgment at any time within one year after actual notice thereof and within three years after its rendition. If the defense be successful and the judgment or any part thereof shall have been collected or otherwise enforced such restitution may thereupon be compelled as the court shall direct; but the title to property, sold under such judgment to a purchaser in good faith, shall not thereby be affected.

**269.49 Copy of paper may be used, when.** If any original paper or pleading be lost or withheld by any person the court may authorize a copy thereof to be filed and used instead of the original.

**269.50 Affidavits need not be entitled.** It shall not be necessary to entitle an affidavit in the action; but an affidavit made without a title or with a defective title shall be as valid and effectual for every purpose as if it were duly entitled, if it intelligibly refer to the action or proceeding in which it is made.

**269.51 Irregularities and lack of jurisdiction waived on appeal; jurisdiction exercised; transfer to proper court.** (1) When an appeal from any court, tribunal, officer or board is attempted to any court and return is duly made to such court, the respondent shall be deemed to have waived all objections to the regularity or sufficiency of the appeal or to the jurisdiction of the appellate court, unless he shall move to dismiss such appeal before taking or participating in any other proceedings in said appellate court. If it shall appear upon the hearing of such motion that such appeal was attempted in good faith the court may allow any defect or omission in the appeal papers to be supplied, either with or without terms, and with the same effect as if the appeal had been originally properly taken.

(2) If the tribunal from which an appeal is taken had no jurisdiction of the subject matter and the court to which the appeal is taken has such jurisdiction, said court shall, if it appear that the action or proceeding was commenced in the good faith and belief that the first named tribunal possessed jurisdiction, allow it to proceed as if originally commenced in the proper court and shall allow the pleadings and proceedings to be amended accordingly; and in all cases in every court where objection to its jurisdiction is sustained the cause shall be certified to some court having jurisdiction, provided it appear that the error arose from mistake.

Although (1) permits the curing of errors where there is a good faith attempt to appeal, this does not extend to the situation where the appeal was not timely, since the court gains no jurisdiction where the objecting party did no more than move to dismiss. Monahan v. Department of Taxation, 22 W (2d) 164, 125 NW (2d) 331.

**269.52 Mistaken remedy; no dismissal; amendment; transfer to court having jurisdiction.** In all cases where upon objection taken or upon demurrer sustained or after trial it shall appear to the court that any party claiming affirmative relief or damages has mistaken his remedy, his action, proceeding, cross complaint, counterclaim, writ, or relation shall not be finally dismissed or quashed, but costs shall be awarded against him and he shall be allowed a reasonable time within which to amend and the amended

action or proceeding shall continue in that court except in case that court has no jurisdiction to grant the relief sought, in which case the action in whole or in such divisible part in which jurisdiction is lacking shall be certified to some other court which has jurisdiction.

269.53 **Release of joint debtor; effect.** (1) If any creditor to whom persons are jointly indebted, either upon contract or the judgment of a court of record, shall release any of them such release shall operate as a satisfaction or discharge of such joint debt to the amount of the proportion which the person so released ought in equity, as between himself and the other joint debtors, to pay; and the balance of such joint debt shall remain in force as to joint debtors not released and may be enforced against them. If the amount paid by a debtor to procure his release shall exceed the proportion of such joint debt which he, as between himself and co-debtors ought to pay then such joint debt shall thereby be satisfied to the extent of the sum so paid. If the person released is only a surety his release shall operate as payment of such joint debt to the extent of the money paid by him and no further.

(2) This section does not permit the discharge of a principal debtor without also discharging his sureties.

**Cross Reference:** See also 113.05 concerning release of co-obligor.

269.55 **Interpreters for hearing—handicapped persons.** Upon a trial or examination in any matter wherein any deaf mute or hearing-handicapped person is accused of a crime or misdemeanor, or upon consideration by any state, county or municipal agency of the right or propriety of any such person to have privileges accorded normal hearing people, or when such person is to come under judgment as to his fitness for a place in society, and there is a definite communications barrier as evidenced by such person being incapable of adequately understanding any charge, issue or pertinent utterances or expressing himself because of a lack of ability to use the English language by reason of being deaf or hearing-handicapped, or by such person suffering from a speech defect or other physical defect which handicaps such person in exercising or maintaining his rights in such matter, the court, judge, magistrate, agency, person or body conducting, considering or having jurisdiction of such trial, examination or matter shall call in and appoint an interpreter competent to converse in the special language, oral, manual or sign, familiar to or used by such deaf mute or hearing-handicapped person. The necessary expense of furnishing such interpreter shall be paid by the unit of government for which such trial, examination, inquiry or consideration is held or made if satisfactory proof be offered that said deaf mute or person is unable to pay the same.

