

802.06 PLEADINGS, MOTIONS AND PRETRIAL PRACTICE

is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If on a motion asserting the defense described in par. (a) 6. to dismiss for failure of the pleading to state a claim upon which relief can be granted, or on a motion asserting the defenses described in par. (a) 8. or 9., matters outside of the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in s. 802.08, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by s. 802.08.

(3) JUDGMENT ON THE PLEADINGS. After issue is joined between all parties but within time so as not to delay the trial, any party may move for judgment on the pleadings. Prior to a hearing on the motion, any party who was prohibited under s. 802.02 (1m) from specifying the amount of money sought in the demand for judgment shall specify that amount to the court and to the other parties. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in s. 802.08, and all parties shall be given reasonable opportunity to present all material made pertinent to the motion by s. 802.08.

(4) PRELIMINARY HEARINGS. The defenses specifically listed in sub. (2), whether made in a pleading or by motion, the motion for judgment under sub. (3) and the motion to strike under sub. (6) shall be heard and determined before trial on motion of any party, unless the judge to whom the case has been assigned orders that the hearing and determination thereof be deferred until the trial. The hearing on the defense of lack of jurisdiction over the person or property shall be conducted in accordance with s. 801.08.

(5) MOTION FOR MORE DEFINITE STATEMENT. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(6) MOTION TO STRIKE. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted upon motion made by a party within 45 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, scandalous or indecent matter.

(7) CONSOLIDATION OF DEFENSES IN MOTIONS. A party who makes a motion under this section may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this section but omits therefrom any defense or objection then available to the party which this section permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in sub. (8) (b) to (d) on any of the grounds there stated.

(8) WAIVER OR PRESERVATION OF CERTAIN DEFENSES. (a) A defense of lack of jurisdiction over the person or the property, insufficiency of process, untimeliness or insufficiency of service of process or another action pending between the same parties for the same cause is waived only if any of the following conditions is met:

1. The defense is omitted from a motion in the circumstances described in sub. (7).

2. The defense is neither made by motion under this section nor included in a responsive pleading.

(b) A defense of failure to join a party indispensable under s. 803.03 or of res judicata may be made in any pleading permitted or ordered under s. 802.01 (1), or by motion before entry of the fi-

nal pretrial conference order. A defense of statute of limitations, failure to state a claim upon which relief can be granted, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under s. 802.01 (1), or by a motion for judgment on the pleadings, or otherwise by motion within the time limits established in the scheduling order under s. 802.10 (3).

(c) If it appears by motion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

(d) A defense of lack of capacity may be raised within the time permitted under s. 803.01.

(9) TELEPHONE HEARINGS. Oral argument permitted on motions under this section may be heard as prescribed in s. 807.13 (1).

History: Sup. Ct. Order, 67 W (2d) 585, 623 (1975); 1975 c. 218; Sup. Ct. Order, 73 W (2d) xxxi; Sup. Ct. Order, 82 W (2d) ix; 1977 c. 260; 1977 c. 447 ss. 196, 210; 1979 c. 110 ss. 51, 60 (7); 1979 c. 323 s. 33; 1981 c. 390 s. 252; Sup. Ct. Order, 112 W (2d) xi (1983); 1983 a. 228 s. 16; Sup. Ct. Order, 141 W (2d) xiii (1987); 1987 a. 256; 1993 a. 213; Sup. Ct. Order No. 95–04, 191 W (2d) xxi (1995); 1995 a. 225, 411; 1997 a. 133, 187; s. 13.93 (2) (c).

