53 BIFURCATED/TRIFURCATED TRIALS: LAW NOTE FOR TRIAL JUDGES

I. Introduction

A. Overview. Wisconsin law grants trial courts discretion to order separate trials for distinct claims when doing so promotes convenience, improves efficiency, or avoids undue prejudice. This authority is codified in Wis. Stat. § 805.05(2), which permits severance of any claim, counterclaim, cross-claim, third-party claim, or separate issue "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy."[1] However, unlike its federal counterpart, Federal Rule of Civil Procedure 42(b), Wisconsin's statute was intentionally drafted to allow separation only of entire claims, not individual issues within a single claim.[2]

In practical terms, this means that while Wisconsin courts may sequence different phases of a single trial (e.g., addressing liability before turning to damages), they may not assign separate juries to decide different issues arising from the same cause of action. The statute's deliberate omission of issue-bifurcation authority reflects a clear legislative intent to prohibit splitting a single claim between multiple juries.[3] As a result, Wisconsin practice meaningfully diverges from federal procedure: with limited exceptions, liability and damages for a single claim must be tried together before the same jury.

B. Purpose. Courts employ separate trials in appropriate cases to advance several objectives[4]:

- Prevent undue prejudice: By isolating potentially inflammatory evidence (for example, extensive damages or a defendant's wealth) until after liability is established, separate phases can ensure jurors are not unfairly swayed on liability by emotion-charged proof relevant only to damages.

- Avoid jury confusion: Complex or technical matters can be segmented so that the jury can focus on one set of issues at a time, reducing the risk of conflating distinct questions.

- Encourage settlement opportunities: Early resolution of key issues (such as liability or insurance coverage) through a separate phase may facilitate

settlement of remaining issues if, for example, a finding of no liability obviates the need to litigate damages.

- Reduce trial time and expense: If a dispositive issue is resolved against a party (e.g. no liability or no coverage), subsequent proceedings on other issues become unnecessary.

- Preserve jury trial rights: Phased proceedings can be structured (consistent with statutory limits) to ensure that each party's state constitutional right to a jury determination is maintained on all material factual questions.

C. Judicial Discretion to Grant Separate Trials. Whether to grant separate trials in a given case lies within the trial judge's sound discretion, bounded by the statutory and constitutional limits described above. However, the Wisconsin Supreme Court's decision in Waters v. Pertzborn places clear limits on that discretion. Specifically, § 805.05(2) does not authorize bifurcation of liability and damages within a single claim for trial before different juries. In Waters, the Court held that the legislature intended to prohibit dividing a single cause of action across multiple trials, and that any attempt to assign separate juries to liability and damages phases "contravene[s]" § 805.05(2) and is "incompatible" with the five-sixths jury verdict requirement set forth in § 805.09(2).[5] Accordingly, while trial judges retain broad authority to manage proceedings and avoid prejudice, that authority must be exercised within the specific limitations imposed by Wisconsin law, most notably, the prohibition on issue bifurcation across multiple juries for a single claim.

II. Legal Authority for Separate Trials

A. General Statutory Authority: Wis. Stat. § 805.05(2). Section 805.05(2) of the Wisconsin Statutes is the primary source of authority for ordering separate trials in civil actions. It provides that a court may order a separate trial "for any claim, cross-claim, counterclaim, or third-party claim, or any separate issue" whenever doing so would further convenience, avoid prejudice, or be conducive to expedition and economy. The statute's operation is subject, however, to two critical constraints: (1) the requirements of Wis. Stat. § 805.09(2), which embodies the state constitutional guarantee of a valid civil jury verdict by at least five-sixths of jurors; and (2) the mandate of Article I, § 5 of the Wisconsin Constitution preserving the right to trial by jury. Practically, this means a court's use of separate trials cannot undermine the principle that the same supermajority of jurors must agree on all questions necessary to resolve a single claim. Indeed, the Wisconsin Supreme Court has explicitly clarified that § 805.05(2) "does not authorize

bifurcation of issues," such as separating liability and damages, for adjudication before different juries.[6] In light of Waters v. Pertzborn, any attempt to split the issues of liability and damages from the same claim into separate trials (with separate juries) falls outside a trial court's discretion under § 805.05(2). Instead, separate trials in Wisconsin are typically limited to distinct claims or distinct litigants, rather than piecemeal issues of one claim, except as otherwise expressly permitted by statute.

B. Separate Trials Involving Insurers: Wis. Stat. § 803.04(2). Wisconsin law provides specific procedures for separate trials in cases involving insurance companies as parties. Wis. Stat. § 803.04(2)(a) applies to negligence actions where an insurer is joined as a defendant, such as under Wisconsin's direct-action statute, and authorizes the court, upon motion by any defendant, to order that the issues between the plaintiff and the allegedly negligent defendant be tried separately from those between the defendant and the defendant's insurer. The statute also requires the court to specify the sequence in which these separate trials will occur. Additionally, §§ 803.04(2)(b) and (2)(c) permit the insurer to be excluded from certain phases of trial, for example, by omitting the insurer's name from the special verdict during the liability phase. Subsection (4) further authorizes separate trials in cases involving permissive joinder of parties or claims, allowing the court to sever issues as necessary to avoid delay or prejudice resulting from the joinder.