269.56 **Declaratory judgments act.** (1) SCOPE. Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

(2) POWER TO CONSTRUE, ETC. Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder. No party shall be denied the right to have declared the validity of any statute or municipal ordinance by virtue of the fact that he holds a license or permit under such statutes or ordinances.

(3) BEFORE BREACH. A contract may be construed either before or after there has been a breach thereof.

(4) EXECUTOR, ETC. Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic or insolvent, may have a declaration of rights or legal relations in respect thereto:

(a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or

(b) To direct the executors, administrators or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

(c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

(5) ENUMERATION NOT EXCLUSIVE. The enumeration in subsections (2), (3) and (4) does not limit or restrict the exercise of the general powers conferred in subsection (1) in

any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

(6) DISCRETIONARY. The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

(7) REVIEW. All orders, judgments and decrees under this section may be reviewed as other orders, judgments and decrees.

(8) SUPPLEMENTAL RELIEF. Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

(9) JURY TRIAL. When a proceeding under this section involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

(10) COSTS. In any proceeding under this section the court may make such award of costs as may seem equitable and just.

(11) PARTIES. When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the right of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney-general of the state shall also be served with a copy of the proceeding and be entitled to be heard.

(12) CONSTRUCTION. This section is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.

(13) WORDS CONSTRUED. The word "person" wherever used in this section, shall be construed to mean any person, partnership, joint stock company, unincorporated association or society, or municipal or other corporation of any character whatsoever.

(14) PROVISIONS SEVERABLE. The several sections and provisions of this section except subsections (1) and (2) are hereby declared independent and severable, and the invalidity, if any, of any part or feature thereof shall not affect or render the remainder of the act invalid or inoperative.

(15) 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, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.

(16) SHORT TITLE. This section may be cited as the "Uniform Declaratory Judgments Act."

In an action by the insurer for a declaratory judgment that its liability policy afforded no protection to the insured under the circumstances of the injuries suffered by an employe of the insured, the injured employe was both a proper and a necessary party. Hardware Mut. Casualty Co. v. Mayer, 11 W (2d) 58, 104 NW (2d) 148.

(11) does not exclude the procedure of representative defense of the interests of a class from an action for declaratory relief. The purpose of (11), in requiring that all interested persons be made parties or that their interests be suitably represented in an action for declaratory relief, is to make it certain that the declaration will terminate the controversy, and that the trial court will not find that it has resolved a question for some of the interested persons, only to have it relitigated by others who were not bound by the first declaration. Lozoff v. Kaisershot, 11 W (2d) 485, 105 NW (2d) 783.

Where a foreign corporation and automobile liability insurer, able to get into federal court on the jurisdictional ground of diversity of citizenship, brought an action in federal court for a declaratory judgment under the federal declaratory judgments act as to liability coverage under a policy issued by such insurer, but the federal court refrained from exercising its jurisdiction in the matter, such insurer, having chosen the federal forum for its purpose, will not be permitted later to bring a similar declaratory action in a Wisconsin state court, since to permit this would be permitting a misuse and abuse of the judicial process. Allstate Ins. Co. v. Charneski, 16 W (2d) 325, 114 NW (2d) 489.

A complaint that the building constructed pursuant to a contract for rent was not in accordance with the contract presents a proper case for declaratory relief to determine the extent to which the rent should be reduced; the court can at the same time declare the proper amount to be paid if an option to purchase the defective building is exercised in the future, since all the facts are before the court; the court can include an award of damages if damages may be predicated on the determination of rights. F. Rosenberg Elevator Co. v. Goll, 18 W (2d) 355, 118 NW (2d) 858.

Where the question of title to an office is ancillary to the principal cause of action for declaratory judgment it can be tried in that action. Boerschinger v. Elkay Enterprises, Inc. 26 W (2d) 102, 132 NW (2d) 258, 133 NW (2d) 333.

An action for declaratory judgment will

lie against a state board where plaintiff alleges an improper construction of a statute. It is not necessary to name the individual board members. It is not necessary to join as plaintiffs all others who might be affected. Barry Laboratories, Inc. v. State Bd. of Pharm. 26 W (2d) 505, 132 NW (2d) 833.

