the complaint, the complaint need not allege that written notice was given to the city as required by statute as prerequisite to action against municipality based on negligence. Christiansen v City of Duluth, 225 M 475, 486, 31 NW(2d) 270.

Order sustaining a general demurrer to a complaint, but permitting plaintiff 30 days within which to file an amended complaint, became final upon the expiration of said 30-day period without interposition of the amended complaint in the absence of appeal or vacation of the order. Thereafter, under section 546.39, neither plaintiff nor the trial court may dismiss the action without prejudice, and the defendant is entitled to a judgment of dismissal on the merits. Christiansen v City of Duluth, 225 M 475, 486, 31 NW(2d) 270.

A dismissal at the close of plaintiff's opening statement is rarely granted, and the power to dismiss in such a case is to be sparingly exercised. Such motion is only granted in those cases where counsel has deliberately conceded facts which, if proved, would not entitle plaintiff to a verdict, and then only after counsel has been given every opportunity to qualify, explain, and amplify his statements. Johnson v Larson, 234 M 505, 49 NW(2d) 8.

The denial of plaintiff's motion for a dismissal of his action without prejudice before he had rested his case in chief was not an abuse of discretion. The granting to the jury of a view of the premises is discretionary with the trial court. Certain expert testimony by plaintiff was properly excluded. The trial court's supplemental instructions to the jury present no grounds for reversible error. Erickson v Northern Minnesota National Bank, 235 M 232, 50 NW(2d) 489.

Whether an additional party may be brought in as defendant is discretionary with the trial court; and where an additional party defendant is brought in on a motion by plaintiffs, the plaintiffs thereafter have the same right to dismiss as if the defendant had been originally sued, and other defendants are not in a position to object to such dismissal. Conradson v Vinkemeier, 235 M 537, 51 NW(2d) 651.

The supreme court will not sustain a verdict where the evidence is so overwhelmingly against the verdict that the testimony supporting it is not worthy of belief or where established physical facts require a conclusion contrary to the verdict. Whether there is a reasonable basis for the verdict of the jury must be decided upon in consideration of all the evidence in the light most favorable to the verdict. Price v Mackner, ... M ....., 58 NW(2d) 260.

546.40 Superseded by Rules of Civil Procedure, Rule 68.01.

546.41 Superseded by Rules of Civil Procedure, Rule 68.02.

Annotations relating to superseded section 546.41.

An order denying defendant's motion to dismiss which was made on the ground that defendant's tender of a sum sufficient to cover the amount of plaintiff's claim, plus costs, had been refused, was not a final order from which an appeal could be taken. Independent School District v Rittmiller, 235 M 556, 51 NW(2d) 664.

An order denying a motion to dismiss a cause of action is not appealable. Independent School District v Rittmiller, 235 M 556, 51 NW(2d) 664.

CHAPTER 547

NEW TRIALS

547.01 Superseded by Rules of Civil Procedure, Rule 59.01.

Annotations relating to superseded section 547.01.

Proximate cause in Minnesota. 34 MLR 185.

If the newly discovered evidence is such that different persons might reasonably draw different conclusions from it, a new trial should not be granted. State v Smith, 221 M 359, 22 NW(2d) 318.

Newly discovered evidence having no bearing upon any fact found in the record will not be considered on a motion for a new trial. State v Martin, 223 M 414, 27 NW(2d) 158.

Contributory negligence is a defense to an action based upon a claimed violation of the statute with reference to sale and delivery of volatile oils allegedly resulting in an explosion which caused the death of plaintiff's decedent. Dart v Pure Oil Co., 223 M 526, 27 NW(2d) 555.

Where the evidence properly admitted was sufficient to justify the verdict and there was no prejudice to substantial rights of the adverse party, or if evidence improperly admitted was immaterial to the issue, a new trial should not be granted. Boehne v Guardian Life Insurance Co., 224 M 57, 28 NW(2d) 54.

Where a newspaper article published during the trial gave account of the verdict recovered in a prior action in the same court room but in a case not connected in any way with this action, and where no objection was made thereto and no showing was made to indicate that it had been read by the jury or influenced their verdict in the present action, such publication did not constitute prejudicial error to the extent of requiring a new trial. Eichten v Central Minnesota Co-operative, 224 M 180, 28 NW(2d) 862.

A verdict of $40,000 for brain and other injuries which deprived a three month old infant girl of useful vision of the left eye and would result in one leg being several inches shorter than the other and would necessitate the use of a brace or an operation to stiffen the leg was not so excessive to indicate passion and prejudice or to require a new trial on that ground. Eichten v Central Minnesota Co-operative, 224 M 180, 28 NW(2d) 862.

Inaccurate or misleading newspaper reports of trial proceedings which find their way into the hands of jurors may be a proper basis for granting a new trial after a verdict where prejudice results. Prejudice cannot be presumed. Eichten v Central Minnesota Assn., 224 M 180, 28 NW(2d) 862.

Where varying inferences may be drawn from testimony, the case is for the jury, a motion for directed verdict presents a question of law only. A verdict may be directed only where the court's manifest duty would clearly be to set aside a contrary verdict as not justified by the evidence or contrary to law. On motion for a directed verdict, the view most favorable to the adverse party must be taken. Olson v Evert, 224 M 528, 28 NW(2d) 753.

A verdict directed for defendant on the sole ground of plaintiff's contributory negligence will be upheld, though the finding of contributory negligence as a matter of law is not sustained, if there is nothing to sustain the finding of defendant's negligence. Olson v Evert, 224 M 528, 28 NW(2d) 753.

The inadvertent language used by the court and not called to the court's attention to give an opportunity to correct the language will not in the instant case be considered ground for new trial. Melzer v Snow, 225 M 59, 29 NW(2d) 647.

In an action for damages resulting from a head-on collision between trucks on a paved highway across which blinding clouds of snow and dust were being blown, a verdict for plaintiff was not manifestly unreasonable in view of the conflicting evidence and the position of the trucks after the collision. Melzer v Snow, 225 M 59, 29 NW(2d) 647.

The supreme court will not reverse an order of the trial court, although it is technically wrong, if no substantial benefit is to be accomplished by a reversal. Moose v Vesey, 225 M 64, 29 NW(2d) 650.

A new trial upon the ground of misconduct of counsel is not granted as a disciplinary measure, but as a vehicle for the correction of wrongs in practice and the prevention of injustice, and as a means of restoring the status quo ante, where, by

his counsel's misconduct, the successful litigant has gained an undue advantage and his defeated opponent has suffered an undeserved injury. Moose v Vesey, 225 M 64, 29 NW(2d) 650.

In an action to recover treble damages on the grounds that the defendants wantonly and maliciously destroyed the plaintiff's fence, the appeal must be decided solely upon the evidence actually produced in the court below, and any plat or instrument not so produced and received in evidence is a mere fugitive paper, which may not be considered by the appellate court, even though its intended use is solely for illustrative purpose. The sufficiency of a plat or of a copy thereof is a question addressed to the discretion of the trial court. Moose v Vesey, 225 M 64, 29 NW(2d) 650.

The trial court was in error in its instructions to the jury imputing contributory negligence to plaintiff's decedent for alleged insufficient admonition of and to the driver relating to the speed at which he was driving. Kordiak v Holmgren, 225 M 134, 30 NW(2d) 17.

Where plaintiff suffered injuries in a fall on a public sidewalk and the evidence indicated that she knew of the defective condition thereof and by the exercise of due care might have avoided it, the trial court did not err in submitting to the jury question of plaintiff's contributory negligence. Ryan v City of Crookston, 225 M 129, 30 NW(2d) 351.

Remarks made by defendant's counsel in final argument which did not appear in the settled case, were denied by defendant's counsel, were not recollected by the trial court, and to which no exceptions were taken or objections made, either during or subsequent to the argument, will not be considered by the appellate court. Ryan v City of Crookston, 225 M 129, 30 NW(2d) 351.

Remarks of the trial court made during trial and directed to both counsel for the purpose of obtaining orderly trial procedure as well as other remarks made out of hearing and presence of the jury was not prejudicial. Ryan v City of Crookston, 225 M 129, 30 NW(2d) 351.

In an action for wrongful death arising out of an automobile accident, testimony of defendant driver made his negligence an issue of fact for the jury. Kordiak v Holmgren, 225 M 134, 30 NW(2d) 16.

Misconduct of plaintiff's counsel in making a statement in his argument relating to permanent injury, of which there was no evidence, was not ground for a new trial, where the trial judge in his charge instructed the jury to disregard the statement. Marcum v Clover Leaf, 225 M 139, 30 NW(2d) 24.

Assignments of error must be separately stated and must specify definitely the matter relied upon for reversal. Failing to properly assign errors is a waiver of such errors, but the respondent by voluntarily arguing the point may waive the failure to so assign. Marcum v Cloverleaf Co., 225 M 139, 30 NW(2d) 25.

The rule that a trier of fact cannot disregard positive testimony of an unimpeached witness until the record shows such improbability or inconsistency as furnishes a reasonable ground for so doing, has no application where witness' testimony is contradicted or where he is evasive. The trier of fact may reject the testimony of a witness where it is contradicted or where it is evasive. Grengs v Erickson, 225 M 153, 29 NW(2d) 881.

