TITLE XXV.

Procedure in Civil Actions.

CHAPTER 260

CIVIL ACTIONS, AND PARTIES THERETO

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

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

(1) Actions.

(2) Special proceedings.

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

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

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

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

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

defense or settlement of the claim or action of the plaintiff or any of the parties to such claim or action, or which by its policy agrees to prosecute or defend the action brought by the plaintiff or any of the parties to such action, or agrees to engage counsel to prosecute or defend said action, or agrees to pay the costs of such litigation, is by this section made a proper party defendant in any action brought by plaintiff in this state on account of any claim against the insured. If the policy of insurance was issued or delivered outside the state of Wisconsin, the insurer is by this section made a proper party defendant only if the accident, injury or negligence occurred in the state of Wisconsin.

(2) If an insurer is made a party defendant pursuant to this section and it appears at any time before or during the trial that there is or may be a cross issue between the insurer and the insured or any issue between any other person and the insurer involving the question of the insurer's liability if judgment should be rendered against the insured, the court may, upon motion of any defendant in any such action, cause the person who may be liable upon such cross issue to be made a party defendant to said action and all the issues involved in said controversy determined in the trial of said action or any third party may be impleaded as provided in s. 260.19 (1). Nothing herein contained shall be construed as prohibiting the trial court from directing and conducting separate trials on the issue of liability to the plaintiff or other party seeking affirmative relief and on the issue of whether the insurance policy in question affords coverage. Any party may move for such separate trials and if the court orders separate trials it shall specify in its order the sequence in which such trials shall be conducted.

Cross References: As to insurers being made defendants, see 204.30 (4). See 285.10, providing that the state may be made a party in an action to quiet title to land.

Where plaintiff did not know which of 2 defendants was the driver, he can join them both; there is no improper joinder of 2 causes of action. Kaas v. Baasch, 48 W (2d) 82, 179 NW (2d) 904.

The 1967 and 1969 amendments to this section did not apply retroactively. Hasselstrom v. Rex Chainbelt, Inc. 50 W (2d) 487, 184 NW (2d) 902.

Where an automobile liability policy has been issued and delivered in Wisconsin, a direct action can be brought in this state against the insurer alone, even if the insured has not been served, regardless of where the accident occurred. Bowman v. Rural Mut. Ins. Co. 53 W (2d) 260, 191 NW (2d) 881.

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

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

Owners of an apartment house who claimed a contract right to park some of their tenants' cars on other property were the real parties in interest since they controlled the parking by their tenants. Schwartz v. Evangelical Deaconess Society, 46 W (2d) 432, 175 NW (2d) 225.

Financial agreement requiring the pledging of the contract documents constituting the mortgagor's loan by the mortgagee, although taking the form of an absolute assignment, did not constitute the pledgee the real party in interest to the foreclosure action. Mortgage Associates v. Monona Shores, 47 W (2d) 171, 177 NW (2d) 340.

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

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

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

included in the same action at the option of the plaintiff.

260.18 Defendants in actions on insurance policies. In an action to recover on property insurance loss by fire, lightning, hail, cyclone or other casualty the plaintiff may join as defendants all of the insurance companies liable for the loss or any part thereof, and all the issues shall be tried together and the verdict or finding shall fix the amount for which each defendant is liable. If the plaintiff recovers, a separate judgment shall be rendered against each defendant for the sum for which it is liable, together with such proportion of the cost as the court shall determine to be equitable.

260.185 Adding new defendants by plaintiffs. In every action, the summons or the summons and complaint may be amended of course, by any plaintiff, without costs, and without prejudice to the proceedings already had by adding other persons as parties defendant and making the proper allegations for such purpose. Service of the amended summons, together with the complaint or a notice of the object of the action, shall be made upon such new defendants and upon existing parties within 10 days thereafter. If it appears to the court that the addition of such party was for the purpose of delay, the service of the amended summons may be set aside upon such terms as the court may deem just.