Declaratory judgments; nature and subject matter. 1961 WLR 467.

**269.565 Declaratory judgments against obscene matter.** (1) GROUNDS FOR AND COMMENCEMENT OF ACTION. Whenever there is reasonable cause to believe that any book, magazine, or other written matter, or picture, sound recording or film, which is being sold, loaned or distributed in any county, or is in the possession of any person who intends to sell, loan or distribute the same in any county, is obscene, the district attorney of such county, in the name of the state, as plaintiff, may file a complaint in the circuit court for such county directed against such matter by name. Upon the filing of such complaint, the court shall make a summary examination of such matter. If it is of the opinion that there is reasonable cause to believe that such matter is obscene, it shall issue an order, directed against said matter by name, to show cause why said matter should not be judicially determined to be obscene. This order shall be addressed to all persons interested in the publication, production, sale, loan, exhibition and distribution thereof, and shall be returnable within 30 days. The order shall be published as a class 2 notice, under ch. 985. A copy of such order shall be sent by certified mail to the publisher, producer, and one or more distributors of said matter, to the persons holding the copyrights, and to the author, in case the names of any such persons appear on such matter or can with reasonable diligence be ascertained by said district attorney. Such publication shall commence and such notices shall be so mailed within 72 hours of the issuance of the order to show cause by the court.

(1m) INTERLOCUTORY ADJUDICATION. After the issuance of the order to show cause under sub. (1), the court shall, on motion of the district attorney, make an interlocutory finding and adjudication that said book, magazine or other written matter or picture, sound recording or film is obscene, which finding and adjudication shall be of the same effect as the final judgment provided in sub. (3) or (5), but only until such final judgment is made or until further order of the court.

(2) RIGHT TO DEFEND; JURY TRIAL. Any person interested in the publication, production, sale, loan, exhibition or distribution of such matter may appear and file an answer on or before the return day named in said notice. If in such answer the right to trial by jury is claimed on the issue of the obscenity of said matter, such issue shall be tried to a jury. If no right to such trial is thus claimed, it shall be deemed waived, unless the court shall, for cause shown, on motion of an answering party, otherwise order.

(3) DEFAULT. If no person appears and answers within the time allowed, the court may then, without notice, upon motion of the plaintiff, if the court finds that the matter is obscene, make an adjudication against the matter that the same is obscene.

(4) SPEEDY HEARING; RULES OF EVIDENCE. If an answer is filed, the case shall be set down for a speedy hearing, but an adjudication of default and order shall first be entered against all persons who have not appeared and answered in the manner provided in sub. (3). If any person answering so demands, the trial shall not be adjourned for a period of longer than 72 hours beyond the opening of court on the day following the filing of his answer. At such hearing, subject to the ordinary rules of evidence in civil actions, the court shall receive the testimony of experts and evidence as to the literary, cultural or educational character of said matter and as to the manner and form of its production, publication, advertisement, distribution and exhibition. The dominant effect of the whole of such matter shall be determinative of whether said matter is obscene.

(5) FINDINGS AND JUDGMENT. If, after such hearing, the court, or jury (unless its finding is contrary to law or to the great weight and clear preponderance of the evidence), determines that such matter is obscene, the court shall enter judgment that such matter is obscene. If it is so determined that such matter is not obscene, the court shall enter judgment dismissing the complaint, and a total of not more than $100 in costs, in addition to taxable disbursements, may be awarded to the persons defending such matter, which shall be paid from the county treasury. Any judgment under this subsection may be appealed to the supreme court pursuant to ch. 274 by any person adversely affected, and who is either interested in the publication, production, sale, loan, exhibition or distribution of said matter, or is the plaintiff district attorney.

(6) ADMISSIBILITY IN CRIMINAL PROSECUTIONS. In any trial for a violation of s. 944.21 or 944.22, the proceeding under this section and the final judgment of the circuit court under sub. (3) or (5) or the interlocutory adjudication under sub. (1m), shall be admissible in evidence on the issue of the obscenity of said matter and on the issue of the defendant's knowledge that said matter is obscene; provided, that if the judgment of the court sought to be introduced in evidence is one holding the matter to be obscene, it

shall not be admitted unless the defendant in said criminal action was served with notice of the action under this section, or appeared in it, or is later served with notice of the judgment of the court hereunder, and the criminal prosecution is based upon conduct by said defendant occurring more than 18 hours after such service or such appearance, whichever is earlier.