If the trial court's decision in directing a verdict is sustained for any reason the fact that the trial court directed a verdict on another ground does not vitiate the decision. The defendant in this case was entitled to a directed verdict for the reason stated in the opinion which was, however, quite different from the reason announced by the trial judge. Bemboom v National Surety Corp., 225 M 163, 31 NW(2d) 1.

An appeal does not lie from an order denying motion for amended findings. An order denying a motion for a new trial must be affirmed on appeal where the motion specifies no grounds therefor, since there is nothing before the appellate court to review. Radabaugh v Just, 225 M 187, 30 NW(2d) 534.

It was not an abuse of discretion to deny a motion for a new trial on the ground of newly discovered evidence. State v Ward, 225 M 208, 30 NW(2d) 349.

Where the construction of a contract is erroneously left to the jury for determination and the jury's determination of the issue is such as the court itself ought to have made, no harm results and the error is without prejudice. Cement Co. v Agricultural Insurance Co., 225 M 211, 30 NW(2d) 342.

Where there was a showing that a passenger on a bus having knowledge that there was an accumulation of snow and ice on a step by means of which she attempted to alight without taking hold of a handrail or a bar, slipped and fell, the evidence sustained a finding that passenger was guilty of contributory negligence and thus justified the submission of that question to the jury. Ball v Twin City Motor Bus Co., 225 M 274, 30 NW(2d) 523.

A shoplifter apprehended by store detective was being escorted by the detective to the manager's office on an upper floor and, while waiting for an elevator to take them up, broke away and as he ran down an aisle a customer was injured. Under such set of facts there was no negligence on the part of the store, and the customer cannot recover. Knight v Powers, 225 M 280, 30 NW(2d) 536.

Where plaintiff, a passenger in an automobile, was injured in a collision on a crossing between the automobile and a moving freight train, it was error for the court to charge the jury: "The question for you to determine is whether or not the signs that were there were sufficient to admonish the parties of their approach to the crossing in time for them to avert the injury which they suffered," and again "everyone is required to use his or her senses but, of course, one is not required to see that which is not visible. If it is visible, one is required to see it. If is not visible under the existing circumstances, then, of course, you are not required to see it because the law does not require the impossible." A new trial must be ordered. Koop v Great Northern, 225 M 286, 28 NW(2d) 687.

An instruction to the effect that both defendants were liable if their negligence contributed in some degree toward the collision was not objectionable as permitting recovery for slight negligence where the instruction also stated that negligence is the failure to exercise due care and that there is no liability for negligence unless it was "a direct or proximate cause of the injuries complained of." Kapla v Lehti, 225 M 325, 30 NW(2d) 686.

Where plaintiff's intestate was electrocuted when, with long-handled rake he pulled from the side of his house a burning telephone wire which had become charged with high voltage by the falling of a lightning-struck power line across the telephone line, he was contributorily negligent. The court erred in charging the jury: "but if you find from the evidence that defendant was negligent in designing, maintaining, constructing or operating its transmission lines, then you would go further and determine whether or not the accident in question was due to the negligence of the defendant, or to an act of God. If it was due to an act of God then, of course, the defendant would not be responsible in this action." Sauer v Rural Power Assn., 225 M 356, 31 NW(2d) 15.

Irregularity in proceedings of court or jury, to be sufficient to justify or form the basis of an order granting a new trial, must affect the moving party's rights to the extent of depriving him of a fair trial. Whether an irregularity in such proceedings deprived the moving party of a fair trial is to be determined by the trial court in exercise of its sound discretion. Moran v Northern Pacific, 225 M 373, 31 NW(2d) 37.

A judgment to be appealable, must be a final determination of the rights of parties in the action, but only in the sense of terminating the particular action. Neither the plaintiff nor the court is authorized to dismiss an action without prejudice after final submission. Where action for damages against a municipality is founded on nuisance or trespass and no allegations of negligence are set forth in the complaint, the complaint need not allege that written notice was given to the city as required by statute as prerequisite to action against municipality based on negligence. Christiansen v City of Duluth, 225 M 475, 486, 31 NW(2d) 270.

An agent, acting within the scope of his authority, was not personally liable for the purchase price of tires ordered by him for a disclosed principal. Firestone Tire Co. v Robinson, 225 M 493, 31 NW(2d) 18.

A party is not prejudiced by the erroneous sustaining of an objection to a question if the witness answers the question and such answer is not stricken from the record or otherwise withdrawn from the jury's consideration. Nubbe v Hardy, 225 M 496, 31 NW(2d) 333.

A charge that presents to the jury the applicable law in a clear, precise, and intelligible form so as to leave no reasonable likelihood for the drawing of erroneous inferences therefrom is sufficient and it need not be buttressed by the express exclusion of nonapplicable principles of law. Nubbe v Hardy, 225 M 496, 31 NW(2d) 333.

The courts have jurisdiction to determine the rights of an employee under a contract between a railroad and its employees' statutory bargaining representative even if the statutory remedies under the Federal Railway Labor Act have not been exhausted. A point raised for the first time on appeal will not be considered. Edelstein v Duluth & Iron Range Ry., 225 M 508, 31 NW(2d) 465.

The theory on which a case is tried becomes the law of the case and must be adhered to on appeal; and where an action against a railroad employer, brought by an employee to recover damages for discharge in violation of the employment contract, and where the case was tried upon the theory that a certain labor organization was, under the Railway Labor Act, the bargaining representative, and that the Act governed as to all matters arising under the contract of employment, that theory must be adhered to on appeal. Edelstein v Duluth & Iron Range Ry., 225 M 508, 31 NW(2d) 465.

When an action is tried by a court without a jury its findings of fact are entitled to the same weight as the jury's verdict, and will not be reversed on appeal unless manifestly and palpably contrary to the evidence; this applies whether the appeal is from a judgment or from an order granting or denying a new trial. Sullivan v Brown, 225 M 524, 31 NW(2d) 439.

Where issues of fact are tried by the court without a jury and incompetent evidence is admitted but the competent evidence is sufficient to support the findings of fact, and there is no reasonable ground for inferring from the character of the incompetent evidence that it might have been a material factor in the court's determination of facts, admission of such evidence is not reversible error. Sullivan v Brown, 225 M 524, 31 NW(2d) 439.

The question as to whether defendant was guilty of contributory negligence was one of fact and not of law, where there was evidence showing that when defendant turned into a strip of road 120 feet long he saw that the road was unobstructed; that plaintiffs' car was coming from the opposite direction on its right side of the road with its headlights turned on; that when plaintiff driver turned onto the 120-foot strip defendant pulled down his sun visor because he was blinded by the lights on plaintiffs' car; that after the visor was down defendant could see only 10 or 12 feet ahead; that defendant with his vision thus limited proceeded on his right side of the road close to the shoulder; and that plaintiffs' car collided with defendant's car by suddenly crossing to the wrong side of the road. Moan v Aasen, 225 M 504, 31 NW(2d) 265.

Trial court committed no reversible error in instructing jury, in terms of a statute which did not apply to streetcars, as to the degree of care required of streetcar motormen, since the statutory standard given by the court was merely declaratory of the common law, and the common law standard of care required of operators of streetcars is substantially the same as that embodied in the statute submitted to the jury. Peterson v Minneapolis Street Ry. Co., 226 M 27, 31 NW(2d) 905.

Plaintiff, an attorney and expert accountant, was employed by defendant, a merchant, to represent him in connection with a controversy that had arisen between defendant and the office of price administration because of overcharges by defendant in the sale of goods above the ceiling price established by the administration, on the basis of "15 percent of the difference between the maximum violations and the

amount actually settled for with the office of price administration" the contract was not void as against public policy, that plaintiff performed the contract, that in the performance of the contract plaintiff used no illegal or unlawful means, and that he is therefore entitled to recover. Weinstein v Palmer, 226 M 64, 32 NW(2d) 154.

Where plaintiff, a registered nurse, 26 years of age, sustained serious injuries in an automobile accident, resulting in special damages of $1,200 and leaving numerous permanent and disfiguring scars on her face and neck, a verdict of $15,740 was not excessive. Nikkari v Jackson, 226 M 88, 32 NW(2d) 149.

A verdict will not be disturbed on appeal if the evidence reasonably or fairly tends to sustain it, even if different persons might reasonably draw different conclusions from the evidence or if the evidence might justify a verdict for either party. Delyea v Goosen, 226 M 91, 32 NW(2d) 180.

An order denying a motion to vacate an order dismissing an action for want of prosecution, itself a nonappealable order, is nonappealable. Quevli v First National Bank, 226 M 102, 104, 32 NW(2d) 146.

Where the jury's finding of negligence may have rested upon any one of several Acts or omissions on the part of the defendant, it was error for the court to hold that the jury's finding was limited to only one of such Acts, to wit, his negligence in parking in violation of section 169.34 (13). Grabow v Hanson, 226 M 265, 32 NW(2d) 593.