These provisions reflect a recognition that, in insurance-related litigation, separating coverage issues from liability issues can be essential. Wisconsin appellate courts have repeatedly upheld the use of bifurcated procedures in this context, particularly where insurance coverage is disputed. In Mowry v. Badger State Mutual Casualty Co.[7] and later in Newhouse (by Skow) v. Citizens Security Mutual Insurance Co.,[8] the Wisconsin Supreme Court endorsed a "coverage-first" trial structure pursuant to § 803.04. In both cases, the insurer was permitted to contest coverage in an initial phase, or in a separate proceeding, before the underlying liability and damages claims against the insured were litigated. This bifurcated approach serves as an important procedural safeguard for insurers. By timely moving for bifurcation and requesting a stay of the liability phase, an insurer can seek a declaratory judgment on coverage without risking a breach of its duty to defend. If the court determines that coverage does not exist, the insurer may avoid participating in what could otherwise be a costly and prejudicial liability trial. Conversely, if coverage is confirmed, the case proceeds with the insurer properly joined in the action.

The Wisconsin Supreme Court in Choinsky v. Employers Insurance Co. of Wausau[9] reaffirmed the "coverage-first" approach as one of four "judicially preferred procedures" for resolving disputes involving both liability and insurance coverage. Under Choinsky, an insurer that disputes coverage should intervene in the action and promptly move for bifurcation of the coverage issue, along with a stay of the liability phase until the coverage determination is resolved. The Court explained that this bifurcation-and-stay procedure benefits both parties: it provides the insurer with a streamlined, independent resolution of the coverage question, while shielding the insured from the burden of simultaneously litigating liability and coverage, often with conflicting interests. As the Court emphasized, "the goal is to protect the insured" in all four preferred procedural frameworks.[10] If the trial court denies a stay and allows the liability case to proceed before coverage is decided, the insurer must defend the insured under a reservation of rights and may be required to reimburse reasonable defense costs if coverage is later found not to exist. In essence, Wis. Stat. § 803.04(2) provides a narrowly tailored exception to Wisconsin's general prohibition on issue bifurcation by treating the coverage dispute as a separate, bifurcatable claim, so long as the insurer follows the proper procedure by filing a timely motion and securing a stay of the liability proceedings.

C. Inherent Judicial Authority. Apart from the explicit procedures in §§ 805.05(2) and 803.04, Wisconsin courts have considered whether the general trial-management powers conferred by Wis. Stat. § 906.11 might support ordering separate trials on particular issues. Section 906.11(1) gives trial judges broad authority to control the mode and order of presenting evidence "so as to (1) make the interrogation and presentation effective for ascertaining the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." In Zawistowski v. Kissinger, 160 Wis. 2d 292 (Ct. App. 1991), the court of appeals suggested that § 906.11 could provide an independent basis to bifurcate issues within a single trial for reasons of judicial economy[11]. In Zawistowski, a defamation case, the trial court had split the trial into two phases: in the first phase the jury determined whether the defendant made the alleged defamatory statements, and only if the statements were found to have been made would the trial proceed to a second phase on whether the statements were false or caused damages. The Court of Appeals upheld this procedure, implying that a trial judge's inherent authority over trial proceedings encompassed the discretion to isolate an issue for an initial determination.

In doing so, Zawistowski identified three primary factors to guide a court's decision to conduct an issue-by-issue trial under § 906.11:

1. Potential prejudice to either party if issues are not separated;
2. Complexity of the case and the risk that a jury might be confused by having to decide too many issues at once; and
3. Considerations of convenience, judicial economy, or delay, such as whether focusing on a key threshold issue first might streamline the case or encourage resolution.

Using these factors, the appellate court reasoned that in the defamation scenario, deciding the fact of publication first (separate from falsity and damages) avoided potential prejudice and jury confusion, and could save time if the jury found no publication (making the truth or falsity of the statement irrelevant).[12]

However, the continued vitality of Zawistowski's approach was later curtailed by the Wisconsin Supreme Court. In Waters v. Pertzborn, the Supreme Court expressly overruled Zawistowski to the extent it permitted issue bifurcation that contravenes § 805.05(2). The Waters court held that § 906.11 does not authorize separating issues for trial in any manner that § 805.05(2) forbids.[13] In practical terms, this means a trial judge's inherent authority is not an end-run around the legislature's ban on splitting a single claim between multiple juries. While the Zawistowski factors (prejudice, confusion, efficiency) remain relevant as general principles for managing trials, they "cannot be relied upon to justify separate trials of liability and damages before different juries." After Waters, any intra-claim phasing must still take place before one jury. Inherent authority may still allow a judge to phase the presentation of issues to one jury (for clarity or efficiency), but it cannot justify completely separate trials on parts of one claim in a way that violates the same-five-sixths verdict rule.

