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STATE OF WISCONSIN CIRCUIT COURT LINCOLN COUNTY

LIBBIE PESEK,
Petitioner,

v.

96-CV-187

STATE OF WISCONSIN DEPARTMENT
OF ADMINISTRATION,
Respondent.

PETITIONER'S REPLY
TO RESPONDENT'S BRIEF REGARDING THE COURT'S
AUTHORITY TO AWARD COSTS OR SANCTIONS
(i.e., AWARD INTERLOCUTORY COSTS IN ACTIONS WHEREIN
STATE IS A PARTY AND IMPOSE SANCTIONS
AGAINST THE STATE, ITS AGENCIES AND/OR ITS ATTORNEYS

Petitioner herewith submits her reply brief on the court's authority to award costs and impose sanctiions in actions wherein the state is a party.

At a hearing wherein the court ordered the briefing by the parties on this subject, the court ordered that no reference be made in these briefs to specific allegations contained in the pending motions for interlocutory costs and sanction, especially until such time as the court determined it has authority to sanctiions the government, its agencies and/or its attornyes, and even to tax costs against the government, its agencies and/or its attorneys. If the court found that it has authority to sanction them, the court advised that it would hold a hearing and receive evidence to determine if the imposition of sanctions is warranted. Therefore, there is no evidence before the court as to whether or not sanctionable conduct occurred, only Petitioenr motions containing allegations.

Respondent's brief is defensive and conclusatory: that no actiion on their part or the part of their attorney warrants imposititon of sanctions. This is not before this court at this time.

Respondents brief also has a few omissions of very important words in the decisions of our higher ocurts and in their brief they also present a "slant" on the application of law to its application under Chapter 227 judical review, etc., Petitioner simply does not feel qualified as a "professional attorney" to expose and straighten it out so that it can be simply noted and comprehended by the court, however, she will do the best she can. They present two arguments and I will refer to them only as Argument No. 1 and Argument No. 2.

1. ARGUMENT NO. 1 - Petitioner's Reply

In the title of their arguemnt they present that the court has limited authority to award costs or sanctiions agaisnt the state in actiions for judical reviews.

Concerning the court's authority to sanctiion, all of their arguemnt and case law is unpersuasive. The court has inherent authority to impose sanctiions (whether fines, costs, flat monetary awards, etc) and this inherent authority is not limited only to statutory authority:

> A trial court is not limited only to its statutory authority to sanctiion parties, for it also has "inherent authority to sanction parties for failure to prosecute, failure to comply with procedural statutes or rules, and for failure to obey court orders. Johnson v Allis Chalmers Corp 162 Wis. 2d 261, 273-74, 470 NW2d 859, 863 (1991).

Schaerer v Northern Assur Co. 182 Wis 2d 148 at 162.

Further, the "inherent authority"is not limited to only those three areas. The court may impose sanctioins because of a party's or the party's attorney statements of misrepresentations, Schaefer supra (also see Petitioner 1st brief on this subject.) Misstatements could be as collusion, conspiracy to defraud a party or their party. Also misstatements of fact or law to mislead the court, etc.

Further, the "inherent authority" is not limited to only certain types of actions. It simply is not limited to the type of action, special proceeding or whatever the reason parties are before the court in whatever manner they appear before the court. The court's "inherent authority" exists because the court exists

> The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.

Chilcutt v US (5th Cir 1993) 4 F3d 1313 quoting Justice Field writing for the court in Ex Parte Robinson (86 US (19 Wall) 505, 22 Led 205 (1873)).

Since sanctions may include the "costs", the respondents present that there must exist statutory authority concerning "costs" before such is awarded against the state or its agencies. Sanctiion may include but are not limited to, fines, costs or flat monetary awards. Respondnents take the word "costs" out of the sanctions and apply their law in support. They omit a very important word in their use of the law. They state on page 2 of their brief: "Costs against the state or a state agency are allowed only where expressly authorized by statute." However, the case law presented only applies to the "taxation

of costs agaisnt the state or its agency. It does not apply to the court's inherent authority to sanction with sanctiions deemd "assessments", see Schaefer 182 Wis 2d at 161-162.

The parties are in agreement that the taxation of costs against the state or its agency's cannot occur unless expreslly allowed by statutre. Martineau v State Conservatiion Comm 54 Wis 2d 75 79, 194 NW2d 664 (Ct App 1972). The parties are in agreement that under Judical Reviews statutes allow for the taxation of costs 814.245 Wis. Stats. The parties are in agreement that in judical reviews the party (or individual as the sectioin 814.245 indicates) must be the prevailing party inorder to be awarded costs against the state which would "taxation of costs" per 814.245(6). The parties are in agreement that even if the indivudual is the prevailing party the court must make specific findings per statutes before it requires or allows the taxation of costs agaisnt the state and/or its agency.

The aprties disagree, however, that their must be expressed statutory authority under judical review for the court to tax costs against the State's attorney. Respondents further wish to ahve this court determine that judical review proceedings are all inclusive and exclusive, simply everything within the internal proceedings of a judical review are just a judical review proceedings. They simply wish to ignore Wagner v State of Wisconsin Medical Examining Board 181 Wis2d 6733, 511 NW2d 874 (1994) wherein the supreme court of Wisconsin has delcared there are other types of the proceedings within a judical review proceedings wherein the court may grant relief. i.e.,writ of mandamus, contempt of court. The court also recommended other sanctions for noncompliance

by respondents to statutory procedures. Writ of mandamus and Contempt of Court are separate proceedings within the judical review (injunctiion would be also by defintion of statute). They are usually instituted because of the actiion or inaction of the respondent and/or its attorney, in judical reviews, the State, its agency and/or its state-employeed attorney. Courts have also issued other relief outside chapter 227. Section 227.02 provides:

> 227.02 Compliance with other statutes. Compliance with this chapter does not eliminate the necessity of complying with a procedure required by another sttatute.

In addition the scope of civil procedure statutes is found within sec 801.01(2) Stats which provides:

> 801.01 Kinds of proceedings; scope of chs 801 to 847.
>
> ...
>
> (2) Scope, Chapter 801 to 847 govern procedure and practice in circuit court of this state in all civil actions and special proceedings whether cognizable as cases at law, in equity or of statutory orgin except where different procedure is prescribed by statute or rule. Cahpter 801 to 847 shall be construed to secure the just, speedy and inexpensive determination of every actiion and proceedings.

Our higher courts have stated that a ch. 227b judicial review is a "special proceeding." Ashwaubernon v Public Service Comm 15 Wis2d 445, 448, 113 NW2d 412 (1962).

As chs 801 to 847 apply to special proceedings, chapter 814 "Court Costs and Fees" also apply:

814.02(2) quoted in pertinent part:

> 814.02(2) In equitable actions and special proceedings costs may be allowed or not to any party, in whole or in part, in the discretion of the court... as the court deems reasonable and just, in view of the nature of the case and the work involved.

State's attorneys are given a great amount of leeway in their representation of the State. Usually the inaction or action causing a writ of mandamus or contempt of court or other sanctionable conduct is the result of the attorny, and since the State is immunue to taxation of costs unless authorized by statute. we find that the State is immune to taxation of costs when these other proceedings must be insituted.

Chapter 783 Mandamus and Prohibition is defined as a civil actioin and therefore costs would fall under Chp 814. However, while government (county city etc) are laible for costs, the State may be immune to such taxation of costs. Yet the reasons for intituting the mandamus or contempt proceedings usually is the result of the attorney rtather than the State. Therefore, since the attorney is not a "party" and cannot falls under the party to be imposed taxation of cost status. Chapter 814 allows a Omnibus costs provision for situations arising in which the allovance of costs is not covered by ss 814.01 to 814.035:

> 814.036 Omnibus costs provision. If a situation arises in which the allowance of costs is not covered by ss. 814.01 to 814.035, the allowance shall be in the discretion of the court

with courts thus awardinging costs to a party as prevailing in the action or proceedings by taxation against the attorney. And in the case of an attorney employed by the state, forbidding the attorney from going to the State for reimbursement (which would effectuate an "immunity" for the state's attorney if he was allowed to go to the state for reimbursement of the taxation of costs). Strong v Brushafer 2185 Wis2d 812, 519 NW2d 668 fn. 9; Chilcutt v US 2 4F3d 1313, 1325-1327 (th Cir 1993); Schultz v Darlington

Mut Ins Co. 181 Wis 2d 646, 511 NW2d 879, Derchin v State University of New York 963 F2d 513 (2nd Cir 1992).

In one pof these judical review now before this court, Petitioner will show the court that the parties were before the court continually for over a year, after the court remanded to the administrative level, solely because of the state's attorney's action or inaction, thus being placed before the court with Petitioner's expense and court's time, correspondence, hearings., reading of voluminious materials, etc. with the court eventually having to issue the administrative agency's decision. It is unconceivable that the petitioner (who in judical reviews is usually a poor person apealing the denial of public aid benefits due to the arbitary abuse of power by the government) should not be made whole and must wait until s/he is the prevailing party inorder to be made whole of all interlocutory proceedings.

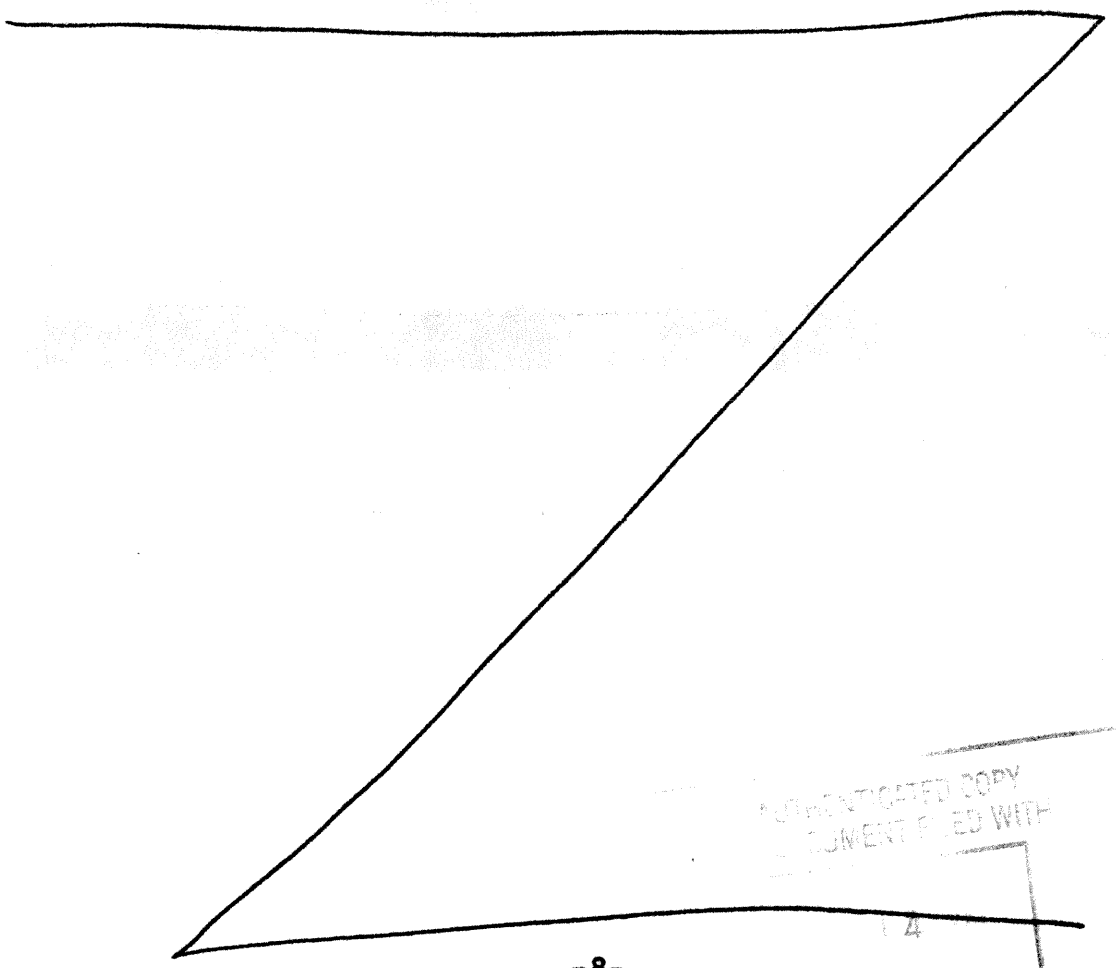
> "'One of the purposes of the EAJA [and the WEAJA] is to encourage challenges to agency action and to provide a disincentive to agencies to prolong the litigation process; and that awarding higher, fully compensatory fees would better serve th4ees statutory purposes than lesser awards'"

Stern v Wisconsin Dept of Health 569 NW 79 (Wis App 1997).

