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JURISDICTION OF THE WISCONSIN COURT OF APPEALS

EARL H. HAZELTINE*

INTRODUCTION

The Wisconsin Court of Appeals came into existence on August 1, 1978. At that time, the new Rules of Appellate Procedure were enacted which set forth with particularity the procedures necessary to invoke the jurisdiction of the court of appeals. While the scope of the jurisdiction of the court of appeals has since been further delineated by the Wisconsin courts, new issues are still being forged. This article will examine the statutory standards for jurisdiction and the development of more intricate procedural issues under the court's interpretation of the rules.

I. SOURCE OF JURISDICTION

The jurisdiction of the court of appeals is derived from the Wisconsin Constitution, Article VII, section 5(3) which provides:

The appeals court shall have such appellate jurisdiction in the district, including jurisdiction to review administrative proceedings, as the legislature may provide by law, but shall have no original jurisdiction other than by prerogative writ. The appeals court may issue all writs necessary in aid of its jurisdiction and shall have supervisory authority over all actions and proceedings in the courts in the district.

and Wisconsin Statute section 752.01, which provides:

- (1) The court of appeals has appellate jurisdiction as provided by law.
- (2) The court of appeals has original jurisdiction only to issue prerogative writs.
- (3) The court of appeals may issue all writs necessary in aid of its jurisdiction.

and section 808.03(1), which provides:

A final judgment or a final order of a circuit court may be appealed as a matter of right to the court of appeals unless

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otherwise expressly provided by law. A final judgment or final order is a judgment or order entered in accordance with s. 806.06(1)(b) or 807.11(2) or a disposition recorded in docket entries in ch. 799 cases or traffic regulation or municipal ordinance violation cases prosecuted in circuit court which disposes of the entire matter in litigation as to one or more of the parties, whether rendered in an action or special proceeding.

An appellate court has appellate jurisdiction only to the extent allowed by statute.¹ Subject matter jurisdiction cannot be conferred by waiver, consent or estoppel.² Courts are required to inquire into their jurisdiction, even though the parties have not raised the issue.³ An appellate court always has jurisdiction to determine jurisdiction.⁴ If the trial court had no jurisdiction, then the appellate court also has no jurisdiction, and the appeal must be dismissed.⁵

II. HOW JURISDICTION IS ACQUIRED

A. *Notice of Appeal and Filing Fee*

Before the new Rules of Appellate Procedure were enacted in 1978, Wisconsin Statute section 817.11(4) (1975) provided that the supreme court acquired subject matter jurisdiction of an appeal upon the entry of the appealable order or judgment.⁶ Proper service and filing of a notice of appeal gave the

1. *Hoppenrath v. State*, 97 Wis. 2d 449, 462, 293 N.W.2d 910, 916-17 (1980), *overruled on other grounds*, 113 Wis. 2d 497, 335 N.W.2d 376 (1983); *State v. Jakubowski*, 61 Wis. 2d 220, 223, 212 N.W.2d 155, 156 (1973) (quoting *State v. Omernik*, 54 Wis. 2d 220, 222, 194 N.W.2d 617, 617 (1972)).

2. *Coleman v. Percy*, 96 Wis. 2d 578, 587, 292 N.W.2d 615, 620 (1980). *Wisconsin Envtl. Decade v. Public Serv. Comm'n*, 84 Wis. 2d 504, 515-16, 267 N.W.2d 609, 616-17 (1978). Subject matter jurisdiction is defined as the power of a court to entertain a particular type of action. *Shopper Advertiser v. Department of Revenue*, 117 Wis. 2d 223, 230, 344 N.W.2d 115, 118 (1984).

3. *State ex rel. Teaching Assistants Ass'n v. University of Wis.-Madison*, 96 Wis. 2d 492, 495, 292 N.W.2d 657, 658-59 (Ct. App. 1980); *State ex rel. Skinkis v. Treffert*, 90 Wis. 2d 528, 535, 280 N.W.2d 316, 319 (Ct. App. 1979).

4. *Milwaukee v. Cohen*, 57 Wis. 2d 38, 44, 203 N.W.2d 633, 636-37 (1973).

5. *In re Termination of Ryde*, 76 Wis. 2d 558, 564, 251 N.W.2d 791, 793-94 (1977).

6. *First Wis. Nat'l Bank of Madison v. Nicholaou*, 87 Wis. 2d 360, 364, 274 N.W.2d 704, 706 (1979). Chapter 817 was repealed by 1977 Wis. Laws 187 when the court of appeals was created.

supreme court jurisdiction of the parties and personal jurisdiction could be waived by participation in the appeal.⁷

Rule 809.10(1)(b) now provides that the court of appeals acquires jurisdiction of the appeal upon the timely filing of a notice of appeal in the trial court.⁸ The time for appeal commences to run when the appealable judgment or order is entered pursuant to Wisconsin Statutes sections 806.06(1)(b) or 807.11(2), even if costs have not been taxed.⁹ The time for appeal in most civil cases is forty-five days from entry of order or judgment, if notice of entry is given, or 90 days if no notice is given.¹⁰ Criminal appeals are taken pursuant to the procedure set forth in Rule 809.30. The time for appeal in a criminal appeal may be extended for good cause.¹¹

A notice of appeal is considered filed when it is received by the clerk of the trial court.¹² The appellant assumes the risk of late filing due to delay by mail.¹³ The clerk of the trial court must accept the notice of appeal for filing, when the \$50.00 filing fee is paid even if the \$10.00 forwarding fee is not

7. *Gallagher v. Scherneck*, 60 Wis. 2d 143, 146-47, 208 N.W.2d 437, 439 (1973); *Baumgarten v. Jones*, 21 Wis. 2d 467, 470, 124 N.W.2d 609, 610 (1963).