D. Federal Rule 42(b). It is important to note that Wisconsin's bifurcation rule is narrower than its federal counterpart. Federal Rule of Civil Procedure 42(b) gives federal judges broad discretion to order separate trials "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy," and federal courts frequently bifurcate not just claims but individual issues (such as liability and damages, or compensatory and punitive damages) between different trials or juries. Wisconsin, by contrast, pointedly rejected that broad approach. The Wisconsin Supreme Court, when promulgating § 805.05(2), "expressly declined to adopt the federal model," choosing instead to limit bifurcation to distinct causes of action[14]. Except for the narrow insurance-related exceptions noted above (§ 803.04(2)), Wisconsin courts may not bifurcate discrete issues within a single cause of action.[15] This divergence means that

practitioners cannot simply rely on federal practice or precedents under Rule 42(b) when seeking separate trials in Wisconsin state court.

E. Constitutional Safeguards for Jury Trials. Any order for separate trials must respect the fundamental right to a jury trial as guaranteed by the Wisconsin Constitution. Article I, § 5 of the Wisconsin Constitution preserves the right to a trial by jury in civil cases, and § 805.05(2) explicitly conditions that any bifurcation must not infringe on this right. In practice, this means a court cannot employ separate trials in a way that would deprive a party of having a jury decide any factual issue that is material to that party's claim or defense. For example, the constitutional jury-trial guarantee, coupled with Wis. Stat. § 805.09(2), necessitates the same jury deciding all phases of a single claim. Courts should be vigilant that bifurcation not lead to inconsistent verdicts or violate the prohibition on re-examining facts found by another jury.

III. Key Considerations for Separate Trials

When determining whether to bifurcate or otherwise order separate trials in a case, courts balance several practical and policy considerations. The overarching question is whether separate proceedings will enhance fairness or efficiency enough to outweigh the inherent duplication and complexity that multiple trial phases can introduce. Key factors include the risk of prejudice, the potential for juror confusion, the likelihood of overall time savings, and the interdependence of issues:

A. Avoiding Prejudice: Perhaps the most common rationale for bifurcation is to prevent a jury from being prejudiced by evidence that is relevant to one issue but not another. For instance, in a personal injury case, evidence of catastrophic injuries or of a defendant's wealth (relevant to damages or punitive damages) might unduly sway a jury's determination of liability. Separating the trial so that liability is decided first, without reference to the scale of harm or the defendant's financial status, can ensure a cleaner, more impartial determination on liability. Only if the jury finds liability would it then hear the potentially prejudicial damages evidence in a second phase. In this way, bifurcation can prevent evidence of significant harm or other potentially prejudicial information from improperly influencing the jury's assessment of liability.[16]

B. Efficiency and Mootness: Bifurcation can also promote judicial economy by resolving threshold issues that may render other issues moot. A classic example is separating liability from damages: if the defendant is found not liable in Phase 1, there is no need to hold a Phase 2 on damages at all. Similarly, bifurcating an

insurance coverage question from the underlying liability can conserve resources: if the court (or jury) decides there is no coverage, the case might end or be significantly narrowed. By focusing first on a dispositive issue, separate trials can potentially spare the parties and court the time and expense of litigating everything. This is one reason Wisconsin encourages trying coverage disputes before liability, as discussed in Mowry and Newhouse.[17] However, courts must consider the flip side: if the first phase does not dispose of the case, a two-stage trial might end up being lengthier and more expensive overall. The Zawistowski factors highlighted this trade-off; while a separate trial on a key issue can streamline a case, it should be ordered only when it truly appears likely to enhance, rather than hinder, ultimate efficiency.

C. Jury Comprehension: In cases with especially complex facts or legal theories, dividing the trial can help jurors focus and reduce confusion. For example, in a complicated products liability lawsuit, a court might try the question of defect and liability in one phase and, only if liability is found, proceed to causation and damages in a second phase. This could simplify what the jury has to consider at one time. Likewise, in very technical cases (patent disputes, complex financial frauds, etc.), isolating certain issues, like liability or coverage, can make the proceedings more digestible. Wisconsin courts have noted that bifurcation may be warranted to enhance clarity for the jury. On the other hand, segmenting a trial can also confuse jurors if not done carefully. Jurors might not understand why they are hearing only part of the case, or they might speculate about the missing pieces. Thus, any benefit in juror understanding must be weighed against the need to present a coherent story.