> In Berman v Schweiker, 713 F2d 1290, 1297 (7th Cir. 1983), the purposes of the EAJA were discussed:
>
> > The purposes of the Act are threefold: (1) to encourage private litigants to pursue their adminbistrative and civil actions against the government and not be deterred by the prospect of having to absorb the cost...(2)to compensate parties for the cost of defending agaisnt unreasonable government actiion; and (3) to deter the federal government from prosecxuting or defending cases in which its position is not substnatially jusified.

Sheely supra (typosgraphical errors not in original).

Writ of Mandamus proceedings, contempt of court proceedings, and other interlocutory proceedings should never have to be instituted by an individual or anyone to get the government to comply with statutory procedures or court orders. Public interest dictates that the government and its employed attorneys, more than any other entity should comply with statutory procedures and court orders -- they are the most frequent litigant in the court. See Chilcutt supra 4F3d 1313 at 1327 and footnotes 36 and 38.



2. ARGUMENT No. 2 - Petitioenr's Reply

Section 814.025 Stats frivilous costs have been determined by our higher courts applicable to and may be awarded in Chapter 227 proceedings. See Tatum v LIRC 132 Wis2d 411, 392 NW 2d 840 (Ct App 1986).

Cahpter 804 allows for sanction of abuses of discovery procedures/statutes to be imposed against the party's attorney, see 804.12(2)(b) Wis. Stats., and the courts, in the case of a state-employed attorney, may require that that attorney not seek reimbursement from the State, Chilcutt supra.

Nowhere does Chapter 227 reflect the legislative intent to limit the power of this court to sanctiion. Again, sanctioning (not limited to fines, costs, attorney fees, monetary amounts), is not limited to statutory authority. The ocurt has inherent authority to sanction parties for failure to prosecute, failure to comply with procedural stautes or rules, and for failure to obey court orders, Johnson supra, Schaefer supra. Parties include the State or its administrative agencies or employees/officials, etc. If the executive branch was so immune, it and its agencies, employees, officials would run lawless before the courts. This would invite them to ignore statutory procedures, flout court orders, and even ignore acceptable standards of decorum and would even control the inherent authority of the courts. Chilcutt supra. Thus seriously eroding our system of separation of pwoers. They would dictate to the courts what the court must do and accept! Thus the judiciary would be powerless to impose the most effective effective remedy for ensuring compliance against the most frequent litigant in the court. Chilcutt supra.

My dictionary defines "egregious" as "estraordinary or remarkable in a bad sense or for underdesirable characteristics; flagrant" Living Webster Encyclopeid Dictionary, English Language Institute of America (1977).

In their title of this argument Respondents appearently agree that inorder for the court to impose sanctions against an attorney, there must be some misconduct on the part of the attorney. However, that conduct neither be disruptive nor egregious. The case they support that the attroney's conduct msut be egregious only applies to the sanction of dismissal of a case with prejudice, such being termed by the Johnson court as "particularly harsh" "the most severe sanction available" -- that only a egregious conduct of the party or its attorney would warrant such a sanction.

Further, the state-employed attorney in the Justice Dept of Wisocnsin is not a state official.

Dismissal of an action imposed as a sanctiOn would be improper unless "bad faith" or egregious conduct can be shown on part of non-complying part.

Significant prejudice is inherent in any flagrant disobedience of court orders and sanctions are necessary to maintain judical integrity and promote orderly processing of cases and continuing failure to sanction might be prescribed by non-complying party and other litigants as green light to flaunt court orders.

A checklsit of relevant factors for circuit court to consider when imposing sanctions for failure to comply with procedures and orders is unnecessary would tend to unduly emphasize quantity of factors involved, rather than properly focusing on degree to which party's conduct offends standards of trial practice.

In her concurring opinion in Johnson supra, Justice Shirely S. Abrahamson noted the court has sanctions aviable to it including imposing monetary sanctions on the attornys referring to Why Not Fine Attorneys": An Economic Approach to Lawyer Disciplinary Sanctions, 43 Stan. L. Rev. 907 (1991).

Petitioner believes tht if the court finds that it has authority to impose sanctions (whatever type), agaisnt the State, it agencies and/or its attorneys. it will first, before imposition of any sanction, conduct a hearing wherein papers of the record in this case will bve reviewed and "evidence" presented. At such time Petitioner beleives this court will indeed find misconduct on the part of the agency and/or the attorneys invovled.

SUMMARY

Petitioner relies upon her brief and arguments presented that this court has authority to impose sanctions against the State, its agencies, and/or its attorneys and to even make monetary assessments against same. She therefore requests the court to schedule hearings in this matter.

Petitioner believes the court may effectively use the Omnibus Costs statute and require a state-employed attorney not to seek reimbursement form the State, if the court finds that the proceedings, failure to obey statutory procedures, court orders, the continuation and prolonging of litigation process, etc., were because of the attorney's conduct.

The court not only has statutory authority to sanction for various litigation abuses, etc., it has inherent authority to do so.

Dated April 13, 1998.

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STATE OF WISCONSIN CIRCUIT COURT LINCOLN COUNTY

LIBBIE PESEK,

Petitioner,

v. Case No. 96-CV-187

STATE OF WISCONSIN
DEPARTMENT OF ADMINISTRATION,

Respondent.

RESPONDENT'S BRIEF REGARDING THE COURT'S AUTHORITY TO GRANT COSTS OR SANCTIONS

The above-named respondent, Department of Administration (hereinafter DOA), by its attorneys, James E. Doyle, Attorney General, and Leonard E. Martin, Assistant Attorney General, hereby opposes any and all motions by petitioner Pesek regarding costs, sanctions, fees, or contempt of court. Both the history and the nature of this case are convoluted and confused. Respondents and their attorneys have made every effort to comply with the requests and orders of the court, and have made reasonable efforts to comply with the demands of petitioner during the pendency of this action. Accordingly, any award to petitioner Pesek based on her motions regarding costs, sanctions, fees, or contempt would be inappropriate. All such motions made by petitioner Pesek should be denied and dismissed. The court has ordered the parties to address the issue of whether the court has authority to impose costs and sanctions.

I. THE COURT'S AUTHORITY TO AWARD COSTS OR SANCTIONS AGAINST THE STATE IN AN ACTION FOR JUDICIAL REVIEW UNDER CHAPTER 227 IS LIMITED TO INSTANCES WHERE THE PLAINTIFF IS A PREVAILING PARTY AND THE STATE'S POSITION WAS NOT SUBSTANTIALLY JUSTIFIED.

Costs against the state or a state administrative agency are allowed only where expressly authorized by statute. Dept. of Transp. v. Wis. Personnel Comm., 176 Wis. 2d 731, 735, 500 N.W.2d 664 (1993); Martineau v. State Conservation Comm., 54 Wis. 2d 76, 79, 194 N.W.2d 664 (Ct. App. 1972). This applies to state officials and agents of the state. State ex rel. Korne v. Wolke, 79 Wis. 2d 22, 255 N.W.2d 446 (Ct. App. 1976). Costs against agencies involved in actions for judicial review are also inappropriate unless the party seeking fees prevails, and the position taken by the agencies involved was not substantially justified. Stern v. DHFS, 212 Wis. 2d 393, 569 N.W.2d 79, 81 (Ct. App 1997); Sheely v. DHSS, 150 Wis. 2d 320, 336-37, 442 N.W.2d 1 (1989). At common law, there was no right to costs, particularly against the government or its agents. Accordingly, where the Legislature has created such a right, and has provided a statutory mechanism for the enforcement of that right, that mechanism is exclusive. Hermann v. Town of Delavan, 208 Wis. 2d 216, 228, 560 N.W.2d 280 (Ct. App. 1996). Where the sovereign has imposed conditions upon its consent to suit, strict compliance with those conditions is necessary to obtain jurisdiction. See Lister v. Board of Regents, 72 Wis. 2d 282, 291, 240 N.W.2d 610 (1976).

The Legislature has set up a statutory scheme in ch. 227. Stats., which specifies that even a prevailing party must meet certain conditions to be awarded costs. This statutory scheme is exclusive, and it is therefore inappropriate for petitioner to seek to circumvent that statutory scheme merely for purposes of obtaining compensation for litigation costs. Petitioner has presented nothing in ch. 227, Stats., that allows costs against the state's attorneys in lieu of costs against the state. If the Legislature had meant to compensate all litigants under ch. 227, Stats., it would not have enacted the provisions requiring that costs not be imposed unless the party seeking costs

prevailed, and would not have included a condition that the agency position not be substantially justified.

II. THE COURT'S DISCRETIONARY AUTHORITY TO IMPOSE COSTS AND SANCTIONS AGAINST ATTORNEYS UNDER VARIOUS OTHER STATUTES WOULD REQUIRE THAT THERE BE SOME MISCONDUCT ON THE PART OF THOSE ATTORNEYS.

Although there are various statutes other than those in ch. 227, Stats., which might authorize an award of costs, such statutes either depend on a party prevailing on the merits, or are in the nature of sanctions. Petitioner is not at this stage a prevailing party, so statutes intended to recompense a prevailing party are not applicable here. Section 814.025, Stats., for example, authorizes an award of costs to a successful party where an action, special proceeding, counterclaim, defense or cross-complaint is found to be frivolous. There must be some showing that the party or the party's attorney knew or should have known that the action, special proceeding, counterclaim, defense or cross-complaint was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law. Sec. 814.025(3)(b), Stats. A finding of frivolousness should not be against the great weight and clear preponderance of evidence. Sommer v. Carr, 95 Wis. 2d 651, 291 N.W.2d 301 (Ct. App. 1980).