260.19 Adding new parties by defendants. (1) When a complete determination of the controversy in court cannot be had without the joinder of other parties, the defendant desiring the joinder of such parties shall serve on each of them a third-party summons, third-party complaint and a copy of all prior pleadings. Such parties shall be indicated as third-party defendants.

(2) The proceedings in sub. (1) may be taken without leave of the court within 40 days after issue is joined. Thereafter leave of the court, on notice and hearing, or stipulation of the parties, must be obtained.

(3) Within 10 days after addition of a new party under sub. (1) or (2), the defendant adding such party shall serve copies of the third-party summons, the third-party complaint and order of the court, if any, adding such party, on all other parties to the action.

(4) Within 20 days after service of the third-party complaint on him, the third-party defendant shall serve a copy of his answer on all parties to the action.

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

(6) A defendant, who if he be held liable in the action, will thereby obtain a right of action against a person not a party may implead such person as provided in sub. (1).

260.195 Third-party summons. The third-party summons shall be substantially in the following form:

..... Court
..... County
A. B., Plaintiff
V.
C. D., Defendant and
Third-Party Plaintiff
V.
E. F., Third-Party Defendant

THE STATE OF WISCONSIN, To said third-party defendant:

You are hereby summoned and required to serve upon the respective attorneys for the parties to this action an answer* to the third-party complaint which is herewith served upon you within 20 days after service, and in case of your failure so to do judgment will be rendered against you according to the demand of the third-party complaint.

C. D.
Third-Party Plaintiff's Attorney
P.O. Address ..... County, Wisconsin

*If the third-party complaint is for contribution only no answer is required by s. 263.15 (3), Wis. Stats.

260.205 Intervention. If in an action for the recovery of property, a person not a party has an interest in the property, or if in any other action, a person not a party has such an interest in the subject matter of the controversy as requires him to be a party for his own protection, and such person applies to the court to be made a party, the court may order him brought in. The motion shall be accompanied by a complaint or answer stating the cause of action or defense desired to be interposed. If the motion is granted the court shall indicate in its order the existing parties on whom the pleading should be served, and the time within which it should be served. If answer or reply is proper,

the party served shall have 20 days in which to answer or reply.

Where an insurer was named as a defendant but had the action dismissed as to it because of a no-action clause and thereafter took no part, it is not an abuse of discretion to deny intervention after judgment. Capitol Indemnity Corp. v Morris, 46 W (2d) 527, 175 NW (2d) 479.

The court properly denied intervention in a mortgage foreclosure action after the sale where petitioner had not recorded his interest at the time the action was started and should have known about it and intervened prior to the sale. Mercantile Contract Purchase Corp v. Melnick, 47 W (2d) 580, 177 NW (2d) 858.

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

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

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

260.22 Appearance by guardian or guardian ad litem. If a party to an action or proceeding is a minor, or if the court has reason to believe that a party is mentally incompetent to have charge of his affairs, he shall appear by an attorney, by the general guardian of his property who may appear by attorney or by a guardian ad litem who is an attorney appointed by the court or by a judge thereof. A guardian ad litem shall be appointed in all cases where the minor or incompetent has no general guardian of his property, or where the general guardian fails to appear and act on his behalf, or where the interest of the minor or incompetent is adverse to that of the general guardian. Except as provided in s. 269.80, if the general guardian does appear and act and his interests are not adverse to the minor or incompetent, a guardian ad litem shall not be appointed. Where the interests of the minor or mentally incompetent person are represented by an attorney of record the court shall, except upon good cause stated in the record, appoint that attorney as the guardian ad litem.

History: Sup. Ct. Order, 50 W (2d) vii.