D. Duplicative Proceedings and Fairness: Judges considering bifurcation should remain aware of the potential drawbacks. Multiple trial phases can lead to repetition (e.g., witnesses like accident reconstruction experts might need to testify in both phases, first on liability and later on damages causation). There is also a risk of inconsistent findings if issues overlap. As Wisconsin courts have cautioned, dividing a case into too many phases can lead to increased costs, unnecessary delays, and greater procedural complexity. For these reasons, a court will generally order separate trials only when the expected gains in fairness or efficiency clearly outweigh the downsides. In practice, bifurcation is often reserved for scenarios where one issue is both highly prejudicial to combine with others and sufficiently distinct that trying it first could resolve or greatly simplify the rest of the case.

IV. Burden of Proof

A party moving for a bifurcated or separate trial bears the burden of convincing the court that the separation will indeed promote justice in the case. In general, the proponent of bifurcation must demonstrate that the proposed separation would either reduce the risk of unfair prejudice or otherwise serve the interests of convenience and economy without unduly harming the other party's case.[18] This typically involves showing, for example, that the issues to be separated are truly independent or that any overlap is manageable, and that a single trial would create a substantial danger of bias or confusion. Ultimately, the court should grant separate trials only if persuaded that doing so will enhance fairness or efficiency overall. If the court is not convinced, or if it finds that bifurcation would simply shift prejudice or inconvenience onto the other party, it should deny the motion.

V. Practical Considerations in Managing Separate Trials

When a court does decide to order separate trials or phases, there are several practical matters and procedural details to manage to ensure the bifurcated process runs smoothly and fairly:

A. Preliminary Hearings and Scheduling: The possibility of bifurcation is usually addressed early in the case, often at a pre-trial conference or through a motion before trial. At these stages, courts evaluate whether separating certain claims or issues will advance fairness or efficiency in the proceedings. If bifurcation is ordered, the court's scheduling order will outline the sequence of trial phases (for example, "Phase 1 (Liability) to be tried to a jury on [date]; Phase 2 (Damages) to follow if necessary"). The court may also set limits on what evidence is admissible in each phase. Judges will typically also discuss with counsel how jury selection will be handled (one jury for all phases, as is generally required in Wisconsin, versus separate juries for truly separate trials of different claims) and how to allocate time between phases.

B. Jury Instructions: In a bifurcated trial, jury instructions must be carefully tailored to each phase. The court will instruct the jury in Phase 1 only on the law relevant to that phase (e.g., negligence and causation, but not damages). If the trial proceeds to a second phase, the jury will receive additional instructions addressing the remaining issues (e.g., the law of damages) at that time. It is crucial that jurors clearly understand which issues they are deciding in each phase and that they should not speculate about issues reserved for later. Wisconsin's jury instructions include

special preliminary instructions for bifurcated trials (Wis JI–Civil 52A for Phase 1 and 52B for Phase 2) to orient the jury about the phased process.

C. Discovery Management: Unless otherwise ordered, discovery in civil cases is not automatically bifurcated. Parties may normally inquire into all claims and defenses during the discovery period, even if a trial might be staged in phases. However, courts have discretion to implement staged discovery in conjunction with separate trials[19]. For instance, if an insurance coverage issue is to be tried before liability, a court might stay or limit discovery on damages or claims of bad-faith until the coverage question is resolved. Similarly, in a complex case, the court could allow discovery on Phase 1 issues first, and hold off on expensive or burdensome Phase 2 discovery unless it becomes necessary. The goal is to avoid wasting effort: if Phase 1 might dispose of the case, there is little sense in forcing the parties to engage in full discovery on Phase 2 matters upfront. On the other hand, completely bifurcating discovery can introduce its own inefficiencies (potential duplication or disputes about overlap). Thus, judges should tailor discovery management to the needs of the case, for example, by permitting discovery on all issues but sequencing expert disclosures, or by requiring parties to update discovery after Phase 1 if Phase 2 is needed.

VI. Separation of Liability and Damages

A. Common Practice. A frequent form of trial "bifurcation" in civil cases is to address liability issues before turning to damages. The logic behind this practice is straightforward: If the jury finds the defendant not liable, then there is no need to spend time presenting evidence or arguments about the amount of damages. Many courts therefore structure trials in two stages: First, a liability phase, in which the jury determines whether the defendant is liable (and sometimes related issues like causation); and second, if needed, a damages phase, in which the same jury determines the amount of damages. This sequential approach can save time and avoid unnecessary complexity by focusing the initial trial on the yes/no question of liability. It can also mitigate prejudice, for example, keeping evidence of a plaintiff's severe injuries or a defendant's wealth out of the liability deliberations. Wisconsin courts commonly use this technique within a single trial, and it is permissible as long as the same jury hears both phases and all findings necessary to the verdict are made by that one jury.