As to those statutes which impose sanctions, their purpose is not to recoup the costs of litigation, but instead to deter misconduct. This requires at least some threshold indication that misconduct has occurred. A court has both inherent and statutory authority to exercise discretionary control over the proceedings occurring before that court. Exercise of the court's discretion requires a process of reasoning, "based on facts in the record or reasonably inferred from the record and conclusion based on logical rationale founded on proper legal standards." Reidinger

v. Optometry Examining Board, 81 Wis. 2d 292, 260 N.W.2d 270 (1977). The purpose of the court's discretionary power is to penalize conduct which is disruptive to the administration of justice. Schultz v. Darlington Mut. Ins. Co., 181 Wis. 2d 646, 656, 511 N.W.2d 879 (1994). An exercise of the court's discretionary authority would therefore seem to require at least some threshold indication that some type of disruption occurred. In Schultz, for example, a mistrial had been declared, and the court ruled that the mistrial was caused by the conduct of an attorney. Here, there has been no such disruption. Courts have also based the exercise of discretionary authority on egregious conduct for which no satisfactory explanation was provided. Johnson v. Allis Chalmers Corp., 162 Wis. 2d 261, 266, 470 N.W.2d 859 (1991) (court's dismissal of a suit was not an abuse of discretion where a party's conduct in failing to comply with the court's orders was egregious and without a "clear and justifiable excuse"). Here, there is no indication that respondent's attorneys have failed to comply, and there is nothing to indicate that egregious conduct has occurred. Moreover, the Legislature may impose reasonable limitations upon the court's inherent powers. See In re Contempt Finding Against B.L.P., 118 Wis. 2d 33, 40, 345 N.W.2d 510 (Ct. App. 1984); State ex rel. Attorney General v. Circuit Court for Eau Claire County, 97 Wis. 1, 8, 72 N.W. 193 (1897). The provisions of ch. 227, Stats., regarding costs signals at least some concern on the part of the Legislature that state officials not be subjected to costs or sanctions without good reason.

A court may invoke its inherent authority in order to award attorney fees, but that authority rests on the court's sound discretion, thus requiring that there be sufficient reason for the award. Schaefer v. Northern Assur. Co., 182 Wis. 2d 148, 162, 513 N.W.2d 615 (Ct. App. 1994) (existence of collusion and conspiracy on the part of one party justified an imposition of attorney's fees). Here, there is no indication of any conduct so improper as to reasonably call for the court to consider exercise of its inherent authority.

A court may find in contempt a party that engages in misconduct. Again, such a finding of contempt, under sec. 785.01, Stats., requires the court to exercise its sound discretion in determining the existence of such things as interference with a court proceeding or with the administration of justice, conduct which impairs the respect due the court, disobedience to an order of the court, or refusal to produce a record. In re Marriage of Haeuser v. Haeuser, 200 Wis. 2d 750, 767, 548 N.W.2d 535 (Ct. App. 1996). A finding of contempt is generally appropriate for willful misconduct, rather than mere inadvertence or mistake. Id.

Section 802.05, Stats., allows sanctions where an attorney submits pleadings, motions, or other papers without reading the document, or without ensuring that, to the best of the attorney's knowledge, information and belief, formed after reasonable inquiry, the document is well grounded in fact, is warranted by existing law or good faith argument for modification or reversal of existing law, and is not filed for any improper purpose such as harassment or needless delay. There is no evidence that anything filed by respondent's attorneys resulted in needless delay or harassment. There is no evidence that anything was filed by respondent's attorneys without reasonable inquiry. Respondent's attorneys responded adequately to petitioner Pesek's continual pursuit of orders from this court, or further agency proceedings. In no instance was the timeliness of the response delayed without reason, and petitioner Pesek has not produced evidence to the contrary.

Section 805.03, Stats., allows a court to make such orders as are just, where a party fails to comply with civil procedural statutes or court orders. The court under that statute exercises its discretion where it is just that it do so, and not merely for the convenience of one party. Here again, there is no credible indication that an exercise of the court's discretion is warranted in this case.

CONCLUSION

Nothing in ch. 227, Stats., authorizes an award of costs or sanctions at this stage of the proceedings. The other statutory bases for such an award require some threshold indication of misconduct, willful disobedience, or the like which might cause the court to reasonably consider the use of its discretionary power. Nothing in the record indicates that sanctions or costs might be appropriate. Moreover, nothing in the case law or the statutory law contemplates the use of other statutes to obtain, as recoupment for litigation expenses, costs or sanctions against state attorneys which would not otherwise be appropriate under ch. 227, Stats. Petitioner's motions for costs and sanctions should accordingly be denied and dismissed.

Dated this 30th day of March, 1998.

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STATE OF WISCONSIN CIRCUIT COURT LINCOLN COUNTY

LIBBIE PESEK,
Petitieonr,

v. 96-CV-187

STATE OF WISCONSIN DEPARTMENT
OF ADMINISTRATION,
Respondent.

PETITIONER'S BRIEF IN SUPPORT OF COURT AUTHORITY TO: (1) AWARD INTERLOCUTORY COSTS IN ACTIONS WHEREIN STATE IS A PARTY AND, (2) IMPOSE SANCTIONS AGAINST THE STATE, ITS AGENCIES AND/OR ITS ATTORNEYS

STATEMENT OF THE CASE

Due to at risk of heat loss and utility cut off, on April 19, 1996 Petitioenr requested Emergency Services, a compoent program under the Crisis Assistance Program under the Wisconsin Energy Assistance Program. An applcaition was filled out on April 23, 1996. The agency found Petitioenr eligible for Crisis Assistance and offered budgeting counseling. An administrative hearing was held on May 9, 1996 before an hearing examiner. One June 1, 1996 Petitioner filed suit in federal court for alleged violations of civil rights naming the hearing examiner as defendant for failure to issue decision timely in an emergency situation, he was served summons and complaint on June 30, 1996. On July 25, 1996 he issued his decision upholding the agency's actions.Rehearing was denied.

On October 2, 1996 Petitiieonr petitioned the circuit court for judical review alleging that the fairness of the proceedings and/or procedural irregularities before the agency violated her due process rights to an impartial hearing examiner requesting the administrative decisiion to be vacated. (Amended in April 1997).

During the proceedings at the circuit court level, many interlocutory mostions were made by the aprties. Considerable amount

of exposure was concentrated concerning interrogratories, an evidentiary hearing and establishing a record to be certified for use in the judical review. Petitioenr made, during this time various motions requesting motion costs, contempt sanctions and 802.05 sanctions, along with any other applicable relief.

The court has allowed this briefing on the court's authroity to award and impose the relief Petitioenr requests in her motions. This brief will attempt to show the court it h as such authority.

After the administrative record was finally certified, ~~khm~~ (around October 27, 1997), the court decided to dispose of this judical review based upon the evidence contained in the record.On Janaury 15, 1998 the court entered its amended order disqualifying the hearing examienr, vacating the adminsitrative decision and remanding to the Department for further considerations and hearing. Petitioner has subsequently filed a motion for costs as prevailing party at the circuit court level in this judical review, hwoever, that motion is not the subject fo this brief and is separate, with the court having authority and statutory duty imposed upon it under 814.245 Wis. Stats.

INTRODUCTION

Petitioner believes that various flagrant abuses of statutory procedures in judical review have been committed by the State, its agencies/deaprtments and/or its attorneys before this court, not only ~~khkm~~ in this particular case, but in others before this court.

Our Supreme Court in Wagner v State of Wisconsin Medical Examining Board 181 Wis2d 633, 511 NW2d 874/(affirming 173 Wis 2d 422, 496 NW2d 213 (Ct Appl 1992) concluded that the time provisions in secs. 227.53(2) and 227.55 Stats are mandatory. While the Wagner court found that default judgments were not applciable to

(1994)

judical reviews when these sections were vioalted, the court did state the court has other remedies compatible with the ch. 227 scope of judical review:

> For example, the circuit court, upon motion or petiton, could ahve (a) issued a wrot of mandamus, ordering compliance by the Board; (b) issued an order to show cause as to why the Board should not be held in contempt for noncompliance; (c) ordered production of the record; or (d) refused to consider the Board's statement of position because it failed to timely file its notice of appearance

stating all of these remedies would ahve been consistent with the purpose of sec 227.57 Stats., Wagner 181 Wis2d at 644.

However, there appeared to be a delima when a party did petition the court for these remedies and requested costs for having to be"forced" to initiate them, in that the court had its hands tied and appeared unable to make the movant "whole". This was because of the immunity granted to the soveringn, and inability to tax costs against it or its agencies/departments.

Petitiioenr prays that this brief "opens the way" and precedent and legal authority establish ~~methods and procedures~~ that will allow the court to "make whole" granting relief to the movant and also fashioning sanctiions to deter future abuses.

COURT'S AUTHORITY

A copy of the statutes involved and referred to granting court's authority to award costs as previaling party (other than in judical reivews) and impose sanctions is attached to this brief for easy refernece.

A trial court has inherent authority to sanction parties or their attorneys for failure to comply with procedural statutes or rules or failure to obey court orders. Johnson v Allis Chambers Corp 162 Wis2d 261, 273-4, 270 NW2d 859, 863 (1991); also see Wis. Stats. 805.03; 785.04;804.12(2)(a)4.

Courts are also allowed to award costs and reasonable attorney fees under Wis. Stats. 814.025 upon frivolous claims, defenses, counterclaims or initiating or continuing same by either party. These may be awarded against the party, their attorney, or both. This statute further stat4es "to the extent s. 802.05 is applicable and differs from this section, s. 802.05 applies" (814.025(4) Wis Stats.). Riley v Isaacson 156 Wis 2d 249; 465 NW2d 619 (Wis App 1990).

Section 802.05(1)(a) Stats. specifically grants the court authroity to impose sanctions upon the represented party, the person signing the petition, motion or other paper, or upon both. Section 802.05(1)(a) Stats. was created by sec. 5, 1987 Wis. Act. 256 bringing it into conformity with Federal Rule of Civl Procedure 11 (Rule 11). See Legislative Reference Bureau Analysis 1987 S.B. 550. The language of the two is virtually identical.

Our court of appeals has declared that because the state statute (802.05(1)(a)) was patterned after Rule 11, federal cases interpreting Rule 11 may serve as persuasive authority and guide in Wisconsin courts' interpretation of sec. 802.05. See Northwest Wholesale Lumber Inc v Anderson (Appl 1995) 528 NW2d 502, 191 Wis2d 278; Riley supra; Gygi v Guest 117 Wis 2d 464, 344 NW2d 214 (Ct Appl 1984).

The types and amounts of sanction is within the discretion of the court, as will be shown with numerous state and federal cases, later in this brief.

In addition, our court of appeals has delcared that it is within the trial court's discretion to prohibit government attorneys

from seeking reimbursement from their employer for sanctionable conduct. See Strong v Brushafer 185 Wis 2d 812, 519 NW2d 668, fn 9 (Quoting Chilcutt v US 4F3d 1313, 1325-1327 (5th Cir 1993) (assistant United States Attorney barred from seeking or obtaining reimbursement for sanctions for flagrant disregard of discovery obligations and intentional misrepresenting certain facts to the court).

WHO MAY BE SANCTIONED?