On an appeal involving only the sufficiency of the evidence to justify a verdict, it is not necessary for the supreme court to review and discuss the evidence to demonstrate the correctness of the verdict. The fact alone that the testimony of the plaintiff is opposed by that of two other witnesses is not enough to warrant setting aside a verdict based on the testimony of the plaintiff. In an action under the Federal Employers' Liability Act evidence that boards or blocks, such as the plaintiff, a railroad brakeman, claimed to have tripped over while walking in a pathway to the switch, were customarily used in railroad yards by the defendants' employees for blocking car wheels, justified the jury in drawing an inference that the brakeman tripped over such blocks, that the block was placed there through negligence of defendants' employees and the defendant was charged with constructive knowledge of the presence of the block so as to be liable for injuries sustained by the plaintiff. Clark v Chicago & Northwestern Ry. Co., 226 M 375, 33 NW(2d) 484.

On defendant's appeal the reviewing court must take the view of evidence most favorable to the plaintiff; and on removal of a denial of a motion for judgment notwithstanding a verdict of a new trial, the court takes the view of evidence most favorable to the verdict; and on review of denial of motion for judgment notwithstanding the verdict of a new trial, the court takes that view of the evidence most favorable to the verdict. Johnson v Johnston, 226 M 388, 33 NW(2d) 53.

In action for personal injuries sustained by the plaintiff while helping defendant unload a fishhouse from a truck, issues of negligence and contributory negligence were for the jury; and where individuals are acting in concert in unloading from a vehicle an object of great weight and of such bulk that they are concealed from each other and cannot coordinate their efforts by visual observation, whether one of them owes a duty of giving others advance warning before performing an act which suddenly deposits on them a weight of such magnitude as will constitute a potential source of serious injury if they are not prepared to receive it, is for the jury. Johnson v Johnston, 226 M 388, 33 NW(2d) 53.

Review on appeal must be limited to the record. To justify reversal of a judgment the record must show affirmatively that there was material error. In an action for accounting the finding of a balance due necessarily negatives all items litigated and not allowed in arriving at the balance. The burden is upon the defendant to show that there is no substantial evidence reasonably pending to sustain the findings of fact. Frisbie v Frisbie, 226 M 435, 33 NW(2d) 23.

Ordinarily an order denying a motion for more definite and certain findings of fact is not appealable but, where the order was made after trial and before entry of judgment it could be reviewed upon appeal from the judgment where no motion for a new trial has been made. Frisbie v Frisbie, 226 M 435, 33 NW(2d) 23.

When an action is tried by a court without a jury its findings of fact are entitled to the same weight as the verdict of the jury and will not be reversed on appeal unless they are manifestly and palpably contrary to the evidence. Evidence in the instant case sustains the findings of the trial court. Frisbie v Frisbie, 226 M 435, 33 NW(2d) 23.

The trial court has wide discretion for a new trial, in determining the probable effect of evidence erroneously admitted; and in the instant case where the defendant testified at the trial that the deceased and not the defendant was driving the car at the time of the accident, the trial court did not abuse its discretion in denying plaintiff's motion for a new trial, on ground of newly discovered evidence in a death action to the effect that one of the defendants had told the proposed witness that the defendant was driving the automobile at the time of the accident, where the evidence was cumulative to that given in the trial. Manahan v Jacobson, 226 M 505, 33 NW(2d) 606.

Where inadmissible evidence was erroneously received over plaintiff's objection, but evidence to the same effect had previously been offered and received without objection, the plaintiff's motion for a new trial was properly denied; and where any discovered evidence is cumulative only, the trial court has the discretion to determine whether the ends of justice require a new trial. Manahan v Jacobson, 226 M 505, 33 NW(2d) 606.

In an action by an employee to recover a bonus from her employer, under the facts in the case the trial court's action in granting defendant judgment notwithstanding the verdict should not be reversed, since the evidence of a parol modification of a written contract was not clear and convincing. Kavanagh v The Golden Rule, 226 M 510, 33 NW(2d) 697.

Where the complaint does not state cause of action the supreme court must sustain the trial court's order overruling plaintiff's demurrer to the defenses in answer, even if the answer does not set up a good defense; and a correct decision of the trial court will be sustained on appeal regardless of whether the court gave the right reason for the decision. Warner v Warner Co., 226 M 565, 33 NW(2d) 721.

An order allowing attorney's fees for services to a trust estate affected a substantial right of attorneys and was appealable or subject to modification by motion or other form of direct attack; but it could not be granted or modified in a collateral proceeding. But where, upon undisputed facts disclosed by the record, the trial court is fully informed that pursuant to a prior and final adjudication the reasonable value of services to the trust estate has been determined and paid for, affirmative defense of res judicata as a bar to a second allowance and payment for the same service is within the judicial knowledge of the trial court and may be considered for the first time on appeal. Atwood v Holmes, 229 M 37, 38 NW(2d) 63.

Where an employee who could give important testimony relative to issues in litigation is not present and his absence is unaccounted for by his employer, who is a party to the action, a presumption arises that the testimony of such employee would be unfavorable to his employer. The foregoing rule has no application, however, where such a witness is no longer in the employ of the party to the litigation and no obligation rests upon the latter under such circumstances to present the former employee as a witness, particularly where the burden of proof is upon the opposing litigant. Held that trial court erred in permitting over objection counsel for plaintiff to draw jury's attention to failure of defendant corporation to produce as a witness a former employee whose employment with such defendant had been terminated some four years prior to the trial, and to insist that defendant's failure in this respect warranted the jury in drawing unfavorable inferences against defendant because thereof. Ellerman v Skelly Oil Co., 227 M 65, 34 NW(2d) 251.

Where defendant's counsel was employed by insurance company, and counsel stated that company denied liability on ground that insured defendant had failed to report automobile accident promptly, and judge informed counsel for all parties that he would permit plaintiff's counsel to ask jurors generally whether they were interested in such company, and plaintiff's counsel did so, statement of defendant's counsel in presence of jury that there was no insurance with respect to one de-

fendant and that, with respect to the other defendant, company denied liability because of his violation of terms of policy, was misconduct justifying new trial. Rom v Calhoun, 227 M 143, 34 NW(2d) 359.

It is well settled that the parol evidence rule is not applicable to exclude evidence of fraudulent oral representations by which one party induces another to enter a written contract, provided the representations were such that the other party might reasonably rely upon them. Where a party to a contract has partially performed it before discovering the falsity of the representation which induced him to enter into it, he is not obliged to retrace his steps, but may complete performance without waiving the fraud and then bring an action for damages for deceit. Damages in an action for false representations and deceit are the natural and proximate loss sustained by the party because of reliance thereon. In cases where the fraud induced a purchase, the measure of damages is the difference in value between what was given and what was received. The burden of proving his loss is on plaintiff, and the amount of damages is a question of fact for the jury to determine from a consideration of all the facts of the case. Rosenquist v Baker, 227 M 217, 35 NW(2d) 346.

When an order denying a new trial has been affirmed on appeal, all questions that might have been raised therein are set at rest and cannot be raised on a subsequent appeal from the judgment. State v Longyear Co., 227 M 255, 35 NW(2d) 291.

Where no ground is stated in a motion for new trial, no question is presented either to the trial court or to this court. An assignment of error not argued in the brief is abandoned. A general assignment of error that the findings of fact are not sustained by the evidence presents no question for decision. The following assignments of error present only the question whether the conclusions of law are sustained by the findings of fact: that the conclusions of law are not justified by the fact found and are contrary to law; that the findings of fact and conclusions of law are not justified by the evidence and are contrary to law; that the judgment entered herein is not justified by the evidence and is contrary to law; the denial of a proposed finding of fact is equivalent to a contrary finding. The findings of fact sustain the conclusions of law. Kiebach v Kiebach, 227 M 328, 35 NW(2d) 531.

On defendant's appeal from an order denying a motion for a new trial after findings in favor of the plaintiff, the evidence is viewed in an aspect most favorable to the plaintiff. Hall-Vesole Co. v Durkee-Atwood Co., 227 M 379, 35 NW(2d) 601.

On an appeal from an order denying a motion for judgment notwithstanding the verdict and for a new trial, it is not the function of the supreme court to say where the evidence preponderates but it must take the evidence most favorable to the prevailing party unless it is demonstrably unworthy of belief. Kime v Koch, 227 M 372, 35 NW(2d) 534.

Alleged errors in instructions were not reviewable where no exception was taken to the instructions and errors were not assigned in motion for new trial. Murray v Wilson, 227 M 365, 35 NW(2d) 521.

In a divorce proceeding the trial court is a finder of the facts and conflicts in the evidence are to be resolved in that court. The supreme court will not reverse a finding having evidentiary support even though the court might find the facts differently if permitted to pass on them. Loth v Loth, 227 M 387, 35 NW(2d) 542.

On appeal a finding of the trial court is attended with every presumption of evidentiary support and the rule also applies in divorce cases. "Appeal" is in the nature of a writ of error under which the function of the appellate court is not to try the case de novo but to determine whether error was committed in the trial court. The record made in the trial court is ordinarily conclusive on appeal and the appellate court will limit its consideration of the case not only to questions presented and decided by the trial court but also to the record upon which the decision of such questions are based. Loth v Loth, 227 M 387, 35 NW(2d) 542.