B. Single Jury Requirement. Under Wisconsin law, if liability and damages are separated into phases, the same jury must decide both. This requirement stems from Wis. Stat. § 805.09(2) (the five-sixths rule) and the Supreme Court's holding in

Waters v. Pertzborn. In Waters, the court examined the history of § 805.05(2) and confirmed that the legislature intentionally omitted any language permitting separate juries for different issues of one claim.[20] Because § 805.09(2) mandates that at least five-sixths of jurors agree on all questions essential to a verdict on the same claim, it follows that liability and damages for that claim must be tried to a single jury. In practical terms, once a jury has determined liability, that same jury should hear the evidence on damages (if needed) and render the damages verdict. An order assigning liability to one jury and damages to a different jury would violate Wisconsin law. The Supreme Court bluntly stated that ordering separate juries for liability and damages "contravene[s]" § 805.05(2) and "cannot be reconciled" with § 805.09(2).[21] Wisconsin's clear rule, therefore, is that liability and damages may be phased, but not separated into different trials before different juries. The phasing must occur within one trial before one jury, which deliberates on both sets of questions in turn.

VII. Punitive Damages Bifurcation

A. Procedural Considerations. Punitive damages present a special situation where bifurcation is often considered. By their nature, punitive damages involve evidence that is not relevant to liability for the underlying wrong but can be highly prejudicial. Wisconsin law generally requires that a single jury decide all aspects of a case, including liability, compensatory damages, and punitive damages, if sought.[22] Nonetheless, courts commonly bifurcate the presentation of punitive damages to mitigate prejudice. This typically means the jury is asked to determine liability (and sometimes compensatory damages) first. Only after the jury finds liability, and if the facts could support punitive damages, does the trial move to a second phase on the punitive award. During the initial phase, evidence pertaining solely to punitive damages — for example, the defendant's wealth or profits, or egregiousness of conduct beyond what is needed to establish liability — is kept out, to avoid influencing the jury's basic verdict. The Wisconsin Supreme Court has acknowledged the wisdom of this approach. In Wangen v. Ford Motor Co., the Court cautioned that introducing evidence of a defendant's financial status, which is relevant only to punitive damages, is "highly prejudicial" when a jury is concurrently deciding liability.[23] To guard against this, Wisconsin courts may isolate punitive-damages evidence to a later phase of trial. This ensures that the liability determination is based solely on the facts of the underlying wrongdoing, without the inflammatory overlay that punitive evidence can add.

B. Two-Phase Approach. The common procedure in Wisconsin is a two-phase trial for cases involving punitive damages. In Phase 1, the jury decides liability and

usually assesses compensatory damages. If, and only if, the jury finds the defendant liable, and if the plaintiff has made a showing that punitive damages are legally tenable, the trial proceeds to Phase 2, where the same jury hears additional evidence and arguments on punitive damages. In Phase 2, evidence of the defendant's wealth, the profitability of the misconduct, and other punishment-related considerations can be introduced, since those are pertinent to deciding the amount of punitive damages. The jury then returns a second verdict on whether punitive damages should be awarded and in what amount. Notably, Wisconsin law still mandates that the same jury handle both phases (liability and punitive), so this is a bifurcation in time, but not in the jury's composition. This approach was effectively endorsed in Wangen, which required that a plaintiff first establish a prima facie case of entitlement to punitive damages (i.e. demonstrate "outrageous" conduct by clear, satisfactory, and convincing evidence) before the issue of punitive damages may be submitted to the jury.[24] Only after clearing that evidentiary threshold is the second phase warranted.

Once a case enters the punitive damages phase, the jury is guided by specific criteria to ensure any award is rational and fair. In Wangen, the Supreme Court identified several factors that a jury should consider when determining punitive damages. These include:

- The seriousness of the hazard posed by the defendant's conduct;
- The profitability of the misconduct;
- The duration of the conduct and any concealment of it;
- The defendant's financial condition; and
- The likelihood of detection and punishment from other sources.[25]

These factors, drawn from Wangen and subsequent cases, help ensure that the jury's focus in Phase 2 remains on gauging how blameworthy the conduct was and what amount of money (if any) would serve to adequately punish and deter such conduct in the future.

The Wangen rule (clear and convincing proof of outrageous conduct as a prerequisite) was later codified by the legislature in Wis. Stat. § 895.043(3). Under that statute, punitive damages may be awarded only if the plaintiff proves by clear and convincing evidence that the defendant acted "in an intentional disregard of the rights" of the plaintiff. This codification reinforces the notion that punitive damages are exceptional; they require a showing of something beyond ordinary negligence or even gross negligence. As a practical matter, judges may grant a motion to bifurcate punitive damages until the plaintiff meets this threshold, often via a summary judgment ruling. If the claim survives, a bifurcated trial structure ensures

that the jury deliberates on punitive damages only after establishing liability and only with proper guidance.