Judicial Council Committee's Note, 1976: Subs. (2) (e) and (8) make clear that, unless waived, a motion can be made to claim as a defense lack of timely service within the 60 day period that is required by s. 801.02 to properly commence an action. See also s. 893.39. Defenses under sub. (8) cannot be raised by an amendment to a responsive pleading permitted by s. 802.09 (1). [Re Order effective Jan. 1, 1977]

Judicial Council Committee's Note, 1977: Sub. (1) which governs when defenses and objections are presented, has been amended to delete references to the use of the scheduling conference under s. 802.10 (1) as the use of such a scheduling procedure is now discretionary rather than mandatory. The time periods under s. 802.06 are still subject to modification through the use of amended and supplemental pleadings under s. 802.09, the new calendaring practice under s. 802.10, and the pretrial conference under s. 802.11. [Re Order effective July 1, 1978]

Judicial Council Note, 1983: Sub. (1) is amended by applying the extended response time for state agencies, officers and employees to state agents. The extended time is intended to allow investigation of the claim by the department of justice to determine whether representation of the defendant by the department is warranted under s. 893.82 or 895.46, Stats. [Re Order effective July 1, 1983]

Judicial Council Note, 1988: Sub. (9) [created] allows oral arguments permitted on motions under this section to be heard by telephone conference. [Re Order effective Jan. 1, 1988]

Motion under (2) (f) usually will be granted only when it is quite clear that under no conditions can plaintiff recover. *Wilson v. Continental Insurance Cos.* 87 W (2d) 310, 274 NW (2d) 679 (1979).

Under (2) (f), claim should only be dismissed if it is clear from the complaint that under no conditions could plaintiff recover. *Morgan v. Pennsylvania General Ins. Co.* 87 W (2d) 723, 275 NW (2d) 660 (1979).

Plaintiff need not prima facie prove jurisdiction prior to evidentiary hearing under (4). *Bielefeldt v. St. Louis Fire Door Co.* 90 W (2d) 245, 279 NW (2d) 464 (1979).

Since facts alleged in complaint stated claim for abuse of process, complaint was improperly dismissed under (2) (f) even though theory of abuse of process claim was not pleaded or argued in trial court. *Strid v. Converse*, 111 W (2d) 418, 331 NW (2d) 350 (1983).

Counsel's appearance and objection, affidavit and trial brief were adequate to raise issue of defective service of process; if not in form, in substance they were the equivalent of a motion under sub. (2). *Honeycrest Farms, Inc. v. A. O. Smith Corp.* 169 W (2d) 596, 486 NW (2d) 539 (Ct. App. 1992).

Pleading failure to secure proper jurisdiction or alternatively failure to obtain proper service was sufficient to challenge sufficiency of summons and complaint served without proper authentication. *Studelska v. Avercamp*, 178 W (2d) 457, 504 NW (2d) 125 (Ct. App. 1993), 213.

Motions for sanctions under this section must be filed prior to the entry of judgment. *Northwest Wholesale Lumber v. Anderson*, 191 W (2d) 278, 528 NW (2d) 502 (Ct. App. 1995).

A party does not waive the defense of lack of jurisdiction when 2 answers are filed on its behalf by 2 different insurers and only one raises the defense. *Honeycrest Farms v. Brave Harvestore Systems*, 200 W (2d) 256, 546 NW (2d) 192 (Ct. App. 1996).

Trial courts have the authority to convert a motion to dismiss to a motion for summary judgment when matters outside the pleadings are considered. *Schopper v. Gehring*, 210 W (2d) 209, 565 NW (2d) 187 (Ct. App. 1997).

A claim of misjoinder must be timely asserted in a responsive pleading. Failure to do so may result in the entry of default judgment against the defaulting party. *Holman v. Family Health Plan*, 216 W (2d) 100, 573 NW (2d) 577 (Ct. App. 1997).

802.07 Counterclaim and cross-claim. (1) COUNTERCLAIM. A defendant may counterclaim any claim which the defendant has against a plaintiff, upon which a judgment may be had in the action. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. Except as prohibited by s. 802.02 (1m), the counterclaim may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(2) COUNTERCLAIM MATURING OR ACQUIRED AFTER PLEADING. A claim which either matured or was acquired by the pleader after

servicing the pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(3) CROSS CLAIM. A pleading may state as a cross claim any claim by one party against a coparty if the cross claim is based on the same transaction, occurrence, or series of transactions or occurrences as is the claim in the original action or as is a counterclaim therein, or if the cross claim relates to any property that is involved in the original action. Except as prohibited by s. 802.02 (1m), the cross claim may include a claim that the party against whom it is asserted is or may be liable to the cross claimant for all or part of a claim asserted in the action against the cross claimant.