Litigants are usually bound upon appeal by theories however erroneous and improvident, upon which the case was tried in the lower court. The appellate court has a duty to, and upon its own motion may determine a case upon the ground of illegality, though such ground was neither presented to nor considered by the trial

court, if such illegality is apparent upon the undisputed facts, is in clear contravention of public policy, and if a decision thereon will be decisive of the controversy on its merits. Atwood v Holmes, 227 M 495, 38 NW(2d) 63.

Findings of fact of a trial court are entitled to the same weight as the verdict of a jury and will not be reversed on appeal unless manifestly and palpably contrary to the evidence. On appeal the testimony must be considered in the light most favorable to the appellee. Lipinski v Lipinski, 227 M 511, 35 NW(2d) 708.

Appeal from an order denying a motion for amended findings or a new trial brought up for review the order only insofar as it denied a motion for a new trial. The elements of a cause of action to enforce a constructive trust are the existence of a fiduciary relation and the abuse by the defendant of confidence and trust imposed in him thereunder to plaintiff's harm, and if an element is lacking, such a trust cannot be adjudged. In the instant case the evidence warrants the finding that the defendant purchased the property for his own benefit with his own money and there was no agreement to purchase the property for the plaintiff. Wilcox v Nelson, 227 M 545, 35 NW(2d) 741.

Though exceptions to prejudicial remarks to the jury were neither taken at the time they were made nor at the close of counsel's argument as permitted by the district court rule, the appellate court regards the conduct and remarks here under consideration so calculated as to arouse prejudice and passion that it was the trial court's duty to take action thereon on its own motion. Magistad v Potter, 227 M 570, 36 NW(2d) 400.

Where the evidence established that an order of convenience and necessity made by the commission would not materially interfere with the respondent's revenue, it was error for the trial court to find that the commission's order resulted in confiscation of respondent's properties; and on appeal from the district court's judgment vacating the order of the commission, the issue in the supreme court is not whether the evidence is sufficient to sustain the district court's findings and conclusions, but rather whether all the evidence presented, including evidence before the commission and the district court as well, reasonably sustains the district court's finding that the commission's order was unlawful and unreasonable. Twin City Motor Bus v Rechtziegel, 228 M 14, 38 NW (2d) 825.

Upon an appeal questioning the sufficiency of the evidence to sustain a verdict, evidence will be viewed in the light most favorable to the party prevailing in the trial court, and the verdict will not be set aside unless manifestly and palpably contrary to the evidence. Rivera v Mandsager, 228 M 227, 36 NW(2d) 700.

If proper findings can be directed by the supreme court without injustice to the parties a new trial will not be granted because the findings of the trial court are not supported by the evidence. In the instant case, a new trial is not necessary as a finding of no abandonment can be properly directed by the appellate court. State v McCoy, 228 M 420, 38 NW(2d) 386.

On appeal from an order denying a motion for judgment notwithstanding the verdict, the evidence must be reviewed in line most favorable to the prevailing party, and the verdict will not be set aside unless it is manifestly and palpably contrary to the evidence. Hagerty v Radle, 228 M 487, 37 NW(2d) 819.

An amended pleading supersedes the original pleading and must be construed as the only pleading interposed so that an order sustaining the demurrer to the original complaint will not be considered on appeal from an order sustaining demurrers to both original and amended complaints. Berghuis v Korthuis, 228 M 534, 37 NW(2d) 809.

Where there is a finding of negligence against the defendant who, on appeal, seeks a reversal upon grounds other than the validity of such findings and the decisions of the questions raised goes against him, there must be an affirmance. Howard v Marchildon, 228 M 539, 37 NW(2d) 833.

It was a question for the jury whether the use of employee's own car was expressly or impliedly authorized, whether defendant employer was responsible for

employee's negligence while engaged in the furtherance of his master's business. Rampi v Vevea, 229 M 11, 38 NW(2d) 297.

Hypothetical questions put to medical witnesses on direct examination in compensation proceedings which were not objected to at the time cannot be complained of for the first time on appeal. Roberts v DeKalb, 229 M 188, 38 NW(2d) 189.

Bindings of the trial court will not be disturbed on appeal unless manifestly contrary to the evidence. Schumacher v Schumacher, 229 M 382, 39 NW(2d) 604.

Evidence will be reviewed on appeal in the light most favorable to the prevailing party at the trial; and the verdict will not be set aside unless it is manifestly and palpably contrary to the evidence. Holtz v Pearson, 229 M 395, 39 NW(2d) 867.

In an action for wrongful death of a grandmother, admission of testimony as to service and contributions furnished by decedent to son and daughter, as well as contributions of necessities to their minor children for whose care and support the parents are responsible was not reversible error. Holtz v Pearson, 229 M 395, 39 NW(2d) 867.

On appeal from an order denying defendant's motion for a new trial, the evidence must be viewed in the light most favorable to the plaintiff; and there is no general test for determining whether the evidence is too slight, conjectural, or remote to be admissible, such questions being left largely to the discretion of the trial court. That occurrences were remote in time goes to the weight of evidence therein and not to its admissibility. Frame v Hohrman, 229 M 468, 39 NW(2d) 881.

On an appeal from an order denying a motion for a new trial, when no ground for a new trial is stated in the motion, no question is raised and the order must be affirmed. Coughlin v Rosemount, 229 M 494, 35 NW(2d) 744.

Where the plaintiff was contributorily negligent as a matter of law, errors in admission of evidence relating to defendant's negligence or misconduct of counsel was harmless and furnished no ground for a new trial; and where the verdict is right as a matter of law there will be no reversal on account of errors in the admission of evidence, instructions of the court, or misconduct of counsel which does not affect the correctness of the verdict. McGuiggan v St. Paul City Ry. Co., 229 M 534, 40 NW(2d) 429.

In a homicide prosecution a statement by the trial court in commenting on defendant's absence during the trial that he wanted the jury to co-operate with him and help to see that the law and order would be victorious, delivery in an atmosphere of judicial indignation deprived the defendant of his constitutional right to an impartial trial and a new trial is granted. State v Shetsky, 229 M 566, 40 NW(2d) 337.

Under the due process clause of the state constitution a defendant in a criminal prosecution is entitled to be tried without prejudicial remarks by the presiding judge and without any expressions on his part which would point to his guilt or discredit or prejudice him with the jury. State v Shetsky, 229 M 566, 40 NW(2d) 337.

Courts and officials charged with administration of justice cannot be too careful in performing their duties to the end that the rights of litigants and persons charged be protected under law, and any methods on the part of courts, whether justice, municipal or otherwise, to bring about a plea of guilty merely to get the case disposed of and the file closed as a matter of expediency or convenience to the court are condemned. It is always desirable that minors charged with a criminal offense be represented by counsel if they wish and also that their parents be notified before trial. State v Boulton, 229 M 576, 40 NW(2d) 417.

Incompetent or irrelevant questions asked by the prosecuting officer, calculated to prejudice defendant in a criminal case, constitute a violation of defendant's right to a fair and impartial trial guaranteed to him by the constitution. The fact that the accused took the witness stand to testify did not put in issue his general character or his propensities, but it opens up only the issue of credibility. Where the prosecuting attorney persists in asking prejudicial questions, there is reversible error, although the objections thereto were sustained. State v Silvers, 230 M 12, 40 NW(2d) 630.

Where the defendant railroad objected to plaintiff's testimony that he attempted to find a unit to replace his truck which had been damaged in a crossing collision, but defendant did not assign as error the overruling of his objection, the alleged error was not before the appellate court; and where the plaintiff testified that his truck was laid up from Nov. 15, 1947 to Jan. 22, 1948, and the defendant railroad made no objection to the testimony and did not cross-examine on the point and did not assign as error the unreasonableness of the period of repair, the question of reasonableness of the period of repair cannot be considered by the appellate court. Kopischke v Chicago, St. Paul, M. & O. Ry., 230 M 23, 40 NW(2d) 834.

In an action for damages where the plaintiff's truck was struck by defendant's train, an instruction that it is the difference between the reasonable market value of the personal property immediately before its destruction and the reasonable market value of the same property immediately after it was destroyed or damaged, and that plaintiff is entitled to the damage for the loss of the use of the truck, was not error. Kopischke v Chicago, St. Paul, M. & O. Ry., 230 M 23, 40 NW(2d) 834.

A new trial on the basis of surprise was properly denied where the trial courts failure to observe a previous agreement to place a second form of verdict before a jury did not have effect of denying counsel an opportunity to argue a proposition of fact to jury. The granting of a new trial on ground of surprise is largely within the discretion of the trial court and will rarely be reversed on appeal. A new trial on ground of surprise should not be granted unless there is a strong probability that a new trial will result differently. Sward v Nash, 230 M 100, 40 NW(2d) 829.

Facts show that a contractor has substantially performed a building contract, though there were minor defects in his work, and he is entitled to recover the contract price less a sum necessary to cure the defects; but the doctrine of "substantial performance" does not apply when the omissions or departures from the contract are intentional or so substantial as not to be capable of remedy so that even though the owner received an allowance out of the contract price he still would not receive what he contracted for. If the building contract is entire, and performance is wilfully abandoned by the contractor before completion, there can be no recovery on the contract or in quantum meruit. Sward v Nash, 230 M 100, 40 NW(2d) 830.