~~Attorney barred from seeking or obtaining~~

Sanctions can be divided into two types: (1) monetary and non-monetary. Since monetary sanctions would be the imposition of cash payemnt agaisnt a party/entity or its attorney, we should examine the relationship between monetary sanctions and costs and determine if the court may impose and fashion such sanctions against the government and/or its agencies or departments.

a. Taxation of Costs against the State

A few definitions from the Blacks Law Dictionary, West Publishing Co., St. Paul, Minn. 6th Ed (1990) should assist:

> "Costs". A pecuniary allowance, made to the successful party and recoverable from the losing party, for his expenses in prosecuting or defending an action or a distinct proceeding within an action. Generally "costs" do not include attorney fees unless such fees are by a statute denominated costs or are by statute allowed to be recorverred as costs in the cases.
>
> "Interlocutory costs". Costs accruing upon proceedings in the intermediate stages of a cause as distinguished from final costs; such as costs of motions.

(typographical error not in quoted text).

Upon submission of a Bill of Costs (a certified, itemized statement of the amount of costs in an action or suit), the process of "taxation of costs" ensues:

> "Taxation of Costs". The process of ascertaining and charging up the amount of costs and fees in an action to which a party is legally entitled, or which are legally chargeable.

Thus the party must be the "successful party" or the "previaling party in an action." [4]

The well-established principle that the sovereign cannot be sued without its consent is applciable to exempt a state from liability for costs to which a prviate litigant would be subject, in the absence of a statute indicating its consent to such liability. The general immunity from liability for costs enjoyed by a state as a distinct legal entity is generally extended to state officers, boards or other agencies therein. And this immunity from liability for costs applies in criminal as well as in civil cases in which the state is a party. 20 AmJur 2d Costs §39.

In Wisconsin costs may not be taxed against the state or an administrative agency of the state unless expreslly authorized by statute. Martineau v State Conservation Comm 54 Wis 2d 76, 79, 194 NW2d 664, 666 (1972). This has been applied to 804.12(1)(c) Wis. Stats.(Wherein the court may statutorily award expenses of a discovery motion) Wisconsin Department of Transportation v Wisconsin Personnel Comm. 176b Wis 2d 731, 500 NW2d 664 (Wis 1993); State v Beloit Concrete Stone Co 103 Wis 2d 506, 513-14, 309 NW2d 28 (Ct App 1981).

However, as noted hereinabove, under Wisconsin's 814.036 Omnibus Costs statutes, an attorney may be fully assessed costs as the "loosing party" in an action because of his own conduct

in the proceedings and ordered not to seek reimbursement from his employer. See Schultz v Darlington Mut Ins Co 181 Wis 2d xx 646, 511 NW 2d 879, Strong supra. Also see Derchin v State University of New York 963 F2d 513 (2d Cir 1992).

In the following federal cases the state was taxed costs: Citizen Ban Potawatomi Indian Tribe of Oklahoma v Oklahoma Tax Comm CA 10 (Okla) 1989, 888 F2d 1303, affirmed in part, reversed in part 111 S.Ct. 905, 112 LE 2d 112, on remand 932 F2d 1355, U.S. v Ward CA La 1965 349 F2d 795, modified on other grounds 352 F2d 329; Stacy v Williams DC Miss 1970 50 FRD 52, affirmed 446 F2d 1366; US v Crawford DC LA 1964 35 FRD 174.

b. Sanctions

"Sanctions" are punitive awards imposed as deterence for actions of a party or an attorney for violations of procedures, of statutory requirements or an order of the court. From Blacks Law Dictionary 6th Ed. (1990):

> "Sanction". Penalty or other mechanism of enforcement used to provide incentives for obedience with the law or with rules and regulations. That part of a law which is designed to secure enforcement by imposing a penalty for its violation or offering a reward for its observance. Fed.R.Civil R.Rule 11 empowers courts to impose disciplinary sanctions on attorneys for other types of improper conduct.

The imposition of sanctions, appears to present a different realm and law.

Not only can a court forbid a government attorney from seeking reimbursement from his employer, Strong supra, Derchin v State University of New York 963 F2d 513 (2nd Cir 1992) (upholding a district court's decision to forbid a state-employed attorney from seeking reimbursement from the state); Chilcutt v US (5th Cir 1993) 4 F3d 1313, the Chilcutt court determiend that court

has power to sanction, even punish for contempt the government and its attorney.

In Chilcutt, the government and its attorney agrued against the imposition of sanctions against the government contending that such would violate the separation of powers. The court disagreed:

> Contary to Mr. Means' contention that the district court's decision violated the separation of powers doctrine, we believe that to restrict a district court's power to fashion appropriate sanctions, simply because the transgessor is a member of the executive or legislative branch [FN36] would violate the separation of powers doctrine. [FN37] Such a decision would invite members of our sister branches to ignore acceptable standareds of decorum in courts and flout court orders. Indeed to rule as Mr Means requests would rob federal courts of power they inherited at their inception: power to preserve order in judicial proceedings and enforce judgments.

(typographical errors ommioted).

The Chilcutt court quoted McBride v Coleman 955 F2d 571, 582-83 (8th Cir) cert. denied, 506 US 819, 113 S.Ct. 65, 121 LEd2d 32 (1992) (Lay, C.J., dissenting) (concluding that "[i]t would seriously erode our system of separation of powers if the executive branch was (sic) effectively immune from the judical power. the federal courts must have the inherent authority to enforce executive branch compliance with judicial orders.... Otherwise, the judiciary would be powerless to impose the most effective remedy for ensuing compliance with its orders agaisnt the most frequent litigant in the federal courts").

> [FN36] Governmental attorneys should model the ideals of integrity and ethics rather than attempt to circunvent them. See Perry v Golub 74 FRD 360, 366 (NE Ala 1976) (asserting that public interest dictates that the Government, more than any other entity, comply with court orders).

[FN38] (quoted in pertinent part) Writing for the Court in Ex parte Robinson (86 US (19 Wall) 505, 22 LEd 205 (1873)), Justice Field began his opinion as follows:

> The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the
>
> enforcement of all judgements, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.

The exact same can be applied to Wisconsin and its courts and their judiciary powers.

The rest of this brief will present the types of sanctions and what courts have found to be sanctionable.

WHAT IS SANCTIONALBE AND TYPE OF SANCTIONS

Sanctions can be monetary or non-monetary. In imposing and fashioning monetary sanctions, courts have either imposed

- a flat amount to the movant/poarty, a fine to the court, and/or
- a required "donation" possibly to a local or state law library or a jduge's retirement fund. Monetary sanctions have also, more traditinally, included "costs and expenses" as well as attorney's fee". These monetary sanctions could be in addition and separate from costs and fees as prevailing party awards.

Courts hav e fashioned non-monetary sanctions inaddition to monetary sanctions and have been very innovative and creative in their determinations, even novel, i.e, requiring counsel to take opposing counsel out to dinner, to take continuing education, write various scarlet letters, partipate in a "blackboard punishment; and even recommended disciplinary actions be taken against the practicing attorneys.

Because courts have recommended disciplinary actions against the practicing attorneys with or without prior sanctionable conduct, for violations of the Professional Conduct for Attorneys, I am presenting out of our Wisconsin Statutes SCR 20 in possible pertinent part:

Wisconsin Statute Chapter 165 governs the state's attorney general with s. 165.25(6)(a) stating that the Attorney General ("AG") is to appear in matters brought before the court or an administrative agency which is brought before the state department or office, employer or agent, etc. He appoints assistant AGs under s. 165.055(1) who must be an attorney at law admitted to practice in this state and who take and subscribe to the constitutional oath of office and perform such duties as the AG prescribes.

As such, the assistant attorney general and attorney general are "lawyers" subject to Wisconsin's SCR 20 rule of Professional Conduct for Attorneys. The Preabmble: A Laywer's Responsibilities:

> A lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of jsutice.

Several rules under SCR 20 incorporate the advocate's duties and responsibilities with the words "shall" being mandatory:

> SCR 20:3.1 Meritorious claims and contentions.
> (a) In representing a client, a lawyer shall not:
> (1) knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law;
> (2) knowingly advance a factual position unless there is a basis for doing so that is not frivolous, or

(3)file a suit, assert a position, conduct a defense, delay a trial or take other action on behalf of the client when the lawyer knows or when it is obvious that such an action would serve merely to harass or maliciously injure another,

SCR 20:3.2 Expediting litigation
A lawyer shall make reasonable efforts to expedite litigation consistent with the interest of the client.

SCR 20:3.3 Candor toward the tribunal
(a) A lawyer shall not knowingly:
(1) make a false statement of fact or law to a bribunal;
...
(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not be disclosed by opposing counsel;
(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

It should be noted that many of the cases being cited below are federal and also refer to violations of 28USC 1927 as sanctionable conduct. We do not have an identical statute in Wisconsin to 28 USC 1927 however, our 814.025 frivolous statute is comparable. alogn with 802.05 Wis. Stats. In addition, the federal court in 1993 revised their Rule 11 hwoever Wisocnsin did not revise theirs which is almost identical to the 1983 revision of Rule 11. It is for that reason this following sectioin is applicqble to case law developed under the 1983 revision for which our court in Northwest supra stated that since Rule 11 and our 890 805.02 Wis. Stats were veritually identical, wisoncins courts could use federal case law as guide in applying 802.05 sanctions.

Under Wisconsin sec 802.05 a "hgood faith argument" is barred Riley 156 W2d at 259, 465 NW 2d at 623: Section 802.05 "creates obligations to one's adver4saries and to the legal system to avoid needless cost, delay and waste of judical resources. In particular, it mandates an affirmative duty to reasonable inquiry before proceeding with a claim or filing of any paper" Id.; State ex Rel Campell v TP of Delvan 565 NW2d 209 (Wis Appl 1997), Riley v Isaacon 456 NW2d 619, 156 W2d 249 (Wis App 1990).

The 7th Circuit makes the point that the district judge has the discretion to determine whether Rule 11 is vioalted Samuels v Wilder 906 F2d 272, 276 (7th Cir 1990).

The purpose of Rule 11 is deterence "Rule 11 sanctions are meant to serve several purposes, incldiuing (1) deterring future litigation abuse, (2) punishing present litigation abuse, (3) compensating victims of litigation abuse, and (4) streamlining court dockets and facilitating case management" White v General Motors Corp 908 F2d 675, 683 (10th Cir 1990).

Appropriate sanctions and factors that may be relevant in fashioning same include (1) willfulnes of the violation, (2) whether whole paper or minor parts vioalted rule,(3) the litigants prior sanctioin history, (4) the financial resources of the target, (5) the victims need, or (6) what is sufficient to deter repettion of such conduct.

> While we eschew the imposition of rigid guidelines for the trial courts...the jdug should take pains neither to use an elephant gun to slay a mouse nor to weild a carboard sword if a dragon looms. Whether deterrence or compensation is the goal, the punishment should be reasonably suited to the crime. Nevertheless ...the trial court's discretion in fashioning sanctions is borad.

Anderson v Beatrice Foods Co 900 F2d 388 (1st Cir) cert deneid 111 S. Ct. 233 (1990).

In Brandt v Schal Associates Inc 960 F2d 640, 645 (7th Cir 1992) the court stated "Compensation and deterrence are not only not mutually exclusive, they are sometimes compatible. If compensation was not a recognizable basis for Rule 11 awards, aggrieved litigants would have little incentive to pursue sanctions thus dimishing the important deterrent effect of Rule 11".