8. The 1978 Judicial Council Committee's Note clarifies that the jurisdiction mentioned in Wis. STAT. § 809.10(1)(b) (1975) is subject matter jurisdiction. Because Wis. CONST. art. IV, § 21(1) guarantees the right to obtain a writ of error, Wis. STAT. § 808.02 (1978) also provides that a writ of error may be sought in the court of appeals. However, Wis. STAT. § 809.01(1) (1978) defines "appeal" as review by appeal or writ of error, and no special procedure is provided for writs of error.

9. *Fredrick v. City of Janesville*, 91 Wis. 2d 572, 576, 283 N.W.2d 480, 482 (Ct. App.), *rev'd on other grounds*, 92 Wis. 2d 685, 285 N.W.2d 655 (1979).

10. Wis. STAT. § 808.04(1) (1978). The time for appeal in almost all civil appeals was standardized to 90 and 45 days by 1983 Wis. Laws 183, 219 (effective Apr. 27, 1984). Three exceptions remain: Wis. STAT. § 9.10(4)(a) (1983-84) (recall); Wis. STAT. § 227.26 (1983-84) (state law question referred from federal court); and Wis. STAT. § 799.445(1) (1983-84) (eviction). The time for appeal in these cases is 15 days. Wis. STAT. § 808.04(2) (1983-84).

11. Wis. STAT. § 809.82(2)(b) (1983-84); *State v. Rembert*, 99 Wis. 2d 401, 406, 299 N.W.2d 289, 292 (Ct. App. 1980). The procedure for taking a criminal appeal was amended by the Wisconsin Supreme Court, effective July 1, 1985. 123 Wis. 2d xi-xiii. A criminal appeal is initiated when the defendant takes the initial steps under Wis. STAT. § 809.30 (1983-84) to commence the appeal. *State v. Firkus*, 119 Wis. 2d 154, 165-66, 350 N.W.2d 82, 87-88 (1984).

12. *Boston Old Colony Ins. v. International Rectifier Corp.*, 91 Wis. 2d 813, 822, 284 N.W.2d 93, 97-98 (1979).

13. *Gunderson v. State*, 106 Wis. 2d 611, 615, 318 N.W.2d 779, 780 (1982). The Wisconsin Supreme Court held that Wis. STAT. § 801.15(1) (1981-82) applied in a condemnation appeal. *In re Electric Power Co.*, 110 Wis. 2d 649, 656, 329 N.W.2d 186, 189 (1983).

paid as required under section 814.61(9) of the Wisconsin Statutes.¹⁴ Untimely service on opposing parties is not a jurisdictional error, but may result in dismissal of the appeal if the late service is prejudicial and waiver is not present.¹⁵

The notice of appeal must specify the judgment or order being appealed.¹⁶ There is no requirement that the notice set forth the date of the judgment or order; all that is necessary is that the judgment or order be sufficiently identified so that there can be no doubt as to what is being appealed.¹⁷ A notice of appeal may be amended in the proper case under Wisconsin Statute section 807.07(1) to more particularly specify what is being appealed.¹⁸

B. Notice of Entry of Judgment or Order

Timely service of a notice of entry of judgment or order accelerates the time for appeal to forty-five days.¹⁹ The notice of entry must be given within twenty-one days of entry of judgment.²⁰ The notice of entry of judgment must be a written document, other than the judgment or order, which accurately and completely informs the opposing party of the date of entry, and must be served after the entry of judgment.²¹ A letter from respondent's counsel to appellant's counsel stating that the judgment had been filed on a certain date is not sufficient to constitute a formal notice of entry of judgment.²²

14. *Rome v. Betz*, 120 Wis. 2d 528, 530-31, 355 N.W.2d 844, 845-46 (Ct. App. 1984). The filing fee has been raised to \$150.00. 1985 WIS. ACT 29 § 2415m (effective July 1, 1985). The clerk is also required under WIS. STAT. § 59.42(1) (1983-84) to collect a \$10.00 forwarding fee, plus postage, under WIS. STAT. § 814.69(9) (1983-84).

15. *Rhyner v. Sauk County*, 118 Wis. 2d 324, 327-28, 348 N.W.2d 588, 590 (Ct. App. 1984). See also *State v. Rhone*, 94 Wis. 2d 682, 288 N.W.2d 862 (1980).