Knowledge of the jury of the existence of insurance is not likely to be prejudicial since the average citizen of sufficient intelligence to be a juror knows that as a general rule contractors, automobile owners, and others of normal financial responsibility carry protective insurance. Sander v Dieseth, 230 M 125, 40 NW(2d) 844.

In an action for an accounting of a creditor's operation of plaintiff's business during his absence and to set aside a settlement stipulation agreement entered into between plaintiff and his creditors, where a bank official testified as to the value of certain of plaintiff's personalty covered by mortgage to the bank, but such personalty was subsequently delivered to the plaintiff or disposed of at its fair market value, error if any in permitting the testimony was immaterial. Dale v Berg, 230 M 128, 40 NW(2d) 851.

In an action for breach of contract to instal hot water boilers in defendant's building where the order blank was written but not signed, the trial court was justified in refusing an instruction that "when parties make the reduction of the agreement to writing and its signature by them is a condition precedent to its completion, it will not be a contract until that is done, and this true although all the terms of the contract have been agreed upon. Krumholz v Rusak, 230 M 178, 41 NW(2d) 177.

An award of $500 increased to $1,000 by additur, to a motorist for damages to his automobile and personal injuries, including a sacro-iliac sprain, was inadequate; and although the grant or refusal of a new trial for inadequate damages rests largely with the trial court, whose decision thereon is subject to the general rule applicable to other discretionary orders for purposes of review, a new trial is ordered by the appellate court where upon the record the damages awarded appear inadequate. Olson v Christensen, 230 M 198, 41 NW(2d) 248.

Where a dress was delivered to the laundry driver and the laundry failed to return it, the burden was on the laundry to prove not only the loss of the dress but

also the loss did not occur by reason of its negligence. It was sufficient defense to prove the establishment in its place of business of a system under which it was almost impossible that a garment be lost. The evidence sustained an award of damages to the plaintiff. Murphy v Co-operative Laundry, 230 M 213, 41 NW(2d) 261.

A person is liable for fraud if he makes false representation of a past or existing material fact susceptible of knowledge, knowing it to be false, or as of his own knowledge without knowing whether it is true or false, with the intention to induce the person to whom it is made to act in reliance upon it, or under such circumstances that such person is justified in acting in reliance on it; and such person is thereby deceived and induced to act in reliance upon it to his pecuniary damage. A bad motive is not an essential element of fraud. An unqualified affirmation amounts to an affirmation as of one's own knowledge. A purchaser is justified in relying upon the truth of the seller although he had an opportunity to ascertain the falsity of the statement by investigation. Spiess v Brandt, 230 M 246, 41 NW(2d) 561.

A new trial will seldom be granted on the ground that court's action in reproving counsel for one of the parties put him in a bad light before the jury. Dose v Yager, 231 M 90, 42 NW(2d) 420.

Granting a new trial for improper remarks of counsel is almost wholly in the discretion of the trial court and a new trial will rarely be granted if the court has instructed the jury to disregard the remarks; nor will a new trial be granted for refusal to give negative instructions, the substance of which is included in the general charge. State v Becker, 231 M 174, 42 NW(2d) 704.

Plaintiff's injuries were: fracture dislocation of the left hipbone, which was reduced; fracture of the lower bone in the pelvic girdle, known as the sacrum; fracture of one of the parts of the pelvic bone in front; tearing of the ligaments near the hipbone; and bruises of the face and right arm. A $2,000 verdict was so inadequate as to require a new trial on the issue of the amount of damages. Blacktin v McCarthy, 231 M 303, 42 NW(2d) 818.

Where the record shows numerous disagreements between court and counsel for one of the litigants of more or less caustic nature in the presence of the jury, the interests of justice will be best served by a new trial, with some of these incidents eliminated. Hansen v St. Paul City Railway, 231 M 354, 43 NW(2d) 260.

Award of $6,500 to patient 80 years of age afflicted with hypertrophic arthritis in vertebral joints and osteoporosis of the vertebrae whose injuries from fall in defendant hospital consisted of numerous abrasions and an injury to her lower back causing severe pain and making it difficult for her to move in bed, was not so excessive as to indicate passion or prejudice. MacIlravie v St. Barnabas Hospital, 231 M 384, 43 NW(2d) 221.

On appeal from a judgment entered after denial of defendant's motion for judgment, notwithstanding verdict for plaintiff on a new trial, evidence would be viewed in the light most favorable to the plaintiff. Benston v Berde, 231 M 451, 44 NW(2d) 481.

Where the testimony of a party to the action consists of a narrative of events in which the party participated or which he observed, such testimony may be contradicted by the testimony of other witnesses. Conflicting testimony of witnesses as to the movement of defendants' truck presented question of fact for the jury as to negligence and proximate cause, even though it would appear as a matter of law from plaintiff's testimony, standing alone, that negligence was not proximate cause of plaintiff's injuries.

Where plaintiff in one action sued for $2,500 and jury returned a verdict of $4,500, which was reduced on motion of plaintiff to $2,500, and plaintiff in the other action sued for $1,100 and jury returned verdict of $1,600, which was reduced on motion of plaintiff to $946.04, the amount of the repair bill, and where the verdicts were against the great weight of the evidence, there should be a new trial rather than a remittitur. McHardy v Standard Oil Co. of Indiana, 231 M 493, 44 NW(2d) 91.

The duty to exercise due care to eliminate conditions on real property which are hazardous to children is the same whether the person who creates the condition is

an owner or a mere occupant of the property and whether the child is an invitee, licensee or trespasser. The person creating a condition dangerous to children cannot be held liable merely because a child was in fact injured but can only be held liable for negligence if there is a foreseeable risk of injury to children under the circumstances. Meagher v Hirt, 232 M 336, 45 NW (2d) 563.

To warrant overturning a verdict for passion or prejudice, the damages must so greatly exceed adequate compensation as to be accounted for on no other basis. Peculiar facts may be applicable in determining the amount of damage and the diminished value or purchasing power of the dollar may be taken into consideration. In the instant case the amount was not excessive. Gilbertson v Gross, 232 M 373, 45 NW(2d) 547.

Where a fireman enters upon the premises of another in response to a call of duty, the owner or occupant has the duty to warn him of hidden dangers if he has knowledge of the danger and opportunity to give the warning. Shypulski v Waldorf Paper Products Co., 232 M 394, 45 NW(2d) 549.

Where the evidence establishes only one cause that could constitute a proximate cause of injury in a legal sense, it was not prejudicial to instruct the jury that the defendant's negligence must be found to be "the sole, direct and proximate cause" or "the" proximate cause. Where two or more causes combined to produce an injury a person is not relieved from liability because he is responsible for only one of such causes. Leebens v Baker Co., 233 M 119, 45 NW(2d) 791.

A motion for a directed verdict by its very nature accepts the view of entire evidence most favorable to the adverse party and admits the credibility, except in extreme cases, of the evidence in his favor and all reasonable inferences to be drawn therefrom. Hanrahan v Safway Steel Scaffold Co., 233 M 171, 45 NW(2d) 243.

Although a trial court's finding of reasonable value does not coincide with the valuation figures of any particular witness, if such finding is within the valuation limitations established by the various witnesses or by the evidentiary figures as to cost, and is otherwise reasonably supported by the evidence as a whole, the finding must be sustained. Lovrenchick v Collins, 233 M 183, 45 NW(2d) 264.

In an intersectional collision case the refusal of the trial court to give the requested instructions was reversible error. Plaintiff should not be held contributorily negligent as a matter of law where the evidence of whether he committed a negligent act is conflicting, or where there is a lack of evidence which would compel a finding that such negligence was the proximate cause of his injuries; and where there is credible evidence that plaintiff was traveling at an unlawful speed, that issue should be submitted to the jury with instructions as to the applicable speed limit and with instructions that a driver forfeited his right of way when traveling at an unlawful speed. Fisher v Clarkson, 233 M 318, 46 NW(2d) 665.

Where it is alleged that a quit claim deed was procured by overreaching, undue influence, and misrepresentation, all amounting to constructive fraud, and the evidence is conflicting, the jury and trial court finding that the deed was not procured in the manner alleged must stand unless they are manifestly and palpably against the weight of evidence. Caskey v Lewandowski, 233 M 334, 46 NW(2d) 865.

In a divorce action findings of the trial court which are supported by the evidence will not be disturbed on appeal and the trial court's award to the wife will not be reversed except where, in the light of the findings made, it appears that the court has abused its discretion. Swanson v Swanson, 233 M 354, 46 NW(2d) 878.

Where the attendant circumstances allowed a jury to find that a contract in itself does not express the true relationship of the parties thereto, the jury may determine from the facts presented relative to the conduct of the parties, whether an independent-contractor relationship existed as to a party thereto. Barnes v Northwest Airlines, 233 v 410, 47 NW(2d) 180.