VIII. Trifurcation and Additional Phases

In rare cases, courts may consider trifurcation or even more segmented trial structures. "Trifurcation" typically refers to splitting a trial into three phases, for example, Phase 1 on liability, Phase 2 on compensatory damages, and Phase 3 on punitive damages (if applicable). This approach has been used when circumstances warrant a very granular division, such as a complicated case that also involves punitive damages, or when required by a specific statutory scheme. Wisconsin courts have the discretion to approve such multi-phase trials "when statutory requirements or practical considerations warrant such a structure."[26] Additionally, courts might create a preliminary phase to resolve a threshold issue (like personal jurisdiction, coverage, or the applicability of an immunity) before the main issues. This is effectively a form of bifurcation or trifurcation as well, carving out an extra phase to handle a front-end issue that could be dispositive.

In practice, trifurcation is most commonly seen in complex civil litigation (for instance, some insurance coverage disputes or class actions) or where a statute essentially mandates it, as with certain punitive damages procedures, or perhaps separate trials for particular issues like eminent domain valuation. Even then, courts should remain vigilant to ensure that the constitutional jury trial rights are protected and that the proceeding does not become unmanageably fragmented.

IX. Five-Sixths Rule in Bifurcated/Trifurcated Trials

Wisconsin's five-sixths rule for civil jury verdicts plays a central role in shaping bifurcated trial procedure. The rule, rooted in Article I, § 5 of the state constitution and codified at Wis. Stat. § 805.09(2), provides that a civil verdict need not be unanimous – a valid verdict can be reached with agreement by five-sixths of the jurors. However, § 805.09(2) adds a critical caveat: "If more than one question must be answered to arrive at a verdict on the same claim, the same five-sixths of the jurors must agree on all the questions." In other words, when multiple questions (such as negligence, causation, and damages) collectively determine a single claim's outcome, the jurors who make up the supermajority on each of those answers must be the same individuals across all the questions for that claim.[27] This statute prevents a verdict from being patched together by different combinations of jurors on different questions; there must be a consistent core group of at least five-sixths who agree throughout the special verdict for one claim. Notably, when distinct claims are tried together, the five-sixths

rule applies to each claim independently, the composition of the five-sixths can differ from claim to claim, so long as for each separate claim there is a stable supermajority on all its elements.

A. Single Claim, Phased. Section 805.09(2) requires that the verdict's validity rests on an identical group of (at least) five-sixths of jurors agreeing to every answer necessary to support the judgment on that claim. Thus, in a phased trial of one claim, the same jurors must participate in both phases. They will have heard all the evidence relevant to that claim (even if presented in stages) and will collectively supply the answers to all parts of the verdict. The same-five-sixths rule then simply operates as usual: at least five-sixths of that one jury must agree on each answer in Phase 1 and each answer in Phase 2, and it must be the same five-sixths concurring on every answer from both phases to constitute a proper verdict.

B. Separate Claims, Phased. For phased trials involving different claims, the five-sixths rule applies separately to each claim. If Claim A and Claim B are bifurcated into separate phases of a trial (say, because one claim is tort and the other is contract or because the claims involve different parties), the verdicts for the two claims need not have agreement by the same 5/6 jurors. Five-sixths of the jury must agree on all answers for Claim A and Claim B, but the same jurors who decide Claim A need not also decide Claim B, because the claims are independent of each other. The law recognizes that, for example, a personal injury claim and a property damage claim, or a tort claim and a contract claim, might be tried separately to different juries without issue. What § 805.09(2) ensures is that within each of those phases or trials, the verdict is coherent and meets the supermajority threshold. Truly separate causes of action can be separately tried, and each can produce a valid verdict as long as each jury internally satisfies § 805.09(2).

X. Bifurcation of Bad-Faith Insurance Claims

First-party insurance cases often involve both a contractual claim (e.g., for coverage or policy benefits) and a tort claim for bad faith against the insurer. Wisconsin courts frequently bifurcate these two claims, recognizing that they raise distinct issues and that trying them together can be problematic. The primary rationale, as articulated in Dahmen v. American Family Mut. Ins. Co., is that litigating a bad-faith claim alongside the coverage claim would undermine fairness to the insurer.[28] The evidence needed to prove bad faith (such as internal claims-handling documents, attorney opinions, and other privileged or highly prejudicial material) is very different from the evidence relevant to whether the insured is entitled to coverage or damages under the policy. If both claims were tried together, the insurer might be forced to disclose confidential files

and strategies to defend itself on the bad-faith claim, which could in turn prejudice its defense on the contract claim. Additionally, a joint trial would allow the jury to hear about the insurer's alleged malice or egregious conduct (necessary for bad faith) while deciding the more straightforward question of contract liability. This commingling of issues could lead the jury to "punish" the insurer by finding coverage where there is none, or inflate damages, due to anger over the bad-faith allegations.