16. WIS. STAT. § 809.10(1) (1981-82).

17. *State v. Ascencio*, 92 Wis. 2d 822, 825, 285 N.W.2d 910, 912 (Ct. App. 1979); *Rhyner*, 118 Wis. 2d at 325-26, 348 N.W.2d at 589.

18. *Northridge Bank v. Community Eye Care Center, Inc.*, 94 Wis. 2d 201, 287 N.W.2d 810 (1980).

19. WIS. STAT. § 808.04(1) (1983-84).

20. WIS. STAT. § 806.06(5) (1983-84).

21. WIS. STAT. § 806.06(3) (1983-84); Judicial Council Committee's Note to WIS. STAT. §§ 806.06(3), (5) (1981-82); *Soo Line R.R. v. City of Neenah*, 64 Wis. 2d 665, 673, 221 N.W.2d 907, 911 (1974); *Sub-Zero Freezer Co. v. Manhattan Life Ins. Co.*, 90 Wis. 2d 76, 78, 279 N.W.2d 492, 493 (Ct. App. 1979).

22. *In re Marriage of Soquet v. Soquet*, 117 Wis. 2d 553, 345 N.W.2d 401 (1984).

Notice of entry of judgment or order is considered given within the meaning of section 806.06(5) when it is mailed.²³ Service by mail is complete upon mailing.²⁴ Because the time for appeal under section 808.04(1) is forty-five days from the entry of the judgment or order being appealed, when a notice of entry of judgment or order is served the appellant does not receive an additional three days for mailing under section 801.15(5) when the notice of entry is served by mail.²⁵ If a conflict exists as to whether or when the notice of entry was given, the appellate court will remand the matter to the trial court for determination of those factual issues.²⁶

Service of an accurate and timely notice of entry of judgment by the clerk of small claims court under section 799.24(1) is effective to reduce the time for appeal to forty-five days.²⁷ Proper service of a notice of entry not only reduces the time for filing the notice of appeal to forty-five days, but also reduces the time for filing the cross-appeal.²⁸

C. *Standing*

Persons may not appeal unless they are aggrieved by the judgment or order being appealed.²⁹ A person may be aggrieved by a judgment or order even though he or she is not a named party in the suit.³⁰ A defendant who is committed after a plea of not guilty by reason of mental disease or defect may obtain review of issues in the guilt phase of the trial.³¹

23. *Bruns v. Muniz*, 97 Wis. 2d 742, 746, 295 N.W.2d 11, 14 (Ct. App. 1980).

24. Wis. STAT. § 801.14(2) (1983-84).

25. *First Wis. Nat'l Bank v. Nicholaou*, 87 Wis. 2d 360, 364-65, 274 N.W.2d 704, 706-07 (1979), *aff'd in part, rev'd in part*, 113 Wis. 2d 524, 335 N.W.2d 390 (1983); *Fredrick v. City of Janesville*, 91 Wis. 2d 572, 576-78, 283 N.W.2d 480, 482 (Ct. App.), *rev'd on other grounds*, 92 Wis. 2d 685, 285 N.W.2d 655 (1979).

26. *Wisconsin State Employees Union v. Henderson*, 106 Wis. 2d 498, 501-02, 317 N.W.2d 170, 171-72 (Ct. App. 1982).

27. *Mock v. Czemierys*, 113 Wis. 2d 207, 210, 336 N.W.2d 188, 189 (Ct. App. 1983).

28. *Dobberfuhr v. Madison White Trucks, Inc.*, 118 Wis. 2d 404, 406, 347 N.W.2d 904, 905 (Ct. App. 1984).

29. *Mutual Serv. Casualty Ins. Co. v. Koenigs*, 110 Wis. 2d 522, 526, 329 N.W.2d 157, 159 (1983); *Edlin v. Soderstrom*, 83 Wis. 2d 58, 64, 264 N.W.2d 275, 278 (1978); *La Crosse Trust Co. v. Bluske*, 99 Wis. 2d 427, 428-29, 299 N.W.2d 302, 303 (Ct. App. 1980).

30. *Miller v. Lighter*, 21 Wis. 2d 401, 403, 124 N.W.2d 460, 461 (1963).

31. *State v. Smith*, 113 Wis. 2d 497, 508, 335 N.W.2d 376, 381-82 (1983) (overruling *Hoppenrath v. State*, 97 Wis. 2d 449, 293 N.W.2d 910 (1980)).

D. Order or Judgment Must be in Writing and Entered

To be appealable, an order or judgment must be in writing and entered.³² The right of appeal exists only from the time of entry of the order or judgment.³³ Although an oral ruling from the bench may be effective between the parties,³⁴ oral rulings are not appealable.³⁵ Section 808.03(1) provides an exception where a disposition is recorded in docket entries in small claims traffic regulation and municipal ordinance violation cases.³⁶ It is incumbent upon counsel to obtain a sufficient order or judgment upon which to predicate an appeal.³⁷

E. Finality

An order or judgment, to be appealable as of right, must dispose of the entire matter in litigation as to one or more of the parties.³⁸ The test of finality is whether the trial court contemplated that an additional formal document would be entered with respect to the matter covered in the decision.³⁹ The label put on the document by the trial court is not binding on the appellate court.⁴⁰ The appellate court will look through the form and label of the document to the substance and nature of the determination.⁴¹ The purpose of the finality rule is:

- (1) to protect the trial proceedings by avoiding unnecessary interruptions and delay caused by multiple appeals and (2)

32. *Ramsthal Advertising Agency v. Energy Miser, Inc.*, 90 Wis. 2d 74, 75, 279 N.W.2d 491, 492 (Ct. App. 1979). Filing constitutes entry. WIS. STAT. §§ 808.03(1), 806.06(1)(b) and 807.11(2) (1983-84).

