

## 802.05 PLEADINGS, MOTIONS AND PRETRIAL PRACTICE

of jurisdiction, that pleading is curable. *Rabideau v. Stiller*, 2006 WI App 155, 295 Wis. 2d 417, 720 N.W.2d 108, 05–2868.

The Effect of *Jandrt* on Satellite Litigation. Geske & Gleisner. Wis. Law. May 2000.

Frivolous Sanction Law in Wisconsin. Geske & Gleisner. Wis. Law. Feb. 2006.

**NOTE: The above case annotations refer to s. 802.05 as it existed prior to its repeal and recreation by SCO 03–06.**

This section is a procedural rule and procedural rules generally have retroactive application. However, this section, as affected by Supreme Court Order 03–06, is not to be applied retroactively when the new rule diminishes a contract, disturbs vested rights, or imposes an unreasonable burden on the party charged with complying with the new rule's requirements. *Trinity Petroleum, Inc. v. Scott Oil Company, Inc.* 2007 WI 88, 302 Wis. 2d 299, 735 N.W.2d 1, 05–2837.

Sub. (3) (a) 1. requires the party seeking sanctions to first serve the motion on the potentially sanctionable party, who then has 21 days to withdraw or appropriately correct the claimed violation. The movant cannot file a motion for sanctions unless that time period has expired without a withdrawal or correction. A postjudgment sanctions motion does not comply with sub. (3) (a) 1. It would violate both the language and the purpose of the rule to permit an informal warning to substitute for service of the motion. *Ten Mile Investment, LLC v. Sherman*, 2007 WI App 253, 306 Wis. 2d 799, 743 N.W.2d 442, 06–0353.

**802.06 Defenses and objection; when and how presented; by pleading or motion; motion for judgment on the pleadings. (1) WHEN PRESENTED.** Except when a court dismisses an action or special proceeding under s. 802.05 (4), a defendant shall serve an answer within 20 days after the service of the complaint upon the defendant. If a guardian ad litem is appointed for a defendant, the guardian ad litem shall have 20 days after appointment to serve the answer. A party served with a pleading stating a cross claim against the party shall serve an answer thereto within 20 days after the service upon the party. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer. The state or an agency of the state or an officer, employee, or agent of the state shall serve an answer to the complaint or to a cross claim or a reply to a counterclaim within 45 days after service of the pleading in which the claim is asserted. If any pleading is ordered by the court, it shall be served within 20 days after service of the order, unless the order otherwise directs. If a defendant in the action is an insurance company, or if any cause of action raised in the original pleading, cross claim, or counterclaim is founded in tort, the periods of time to serve a reply or answer shall be 45 days. The service of a motion permitted under sub. (2) alters these periods of time as follows, unless a different time is fixed by order of the court: if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; or if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.

**(2) HOW PRESENTED.** (a) Every defense, in law or fact, except the defense of improper venue, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or 3rd-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

1. Lack of capacity to sue or be sued.
2. Lack of jurisdiction over the subject matter.
3. Lack of jurisdiction over the person or property.
4. Insufficiency of summons or process.
5. Untimeliness or insufficiency of service of summons or process.
6. Failure to state a claim upon which relief can be granted.
7. Failure to join a party under s. 803.03.
8. Res judicata.
9. Statute of limitations.
10. Another action pending between the same parties for the same cause.

(b) A motion making any of the defenses in par. (a) 1. to 10. shall be made before pleading if a further pleading is permitted. Objection to venue shall be made in accordance with s. 801.51. If a pleading sets forth a claim for relief to which the adverse party 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 20 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. If a defendant in the action is an insurance company, if any cause of action raised in the original pleading, cross-claim, or counterclaim is founded in tort, or if the moving party is the state or an officer, agent, employee, or agency of the state, the 20-day time period under this subsection is increased to 45 days.

**(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 final 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 Wis. 2d 585, 623 (1975); 1975 c. 218; Sup. Ct. Order, 73 Wis. 2d xxxi; Sup. Ct. Order, 82 Wis. 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 Wis. 2d xi (1983); 1983 a. 228 s. 16; Sup. Ct. Order, 141 Wis. 2d xiii (1987); 1987 a. 256; 1993 a. 213; Sup. Ct. Order No. 95–04, 191 Wis. 2d xxi (1995); 1995 a. 225, 411; 1997 a. 133, 187; 1999 a. 32; 2001 a. 16; Sup. Ct. Order No. 03–06A, 2005 WI 86, 280 Wis. 2d xiii; 2005 a. 442; 2007 a. 97.

**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]

A motion under sub. (2) (f) [now (2) (a) 6.] usually will be granted only when it is quite clear that under no condition can the plaintiff recover. *Wilson v. Continental Insurance Cos.* 87 Wis. 2d 310, 274 N.W.2d 679 (1979).