When damage to a bridge might with equal propriety have resulted from the acts of others as well as the acts of the shipper, proof of facts other than that of the damage from which the negligence of owner could be inferred, must be made before the question could be submitted to the jury, otherwise the verdict would be

founded on mere speculation. An inference of negligence based on an inferred fact, of which there is neither evidence nor predominating probability, cannot safely be made. The mere proof of the happening of an accident is not enough to establish negligence or its causal relation to the damage. State v Paskewitz, 233 M 452, 47 NW(2d) 199.

An assignment of error in the notice of motion for a new trial is ordinarily waived if it is not renewed on appeal, unless it goes to the jurisdiction over the subject matter in litigation.

Where both parties voluntarily argue the question of the sufficiency of the evidence to sustain the court's findings, we may, in our discretion, consider the case on its merits even though the assignments of error on appeal are inadequate.

By voluntarily arguing the matter, respondents may be held to have waived the inadequacy of the assignments of error. Wojtkowski v Peterson, 234 M 63, 47 NW(2d) 455.

A jury's verdict may be adequately sustained by the testimony of a single witness, even though such witness is a party to the action and even though his testimony is in direct conflict with that of several other witnesses. A conflict in the opinion of expert witnesses is to be resolved by the jury, and in determining the comparative weight to be given to the respective opinions the jury may consider the qualifications of each expert and the source of his information. Robinson v Butler, 234, 252, 48 NW(2d) 169.

Where a pedestrian standing on a safety aisle was crushed when the safety aisle bumper block was struck by a motor vehicle and caused to tip upon him, the city was negligent as a matter of law in approving adoption of the plan of the safety aisle construction which contained such unnecessary and palpably dangerous defect that no reasonably prudent man would approve adoption, and the question of damages was the only submissible issue in an injury action. In view of the decision in Cowling v City of St. Paul, clarifying the supreme court's former decision of Paul v Faricy, plaintiffs are entitled to a directed verdict against the city on the issue of negligence and a new trial on the issue of damages only. Paul v Faricy, 234 M 333, 48 NW(2d) 525.

Where, as in the instant case, both of the statutory grounds upon which a new trial is granted were asserted in the aggrieved party's motion and no showing is made that a new trial was not justified on either of said grounds, mandamus will not lie to compel the trial court to vacate and set aside its order granting a new trial. Waterhouse v Brandon, 234 M 351, 48 NW(2d) 330.

An order vacating a verdict of the jury and granting a new trial which recites on its face that the trial court's reasons were "that the verdict is not justified by the evidence and is contrary to law," satisfies the requirement of section 547.01 "that no order shall be issued granting a new trial unless accompanied by a memorandum stating reasons therefor." Waterhouse v Brandon, 234 M 351, 48 NW(2d) 330.

An order cancelling a notice of lis pendens was appealable under statute providing for an appeal from an order granting or refusing a provisional remedy, granting, refusing, dissolving or refusing to dissolve an injunction, or vacating or sustaining an attachment. Rehnberg v Minnesota Homes, 234 M 419, 49 NW(2d) 197.

A shopkeeper is under legal obligation to keep and maintain his premises in reasonably safe condition for the use of all persons he expressly or impliedly invites to enter.

The state of the evidence in the instant case made the negligence of defendant and the contributory negligence of plaintiff questions for the determination of the jury. Since there is evidence to support its decision, the verdict must stand.

The doctrine of assumption of the risk requires an appreciation of the danger and acquiescence in it. Therefore, evidence that plaintiff upon entering defendant's premises observed the step from which she fell as she was departing presented, at most, a jury question on that issue. Lincoln v Cambridge-Radisson Co., 235 M 20, 49 NW(2d) 1.

Misconduct of counsel not excepted to as such upon trial or during his argument to the jury or at the close of the argument will not be reviewed in the supreme court unless it is so reprehensible as to call for action of the trial court on its own motion. Janicke v Hilltop Farm Feed Co., 235 M 135, 50 NW(2d) 84.

Where evidence as a whole overwhelmingly predominates in favor of a party so as to leave no doubt as to the factual truth, he is entitled to a directed verdict as a matter of law, even though some evidence standing alone might support a verdict to the contrary; but such rule should be cautiously and sparingly exercised. In this case the evidence on the issue of identification of defendant's car is sufficient to create a jury question thereon. The purpose of rebuttal evidence is to cut down the defendant's case and not merely to confirm that of plaintiff and was admissible in the instant case. A new trial must be granted. Van Tassel v Patterson, 235 M 152, 50 NW(2d) 113.

Where the argument of the prosecuting attorney is such as to enflame passion and prejudice of the jury to the extent that defendant is denied a fair trial, it is the duty of the trial court sua sponte to intervene for defendant's protection and its failure to do so constitutes reversible error. State v Morgan, 235 M 388, 51 NW(2d) 61.

The record, on appeal by the defendant, in an action for personal injuries was insufficient to establish that the verdict for plaintiffs had been the result of passion and prejudice, and did not entitle defendant to a new trial, notwithstanding the fact that the trial court had reduced the verdict for one of the plaintiffs on finding that the verdict had been rendered under the influence of passion and prejudice. Conradson v Vinkemeier, 235 M 537, 51 NW(2d) 651.

The granting of a new trial on the ground of misconduct of counsel rests within the discretion of the trial court. Orchard v Northwest Airlines, 236 M 42, 51 NW(2d) 645.

Where the jury found the wife, who was driving her husband's automobile, guilty of contributory negligence, it was not prejudicial in the husband's case, to grant a new trial on the sole issue of damages to the husband's automobile, unless defendant should consent to an additur, where such consent was not given. Hatley v Klingsheim, 236 M 370, 53 NW(2d) 123.

Where evidence discloses that a large volume of gas escaped from a gas company's distribution system because of a break in its gas line and a qualified gas expert, using recognized methods, estimated the loss resulting therefrom, the company's damages, although difficult to ascertain with absolute certainty, were not so speculative as to warrant a denial of recovery. Willmar Gas Co. v Duininck, 236 M 499, 53 NW(2d) 225.

The federal district court's findings of fact supported by substantial evidence cannot be disturbed by the circuit court of appeals. Sprague v Vogt, 164 F(2d) 312.

Where the medical bill of plaintiff was $23 and plaintiff testified that he was prevented from working for about nine weeks because of his injuries, but admitted that during substantially all of that period he was able to attend dances and take part therein, and further testified that prior to the collision his automobile was worth $300 and after the collision he could only obtain $15 for it and the jury returned a verdict for $175, the trial court did not err in denying plaintiff's motion for a new trial on the ground of inadequate damages allegedly the result of passion or prejudice. Olson v Moske, 237 M 18, 53 NW(2d) 562.

Where the outcome of an action for damages arising out of an automobile collision depended upon the oral testimony of the parties and their respective corroborating witnesses and the physical facts were not convincing, erroneous inclusion of testimony of a highway patrolman as to admissions made by defendant concerning his actions immediately prior to the collision entitled the plaintiff to a new trial. Rockwood v Pierce, 235 M 519, 51 NW(2d) 670.

In an action for the death of a pedestrian against the street railway company where the court charged the jury that the law required the company to pave and improve the space between the street car tracks so that it shall correspond with

improvement outside the tracks, and the court's attention was not called to the fact that the controlling city ordinance only required that pavement between the tracks shall substantially correspond with the pavement outside the tracks, a motion for a new trial based on such inadvertent omission was properly denied. LaCombe v Mpls. St. Ry. Co., 236 M 86, 51 NW(2d) 839.

The appellate court on appeal by defendants from an order denying an alternative motion after verdict for plaintiff in an automobile case, must view the evidence in a light most favorable to the verdict. Lewerenz v Wylie, 236 M 94, 51 NW(2d) 834; Norton v Nelson, 236 M 237, 53 NW(2d) 31; Damrow v Zauner, 236 M 447, 53 NW(2d) 139.

In a malpractice action, photographs showing the patient's injured foot were relevant on the issue of the extent of the patient's damage where there was no indication that the photographs were distorted or not an accurate representation of the foot at the time they were made. Such photographs are helpful as an aid to valuable description of objects and conditions provided they are relevant to some material issue. Moeller v Hauser, 237 M 368, 54 NW(2d) 639.

Under the facts relating to plaintiff's injury a verdict of $45,000 is excessive and a new trial as to damages is granted. Propper v Chicago, R.I. & P.R. Co., 237 M 386, 54 NW(2d) 840.

Although the plaintiff's counsel stipulated at the trial that the estate was wholly insolvent and the general creditors would realize nothing therefrom, and it was probable that plaintiff was not materially prejudiced by the error of the trial court, plaintiff was entitled to a new trial against personal representatives of the decedent's estate with respect to two claims based on fraud and deceit growing out of the sale of forged instruments to the claimant. Halvorson v Geurkink, ... M ....., 56 NW(2d) 792.

In one of two actions consolidated for trial only, the court ordered a new trial on all issues but denied a new trial in the other action. This was error as the issues of negligence and contributory negligence of identical litigants had been presented and determined in both actions. The court should have permitted a new trial in the second action. Hierl v McClure, ... M ....., 56 NW(2d) 721.