33. *In Interest of M.T.*, 108 Wis. 2d 410, 415, 321 N.W.2d 289, 292 (1982).

34. *Barbian v. Lindner Bros. Trucking Co.*, 106 Wis. 2d 291, 298-99, 316 N.W.2d 371, 375 (1982).

35. *Hollingsworth v. American Fin. Corp.*, 86 Wis. 2d 172, 180, 271 N.W.2d 872, 876 (1978); *Helmrick v. Helmrick*, 95 Wis. 2d 554, 556, 291 N.W.2d 582, 582 (Ct. App. 1980).

36. WIS. STAT. § 808.03(1) (1983-84) (amended May 1, 1986, effective July 1, 1986, to include small claims cases in the exception).

37. *Helmrick*, 95 Wis.2d at 557, 291 N.W.2d at 583.

38. WIS. STAT. § 808.03(1) (1983-84).

39. *Fredrick v. City of Janesville*, 92 Wis. 2d 685, 686, 285 N.W.2d 655, 656-57 (1979).

40. *Thomas/Van Dyken Joint Venture v. Van Dyken*, 90 Wis. 2d 236, 241, 279 N.W.2d 459, 462 (1979).

41. *In re Incorporation of Town of Fitchburg*, 98 Wis. 2d 635, 647-48, 299 N.W.2d 199, 205 (1980); *Van Dyken*, 90 Wis. 2d at 241, 279 N.W.2d at 462.

to reduce the burden on the court of appeals by limiting the number of appeals to one appeal per case and allowing piecemeal appeals only under special circumstances as set forth in sec. 808.03(2), Stats.⁴²

An order dismissing an action and awarding costs and disbursements was held final, even though a subsequent order for judgment and judgment were entered.⁴³ An order granting summary judgment and providing that "judgment be entered" was held not final because the language of the order revealed that the trial court contemplated that a subsequent document would be entered disposing of the case.⁴⁴ An opinion or memorandum decision will ordinarily not be appealable.⁴⁵

An order for a new trial is not appealable because it does not terminate the litigation between the parties.⁴⁶ Similarly, an order vacating a judgment and ordering a new trial is not appealable because it is not final.⁴⁷ An order deciding a question of jurisdiction was not appealable even though Wisconsin Statute section 801.08(1) (1979-80) provided that an appeal of right could be taken.⁴⁸ An order denying a motion for a change of venue is also not appealable.⁴⁹

An order denying a petition to intervene is final and appealable as of right because it terminates a special proceeding.⁵⁰ But an order denying a motion to bring in an additional

42. *Heaton v. Independent Mortuary Corp.*, 97 Wis. 2d 379, 395-96, 294 N.W.2d 15, 23-24 (1980) (citations omitted).

43. *Fredrick*, 92 Wis. 2d at 688, 285 N.W.2d at 657 (citations omitted).

44. *Radoff v. Red Owl Stores, Inc.*, 109 Wis. 2d 490, 492-94, 326 N.W.2d 240, 240-42 (1982).

45. *Wick v. Mueller*, 105 Wis. 2d 191, 193, 313 N.W.2d 799, 800 (1982); *Committee to Retain Byers v. Elections Bd.*, 95 Wis. 2d 632, 633 n.1, 291 N.W.2d 616, 617 n.1 (Ct. App. 1980).

46. *Wick*, 105 Wis. 2d at 202, 313 N.W.2d at 802; *Earl v. Marcus*, 92 Wis. 2d 13, 284 N.W.2d 690 (Ct. App. 1979). In the event the trial court determines the judgment is either excessive or inadequate and makes a determination of damages which is not accepted as an option in lieu of a new trial, Wis. STAT. § 805.15(6) (1983-84) (amended in 1983) now provides that a petition for leave to appeal the order for a new trial must be filed within ten days after the option period expires.

47. *Cross v. Leuenberger*, 274 Wis. 393, 395, 80 N.W.2d 468, 469-70 (1957).

48. *Heaton v. Independent Mortuary Corp.*, 97 Wis. 2d 379, 396-97, 294 N.W.2d 15, 23-24 (1980); *Grulkowski v. Department of Transp.*, 97 Wis. 2d 615, 294 N.W.2d 43 (Ct. App. 1980).

49. *Aparacor, Inc. v. ILHR Dep't*, 97 Wis. 2d 399, 402, 293 N.W.2d 545, 547 (1980).