The court should make findings on the relationship of the sanction imposed to the purposes of Rule 11 Fox v Acadia State Bank 937 F2d 1566, 1571-72 (11th Cir); Akin v O-L Investment Inc 959 F2d 521, 535 (5th Cir).

a. Offendign parties ability to Pay

"Although equitable considerations are not relevant to the initial decision to impose sanctions (because that is a question of law), once a court determines that sanctions are appropriate, equitable factors may be an ingredient in the discretioianry aspect of Rule 11--fashioning an award. One equitable consideration, perhaps relevant to this case, is the sanctioned attorney's (or party's) assets" Brown v Federation of State Medical Bds 830 F2d 1429, 1439 (7th Cir 1987).

In Napier v Thrity or More Unidentified Fed Agents the district court sanctioned an attorney $17,163 sbecause he was able to donate $10,000 to his alma mater, Harvard Law School.

In Brandt supra the Seventh Circuit refused to consider attorney's bankruptcy filing.

b. Financial Need of Movant

The financial hardship imposed on a victim of a Rule 11 violation may serve as a justification for awarding that party attornye fees. In gutterman v Eimicke 125 FRD 348, 355 (EDNY 1

1989) "This sanction will remedy a manifest hardship sustained by the tenant-defendatns, and most iomportantly, will remind counsel that a failure to satisfy Rule 11 obligations will not be ignroed.

In Perkinson v Gilbert/Robinson Inc 821 F2d 686 (DC Cir 1987) the court of appeals finding the award of $48,085 in attorney fees reasonable, stated "In any event, even if the award overcompensated plaintiff for unnecessary expenses czused by defendant, it oculd still ahve been justified for punitve and deterrent purpose".

The 7th Circuit in Brandt supra upheld the arguemnt of the court's ability to "makewhole" the aggrieved aprty:

> This is not at all a matter of "prejudment interest" on a lodestar award, but reather the determiantion of an appropriate sanction tht really makes [the defendant] whole-- that puts them in the same economic position that they would ahve occupied had [plaitniff] not forced the needless litigation expense on them.

c. Effect of Bad Faith

Even though a finding of bad faith is not necessary to establish a vioaltion of Rule 11, such findings may increase the severity of the saction. As the advisory Committe notes: "[I]n considering the nature and severity of the sanctions to be imposed, the court should take into account the attorney's actual or presumed knowledge at the time when the pleading or other paper was signed. Fed R Civ P. 11 Advisory Committee Notes, ACN 121 FRD at 106.

One court recommended the following:

> It is obvious that a Rule 11 sanction msut be based on a case by case inquiry. This lcoal bar, hwoever, is entitled to know the views on sanctions held by this Court. A three tier form of assessment seems to be appropriate. For those counsel who are being sanctioned for the first time, the amount should be between One Dollar ($1.00) and Ten Thousand Dollars

($10,000). For those counsel being sanctioned for the second time, the range should be above Ten Thousand Dollars $10,000) and below One Hundred T Thousand Dolairs ($100,000). In the event a thrid sanction is imposed, it should be in excess of One Hundred Thousand Dollars ($100,000).

Orlett v Cincinati Micowave Inc 954 F2d 414, 41920 (6th Cir 1992) with the above recommendations by the 6th cir court of appeal.

d. Relevance of Other Sources of Sanctions

The court in Knop v Johnson 712 F Supp 571, 580-81 (W.D. Mich 1989) agreed with the plaintiffs that the duplicative payment (fees generated during the case and fees as sanctions) should not be denied.

Monetary Awards

The amount imposed msut be related to the Rule violation if it is a Rule 11 violation from time the violation occured and were caused by the violation Cooter & Gell v Hartmark Corp 496 US 384, 110 S Ct 2447 (1990)(sanction must be limited to costs and fees incurred because of the sanctionable paper).

The following conduct ahs bveen found sactionable by various courts:

$50,000 imposed agaisnt each law firm for filing 600 pages brief in violation of ocurt limit of 40 pages Glass v ID Financial Serv Inc 137 FRD 262 (D Minn 1991)

Apellant's filed false and mislaeading peittioon with Bankrupcy Court without giving notice ot opposing counsel as required by court rules with court finding false misrepresentations, Matter of Studio Camera Supply Inc 116 BVR 70 (ED MNich 1990)

Coelth (Client) who commited fraud (was referred to US Attorney for possible prosecution) sanction $59,094, Civino v Fed Express

Co (1995 WL 489435 (D NY 8/15/95).

Submission of Reutrn to Writ of Certeriori with papers not part of the certified Board of Review record State Ex rel campbell v TP of Delevan 565 NW2d 209 (Wis App 1997) (appeal costs were also awarded). 805.02 Wis Stats

Against government attorney for discovery abuses Chilcut v US 4F3d 1313 (5th Cir 1993).

Against appellate attrorney falsly imputed particular position in appellate brief Mays v Chciago Sun Time 865 F2d 134 (7th Cir 1989) includes $1,000 sanction agaisnt attorney for vioaltions of attorney Professional code of ethics).

Agaisnt city and its attorney for improeprly made motion Strong v Bruschafer 519 NW2d 668, 185 Wis 2d 812 (1994).

Against attorney who did not make reasonable inquiry beforehand and filed complaint and continued same after discovery produced facts supportive of withdrawal Riley v Isacon Supra

Agaisnt attorney who signed briefs containing statements of facts with no record reference and for which there was no record Lathram Corp v Cambridge Cloth Co (1990 CA DC) 919 F2d 1579, 16 USPQ2d 1929.

Atainst a US Attorney who filed bad faith motions for extension of time to file Answer to petition for judical review Johnson v Secretary, Department of Health and Human Services (1984 DC Dis Col) 587 F Supp 1117, 38 FR Serv 2d 1005 (court also issued default judgment for Petitioner) 28 USC 1927.

Fines have also been sanctioned with generally payable to the court clerk Snow Machines, Inc v Hedco Inc 838 F2d 718 (3rd

Cir 1988). In Magnus Electronic v Masco Corp of Indiana 871 F2d 626 (7th Cir) cert denied sub non. Brainaerd v Msco Corp 493 US 891 (1989) the district judge imposed an additional sanction on the attroney for the court time involved.. One court has reasoned that a fine should not be impsoed when the government is the sanctiioned aprty. Such a fine would carry out a mere transfer of government funds: "[T]he court could ahve required additional sanctions be paid to the clerk of the court due to the hardship imposed on the Court as a result of Defendnats conduct. In light of the fact tht the sanctioned party wouldbe the United States, the Court felt a sanction which merely resulted in a transfer of funds from one branch of the government to antoehr would be fruitless. Hoever, as presented hereinabove, the court can sanction the government attorney and require him not to seek rimbursement from his employer (the state) Strong supra, Chilcutt Supra etc.

Non-monetary awards

As stated slewheres, courts have been very innovated in fashioning sanctions. usually the non-monetary award is in addition to a monetary award:

Refusal to consider testimony Gerrits v Gerrits 482 NW2d 134, 167 Wis 2d 429 (App 1992) rev den 490 NW2d 21.

Such non-monetary awards include reprimands, disciplinary action and striking and/or dismissals:

The court in Crooker v United Marshals Services used the following "[a]s a sanction udner Rule 11, the court shall

enter an order requiring the plaintiff, when filing any further FOIA and/or Pirvancy Act complaint in this Court that name any pof the aforementioend agencies as defendnats, to attach thereto a a memorandum of law stating why the doctrine of resjudicata does not bar the intened suit: 641 F Supp 1141, 1143 (DDC 1986).

Courts may also requrie that an attoney file an affidavit detailing his or her compliance with Rule 11 together with complaints in new actions Moore v Western Surety Co 140 FRD 340, 348 (ND Miss 1991) aff'd 977 F2d 578 (5th Cir 1992).

In Daniels v Stovall 660 F Supp 301., 306 (SD Tex 1987) the court imposed a sanction of $3,721.56 in attroney fees and added "it is further ORDERED that Pamela Rae Daniels shall not file with this Cout any further causes of action until all monetary sanctions imposed ahve been paid in full and satisfactory proof thereof has been furnsihed."

A court can issue an injunction prohibiting a sanctioned attorney from billing the client for the costs of preparing a sanctionable paper Markwell v County of Bexas 878 F2d 899 (5th Cir 1989).

In State of Wisconsin v Missionaries to the Unboarn 50 F3d 790 796 F Supp 389 392-93 (ED Wis 1992) the defendants was granted a TRO for palintiff improperly removal of a state court action.

In Gaiardo v Ethyl Corp 835 F2d 479, 482 (3rd Cir 1987) the court stated "In addition to financial penalties court may sanction by warning, oral reprimands in open court, or written admonition".

In Larkin v Heckelr 584 F Supp 512 (ND Cal 1984) the court

ordered the Government's attorney in a social security appeal to
to bring this order to the attnetion of all Assistant United States Attorneys in this district enegaged in Social Security Benefit litigation".

In Smith v Our Lady of the Lake Hospital Inc 135 FRD 139, 155 (MD La 1991) rev'd on other ground 960 F2d 439 (th Cir 1992) the court also ordered the attorney to attend a continuing legal edcuation program on federal practice and procedure and to attend a minimum of five sessions of an Inns of Court program. The senior attorneys in the firm were subjected to monetary sanctions.

Most court prefer to bring the offending conduct to the attention of the appropirate disciplinary committee Steinle v Warren 765 F2d 95, 102 (7th Cir 1985) . In Donaldson v Clark ¶819 F2d 1551, 1557 n7 (11th Cir 1987) (en bvanc) the court noted that "sanctions may include...suspension or disbarment from practice". In American Ariles Inc v Allied Pilots Assn 968 F2d 532 527039 (th Cir 1992) the Fifth Circuit affirmed Rule 11 sanctions of disbarment from practice before the district court in any matter for peirod ranging from 30 days to six months.

Courts have used "Blackboard Ppnishments" in additions to monetary awards. In Cajun electric Power Coopeative v Fishbach & Moore Inc the court imposed on a plaintiff and distributed the record of it "to all active jduges": "The court, having found ..., counsel for plaitniff in vioaltion of Rule 11, ordered counsel to personally and in his own legible handwriting write, 'In the future I will carefully comply with all provisions of Rule 11, Federal Ruesl of Civil Procedure,' followed by copying the entirety of Rule 11. Counsel shall accomplish this performance one hundred times and shall file all copies with the Clerk of

Court within ten days for delivery to the undersigned jduge."

Awarding a sanction of cost and fees the court in Curran v Price Civ No. 8604910-A 9MD La 1989) o,½pdr imposed an educational sanction agsint the defednat's cpounsel.

In Oxfurth v Siemens AG 142 FRD 424 427 (DN J 1991) the attorney was requried to attend four CLE seminar, including one on law office management, one on the Federal Ruels of Civil Procedure, and the other two on federal pratice in geenral, over 18 month peirofd of time.

Cout have also imposed a sanction of mandatory pro bono work. In Bleckner v General Accident Ins Co 713 F Supp 642 (SDNY 1989) rather than use the $600 per hour benchmark used by
by other court, the court chose to reqduire the plaintiff's cousnel to undertake representation of a pro se plaintiff from the district court jduge's docket.

At a Judicial Conference in 1987 a partipant in the proceedings of Johnson v Sullivan 714 F Supp 1479 (ND I11 1989) suggested that the court should ahve reqduired counsel to take opposing counsel out to lunch.