A new trial on the ground of misconduct of counsel is not granted as a disciplinary measure but because injustice has been done. The trial court is better able than the reviewing court to determine the effect of misconduct by counsel, and the trial court's determination to deny a new trial will not be disturbed unless the record shows prejudice. Harris v Breezy Point Lodge, ... M ....., 56 NW(2d) 655.

Where the attorney in his argument stated that certain facts as to the extent of the client's injury were admitted, such statement does not call for a new trial as the client was not cross-examined as to her injuries and the doctors produced by her testified as to percentage facts referred to in the argument. Bocchi v Karnstedt, ... M ....., 56 NW(2d) 628.

There was ample evidence to sustain a finding that the paving construction company alone was negligent because of the manner in which it placed its equipment and the manner in which it controlled and directed the paving operations. There was no basis for the contention that a verdict in favor of the injured state inspector was perverse though the injury was caused by a truck operated by an employee of the one operating a truck fleet. Crawford v Woodrich, ... M ....., 57 NW(2d) 648.

Where a boy received a severe head injury, skull fracture, injury to the eighth cranial nerve which bears a direct relationship to the sense of hearing, injury to the vestibular portion of the ear, injury or destruction to other nerves, impairment of certain facial nerves, partial paralysis of the left facial muscle, and personality changes of a permanent nature, a verdict in favor of the boy for $19,000 and in favor of his mother for $9,000 were not excessive. Pettit v Lifson, ... M ....., 57 NW(2d) 34.

Where a minor was allowed to purchase intoxicating liquor at a municipal liquor store while and under the influence of liquor injured a third person, a verdict

of $5,800 in favor of the plaintiff and against the city was not excessive. Hahn v City of Ortonville, ... M ....., 57 NW(2d) 254.

While the argument of a prosecuting attorney need not be entirely colorless, and may state conclusions and inferences which the human mind may reasonably draw from the facts in evidence, it should not include the attorney's own opinion, or the opinion of the state, as to the guilt of the defendant; nor should it include references to the amount of funds spent in investigation of the case; nor should it be argued in a prosecution for larceny, when the sole defense is a nontaking that a finding of not guilty would allow the defendant to keep the money. An argument containing such matter is so prejudicial that the defendant is entitled to a new trial. State v Gulbrandsen, ... M ....., 57 NW(2d) 419.

Plaintiff's argument in the instant case was so prejudicial and so calculated to excite prejudice and passion that the trial court, of its own motion, should have taken action upon it. Briggs v Chicago, Great Western Ry. Co., ... M ....., 57 NW(2d) 572.

A storekeeper is not an insurer of his customer's safety. Liability depends on negligence. He is legally obligated to maintain the premises in reasonably safe condition as to all persons expressly or impliedly invited to enter his store. Unless the dangerous condition existing because of the presence of banana peel on the floor of a self-service grocery store resulted from acts of the owner's employees, the owner would be liable for injuries sustained by a customer on the ground of negligence only if the employees failed to rectify the dangerous condition after they knew about it or in the exercise of reasonable care should have known that the condition existed. Messner v Red Owl Stores, ... M ....., 57 NW(2d) 659.

The questions raised by an individual defendant's motion to dismiss an appeal by defendant railway companies from an order denying their motions for judgment notwithstanding the verdict against them for personal injuries, or in the alternative, for judgment against the individual defendant notwithstanding the verdict in his favor or for a new trial on the ground that the order was not appealable as to the individual defendant and that the question raised by the appeal had become moot as against the plaintiff as a result of settlement made by the railway companies with plaintiff, were of considerable importance and doubtful, and the motion to dismiss is denied without prejudice to a renewal of the motion at the hearing of the appeal on the merits. Muggenburg v Leighton, ... M ....., 57 NW(2d) 658.

Granting a new trial rests almost entirely in the discretion of the trial court when considering the misconduct of counsel. Maher v Roisner, ... M ....., 57 NW(2d) 810.

Where there is misconduct of counsel during opposing counsel's closing argument which involves the exposure to the jury of material evidence not properly received, such error is so fundamental and manifest as to require that the trial judge intervene on his own motion when he becomes aware of the situation and his failure to do so constitutes grounds for a new trial. Maher v Roisner, ... M ....., 57 NW(2d) 810.

Whether a new trial should be granted for misconduct of counsel in his argument to the jury is usually to the sound discretion of the trial court, and where as in the instant case, the court at defendant's request instructed the jury to disregard an argument of plaintiff's counsel, and no further exception was taken to such argument, the matter was adequately taken care of by the trial court, which did not abuse its discretion in denying defendants a new trial. Willmar Gas Co. v Duininck, ... M ....., 58 NW(2d) 197.

Whether leave to amend a pleading may be granted at the close of the evidence rests largely in the discretion of the trial court. Parties seeking to amend a pleading must move with reasonable diligence. In the instant case there was no abuse of discretion in denying such motion. Willmar Gas Co. v Duininck, ... M ....., 58 NW(2d) 197.

A new trial is granted on the ground of misconduct of counsel only to prevent a miscarriage of justice and not as a disciplinary measure. Nelson v Twin City Motor Bus Co., ... M ....., 58 NW(2d) 561.

In a personal injury action tried by a jury the question of excessive damages cannot be raised on appeal where it was not presented to the trial court as a ground for new trial. Monson v Arcand, ... M ....., 58 NW(2d) 753.

From a review of the evidence presented in these actions for personal injuries and property damage, alleged to have been suffered in an automobile-streetcar collision, the negligence of defendants was a question for the jury. There is no evidence to support a finding of contributory negligence on the part of the plaintiff passenger, and the jury was properly so instructed. Miller v Minneapolis Street Railway Co., ... M ....., 59 NW(2d) 923.

In prosecution for rape, where defendant admitted intercourse but alleged such act was with the consent of complaining witness, certain remarks of the prosecuting attorney in his closing argument, including his opinion on several material matters and several appeals for a finding of guilty on the basis of defendant's general immoral conduct, were improper to such a degree as to deprive defendant of a fair and impartial trial. State v Cole, ... M ....., 59 NW(2d) 919.

It is difficult to imagine any satisfactory ground for deciding that evidence which is admissible before the federal trade commission is inadmissible before a judge sitting without a jury in a civil anti-trust case brought by the government. United States v United Shoe Machinery Corporation, 89 F Supp 349.

Where claimant alleged that defendant in the process of kiln drying lumber failed to exercise ordinary care required and by its negligence, carelessness, and want of ordinary care the lumber was burned, the record amply sustains the verdict for the claimant. Twin City Hardwood Lumber Co. v Dreger, 199 F(2d) 197.

547.02 Superseded by Rules of Civil Procedure, Rules 59.02 and 59.03.

Annotations relating to superseded section 547.02.

In an action tried to the court, defeated party may move for a new trial on court's minutes on ground of conclusions of law are not supported by the findings of fact. On such motion, the court has no authority to grant a new trial, its power being limited to modifying the conclusions of law to meet the facts. The court's order denying such motion may be reviewed by the appellate court without a settled case or bill of exceptions. Johnson v Johnson, 223 M 420, 27 NW(2d) 289.

Where motion for new trial was not made until about 90 days after entry of judgment and more than two years after verdict, even if ex parte stays issued prior to motion were still in effect, such stays were not effective to extend the court's jurisdiction to hear a motion for new trial, in view of the fact that under rules 9.02 and 59.06, 60-day period for filing motion for new trial can be extended only for cause and upon application during the period. Weberg v Chicago, Milwaukee & St. Paul Ry., ... M ....., 59 NW(2d) 317.

547.023 Superseded by Rules of Civil Procedure, Rule 58.02.

547.03 Superseded by Rules of Civil Procedure, Rules 46 and 51.

Annotations relating to superseded section 547.03.

Appeal and error; status of exceptions. 31 MLR 736.

Where a newspaper article published during the trial gave account of a verdict recovered in a prior action in the same courtroom and in a case not connected in any way with this action, and where no objection was made thereto and no showing having been made to indicate that the article had been read by the jury, or that it influenced their verdict in the present action, such publication did not constitute prejudicial error to the extent of requiring a new trial. Eichten v Central Minnesota Cooperative Power Assn., 224 M 180, 28 NW(2d) 862.

Where a 5-year-old boy was struck by an automobile while crossing on a crosswalk, denial of requested instruction as to the rights and duties of pedestrians at crosswalks was prejudicial and warranted the granting of a new trial. Storey v Weinberg, 225 M 48, 31 NW(2d) 913.

Language inadvertently used in the charge should be called to the trial court's attention in order that the court may correct it. Melzer v Snow, 225 M 59, 29 NW(2d) 67.

Remarks alleged to have been made by defendant's counsel in argument, but of which there is no record in the settled case, and denied by the defendant, and not recollected by the trial court will not be considered on appeal. Ryan v City of Crookston, 225 M 129, 30 NW(2d) 351.

In a civil case where the appellant makes no assignment of errors on his appeal to the supreme court, no question is presented to it; but if the respondent voluntarily argues a question argued by the appellant, the appellate court will consider it. Erickson v Midgarden, 225 M 153, 31 NW(2d) 918.