50. *Becker v. Becker*, 66 Wis. 2d 731, 735, 225 N.W.2d 884, 886 (1975).

party is not final because it does not dispose of the entire matter in litigation as to any party.⁵¹

The Wisconsin Supreme Court held that an order remanding an administrative case back to the agency for further proceedings was final and appealable although arguably the litigation between the parties had not been terminated.⁵² Also, the court held that a foreclosure judgment was appealable as of right even though a deficiency judgment could not be entered until the sale was confirmed.⁵³ An order in a criminal case denying bail pending appeal, although being the final order in any criminal case, is not appealable as of right and can only be reviewed by permission of the court under Rule 809.50.⁵⁴ An appeal cannot be taken from an order of a judge refusing to issue a complaint under section 968.02(3) of the Wisconsin Statutes, because the proceeding is before a judge and appeals can only be taken from orders and judgments entered by a court.⁵⁵

Orders holding people in contempt are usually appealable as of right because they are the final orders in special proceedings.⁵⁶ A judgment dismissing a complaint was not final and therefore not appealable where a counterclaim remained pending before the trial court.⁵⁷ Although a formal judgment had not been entered, language in the trial court's conclusions of law stating "By the Court" and "The petition . . . is hereby denied" was considered final to allow the review of the dismissal of a petition for construction of a will.⁵⁸ No appeal can be taken from a judgment ordered by an appellate court.⁵⁹

An order consolidating criminal counts is not appealable as of right by the state.⁶⁰ The state is barred by the double

51. *Rice v. Fiern*, 108 Wis. 2d 454, 455, 322 N.W.2d 481, 481 (Ct. App. 1982).

52. *Bearns v. ILHR Dep't*, 102 Wis. 2d 70, 306 N.W.2d 22 (1981).

53. *Shuput v. Lauer*, 109 Wis. 2d 164, 172-73, 325 N.W.2d 321, 326-27 (1982).

54. WIS. STAT. § 809.31(5); *State v. Whitty*, 86 Wis. 2d 380, 386-88, 272 N.W.2d 842, 845-46 (1978).

55. *See* WIS. STAT. § 808.03(1) (1983-84); *Gacus v. Maroney*, 127 Wis. 2d 69, 377 N.W.2d 201 (Ct. App. 1985).

56. *Vilter Mfg. Co. v. Humphrey*, 132 Wis. 587, 590, 112 N.W. 1095, 1096 (1907).

57. *Brownsell v. Klawitter*, 102 Wis. 2d 108, 117, 306 N.W.2d 41, 45-46 (1981).

58. *In re Estate of Cayo*, 117 Wis. 2d 154, 155 n.1, 342 N.W.2d 785, 786 n.1 (Ct. App. 1983).

59. *Cross v. Leuenberger*, 274 Wis. 393, 80 N.W.2d 468 (1957).

60. *State v. Rabe*, 96 Wis. 2d 48, 58-59, 291 N.W.2d 809, 814 (1980).

jeopardy clause from appealing the dismissal of a criminal charge if the trial court based the dismissal on insufficient evidence.⁶¹ After initially holding that the orders were final, the Wisconsin Supreme Court held on reconsideration that orders waiving a juvenile into adult court⁶² and denying motions to dismiss on double jeopardy grounds⁶³ were nonfinal orders.

F. *Petitions for Leave to Appeal*

Nonfinal orders may be reviewed by permissive appeals.⁶⁴ The petition must be filed within ten days of entry of the order or judgment sought to be reviewed.⁶⁵ Extensions of time to file the petition may be granted.⁶⁶ The entry of an order granting leave to appeal has the effect of the filing of a notice of appeal.⁶⁷

The granting of a petition for leave to appeal is within the discretion of the court of appeals and the denial of a petition will not be reviewed by the Wisconsin Supreme Court.⁶⁸ The intent of the new Rules of Appellate Procedure is to limit the number of appeals in most cases to one and to allow an interlocutory appeal only in extraordinary circumstances.⁶⁹ The criteria for granting a petition for leave to appeal are based

61. *State v. Mazur*, 101 Wis. 2d 306, 311, 304 N.W.2d 180, 182 (Ct. App. 1981).

62. *State ex rel. A.E. v. Circuit Court for Green Lake County*, 94 Wis. 2d 98, 105a-e, 288 N.W.2d 125, 128, *reconsideration granted*, 292 N.W.2d 114, 114-15 (1980).

63. *State v. Jenich*, 94 Wis. 2d 74, 97a-d, 288 N.W.2d 114, 292 N.W.2d 348, 348-49 (1980). The court of appeals has set up a special procedure for these two types of cases whereby the time for filing the appellant's brief and record is automatically accelerated to 45 days after the petition for leave to appeal is filed. The decision whether to grant the petition is not decided until after the briefs are considered by the court.

64. WIS. STAT. § 808.03(2) (1983-84); WIS. STAT. § 809.50 (1983-84). A permissive appeal may not be taken from an order entered after a final order or judgment is entered. *Marsh v. City of Milwaukee*, 104 Wis. 2d 44, 49, 310 N.W.2d 615, 617 (1981).