Sacarlet Letters have also been found effective. In re Omnitrition Ingerl Inc Secu Litigation the court ordered a law firm ewhcih engages in calss action litigation to inform any court in whcih it sought to serve as class counsel with a copy of ghe order imposing sanctions against it., MLD No 965; No C 92-4133 SBA (ND Ca Agu 19. 1994). Antoehr court reqduired the sanctioned attorney to write letters of apology to the opposing attorneys which are :courteous in tone, specific in retracting the unfounded charges:" in adiditon to imposing monetary sanctions. Nault's Auto Sale v American honda Motr 148 FRD 25, 37 (DNH 1993).

One court in Verone v Tactonic Telephone Corp 826 F Supp 632 635 (ND NY 1993) ordered that if the sanction were not paid within 30 days the attoney would be cited for contempt arrested and held in civil confinement.

SUMMARY

In Wisconsin the allowanble sacntion sttutes wherein the court has authority are: (1) 805.03; 785.04: 804.12(2)(a)4. Wis Stats for failure to comply with procedural statutes or rules or failure oto obey court order, Johnson supra, (2) under 814.025 (costs and attroney fees) upon frivolous claims, defenses, (etc)., and wherein Wis. Stats 802.05 is applciable and differs from 814.025 Wis. Stats., s 804.05 applies. the court may impose sanctions aginst the govern, respresneted aprty, and/or the attorneys. Pro Se litigants are also subject to sanctions.

With supprotive federal case law and the courts inherent poowers, courts may fashion and impose sanctions agaisnt the governemnt, represented aprty and/or their attorneys in keeping with the separation of power.

Under Omnibus Statutes of Wisconsin's statutes 814.036, an governemnt attorney may be proceeded agaisnt for taxation of costs payable to the previaling party and forbidden to seek reimbursement from his employer. In fact, all sanctioning imposed upon a government employer can be ordered the same way.

As presented herein Peittioenr bleieves the court has authroity and duntied hands to work.

the courrt ahs stated that it it fiond authroity to grant relief requested by Petitieonr in these proceedings, it will

conduct individual hearings as to the apritcular allegations sanctionable conduct etc made by Petitioenr and recieve evidence.

Respectfully submiited this 24th day of February, 1998.

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missal, under this rule it is the better practice to state claims separately, particularly as respects complaint for trade-mark infringement and unfair competition. Brooks Bros. v. Brooks Clothing of Cal., D.C.Cal.1945, 60 F.Supp. 442, affirmed 158 F.2d 798, certiorari denied 67 S.Ct. 1315, 331 U.S. 824, 91 L.Ed. 1840.

A claim of trade-mark infringement should be stated separately in complaint from a claim of unfair competition. Ford Motor Co. v. McFarland, D.C.Wash. 1939, 29 F.Supp. 303.

Issues with reference to infringement of registered trade-mark were separate and distinct from those relating to charges of unfair competition and should be separately stated in defendant's counterclaims. Dixie Mercerizing Co. v. Triangle Thread Mills, D.C.N.Y.1955, 17 F.R.D. 8.

Where complaint did not show which of allegations related to charge of trade-mark infringement and which related to charge of unfair competition, plaintiff, was required, on defendant's motion, to amend complaint so as to state claim for infringement of registered trade-mark and claim for unfair competition separately. Esquire, Inc. v. Lewis D.C.N.Y.1954, 16 F.R.D. 246.

81. Miscellaneous actions

Where complaint by alleged owners of gas well against defendants, who had instituted action of ejectment against plaintiffs, contained averments which might give rise to an action for malicious use of process, defamation of title, interference with various business relations, wrongful initiation of civil proceedings, or inducement to break a contract, plaintiffs were required to serve amended complaint stating their claims in separate counts. De Leys v. Keta Gas & Oil Co., D.C.Pa.1955, 18 F.R.D. 353.

In action for damages to properties differently situated on land owned by plaintiffs, allegedly resulting from an overflow of water held back and retarded by dam in river built and maintained by defendant, action of plaintiffs in alleging different causes of action, rather than alleging a single cause of action with separate paragraphs as provided by subdivision (b) of this rule, was not injurious to defendant. Smith v. Empire Dist. Elec. Co., D.C.Mo.1950, 10 F.R.D. 238.

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken

unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(As amended Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987.)

ADVISORY COMMITTEE NOTES

1937 Adoption

This is substantially the content of [former] Equity Rules 24 (Signature of Counsel) and 21 (Scandal and Impertinence) consolidated and unified. Compare former Equity Rule 36 (Officers Before Whom Pleadings Verified). Compare to similar purposes, *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 19, r. 4, and *Great Australian Gold Mining Co. v. Martin*, L.R. 5 Ch.Div. 1, 10 (1877). Subscription of pleadings is required in many codes. 2 Minn.Stat. (Mason, 1927) § 9265; N.Y.R.C.P. (1937) Rule 91; 2 N.D.Comp. Laws Ann. (1913) § 7455.

This rule expressly continues any statute which requires a pleading to be verified or accompanied by an affidavit, such as: U.S.C., Title 28:

§ 381 [former] (Preliminary injunctions and temporary restraining orders)

§ 762 [now 1402] (Suit against the United States)

U.S.C., Title 28, § 829 [now 1927] Costs; attorney liable for, when) is unaffected by this rule.

For complaints which must be verified under these rules, see Rules 23(b) (Secondary Action by Shareholders) and 65 (Injunctions).

For abolition of former rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances, see 12 P.S.Pa. § 1222; for the rule in equity itself, see *Greenfield v. Blumenthal*, C.C.A.3, 1934, 69 F.2d 294.

1983 Amendment

Since its original promulgation, Rule 11 has provided for the striking of pleadings and the imposition of disciplinary sanctions to check abuses in the signing of pleadings. Its provisions have always applied to motions and other papers by virtue of incorporation by reference in Rule 7(b)(2). The amendment and the addition of Rule 7(b)(3) expressly confirms this applicability.

Experience shows that in practice Rule 11 has not been effective in deterring abuses. See 6 Wright & Miller, *Federal Practice and Procedure: Civil* § 1334 (1971). There has been considerable confusion as to (1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action, (2) the standard of conduct expected of attorneys who sign pleadings and motions, and (3) the range of available and appropriate sanctions. See Rodes, Ripple & Mooney, *Sanctions Imposable for Violations of the Federal Rules of Civil Procedure* 64-65, Federal Judicial Center (1981). The new language is intended to reduce the reluctance of courts to impose sanctions, see Moore, *Federal Practice* ¶ 7.05, at 1547, by emphasizing the responsibilities of the attorney and reenforcing those obligations by the imposition of sanctions.

The amended rule attempts to deal with the problem by building upon and expanding the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation. See, e.g., *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980); *Hall v. Cole*, 412 U.S. 1, 5 (1973). Greater attention by the district courts to

paper of a party represented by an attorney shall contain the name, state bar number, if any, telephone number, and address of the attorney and the name of the attorney's law firm, if any, and shall be subscribed with the handwritten signature of at least one attorney of record in the individual's name. A party who is not represented by an attorney shall subscribe the pleading, motion or other paper with the party's handwritten signature and state his or her address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading, motion or other paper; that to the best of the attorney's or party's knowledge, information and belief, formed after reasonable inquiry, the pleading, motion or other paper is well–grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that the pleading, motion or other paper is not used for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If the court determines that an attorney or party failed to read or make the determinations required under this subsection before signing any petition, motion or other paper, the court may, upon motion or upon its own initiative, impose an appropriate sanction on the person who signed the pleading, motion or other paper, or on a represented party, or on both. The sanction may include an order to pay to the other party the amount of reasonable expenses incurred by that party because of the filing of the pleading, motion or other paper, including reasonable attorney fees.

(b) If the attorney who signed a pleading, motion or other paper without reading the paper or making the determinations required by this subsection is representing a party under a contract made between a 3rd person and the party that requires that representation, and the 3rd person has actual knowledge that the pleading, motion or other paper is not well–grounded in fact or warranted by existing law or a good faith argument for the extension, modification or reversal of existing law or is used to harass, delay or increase the cost of litigation, the court may impose a similar appropriate sanction on the 3rd person.

(c) The requirement of a handwritten signature subscribing pleadings, motions or other papers filed in court may be satisfied by a duplicate, as defined in s. 910.01 (4), if a handwritten signature appears on the original document and the signing party or his or her attorney retains the original document.

(2) It is not a violation of sub. (1) if a pleading includes as a party a person who is later dismissed from that action, and the party responsible for including that person acted reasonably in doing so and moves for or agrees to a dismissal of that person within a reasonable time after the party knew or should have known that the person was not a proper party to the action.

History: Sup. Ct. Order, 67 W (2d) 585, 622 (1975); 1975 c. 218; 1987 a. 256; Sup. Ct. Order, 161 W (2d) xvii (1991); Sup. Ct. Order, 171 W (2d) xix (1992).

Judicial Council Note, 1991: Pleadings, papers and other documents filed in court are required to be subscribed with the handwritten signatures of parties or counsel. Sub. (1) (c) is created to clarify that copies of the original papers may be filed in court with the same effect as originals. [Re Order eff. 7–1–91]

This section does not allow a "good faith" defense, but requires affirmative duty of reasonable inquiry before filing; party prevailing on appeal in defense of award under this section is entitled to further award without showing that appeal itself is frivolous under 809.25(3). Riley v. Isaacson, 156 W (2d) 249, 456 W (2d) 619 (Ct. App. 1990).

An unsigned summons served with a signed complaint is a technical defect which in the absence of prejudice does not deny the trial court personal jurisdiction. The purpose of this section is to place a personal obligation on the attorney that there are grounds for the contents of the pleading, which is satisfied by the signing of the complaint. Gaddis v. LaCrosse Products, Inc. 198 W (2d) 396, 542 NW (2d) 454 (1996).

802.06 Defenses and objection; when and how presented; by pleading or motion; motion for judgment on the pleadings. (1) WHEN PRESENTED. A defendant shall serve an answer within 20 days after the service of the complaint upon the defendant. If a guardian ad litem is appointed for a defendant, the guardian ad litem shall have 20 days after appointment to serve the answer. A party served with a pleading stating a cross–claim against the party shall serve an answer thereto within 20 days after the service upon the party. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer. The state or an agency of the state or an officer, employe or agent of the state in an action brought within the purview of s. 893.82 or 895.46 shall serve an answer to the complaint or to a cross–claim or a reply to a counterclaim within 45 days after service of the pleading in which the claim is asserted. If any pleading is ordered by the court, it shall be served within 20 days after service of the order, unless the order otherwise directs. The service of a motion permitted under sub. (2) alters these periods of time as follows, unless a different time is fixed by order of the court: if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; or if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.

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

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

(b) A motion making any of the defenses in par. (a) 1. to 10. shall be made before pleading if a further pleading is permitted. Objection to venue shall be made in accordance with s. 801.51. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If on a motion asserting the defense described in par. (a) 6. to dismiss for failure of the pleading to state a claim upon which relief can be granted, or on a motion asserting the defenses described in par. (a) 8. or 9., matters outside of the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in s. 802.08, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by s. 802.08.

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

(4) PRELIMINARY HEARINGS. The defenses specifically listed in sub. (2), whether made in a pleading or by motion, the motion for judgment under sub. (3) and the motion to strike under sub. (6) shall be heard and determined before trial on motion of any party,

CHAPTER 805

CIVIL PROCEDURE — TRIALS

NOTE: Chapter 805 was created by Sup. Ct. Order, 67 W (2d) 585, 688 (1975), which contains Judicial Council Committee notes explaining each section. Statutes prior to the 1983–84 edition also have these notes.