Under sub. (2) (f) [now (2) (a) 6.], a claim should only be dismissed if it is clear from the complaint that under no condition can the plaintiff recover. *Morgan v. Pennsylvania General Insurance Co.* 87 Wis. 2d 723, 275 N.W.2d 660 (1979).

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

Since facts alleged in the complaint stated a claim for abuse of process, the complaint was improperly dismissed under sub. (2) (f) [now (2) (a) 6.] even though an abuse of process claim was not pleaded or argued in the trial court. *Strid v. Converse*, 111 Wis. 2d 418, 331 N.W.2d 350 (1983).

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

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

Motions for sanctions under this section must be filed prior to the entry of judgment. *Northwest Wholesale Lumber v. Anderson*, 191 Wis. 2d 278, 528 N.W.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 Wis. 2d 256, 546 N.W.2d 192 (Ct. App. 1996), 95–1789.

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 Wis. 2d 208, 565 N.W.2d 187 (Ct. App. 1997), 96–2782.

A defendant may file a motion to dismiss for failure to state a claim after filing an answer. A defendant who raises the defenses of failure to state a claim or the statute of limitations in an answer does not forfeit the right to bring those defenses on for disposition by subsequent motion. *Eternalist Foundation, Inc. v. City of Platteville*, 225 Wis. 2d 759, 593 N.W.2d 84 (Ct. App. 1999), 98–1944.

Sub. (2) (b) requires the court to notify parties of its intent to convert a motion to dismiss for failure to state a claim to one for summary judgment and to provide the parties a reasonable opportunity to present material made pertinent by the application of s. 802.08. *CTI of Northeast Wisconsin, LLC v. Herrell*, 2003 WI App 19, 259 Wis. 2d 756, 656 N.W.2d 794, 02–1881.

Sub. (8) (b), as applied to certiorari proceedings in which there is no pretrial conference, allows a party who has unsuccessfully moved to dismiss on other grounds to still seek dismissal grounded on claims preclusion at any time before the court has considered the merits of the petitioner's claims. *Barksdale v. Litscher*, 2004 WI App 130, 275 Wis. 2d 493, 685 N.W.2d 493, 03–0841.

The plaintiff is normally entitled to an evidentiary hearing when a defendant challenges personal jurisdiction, even if the plaintiff does not demonstrate that an evidentiary hearing is necessary. The burden of going forward with the evidence, as well as the burden of persuasion, on the issue of jurisdiction is on the plaintiff. There is no rule that the plaintiff's burden to prove prima facie the facts supporting jurisdiction must be met by affidavit or in any manner prior to the evidentiary hearing. *Kavanaugh Restaurant Supply, Inc. v. M.C.M. Stainless Fabricating, Inc.* 2006 WI App 236, 297 Wis. 2d 532, 724 N.W.2d 893, 06–0043.

Section 802.06 (2) (b) serves as an exception to the summary judgment procedure laid out in s. 802.08. Section 802.06 (2) (b) allows the circuit court to convert a defendant's motion to dismiss for failure to state a claim into a summary judgment motion when the defendant has not filed an answer even though s. 802.08 requires that the pleadings be complete before a court can review a summary judgment motion. *Alliance Laundry Systems LLC v. Stroh Die Casting Co., Inc.* 2008 WI App 180, \_\_\_ Wis. 2d \_\_\_, 763 N.W.2d 167, 07–2857.

Sub. (2) (b) requires the court to provide both parties with reasonable notice that it will or might convert a motion to dismiss into a summary judgment motion, but it does not require the court to request additional briefs or affidavits. Notice depends on the facts in each case and need not state that the court will, in fact, convert. *Alliance Laundry Systems LLC v. Stroh Die Casting Co., Inc.* 2008 WI App 180, \_\_\_ Wis. 2d \_\_\_, 763 N.W.2d 167, 07–2857.

**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 serving 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 Wis. 2d 585, 628 (1975); 1975 c. 218; Sup. Ct. Order, 104 Wis. 2d xi; 1987 a. 256; 2007 a. 97.

Section 806.02 (2) provides that the plaintiff may move for default judgment according to the demand of the complaint. This section gives no indication that the appellations "plaintiff" and "defendant" may be reversed for purposes of a counterclaim. *Pollack v. Calimag*, 157 Wis. 2d 222, 458 N.W.2d 591 (Ct. App. 1990).

A 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 Wis. 2d 754, 492 N.W.2d 375 (Ct. App. 1992).

This section does not contain mandatory counterclaim language but, res judicata bars claims arising from a single transaction that was the subject of a prior action and could have been raised by a 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 Wis. 2d 465, 515 N.W.2d 904 (1994).

When 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 Wis. 2d 377, 518 N.W.2d 265 (Ct. App. 1994).