65. WIS. STAT. § 809.50(1) (1983-84).

66. WIS. STAT. § 809.50(2)(a) (1983-84).

67. WIS. STAT. § 809.50(3) (1978). Although the supreme court stated in dicta in *Johnson v. Pearson Agri-Systems, Inc.*, 119 Wis. 2d 766, 782-83, 350 N.W.2d 127, 135-36 (1984), and *Stae v. Alles*, 106 Wis. 2d 368, 388, 316 N.W.2d 378, 387 (1982), that a respondent could cross-appeal other nonfinal orders after a petition for leave to appeal is granted, it is unclear whether this holding applies only to orders entered before the original appealed order is entered, or whether it applies to all orders in the case, even if they were entered subsequent thereto.

68. *Aparacor, Inc. v. ILHR Dep't*, 97 Wis. 2d 399, 403-04, 293 N.W.2d 545, 547 (1980).

69. *Heaton v. Independent Mortuary Corp.*, 97 Wis. 2d 379, 395-96, 294 N.W.2d 15, 23-24 (1980); *State v. Rabe*, 96 Wis. 2d 48, 57, 291 N.W.2d 809, 813 (1980).

upon section 3.12 of the ABA Judicial Administration Standards Relating to Appellate Courts.⁷⁰ In practice, the court of appeals has strictly construed the criteria and has required a showing of substantial likelihood of success on the merits before granting a petition.

G. Cross-Appeals

Cross-appeals are taken under Rule 809.10(2)(b). Cross-appeals are considered separate appeals, but the court will set up a combined briefing schedule upon request.

A cross-appeal may be taken from a nonfinal order or judgment.⁷¹ No cross-appeal is required if correction of the alleged errors would merely support the judgment.⁷² A cross-appeal must be filed if the cross-appellant attempts to change the judgment.⁷³ As previously mentioned, a timely notice of entry of judgment or order by a respondent will reduce the time for filing the cross-appeal.⁷⁴

H. Extraordinary Writs

The court of appeals has jurisdiction under both the Wisconsin Constitution and statutes to issue extraordinary writs.⁷⁵ The extent of this jurisdiction is presently under consideration by the Wisconsin Supreme Court.⁷⁶

70. R. MARTINEAU & R. MALMGREN, WISCONSIN APPELLATE PRACTICE § 404 (1978).

71. *Johnson v. Pearson Agri Systems, Inc.*, 119 Wis. 2d 766, 782-83, 350 N.W.2d 127, 135-36 (1984) (quoting *State v. Alles*, 106 Wis. 2d 368, 388, 316 N.W.2d 378, 387 (1982)). A cross-appeal can be taken where the original appeal exists by reason of the granting of a petition for leave to appeal. *Id.*

72. *State v. Alles*, 106 Wis. 2d 368, 392-95, 316 N.W.2d 378, 389-90 (1982).

73. *Auric v. Continental Casualty Co.*, 111 Wis. 2d 507, 515, 331 N.W.2d 325, 329-30 (1983).

74. *Dobberfuhr v. Madison White Trucks, Inc.*, 118 Wis. 2d 404, 406, 347 N.W.2d 904, 905 (Ct. App. 1984).

75. WIS. CONST. art. VII, § 5(3); WIS. STAT. § 752.01(2) (1983-84).

76. *State ex rel. Swan v. Elections Bd.*, Nos. 84-1344-W, 84-1345-W, (Ct. App. Aug. 3, 1984), *review denied*, 119 Wis. 2d 907, 353 N.W.2d 810 (1984). The court of appeals held in *State ex rel. McCaffrey v. Shanks*, 124 Wis. 2d 216, 369 N.W.2d 743 (Ct. App. 1985), *review denied*, 125 Wis. 2d 582 (1985), that it had jurisdiction to review a bindover in a criminal case by writ of habeas corpus.

I. Superintending Power

The Wisconsin Supreme Court has reviewed issues under its superintending authority where the appeal was not properly taken.⁷⁷ The court of appeals also has supervisory authority over all actions and proceedings in the courts in the district pursuant to Article VII of the Wisconsin Constitution.⁷⁸ Thus, the court of appeals could possibly, in the proper case, also review issues on appeal under its supervisory power.

III. LOSS OF JURISDICTION BY THE TRIAL COURT

Once the court of appeals acquires jurisdiction, it would seem to follow logically that the trial court would lose jurisdiction. However, this conclusion is not true in all cases.

The trial court retains jurisdiction pending the appeal to hear a motion for relief pending appeal.⁷⁹ The trial court may hear a motion to grant relief from a judgment under section 806.07 while the appeal is pending.⁸⁰ The trial court also retains jurisdiction to hear matters not directly concerned with the appeal but related to the case which are still properly within the trial court's jurisdiction.⁸¹

The court of appeals recently dismissed an appeal from an order awarding contribution to attorney's fees in a divorce case on the ground that another appeal was pending in the same case and therefore the trial court had no jurisdiction to hear the motion.⁸² Arguably, the trial court retained jurisdiction to hear the contribution issue because the issue of attorney's fees was not raised in the first appeal.⁸³ Apparently, however, this issue was not raised in the appeal and the court of appeals dismissed on the ground that no statutory provision

77. *State v. Kendall*, 94 Wis. 2d 63, 65-67, 287 N.W.2d 758, 759-60 (1980); *McEwen v. Pierce County*, 90 Wis. 2d 256, 268-70, 279 N.W.2d 469, 474 (1979).