805.01 Jury trial of right. (1) RIGHT PRESERVED. The right of trial by jury as declared in article I, section 5, of the constitution or as given by a statute and the right of trial by the court shall be preserved to the parties inviolate.

(2) DEMAND. Any party entitled to a trial by jury or by the court may demand a trial in the mode to which entitled at or before the scheduling conference or pretrial conference, whichever is held first. The demand may be made either in writing or orally on the record.

(3) WAIVER. The failure of a party to demand in accordance with sub. (2) a trial in the mode to which entitled constitutes a waiver of trial in such mode. The right to trial by jury is also waived if the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

History: Sup. Ct. Order, 67 W (2d) 585, 689 (1975); 1975 c. 218; Sup. Ct. Order, 112 W (2d) xi (1983); 1983 a. 192.

Judicial Council Committee Note, 1983: The time deadline for demanding a jury trial is the scheduling conference where that occurs before or in lieu of the pretrial conference because knowledge of the mode of trial is required for proper scheduling. [Re Order effective July 1, 1983]

Just as legal counterclaim in equitable action does not necessarily entitle counterclaimant to jury trial, amendment by plaintiff from equity to law does not necessarily entitle defendant to jury trial, if equitable action was brought in good faith. Tri–State Home Improvement Co. v. Mansavage, 77 W (2d) 648, 253 NW (2d) 474.

Party is entitled as matter of right to jury trial on question of fact if that issue is retried, regardless of earlier waiver. Tesky v. Tesky, 110 W (2d) 205, 327 NW (2d) 706 (1983).

Under facts of case, telephone testimony was not permissible. Town of Geneva v. Tills, 129 W (2d) 167, 384 NW (2d) 701 (1986).

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

The new Wisconsin rules of civil procedure: Chapters 805—807. Graczyk, 59 MLR 671.

See also the notes to Article I, section 5 of the Wisconsin Constitution.

805.02 Advisory jury and trial by consent. (1) In all actions not triable of right by a jury, the court upon motion or on its own initiative may try any issue with an advisory jury.

(2) With the consent of both parties, the court may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

History: Sup. Ct. Order, 67 W (2d) 585, 690 (1975).

805.03 Failure to prosecute or comply with procedure statutes. For failure of any claimant to prosecute or for failure of any party to comply with the statutes governing procedure in civil actions or to obey any order of court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under s. 804.12 (2) (a). Any dismissal under this section operates as an adjudication on the merits unless the court in its order for dismissal otherwise specifies for good cause shown recited in the order. A dismissal on the merits may be set aside by the court on the grounds specified in and in accordance with s. 806.07. A dismissal not on the merits may be set aside by the court for good cause shown and within a reasonable time.

History: Sup. Ct. Order, 67 W (2d) 585, 690 (1975).

Complaint was dismissed for non–compliance with pre–trial order to produce medical report. Trispel v. Haefer, 89 W (2d) 725, 279 NW (2d) 242 (1979).

Judgment dismissing action was void for lack of advance actual notice of dismissal which defined "failure to prosecute" standard. Neylan v. Vorwald, 124 W (2d) 85, 368 NW (2d) 648 (1985).

See note to 802.10, citing Gaertner v. 880 Corp., 131 W (2d) 492, 389 NW (2d) 59 (Ct. App. 1986).

Dismissal for failure to prosecute within year of filing required notice of standards. Rupert v. Home Mut. Ins. Co., 138 W (2d) 1, 405 NW (2d) 661 (Ct. App. 1987).

Dismissal under this section is presumptively with prejudice. Where plaintiff failed to show "good cause" for delay, appeals court erred in dismissing without prejudice. Marshall–Wis. v. Juneau Square, 139 W (2d) 112, 406 NW (2d) 764 (1987).

Dismissal for failure to prosecute wasn't abuse of discretion. Prahl v. Brosamle, 142 W (2d) 658, 420 NW (2d) 372 (Ct. App. 1987).

Where conduct in failing to comply with court order is egregious and without clear and justifiable excuse, court may, in its discretion, order dismissal. Johnson v. Allis Chalmers Corp., 162 W (2d) 261, 470 NW (2d) 859 (1991).

Ordering criminal defendant to pay state's trial expenses upon mistrial for violation of pretrial order was authorized by this section. State v. Heyer, 174 W (2d) 164, 496 NW (2d) 779 (Ct. App. 1993).

Entry of postverdict default judgment as sanction for attorney misconduct discussed. Chevron Chemical Co. v. Deloitte & Touche, 176 W (2d) 935, 501 NW (2d) 15 (1993).

In cases which do not fit squarely within this statute, a trial court has certain inherent powers to sanction parties including the awarding of attorney fees. Schaefer v. Northern Assurance Co. 182 W (2d) 148, 513 NW (2d) 16 (Ct. App. 1994).

A party's failure to appear at a scheduled hearing, after writing the court indicating that unless it heard otherwise from the court it would consider itself excused, was insufficient to excuse the party's appearance and was grounds for dismissal of the party under this section. Buchanan v. General Casualty Co. 191 W (2d) 1, 528 NW (2d) 457 (Ct. App. 1995).

The trial court erred in not considering other less severe sanctions before dismissing an action for failure to comply with a demand for discovery when no bad faith was found. Hudson Diesel, Inc. v. Kenall, 194 W (2d) 532, 535 NW (2d) 65 (Ct. App. 1995).

805.04 Voluntary dismissal: effect thereof. (1) BY PLAINTIFF; BY STIPULATION. An action may be dismissed by the plaintiff without order of court by serving and filing a notice of dismissal at any time before service by an adverse party of responsive pleading or motion or by the filing of a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is not on the merits, except that a notice of dismissal operates as an adjudication on the merits when filed by a plaintiff who has once dismissed in any court an action based on or including the same claim.

(2) BY ORDER OF COURT. Except as provided in sub. (1), an action shall not be dismissed at the plaintiff's instance save upon order of court and upon such terms and conditions as the court deems proper. Unless otherwise specified in the order, a dismissal under this subsection is not on the merits.

(3) COUNTERCLAIM, CROSS–CLAIM AND 3RD PARTY CLAIM. This section applies to the voluntary dismissal of any counterclaim, cross–claim, or 3rd party claim. A voluntary dismissal by the claimant alone shall be made before a responsive pleading is

CHAPTER 814

COURT COSTS AND FEES

SUBCHAPTER I

COSTS IN CIVIL ACTIONS AND SPECIAL PROCEEDINGS

814.01 Costs allowed to plaintiff. (1) Except as otherwise provided in this chapter, costs shall be allowed of course to the plaintiff upon a recovery.

(3) In an action for assault and battery, false imprisonment, libel, slander, malicious prosecution, invasion of privacy or seduction, a plaintiff who recovers less than $50 damages shall recover no more costs than damages.

History: Sup. Ct. Order, 67 W (2d) 585, 761 (1975); Stats. 1975 s. 814.01; 1981 c. 317.

814.02 Costs limited, discretionary. (1) When several actions are brought against parties who might have been joined as defendants and the actions are consolidated under s. 805.05 (1) no costs, other than disbursements, shall be allowed to the plaintiff in excess of what the plaintiff would be entitled to had the plaintiff brought but one action.

(2) In equitable actions and special proceedings costs may be allowed or not to any party, in whole or in part, in the discretion of the court, and in any such case the court may award to the successful party such costs (exclusive of disbursements) not exceeding $100, as the court deems reasonable and just, in view of the nature of the case and the work involved. This subsection refers only to such costs and fees as may be taxed by the authority of the statutes, independent of any contract of the parties upon the subject, which contract shall apply unless the court finds that the provisions thereof are inequitable or unjust.

History: Sup. Ct. Order, 67 W (2d) 585, 761, 780 (1975); Stats. 1975 s. 814.02; 1993 a. 486.

Courts can make a determination of the reasonableness of attorneys fees even where a note specifies the amount. Lakeshore C. F. Corp. v. Bradford A. Corp. 45 W (2d) 313, 173 NW (2d) 165.

814.025 Costs upon frivolous claims and counterclaims. (1) If an action or special proceeding commenced or continued by a plaintiff or a counterclaim, defense or cross complaint commenced, used or continued by a defendant is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs determined under s. 814.04 and reasonable attorney fees.

(2) The costs and fees awarded under sub. (1) may be assessed fully against either the party bringing the action, special proceeding, cross complaint, defense or counterclaim or the attorney representing the party or may be assessed so that the party and the attorney each pay a portion of the costs and fees.

(3) In order to find an action, special proceeding, counterclaim, defense or cross complaint to be frivolous under sub. (1), the court must find one or more of the following:

(a) The action, special proceeding, counterclaim, defense or cross complaint was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

(b) The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense or cross complaint was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

(4) To the extent s. 802.05 is applicable and differs from this section, s. 802.05 applies.

History: 1977 c. 209; 1987 a. 256.

Trial court's finding that claim was not frivolous was against great weight and clear preponderance of evidence. Sommer v. Carr, 95 W (2d) 651, 291 NW (2d) 301 (Ct. App. 1980).

This section is not applicable in quasi–criminal actions (ordinance violations) where decision to proceed is based on prosecutorial discretion. City of Janesville v. Wiskia, 97 W (2d) 473, 293 NW (2d) 522 (1980).

Trial court must apply objective test to support finding that claim was frivolous. Sommer v. Carr, 99 W (2d) 789, 299 NW (2d) 856 (1981).

This section does not permit award of attorney's fees for a frivolous appeal. Determination of frivolity discussed. In Matter of Estate of Bilsie, 100 W (2d) 342, 302 NW (2d) 508 (Ct. App. 1981).

Court may not impose joint and several liability under this section. Frivolity discussed. State v. State Farm Fire & Cas. Co. 100 W (2d) 582, 302 NW (2d) 827 (1981).

See note to 799.25, citing Hessenius v. Schmidt, 102 W (2d) 697, 307 NW (2d) 232 (1981).

Motion for relief under 806.07 was frivolous. Court erred by allowing travel expenses as costs. Wengerd v. Rinehart, 114 W (2d) 575, 338 NW (2d) 861 (Ct. App. 1983).

Arguments that "reduction clauses" in uninsured motorist provisions are invalid and that release does not bar subsequent claim against insurer for tort of bad faith were frivolous. Radlein v. Industrial Fire & Cas. Ins. Co. 117 W (2d) 605, 345 NW (2d) 874 (1984).

Denial of defendant's motion for directed verdict did not bar court from finding plaintiff's action to be frivolous. Court may find some claims constituting an action frivolous and others not frivolous. Stoll v. Adriansen, 122 W (2d) 503, 362 NW (2d) 182 (Ct. App. 1984).

Court may award attorney fees if petitioner's claim was frivolously brought before it on review under ch. 227, but may not award attorney fees incurred at various agency levels. Tatum v. LIRC, 132 W (2d) 411, 392 NW (2d) 840 (Ct. App. 1986).

Section penalizes parties who bring frivolous lawsuits and does not penalize parties for unacceptable tactics in course of proceedings. Gagnow v. Haase, 149 W (2d) 542, 439 NW (2d) 593 (Ct. App. 1989).

Trial court erred in finding frivolousness on attorney's part based upon court's assessment of credibility of client. Blankenship v. Computers & Training, 158 W (2d) 702, 462 NW (2d) 918 (Ct. App. 1990).