**History:** 1961 c. 606; 1965 c. 252.

Tests of obscenity discussed. McCauley v. Tropic of Cancer, 20 W (2d) 134, 121 NW (2d) 545.

Obscenity censorship in Wisconsin. 47 MLR 275.

Civil action against obscene literature discussed. 1960 WLR 309.

**269.57 Inspection of documents and property; physical examination of claimant.** (1) The court, or a judge thereof, may, upon due notice and cause shown, order either party to give to the other, within a specified time, an inspection of property or inspection and copy or permission to take a copy of any books and documents in his possession or under his control containing evidence relating to the action or special proceeding and may require the deposit of the books or documents with the clerk and may require their production at the trial. If compliance with the order be refused, the court may exclude the paper from being given in evidence or punish the party refusing, or both.

(2) The court or a presiding judge thereof may, upon due notice and cause shown, in any action brought to recover for personal injuries, order the person claiming damages for such injuries to submit to a physical examination by such physician or physicians as such court or a presiding judge may order and upon such terms as may be just; and may also order such party to give to the other party or any physician named in the order, within a specified time, an inspection of such X-ray photographs as have been taken in the course of the treatment of such party for the injuries for which damages are claimed, and inspection of hospital records and other written evidence concerning the injuries claimed and the treatment thereof; and if compliance with the portion of said order directing inspection be refused, the court may exclude any of said photographs, papers and writings so refused inspection from being produced upon the trial or from being used in evidence by reference or otherwise on behalf of the party so refusing.

(3) No evidence obtained by an adverse party by a court-ordered physical examination or inspection under sub. (2) shall be admitted upon the trial or by reference or otherwise unless true copies of all reports, photographs, records, papers and writings made as a result of such examination or inspection and received by such adverse party have been delivered to the party claiming damages or his attorney not later than 15 days after the said reports, photographs, records, papers or writings from any such court-ordered physical examination are received by the said adverse party, provided that in an action for recovery of personal injuries, the party claiming damages shall in return deliver to the adverse party against whom the action is brought a true and correct copy of all reports of each physician who has examined or treated such person with respect to the injuries for which damages are claimed.

(4) Upon receipt of written authorization and consent signed by a person who has been the subject of medical care or treatment, or in case of the death of such person signed by his personal representative or by the beneficiary of an insurance policy on his life, the physician, surgeon or other person having custody of any medical or hospital reports, photographs, records, papers and writings concerning such care or treatment, shall forthwith permit the person designated in such authorization to inspect and copy such records. Any person having the custody of such records who refuses to comply with such authorization shall be liable to the person receiving such medical care and treatment for all reasonable and necessary costs of obtaining such copies and inspection and for attorney's fees not to exceed $50 plus costs.

(5) The provisions of sub. (4) shall not be applicable to state or county mental hospitals, or to state colony and training schools, or to community mental health clinics established pursuant to s. 51.36.

**History:** 1961 c. 327, 488, 622; 1963 c. 160.

A statement relating the facts of an accident, given by an insured to an adjuster for his insurer a few days after the accident and before any action had been commenced or was imminent, and before the insurer had assigned counsel to advise and defend insured, was not a privileged communication. Jacobi v. Podevels, 23 W (2d) 152, 127 NW (2d) 73.

Although a seller of property refused to allow the buyer to inspect his books prior to the sale, on a claim of misrepresentation as to book value the court may order inspection. Wisconsin Steel T. & B. Co. v. Donlin, 23 W (2d) 379, 127 NW (2d) 5.

325.21, disqualifying a physician from disclosing information acquired in attending a patient professionally is not controlling over any right of inspection acquired under 269.57 (1), unless disclosure incident thereto would subject the patient to humiliation, shame, or disgrace. Alexander v. Farmers Mut. Automobile Ins. Co. 25 W (2d) 623, 131 NW (2d) 373.

**269.59 Consolidation of actions.** The circuit court may, upon notice, order certified to said court any civil action pending in any other court in the same county for the purpose of consolidation or consolidation for trial with any action pending in said circuit court, in any case where such consolidation or consolidation for trial would be proper if the actions were originally brought in said court. Sections 261.10 and 261.11 so far as applicable shall govern such change in the place of trial. The change shall be deemed complete and the action transmitted shall proceed as other actions in the circuit court, upon the filing of the papers in said court.