(4) JOINDER OF ADDITIONAL PARTIES. Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with ss. 803.03 to 803.05.

(5) SEPARATE TRIALS; SEPARATE JUDGMENTS. If the court orders separate trials as provided in s. 805.05 (2), judgment on a counterclaim or cross-claim may be rendered in accordance with s. 806.01 (2) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

History: Sup. Ct. Order, 67 W (2d) 585, 628 (1975); 1975 c. 218; Sup. Ct. Order, 104 W (2d) xi; 1987 a. 256.

Counterclaim based on contract must aver either satisfaction of any contractual condition precedent or an excuse, such as waiver, for not satisfying it. *S & M Rotogravure Service, Inc. v. Baer*, 77 W (2d) 454, 252 NW (2d) 913.

Defendant may not join opposing counsel in counterclaims, but claims may be asserted against counsel after the principal action is completed. *Badger Cab Co. v. Soule*, 171 W (2d) 754, 492 NW (2d) 375 (Ct. App. 1992).

This section does not contain mandatory counterclaim language but, *res judicata* bars claims arising from a single transaction which was the subject of a prior action and could have been raised by counterclaim in the prior action if the action would nullify the initial judgment or impair rights established in the initial action. *ABCG Enterprises v. First Bank Southeast*, 184 W (2d) 465, 515 NW (2d) 904 (1994).

Where collateral estoppel compels raising a counterclaim in an equitable action, that compulsion does not result in the waiver of the right to a jury trial. *Norwest Bank v. Plourde*, 185 W (2d) 377, 518 NW (2d) 265 (Ct. App. 1994).

802.08 Summary judgment. (1) AVAILABILITY. A party may, within 8 months of the filing of a summons and complaint or within the time set in a scheduling order under s. 802.10, move for summary judgment on any claim, counterclaim, cross-claim, or 3rd party claim which is asserted by or against the party. Amendment of pleadings is allowed as in cases where objection or defense is made by motion to dismiss.

(2) MOTION. Unless earlier times are specified in the scheduling order, the motion shall be served at least 20 days before the time fixed for the hearing and the adverse party shall serve opposing affidavits, if any, at least 5 days before the time fixed for the hearing. Prior to a hearing on the motion, any party who was prohibited under s. 802.02 (1m) from specifying the amount of money sought in the demand for judgment shall specify that amount to the court and to the other parties. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(3) SUPPORTING PAPERS. Supporting and opposing affidavits shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence. Copies of all papers or parts thereof referred to in an affidavit shall be attached thereto and served therewith, if not already of record. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial.

If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party.

(4) WHEN AFFIDAVITS UNAVAILABLE. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the motion for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(5) AFFIDAVITS MADE IN BAD FAITH. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this section is presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney fees.

(6) JUDGMENT FOR OPPONENT. If it shall appear to the court that the party against whom a motion for summary judgment is asserted is entitled to a summary judgment, the summary judgment may be awarded to such party even though the party has not moved therefor.

(7) TELEPHONE HEARINGS. Oral argument permitted on motions under this section may be heard as prescribed in s. 807.13 (1).

History: Sup. Ct. Order, 67 W (2d) 585, 630 (1975); 1975 c. 218; Sup. Ct. Order, 82 W (2d) ix; Sup. Ct. Order, 141 W (2d) xix; 1987 a. 256; Sup. Ct. Order, 168 W (2d) xxii; 1993 a. 490; 1997 a. 254.