78. *McEwen*, 90 Wis. 2d at 269 n.8, 279 N.W.2d at 474-75 n.8.

79. WIS. STAT. § 808.07(2) (1983-84).

80. WIS. STAT. § 808.07(2)(a)(4) (1983-84). WIS. STAT. § 808.07(2)(a)(4) was repealed by Sup. Ct. Order, 130 Wis. 2d xxi (1986) (effective July 1, 1986). The same order also enacted WIS. STAT. § 808.07(2)(am) to provide that only the trial court could hear a motion under § 806.07.

81. *In re Estate of Schaefer*, 91 Wis. 2d 360, 368, 283 N.W.2d 410, 415 (1979); *Hunter v. Hunter*, 44 Wis. 2d 618, 621, 172 N.W.2d 167, 169 (1969); *Estate of Mayer*, 29 Wis. 2d 497, 505, 139 N.W.2d 111, 115 (1966).

82. *Hengel v. Hengel*, 120 Wis. 2d 522, 355 N.W.2d 846 (Ct. App. 1984).

83. *Id.* at 523-24, 355 N.W.2d at 846-47. See *supra* note 81.

existed which would give the trial court jurisdiction to hear the motion while the appeal was pending.⁸⁴

The Wisconsin Supreme Court has said, citing previous Rules of Appellate Procedure cases, that the trial court loses jurisdiction when the appeal is perfected.⁸⁵ Previously, an appeal was perfected "on the service of the undertaking for costs, or the deposit of money instead, or the waiver thereof."⁸⁶ The requirement of an undertaking for costs has been abolished and the new statutes and Rules of Appellate Procedure do not contain a similar provision. Rule 809.11 is entitled "Perfecting the Appeal," but does not specifically provide that performing the acts required by that rule perfects the appeal. Rule 809.11 provides for payment of the filing fee, forwarding a copy of the notice of appeal and docketing of the appeal in the court of appeals, and filing of the statement on transcript in the court of appeals and in the trial court. If perfection of the appeal depends upon performance of these acts, uncertainty may result because of the several different filing dates and the problem of ascertaining the exact date when they all occur.

Either the legislature or supreme court should amend the Rules to provide that the appeal is perfected upon the performance of a certain, ascertainable event; the point in time when the record is forwarded to the court of appeals is the most logical choice. If the trial court retains jurisdiction pending the forwarding of the record, then it can hear and determine the many miscellaneous matters which arise after an appeal is taken, such as motions for reconsideration, attorney's fees, costs, bail, and other post-judgment motions. At present, trial courts are never certain whether they have jurisdiction to hear these motions after an appeal is taken. Defining by rule or statute the time when the trial court loses jurisdiction will remove that uncertainty.

84. *Hengel*, 120 Wis. 2d at 525-27, 355 N.W.2d at 847-48.

85. *State v. Fillyaw*, 104 Wis. 2d 700, 702 n.1, 312 N.W.2d 795, 797 n.1 (1981), *cert. denied*, 455 U.S. 1026 (1982). *See also* *Austin v. FMC*, 73 Wis. 2d 96, 103, 242 N.W.2d 251, 254 (1976), *modified and aff'd*, 86 Wis. 2d 628, 273 N.W.2d 233 (1979); *State ex rel. Von Dyke Ford, Inc.*, 70 Wis. 2d 777, 780, 235 N.W.2d 672, 674 (1975).

86. WIS. STAT. § 817.11(2) (1975).

IV. EXTENT OF JURISDICTION IN COURT OF APPEALS

Just because an appeal is taken does not mean that the appellant can raise every issue present in the case on appeal. First, as previously stated, an appellant has to be aggrieved by an order or judgment to appeal from it.⁸⁷ Thus, an appellant may be able to appeal from certain orders or judgments in a proceeding, but not others. In all cases, an appeal from a final order or judgment brings up for review all prior nonfinal interlocutory judgments, orders, and rulings adverse to the appellant.⁸⁸

Second, an appellate court will ordinarily not consider an issue raised for the first time on appeal,⁸⁹ because the trial court should be given an opportunity to correct the alleged error.⁹⁰ However, the court may decide the appeal *sua sponte* on an issue not raised by the parties.⁹¹ Issues not discussed on appeal are deemed abandoned.⁹² Also, the court will not, as a general rule, consider an issue raised for the first time in a reply brief.⁹³

Third, an appeal cannot be taken from an order or judgment if the issues sought to be reviewed could have been reviewed in an appeal from an earlier order or judgment.⁹⁴ The policy behind this rule is to prevent a party from extending the time for appeal by filing a motion for reconsideration.⁹⁵ The trial court cannot extend the time for appeal by setting aside a judgment and reentering it to accommodate a potential

87. *Mutual Serv. Casualty Ins. Co. v. Koenigs*, 110 Wis. 2d 522, 526-27, 329 N.W.2d 157, 159 (1983); *La Crosse Trust Co. v. Bluske*, 99 Wis. 2d 427, 428-29, 299 N.W.2d 302, 303 (Ct. App. 1980).