Neither errors at law, nor excessive damages could be assigned as errors on appeal, when the motion for a new trial was made solely on the ground that the evidence did not sustain the verdict, and that the verdict was contrary to law. La Nasa v Pierre, 225 M 189, 30 NW(2d) 32.

Alleged errors not assigned in a motion for a new trial were not reviewable on appeal. Ball v Twin City Motor Bus Co., 225 M 274, 30 NW(2d) 523.

On an appeal from a judgment entered on a verdict of the jury, where a motion for judgment non obstante or a new trial was denied and the record failed to disclose whether the motion specified any error other than that the court refused to order judgment non obstante, and where no other errors in the rulings or trial proceedings were involved, the only question presented for review is whether the verdict is sustained by the evidence. Thelen v Gartner, 226 M 36, 31 NW(2d) 639.

The review on appeal must be limited to the record. Where the record fails to disclose whether a notice of motion for a new trial specified an alleged error, the appellate court is compelled to assume that no specification thereof was made. Objection to the misconduct of counsel cannot be raised for the first time on appeal. Thelen v Gartner, 226 M 36, 31 NW(2d) 639.

Section 547.03, subdivision 2, which provides that "any adverse ruling or instruction of the court shall be deemed excepted to for all purposes," was not intended to obviate the necessity of seasonably calling the court's attention to inadvertent omissions or errors in the charge, but merely to eliminate the need for taking an exception where the court has acted adversely after its attention has been directed to the alleged error. Where a motion for a new trial is granted solely for errors of law and the errors specified by the trial court are inadequate, the order granting the motion may be sustained by showing other errors than those specified if such other errors are prejudicial and were properly raised. An appeal from an order setting aside a verdict for defendants and granting plaintiff a new trial does not bring up for review a nonappealable portion of such order which denied a motion by one of the defendants for a dismissal as to said defendant on the merits. Storey v Weinberg, 226 M 48, 31 NW(2d) 913.

Although a formal exception need not be taken to an inadvertent omission or error in instruction to the jury, such omission or error is no ground for granting a new trial unless the attention of the trial court has been seasonably directed thereto in some manner. Foster v Bock, 229 M 428, 39 NW(2d) 862.

Though a formal exception need not be taken to an inadvertent omission or error in instruction, such omission or error is no ground for a new trial unless the trial court's attention has been seasonably directed thereto. An exception is not necessary to an adverse ruling, order, decision, or instruction on a matter of law but an exception may be used to direct the trial court's attention to alleged error or this may be done by any adequate objection, offer of proof, or other means unmistakably directing the court's attention to the error. Froden v Ranzenberger, 230 M 366, 41 NW(2d) 807.

Although errors in jury instruction as to controlling propositions of law may be called to the attention of the trial court for the first time in a notice of motion for a new trial, this is not the case—where the charge as a whole is substantially correct—with respect to inadvertent errors or omissions which creep into a charge

such as ambiguities or unintentional inaccuracies arising from a failure to qualify general statements of law or fact or which involve nothing more than an obvious unintentional reflection of emphasis which arises from devoting more words in stating plaintiff's evidentiary claims than in expressing defendant's denials or defenses. The right to call the court's attention to its inadvertent omission or error in the charge, or to take exception thereto, involves a corresponding duty to exercise such right reasonably before the jury has retired, and such inadvertent omission or error may not, for the purpose of review upon appeal, be raised for the first time in the notice of motion for a new trial. McIllravie v St. Barnabas Hospital, 231 M 384, 43 NW(2d) 222.

Since the enactment of Laws 1945, Chapter 282, Section 1 (MSA 547.03, Subdivision 2), the necessity for taking an express exception to any adverse ruling, order, decision, or instruction of the court on a matter of law has been wholly eliminated. Although an exception may be used as a means of directing the trial court's attention to an alleged error, such purpose may also be accomplished by an adequate objection, and explicit offer of proof, or by some other means which seasonably and unmistakably directs the court's attention to the alleged error. The mere fact that the power to grant a new trial is withheld in the Minneapolis municipal court in unlawful detainer actions, for the sole purpose of providing a summary remedy in determination of the right to present possession, provides no basis for holding that section 547.03, subdivision 2, has no application in such actions. Although the Minneapolis municipal court has jurisdiction over actions of forcible entry and unlawful detainer, whether involving title to real estate or not, such jurisdiction does not embrace the power to entertain or consider a defense which is insufficient per se and which can be asserted only with the aid of affirmative equitable relief. Dahlberg v Young, 231 M 60, 42 NW(2d) 570.

Where there is an inadvertent omission or error in the trial court's instructions formal exception need not be taken, but such omission or error is not ground for granting a new trial unless the court's attention has been seasonably directed thereto in some manner. Chapman v Dorsey, 235 M 25, 49 NW(2d) 4.

Misconduct of counsel not excepted to as such upon the trial or during argument to the jury or at the close of argument will not be reviewed in the supreme court unless it is so reprehensible as to call for action of the trial court on its own motion. Janicke v Hilltop Farm Co., 235 M 135, 50 NW(2d) 84.

Where defendants in connection with their motion in the alternative did not ask for a new trial they could, on appeal, be awarded a new trial. Sorlie v Thomas, 235 M 509, 51 NW(2d) 592.

Objection to the admission of evidence showing that plaintiff and his wife were involved in another automobile accident shortly before the trial cannot be raised for the first time on appeal. Gatley v Klingsheim, 236 M 370, 53 NW(2d) 123.

Where the court gave an erroneous instruction as to damages and it was not challenged by either party, it became the law of the case, and the sufficiency of the evidence of damages to support the verdict is properly determined in the light of the instruction given. Marion v Miller, ... M ....., 55 NW(2d) 52.

If defendants wish to limit the admission of a certain check to a particular purpose, such as the amount the plaintiff may recover, it was their duty to have made their position known to the trial court in their motion for a trial and they cannot raise the issue for the first time on appeal. Blumberg v Palm, ... M ....., 56 NW(2d) 412.

The rule that the court will not decide issues raised for the first time on appeal do not apply to an order granting a judgment notwithstanding the verdict as to another defendant though he could have called the attention of the court to the claimed error on a petition for the rehearing of the motion. Bocchi v Karnstedt, ... M ....., 56 NW(2d) 628.

Where there is misconduct of counsel, and if the misconduct is fundamental, the proper procedure for opposing counsel is to move for a mistrial. Maher v Roisner, ... M ....., 57 NW(2d) 810.

547.04 Superseded by Rules of Civil Procedure, Rule 59.07.

Annotations relating to superseded section 547.04.

Newly discovered evidence having no bearing upon any fact found in the record will not be considered on a motion for a new trial. State v Martin, 223 M 414, 27 NW(2d) 158.

Inaccurate or misleading newspaper reports of trial proceedings which find their way into the hands of jurors may be a proper basis for granting a new trial after a verdict where prejudice results. Prejudice, however, cannot be presumed. Eichten v Central Minnesota Assn., 224 M 180, 28 NW(2d) 862.

Where a newspaper article published during the trial gave account of a verdict recovered in a prior action in the same courtroom and in a case not connected in any way with this action, and where no objection was made thereto and no showing having been made to indicate that the article had been read by the jury, or that it influenced their verdict in the present action, such publication did not constitute prejudicial error to the extent of requiring a new trial. Eichten v Central Minnesota Cooperative Power Assn., 224 M 180, 28 NW(2d) 862.

Where the trial court made an order or judgment exclusively upon the original records on file, the appellate court, on review, need not require a settled case or bill of exceptions, if the original file has been returned to the reviewing court. A litigant who desires the benefit of this rule has the burden of taking the necessary steps to have the original file forwarded prior to the date of the argument. Viilliainen v American Finnish Works, 236 M 412, 53 NW(2d) 112.

547.05 Superseded by Rules of Civil Procedure, Rule 59.07.

Annotations relating to superseded section 547.05

A trial court has jurisdiction to settle and allow a case after an appeal has been taken from an order denying a new trial. Where an appeal has been taken promptly and in good faith, a settled case is needed for proper presentation and determination of appeal, appellant has proceeded with due diligence, and there is no showing that hearing of appeal will be delayed or that any other prejudice will result, exercise of sound judicial discretion requires that trial court should facilitate hearing of appeal on its merits by allowing and certifying settled case. State v Baker, 234 M 528, 49 NW(2d) 107.

The law favors settlement of claims without recourse to litigation. Where during pendency of the action by the occupant of an automobile against a railway company and the automobile owner as joint tortfeasors, the railway company paid plaintiff $6,000 for covenant not to sue and for dismissal of her action, and thereafter the automobile owner insurer paid the injured party $5,000 for her release in favor of the automobile owner and then brought suit against the railway company for contribution, the payment made by the railway company was a substantial and partial compensation and the insurer was not entitled to contribution. Employers Mutual Casualty Co. v Chicago, St. Paul & Omaha Ry., 235 M 304, 50 NW(2d) 689.

547.06 Superseded by Rules of Civil Procedure, Rule 59.08.

CHAPTER 548

JUDGMENTS

548.01 Superseded by Rules of Civil Procedure, Rule 54.03.

Annotations relating to superseded section 548.01.

Binding effect of state trial court decisions on federal courts. 32 MLR 825.