For these reasons, Wisconsin courts have effectively required bifurcation in most instances where an insured simultaneously alleges breach of contract and bad faith. Typically, the coverage or breach-of-contract claim is tried first, and the bad-faith claim is stayed pending the outcome of that first phase. If the insured does not prevail on the contract claim — for instance, if the policy is found not to cover the loss — then the bad-faith claim often becomes moot or fails as a matter of law. If the insured wins on the contract claim, the case may then proceed to the bad-faith phase, where the focus is on the insurer's conduct. This approach was endorsed in Dahmen, where the Court of Appeals held that the trial court erroneously failed to bifurcate and stay the bad-faith claim.[29]

The Wisconsin Supreme Court echoed these principles in Brethorst v. Allstate Ins. Co., where the Court made clear that a plaintiff must establish that the insurer breached its contractual obligations (or at least that the claim for benefits is valid) before pursuing discovery or trial on a bad-faith claim.[30] This rule effectively forces a bifurcation: The insured cannot even get into court on bad faith without first showing some wrongful denial of benefits. Brethorst thus reinforces that the bad-faith issue should be handled in a second phase, only after the contract claim has been resolved in the insured's favor.

XI. Practical Illustrations of Separate Trials

To see how these principles play out, it is helpful to review a few illustrative cases where Wisconsin courts have addressed bifurcation or separate trials:

A. Dahmen v. American Family Mut. Ins. Co., 247 Wis. 2d 541 (Ct. App. 2001). In Dahmen, the insureds sued their auto insurer for underinsured motorist benefits and also alleged the insurer acted in bad faith. The insurer moved to bifurcate the bad-faith claim from the UIM coverage claim and to stay all proceedings on bad faith until the UIM issue was resolved. The trial court denied the motion, but the Court of Appeals reversed, holding that it was an abuse of discretion not to bifurcate these claims. The appellate court reasoned that trying the contract and bad-faith claims together would severely prejudice the insurer and was unnecessary given that the bad-faith claim's viability depended on the outcome of the contract

claim. On remand, the claims were bifurcated: the UIM coverage dispute was tried first. This resulted in a more fair process, the jury deciding coverage did not hear allegations about the insurer's alleged bad faith or see its internal files. Only after the insured prevailed on coverage did the bad-faith claim proceed, at which point the dispute was largely resolved by settlement.[31]

B. Towne Realty, Inc. v. Zurich Insurance Co., 193 Wis. 2d 544 (Ct. App. 1995), aff'd in part, reversed in part on other grounds, 201 Wis. 2d 260 (1996). Towne Realty involved an insurer disputing coverage in a complex lawsuit. The Wisconsin Court of Appeals reiterated in this case that when an insurer receives notice of a suit and believes there is no coverage, the proper procedure is to request a bifurcated trial (to separate coverage from liability) and to move for a stay of the liability proceedings until the coverage question is resolved.[32] The court underscored that this approach protects all parties: it protects insureds by getting the coverage issue settled, so the insurer can't abandon them without consequence, and it protects insurers from having to participate in a full liability trial when they might have no duty to indemnify.

C. Mowry v. Badger State Mut. Cas. Co., 129 Wis. 2d 496 (1986). Mowry was a landmark Wisconsin Supreme Court case addressing an insurer's obligations when coverage is in dispute. The case affirmed the practice of using Wis. Stat. § 803.04(2) to bifurcate an insurance coverage issue from the underlying liability and damages issues.[33] In Mowry, the Court held, first, that an insurer with a "fairly debatable" coverage defense is not required to tender a defense or indemnity, or to accept a settlement demand within policy limits, while the coverage dispute is being resolved.[34] In essence, if coverage is genuinely uncertain, the insurer can insist on a bifurcated proceeding to get a declaratory judgment on coverage before committing its policy funds. Second, Mowry emphasized that even when coverage is disputed, the insurer retains certain duties: It must investigate the claim diligently and keep the insured informed of any settlement opportunities. The insurer cannot simply ignore the underlying case. Mowry is significant in the bifurcation context because it legitimizes the idea that an insurer can defend under a reservation of rights and seek to split off the coverage fight, and that doing so, when coverage is debatable, does not constitute insurer bad faith.

D. Newhouse (by Skow) v. Citizens Security Mut. Ins. Co., 176 Wis. 2d 824 (1993). Newhouse further clarified the "proper procedure" for an insurer that wishes to dispute coverage but also fulfill its contractual duties. The Wisconsin Supreme Court held that an insurer in this position should (1) move to bifurcate the coverage issue from liability and damages, and (2) request a stay of the liability phase until

the coverage issue is decided.[35] This is essentially the Choinsky procedure, and Newhouse made it clear that this was not just a theoretical option but the expected course of action.

COMMENT

This Law Note was approved in January 2026.

The Committee recommends referring to Wis JI–Civil 52A and 52B in the Comment to JI 53 as the standard jury instructions for bifurcated proceedings.