**269.60 Borrowing court files regulated.** The clerk shall not permit any paper filed in his office to be taken therefrom unless upon written order of a judge of the court. The clerk shall take a written receipt for all papers so taken and preserve the same until such papers are returned. Papers so taken shall be returned at once upon request of the clerk or presiding judge, and no paper shall be kept longer than ten days. If any paper is not returned to the clerk within ten days the person retaining the paper shall not be permitted to take any other paper from the office of the clerk until such paper shall have been returned. All papers in causes on the calendar shall be returned to the clerk at least one day before the opening of the term, and no paper in any cause shall be taken from the courthouse during the trial of such cause except upon written order of the presiding judge.

**269.65 Pretrial procedure.** (1) In all contested civil actions and contested special proceedings under Titles XXV and XXVII, and except those under ch. 299, the court shall, unless waived by the parties with the approval of the court, and in all other civil actions and special proceedings the court may, direct the attorneys for the parties to appear before it for a conference to consider:

(a) The simplification of the issues;

(b) The necessity or desirability of amendments to the pleadings;

(c) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(d) The limitation of the number of expert witnesses;

(e) The advisability of a preliminary reference of issues for findings to be used as evidence when the trial is to be by jury;

(f) Such other matters as may aid in the disposition of the action.

(2) When any action is taken at the conference, the court shall make an order which recites the amendments allowed to the pleadings, the agreements made by the parties as to any of the matters considered, and any other action taken; and such order, when entered, shall control the subsequent course of the action, unless thereafter modified to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided.

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

See note to 263.03, citing Schneck v. Mutual Service Cas. Ins. Co. 18 W (2d) 566, 119 NW (2d) 342.

Where plaintiff's counsel did not appear for a pretrial conference after receiving notice of it, which notice nor the local court rule gave any warning of sanctions in the event of failure to appear, a dismissal of the complaint on the merits and granting of judgment on a counterclaim without notice and hearing was an abuse of discretion. Latham v. Casey & King Corp. 23 W (2d) 311, 127 NW (2d) 225.

**269.70 Conciliators.** (1) A circuit judge of the circuit court of any county may appoint, and remove at any time, any retired circuit judge to act, in matters referred to him by the judge, in conciliation matters and in pre-trial procedure under s. 269.65. When a matter for conciliation is referred to him for such purpose, the conciliator shall have full authority to hear, determine and report findings to the court. Such conciliators may be appointed court commissioners as provided in s. 252.14 (2).

(2) The circuit judges of such county shall make rules, not inconsistent with law, governing procedure before and pertaining to such conciliators and the county board shall fix and provide for their compensation.

**269.80 Settlements in behalf of minors; judgments.** (1) COMPROMISE OR SETTLEMENT. A compromise or settlement of an action or proceeding to which a minor or mentally incompetent person is a party may be made by his guardian ad litem with the approval of the court in which such action or proceeding is pending.

(2) COMPROMISE OR SETTLEMENT WITHOUT ACTION. A cause of action in favor of or against a minor or mentally incompetent person may, with the approval of any court of record, be settled by a guardian ad litem without the commencement of an action thereon; and for such purpose, the court may appoint a guardian ad litem upon application made as provided in s. 260.23 (2). An order approving a settlement or compromise under this subsection and directing the consummation thereof shall have the same force and effect as a judgment of the court.

(3) AMOUNTS NOT EXCEEDING $1,500. If the amount awarded to a minor by judgment or by an order of the court approving a compromise settlement of a claim or cause of action of said minor does not exceed $1,500 (exclusive of interest and costs and disbursements), and if there is no general guardian of the ward, the court may upon application by the guardian ad litem after judgment, or in the order approving settlement, fix and allow the expenses of the action, including attorney's fees and fees of guardian ad litem, authorize the payment of the total recovery to the clerk of the court, authorize and direct the guardian ad litem upon said payment to satisfy and discharge the judgment, or to execute releases to the parties entitled thereto and enter into a stipulation dismissing the action upon its merits. Said order shall also direct the clerk upon such payment to him to pay the costs and disbursements and expenses of the action and to dispose of the balance in one of the manners provided in s. 319.04 (2) as selected by the court.

**Cross Reference:** See 319.125 for provision requiring a court approving settlements to be satisfied as to the sufficiency of the guardian's bond.