Judicial Council Committee's Note, 1977: Sub. (1) is revised to allow a party at any time within 8 months after the summons and complaint are filed or the time established in a scheduling order under s. 802.10 to move for a summary judgment. The 8-month time period has been created as the old procedure requiring a party to move for summary judgment not later than the time provided under s. 802.10 can no longer apply in most cases as the use of such a scheduling order is now completely discretionary with the trial judge. The 8-month time period is subject to enlargement under s. 801.15 (2) (a). [Re Order effective July 1, 1978]

Judicial Council Note, 1988: Sub. (7) [created] allows oral arguments permitted on motions for summary judgment to be heard by telephone conference. [Re Order effective Jan. 1, 1988]

Judicial Council Note, 1992: The prior sub. (2), allowing service of affidavits opposing summary judgment up to the date of hearing, afforded such minimal notice to the court and moving party that a plethora of local court rules resulted. *Community Newspapers, Inc. v. West Allis*, 158 Wis. 2d 28, 461 N.W. 2d 785 (Ct. App. 1990). Requiring such affidavits to be served at least 5 days before the hearing is intended to preclude such local rules and promote uniformity of practice. Courts may require earlier filing by scheduling orders, however. [Re Order effective July 1, 1992]

Respondents in appeals from orders denying summary judgment motion are invited to move for summary affirmation under s. 251.71, 1973 stats. [see s. 809.21]. *Am. Orthodontics Corp. v. G. & H. Ins.* 77 W (2d) 337, 253 NW (2d) 82.

Where plaintiff had signed release, and where another illness subsequently developed, question of whether plaintiff consciously intended to disregard possibility that known condition could become aggravated was question of fact not to be determined on summary judgment. *Krezinski v. Hay*, 77 W (2d) 569, 253 NW (2d) 522.

Summary judgment procedure is not authorized in proceedings for judicial review under ch. 227. *Wis. Environmental Decade v. Public Service Comm.* 79 W (2d) 161, 255 NW (2d) 917.

Where insurance policy unambiguously excluded coverage relating to warranties, factual question whether implied warranties were made was immaterial and trial court abused discretion in denying insurer's summary judgment motion. *Jones v. Sears Roebuck & Co.* 80 W (2d) 321, 259 NW (2d) 70.

Sub. (2) mandates more exacting appellate scrutiny of trial court's decision to grant or deny judgment. *Wright v. Hasley*, 86 W (2d) 572, 273 NW (2d) 319 (1979).

See note to 807.05, citing *Wilharm v. Wilharm*, 93 W (2d) 671, 287 NW (2d) 779 (1980).

Existence of new or difficult issue of law does not make summary judgment inappropriate. *Maynard v. Port Publications, Inc.* 98 W (2d) 555, 297 NW (2d) 500 (1980).

Conviction for injury by conduct regardless of life does not establish injury was intentional or expected and entitle insurer to summary judgment on policy exclusion issue. *Poston v. U.S. Fidelity & Guarantee Co.* 107 W (2d) 215, 320 NW (2d) 9 (Ct. App. 1982).

See note to 804.11, citing *Bank of Two Rivers v. Zimmer*, 112 W (2d) 624, 334 NW (2d) 230 (1983).

Appellate court reviews trial court's decision by applying same standards and methods as did trial court. *Green Spring Farms v. Kersten*, 136 W (2d) 304, 401 NW (2d) 816 (1987).

Where only issue before court requires expert testimony for resolution, trial court on summary judgment may determine whether party has made prima facie showing that it can, in fact, produce favorable testimony. *Dean Medical Center v. Frye*, 149 W (2d) 727, 439 NW (2d) 633 (Ct. App. 1989).

See note to 48.13 citing *In Interest of F.Q.* 162 W (2d) 607, 470 NW (2d) 1 (Ct. App. 1991).

A moving party's own inconsistent pleadings, admissible during trial as an admission, may be used to raise an issue of material fact. *Gouger v. Hardtke*, 167 W (2d) 504, 482 NW (2d) 84 (1992).