Comment Of judicial Council, 1971: This section applies to all civil actions and provides that a guardian ad litem shall be appointed for a minor or incompetent in all cases unless the general guardian appears and acts on behalf of the minor or incompetent. If the general guardian appears and acts and his interests are not adverse to his ward, a guardian ad litem shall not be appointed. Further, if the ward has an attorney of record, that attorney shall be appointed the guardian ad litem, thus eliminating the necessity of having both an attorney of record and a guardian ad litem who is also an attorney. Present law says that the general guardian need only "appear", while in all other cases a guardian ad litem shall be appointed. The provision that the attorney shall be appointed guardian ad litem is new. [Re Order effective July 1, 1971]

260.23 Guardian ad litem. (1) APPOINTMENT. The guardian ad litem shall be appointed as provided by this section. A circuit judge or a county judge of the county where the action is to be commenced or is pending may appoint a guardian ad litem.

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

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

(4) MOTION OR PETITION. If the appointment, for a plaintiff or a defendant, is after the commencement of the action, it shall be upon motion entitled in the action. If the appointment is for a plaintiff and is made before the action is begun, the petition for appointment shall be entitled in the name of the action proposed to be brought by the minor or incompetent, and the appointment may be made before the summons is served. Upon the filing of a petition for appointment before summons, the clerk may impose a suit tax and filing fee but in that event no additional suit tax and filing fee shall be imposed when the summons is filed.

(5) HEARING. The motion or petition under sub. (4) shall state facts showing the need and authority for the appointment. The hearing on the motion or petition under sub. (4), if made by a minor or mentally incompetent person for his own guardian ad litem, may be held without notice and the appointment made by order. If the motion or petition is made for a minor or mentally incompetent who is an adverse party, the hearing shall be on notice.

(6) COMPROMISE OR SETTLEMENT. If a compromise or a settlement of an action or proceeding to which an unrepresented minor or mentally incompetent person is a party is proposed, a guardian ad litem shall be appointed, upon petition in a special proceeding, to protect the interest of the minor or incompetent even though commencement of an action is not proposed. Any compromise or settlement shall be subject to s. 269.80.

History: Sup. Ct. Order, 50 W (2d) vii.

Comment of Judicial Council, 1971: A circuit or county judge of the county where the action is commenced or pending may appoint the guardian ad litem. (Clarification)

Subs. (4), (5) and (6) are new provisions which establish the procedures to be followed in the appointment of a guardian ad litem both before and after commencement of an action. There is also provision for the appointment of a guardian ad litem, in a special proceeding, where a compromise or settlement is proposed even though commencement of an action is not proposed. Present law does not spell out this procedure. [Re Order effective July 1, 1971]

260.24 Procedure where minor or incompetent not represented. (1) If at any time prior to the entry of judgment or final order, the court finds that either a minor, or a person believed by the court to be mentally incompetent to have charge of his affairs, has not been represented in the action or proceeding as provided in s. 260.22, there shall be no further proceedings until a guardian ad litem is appointed. In making such appointment, the court shall fix a reasonable time within which the guardian ad litem may move to vacate or strike any order entered or action taken during the period when a guardian ad litem was required; and as to all matters to which objection is not made, he and his ward shall be bound. Any such motion by a guardian ad litem shall be granted as a matter of right.

(2) If the court finds after the entry of judgment or final order that a person, who at the time of entry of judgment or final order was a minor or mentally incompetent, was not represented in the action or proceeding by an attorney of record or otherwise represented as provided in s. 260.22, the judgment or order shall be vacated on motion of:

(a) The minor or mentally incompetent, for whom no appointment was made, at any time prior to the expiration of one year after his disability is removed; or

(b) The personal representative of such minor or mentally incompetent at any time prior to the expiration of one year after the death of the minor or mentally incompetent.

History: Sup. Ct. Order, 50 W (2d) vii.

Comment of Judicial Council, 1971: This is a new section which establishes the procedures to be followed where the court finds either prior to or subsequent to the entry of judgment or final order that a minor or alleged incompetent has not been represented as required by law. If this is discovered after the entry of judgment or final order, such judgment or order shall be vacated on motion of the minor or incompetent within one year after the disability is removed, or on motion of the personal representative within one year after the death of the minor or incompetent. If, however, the minor or incompetent was represented by an attorney, the judgment or order shall be valid even though the attorney had not been appointed guardian ad litem as required by s. 260.22. [Re Order effective July 1, 1971]