88. Wis. STAT. § 809.10(4) (1983-84).

89. *Wirth v. Ehly*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140, 145 (1980) (citations omitted).

90. *Heckert v. Stauber*, 106 Wis. 2d 545, 560-61, 317 N.W.2d 834, 841 (1982); *State v. Monje*, 109 Wis. 2d 138, 153-54, 325 N.W.2d 695, 702 (1982).

91. *State v. Holmes*, 106 Wis. 2d 31, 39-40, 315 N.W.2d 703, 707 (1982).

92. *Reiman Assoc. v. R/A Advertising*, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981); *Charolais Breeding Ranches v. FPC Sec. Corp.*, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493, 498-99 (Ct. App. 1979).

93. *In re Estate of Bilsie*, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508, 512 n.2 (Ct. App. 1981).

94. *Marsh v. City of Milwaukee*, 104 Wis. 2d 44, 47-48, 310 N.W.2d 615, 616-17 (1981); *Ver Hagen v. Gibbons*, 55 Wis. 2d 21, 25, 197 N.W.2d 752, 754 (1972).

95. *La Crosse Trust Co. v. Bluske*, 99 Wis. 2d 427, 429, 299 N.W.2d 302, 303 (Ct. App. 1980).

appellant who neglected to appeal from the first judgment.⁹⁶ An appeal from a judgment does not bring up for review any order entered subsequent to the judgment.⁹⁷

Fourth, the right to appeal may be waived by compliance with a judgment.⁹⁸ The rule does not apply where the purpose of the appeal is to obtain a more favorable award.⁹⁹ Also, the rule does not apply where a reversal would not affect the part of the judgment under which the benefit was received.¹⁰⁰

A guilty or no contest plea in a criminal case waives the right to appeal all issues except an order denying a motion to suppress evidence or an order denying a motion challenging the admissibility of a statement of a defendant.¹⁰¹ This rule, absent the exceptions, also applies to guilty and no contest pleas in civil cases.¹⁰²

V. LOSS OF JURISDICTION

The court of appeals loses jurisdiction and the trial court regains it when the record is remitted.¹⁰³ The record is remitted to the trial court thirty-one days after a decision by the court of appeals, unless a petition for review is filed in the Wisconsin Supreme Court.¹⁰⁴ The court of appeals may retain jurisdiction of an appeal and remand to the trial court for further proceedings.¹⁰⁵ This procedure, however, was held to be error in an appeal involving review of an evidentiary issue

96. *Filer & Stowel Co. v. Chicago, M. & St. P., Ry.*, 161 Wis. 591, 595-97, 155 N.W. 118, 119-20 (1915).

97. *Zeisler Corp. v. Page*, 24 Wis. 2d 190, 199, 128 N.W.2d 414, 418 (1964).

98. *Fort Howard Paper Co. v. Fort Howard Corp.*, 273 Wis. 356, 361, 77 N.W.2d 733, 735-36 (1956).

99. *Anderson v. Anderson*, 72 Wis. 2d 142, 150-51, 255 N.W.2d 473, 479 (1977).

100. *Estreem v. Bluhm*, 79 Wis. 2d 142, 150-51, 255 N.W.2d 473, 479 (1977).

101. WIS. STAT. § 971.31(10) (1983-84); *State v. Nelson*, 108 Wis. 2d 698, 702, 324 N.W.2d 292, 294-95 (Ct. App. 1982).

102. *County of Racine v. Smith*, 122 Wis. 2d 431, 434-36, 362 N.W.2d 439, 441-43 (Ct. App. 1984).

103. *Rohl v. State*, 97 Wis. 2d 514, 515, 293 N.W.2d 922, 922-23 (1980), *aff'd*, 104 Wis. 2d 77, 310 N.W.2d 631 (1981); *State v. Neutz*, 73 Wis. 2d 520, 522, 243 N.W.2d 506, 507-08 (1976).

104. WIS. STAT. § 809.26(1) (1983-84).

105. *Grutzner v. Kruse*, 87 Wis. 2d 38, 43, 273 N.W.2d 373, 376 (Ct. App. 1978). *See also Krueger v. State*, 84 Wis. 2d 272, 275, 267 N.W.2d 602, 603-04, *cert. denied*, 439 U.S. 874 (1978).

where the court of appeals failed to make an independent review of the record.¹⁰⁶

CONCLUSION

The Wisconsin Court of Appeals is now firmly established. The jurisdictional procedures are specifically set forth in the Wisconsin Constitution, statutes, and in the new Rules of Appellate Procedure. However, the interpretation of the jurisdictional standards has been the subject of extensive litigation. While much of the uncertainty concerning the propriety of an appeal has been resolved under case law, questions remain regarding both the procedural requirements necessary to invoke the court's jurisdiction, and once established, the scope of the court's exercise of jurisdiction.

106. *State v. Pharr*, 115 Wis. 2d 334, 343, 340 N.W.2d 498, 502 (1983).