Standard Bifurcation Instructions: Wis JI–Civil 52A (Preliminary Instruction – Phase 1) and Wis JI–Civil 52B (Preliminary Instruction – Phase 2) are the standard jury instructions to use at the start of each phase in a bifurcated (or trifurcated) civil trial. JI 52A is given at the outset of Phase 1 to explain the two-phase procedure, and JI 52B is given at the start of Phase 2 to orient the jury to the new issues and applicable burden of proof. For example, in a case with separate liability and damages phases, JI 52A is read before the liability phase and JI 52B before the damages phase.

NOTES

1. Wis. Stat. Sec. 805.05(2) Consolidation; separate trials.

2. Waters ex rel. Skow v. Pertzborn, 2001 WI 62, ¶¶19-20, 243 Wis. 2d 703, 627 N.W.2d 497.

3. Waters, supra, at ¶¶19-20.

4. Wis. Stat. § 805.05(2).

5. Waters, supra, at ¶24.

6. Waters, supra, at ¶19.

7. Mowry v. Badger State Mut. Cas. Co., 129 Wis. 2d 496, 514-515, 385 N.W.2d 171 (1986).

8. Newhouse by Skow v. Citizens Security Mutual Insurance Co., 176 Wis. 2d 824, 836, 501 N.W.2d 1 (1993).

9. Choinsky v. Employers Ins. Co. of Wausau, 2020 WI 13, ¶17, 390 Wis. 2d 209, 938 N.W.2d 548.

10. Choinsky, supra, at ¶18.

11. Zawistowski v. Kissinger, 160 Wis. 2d 292, 300, 466 N.W.2d 664 (Ct. App. 1991). See also, Waters, supra, at ¶30 (limiting Zawistowski to one-jury use).

12. Zawistowski, supra, at 302–03.

13. Waters, supra, at ¶¶30-31.

14. In Waters v. Pertzborn, supra, at ¶¶17–19 & ¶¶20–24, the court traced the statute's legislative history and concluded that the omission of "issues" was intentional. The court identified two statutory constraints on bifurcation, including the "same five-sixths" jury rule under Wis. Stat. § 805.09(2), which prohibits presenting different issues to separate juries. Waters also limited reliance on general trial-management authority under § 906.11 and overruled Zawistowski v. Kissinger, supra, to the extent it had suggested otherwise.

15. In insurance coverage disputes, Wisconsin courts favor a "coverage-first" approach. If a stay is granted, the merits phase is deferred pending coverage resolution. If denied, the insurer must defend under a reservation of rights and later reimburse reasonable defense costs retroactive to the date of tender. See Choinsky, supra, at ¶3.

16. See Wangen v. Ford Motor Co., 97 Wis. 2d 260, 276–77, 294 N.W.2d 437 (1980). See also 9A Wright & Miller, Fed. Prac. & Proc. Civ. §§ 2388, 2390 (bifurcation can reduce juror confusion in complex cases and encourage settlement once initial liability is resolved).

17. See Mowry, supra; See also, Newhouse, supra.

18. See Dahmen v. American Family Mut. Ins. Co., 2001 WI App 198, ¶11, 247 Wis.2d 541, 635 N.W.2d 1. Cf. 9A Wright & Miller § 2388 (3d ed. 2025) ("party seeking bifurcation must show that separate trials would … avoid prejudice").

19. Wis. Stat. § 804.01(2).

20. Waters, supra, at ¶19.

21. Waters, supra, at ¶19.

22. Waters, supra, at ¶27.

23. Wangen v. Ford Motor Co., 97 Wis. 2d 260, 277, 294 N.W.2d 437 (1980).

24. Wangen, supra, at 298.

25. Wangen, supra, at 303–05.

26. Wisconsin law grants courts discretion to bifurcate or trifurcate proceedings under statutory provisions such as Wis. Stat. § 805.05(2) and § 906.11. Although these statutes primarily address bifurcation, their underlying principles may justify trifurcation when the court determines that dividing the trial into three phases would serve the interests of justice. For example, a court may elect to try liability, compensatory damages, and punitive damages in separate phases, particularly in complex cases involving multiple claims or parties.

27. See Giese v. Montgomery Ward, Inc., 111 Wis. 2d 392, 401, 331 N.W.2d 585 (1983) (applying a claim-by-claim analysis and requiring the same five-sixths concurrence only for questions essential to judgment on a given claim).

28. Dahmen, supra, at ¶¶16-19.

29. See Dahmen, supra.

30. Brethorst v. Allstate Prop. & Cas. Ins. Co., 2011 WI 41, ¶52, 334 Wis.2d 23, 798 N.W.2d 467.

31. Dahmen, supra, at ¶20.

32. Towne Realty, Inc. v. Zurich Insurance Co., 193 Wis. 2d 544, 554, 534 N.W.2d 886 (Ct. App. 1995).

33. Mowry, supra, at 523.

34. Mowry, supra, at 521.

35. Newhouse, supra, at 836.