See note to 809.25 citing Minniecheske v. Griesbach, 161 W (2d) 743, 468 NW (2d) 760 (Ct. App. 1991).

In cases which do not fit squarely within this statute, a trial court has certain inherent powers to sanction parties including the awarding of attorney fees. Schaefer v. Northern Assurance Co. 182 W (2d) 148, 513 NW (2d) 16 (Ct. App. 1994).

Frivolousness under sub. (3) (a) is a high standard typically requiring a finding of bad faith based on some statement or action, such as a threat. The threshold issue under sub. (3) (b) is whether the action may even be brought. If an attorney knows or should have known that the required elements necessary to prove a claim cannot be produced, the claim is frivolous under sub. (3) (b). Stern v. Thompson & Coates, LTD. 185 W (2d) 221, 517 NW (2d) 658 (1994).

The application of this section is not limited to frivolous pleading recognized in ch. 802, but includes any argument by counsel made during the course of a proceeding. Gardner v. Gardner, 190 W (2d) 216, 527 NW (2d) 701 (Ct. App. 1994).

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

There is a presumption of non–frivolousness, requiring all doubts to be resolved in favor of non–frivolousness. When there are disputes as to frivolousness, the moving party has the burden to show at an evidentiary hearing that the action is not well grounded in the facts or the law or equity. Kelly v. Clark, 192 W (2d) 633, 531 NW (2d) 455 (Ct. App. 1995).

Claim of intentional infliction of emotional distress was frivolous. Braski v. AH–NE–PEE Dimensional Hardwood, Inc. 630 F Supp. 862 (1986).

Is Wisconsin's frivolous claim statute frivolous? Endress. 68 MLR 279 (1985).

Awarding reasonable attorney fees upon frivolous claims and counterclaims under s. 814.025. Sundby, WBB May 1980.

814.03 Costs to defendant. **(1)** If the plaintiff is not entitled to costs under s. 814.01 (1) or (3), the defendant shall be allowed costs to be computed on the basis of the demands of the complaint.

(2) Where there are several defendants who are not united in interest and who make separate defenses by separate answers, if the plaintiff recovers against some but not all of such defendants, the court may award costs to any defendant who has judgment in the defendant's favor.

History: Sup. Ct. Order, 67 W (2d) 585, 761, 780 (1975); Stats. 1975 s. 814.03; 1987 a. 345; 1993 a. 486, 496.

Section contemplates awarding of costs only to successful parties. DeGroff v. Schmude, 71 W (2d) 554, 238 NW (2d) 730.

A prevailing defendant is entitled to costs from all plaintiffs including subrogated plaintiffs who elected not participate in the trial. Sampson v. Logue, 184 W (2d) 20, 515 NW (2d) 917 (Ct. App. 1994).

814.035 Costs upon counterclaims and cross complaints. **(1)** Except as otherwise provided in this section, costs shall be allowed on counterclaims and cross complaints as if separate actions had been brought thereon.

(2) When the causes of action stated in the complaint and counterclaim and cross complaint arose out of the same transaction or occurrence, costs in favor of the successful party upon the complaint and counterclaim and cross complaint so arising shall be in the discretion of the court.

(3) Costs recovered by opposing parties shall be offset.

History: Sup. Ct. Order, 67 W (2d) 585, 761 (1975); Stats. 1975 s. 814.035.

Awarding statutory costs to the lessee and denial of costs to the lessor (whose recovery for unpaid instalments of rent under the agreement was reduced by the damages the lessee sustained) was, under 271.035 (2) and (3), Stats. 1969, a matter within the trial court's discretion, the language of the statute indicating that costs are purely discretionary when both parties recover on their respective claims in one action, and there being no showing that the trial court herein abused its discretion. (So much of the opinion in Zimmerman v. Dornbrook, 6 W (2d) 567, implying that if both parties recover on their claims, as a matter of right costs should be allowed for each side, is modified accordingly.) Mid–Continent Refrigerator Co. v. Straka, 47 W (2d) 739, 178 NW (2d) 28.

Where judgment was ordered for defendant in plaintiff's action and also for defendant on one of several counterclaims, costs were properly awarded to defendant as to each. Arrowhead Growers S. Co. v. Central Sands Prod. 48 W (2d) 383, 180 NW (2d) 567.

814.036 Omnibus costs provision. If a situation arises in which the allowance of costs is not covered by ss. 814.01 to 814.035, the allowance shall be in the discretion of the court.

History: Sup. Ct. Order, 67 W (2d) 585, 761, 780 (1975); Stats. 1975 s. 814.036.

Prevailing plaintiff in habeas corpus proceeding may not be awarded costs. State ex rel. Korne v. Wolke, 79 W (2d) 22, 255 NW (2d) 446.

Circuit courts have authority to impose costs on an attorney whose actions have resulted in a mistrial. Schulz v. Darlington Mut. Ins. 181 W (2d) 646, 511 NW (2d) 879 (1994).

Photocopy and facsimile expenses may be taxed under 814.036. Wausau Medical Center v. Asplund, 182 W (2d) 274, 514 NW (2d) 34 (Ct. App. 1994).

814.04 Items of costs. Except as provided in ss. 93.20, 106.04 (6) (i) and (6m) (a), 769.313, 814.025, 814.245, 895.035 (4), 895.75 (3), 895.77 (2), 895.79 (3), 895.80 (3), 943.212 (2) (b), 943.245 (2) (d) and 943.51 (2) (b), when allowed costs shall be as follows:

(1) ATTORNEY FEES. (a) When the amount recovered or the value of the property involved is $1,000 or over, attorney fees shall be $100; when it is less than $1,000 and is $500 or over, $50; when it is less than $500 and is $200 or over, $25; and when it is less than $200, $15.

(b) When no money judgment is demanded and no specific property is involved, or where it is not practical to ascertain the money value of the rights involved, attorney fees under par. (a) shall be fixed by the court, but shall not be less than $15 nor more than $100.

(c) No attorney fees may be taxed on behalf of any party unless the party appears by an attorney other than himself or herself.

(2) DISBURSEMENTS. All the necessary disbursements and fees allowed by law; the compensation of referees; a reasonable disbursement for the service of process or other papers in an action when the same are served by a person authorized by law other than an officer, but the item may not exceed the authorized sheriff's fee for the same service; amounts actually paid out for certified copies of papers and records in any public office; postage, telegraphing, telephoning and express; depositions including copies; plats and photographs, not exceeding $50 for each item; an expert witness fee not exceeding $100 for each expert who testifies, exclusive of the standard witness fee and mileage which shall also be taxed for each expert; and in actions relating to or affecting the title to lands, the cost of procuring an abstract of title to the lands. Guardian ad litem fees shall not be taxed as a cost or disbursement.

(4) INTEREST ON VERDICT. Except as provided in s. 807.01 (4), if the judgment is for the recovery of money, interest at the rate of 12% per year from the time of verdict, decision or report until judgment is entered shall be computed by the clerk and added to the costs.

(5) DISBURSEMENTS IN TIMBER TRESPASS. In actions founded upon the unlawful cutting of timber, or such cutting and its conversion, or such cutting and its unlawful detention, when the value of such timber or the damages recovered exceeds fifty dollars, full costs shall be recovered by the plaintiff, and there shall be included therein the actual reasonable expense of one survey and ascertainment of the quantity of timber cut, made after the commencement of the action, by one surveyor and one assistant, if proved as a necessary disbursement. And the defendant shall recover like costs in the same manner in case the plaintiff is not entitled to costs.

(6) JUDGMENT BY DEFAULT. If the judgment is by default or upon voluntary dismissal by the adverse party the costs taxed under sub. (1) shall be one–half what they would have been had the matter been contested.

(7) JUDGMENT OFFER NOT ACCEPTED. If the offer of judgment pursuant to s. 807.01 is not accepted and the plaintiff fails to recover a more favorable judgment the plaintiff shall not recover

Also 46(c) & request a hearing

Am Jur:
9A Am Jur 2d, Bankruptcy § 638.
21A Am Jur 2d, Customs Duties and Import Regulations § 109.
32B Am Jur 2d, Federal Practice and Procedure § 2599.

Forms:
6A Federal Procedural Forms L Ed, Claims Court §§ 18:51, 53.
13 Federal Procedural Forms L Ed, Patents §§ 52:6, 52.

RIA Coordinators:
8 RIA Employment Coordinator, Remedies ¶¶ EP-29,137; 29,230.

§ 1927. Counsel's liability for excessive costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.
(June 25, 1948, ch 646, § 1, 62 Stat. 957; Sept. 12, 1980, P.L. 96-349, § 3, 94 Stat. 1156.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:
Based on title 28, U.S.C., 1940 ed., § 829 (R.S. § 982).
Word "personally" was inserted upon authority of Motion Picture Patents Co. v. Steiner et al., 1912, 201 F. 63, 119 C.C.A. 401.
Reference to "proctor" was omitted as covered by the revised section.
See definition of "court of the United States" in section 451 of this title.
Changes were made in phraseology.

Amendments:
1980. Act Sept. 12, 1980 deleted "as to increase costs" following "any case"; and substituted "the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct" for "such excess costs".

CROSS REFERENCES

Costs in civil cases, USCS Rules of Civil Procedure, Rules 11, 54.

RESEARCH GUIDE

Federal Procedure L Ed:
2 Fed Proc, L Ed, Appeal, Certiorari, and Review §§ 3:635, 776, 777.
8 Fed Proc, L Ed, Courts and Judicial System § 20:337.
10 Fed Proc, L Ed, Discovery and Depositions § 26:338.
21 Fed Proc, L Ed, Job Discrimination § 50:294.
21 Fed Proc, L Ed, Judgments and Orders § 51:87.
23 Fed Proc, L Ed, Maritime Law and Procedure § 53:141.

establish "bright line" time constraints which courts cannot freely ignore. Motions under sec. 806.07(1)(h) are not subject to such bright-line rules. This distinction is abundantly clear from the structure of sec. 806.07(2) itself, which establishes a one-year maximum time limit for some motions, while subjecting motions made under sec. 806.07(1)(h) only to a "reasonableness" requirement.

In summary, the trial court did not erroneously exercise its discretion when it found that Cynthia brought her motion for relief within a reasonable time.

By the Court.—Decision of the court of appeals reversed.

William A. WAGNER, M.D., Petitioner-Respondent-Petitioner,

v.

STATE of Wisconsin MEDICAL EXAMINING BOARD, Respondent-Appellant.

Supreme Court

No. 90–1932. Oral argument November 1, 1993.—Decided February 23, 1994.

(Affirming 173 Wis. 2d 422, 496 N.W.2d 213 (Ct. App. 1992).)

(Also reported in 511 N.W.2d 874.)

1. **Administrative Law § 92*—rules of civil procedure—administrative review proceeding—question of law.**

   Applicability of rules of civil procedure to administrative review proceeding is question of law, which is answered without deference to decisions of lower courts.

2. **Administrative Law § 46*—circuit court's function—statute and rule conflict.**

   Circuit court's function on summary judgment is to decide, as matter of law, whether there are any issues of material fact to be tried, a function in conflict with court's role in statutory proceeding to review findings of fact already established during initial administrative proceedings, in which conflict statutory dictates must prevail over rules of civil procedure (Stats ch. 227, § 802.08).

3. **Statutes § 199*—statutory provision—directory or mandatory.**

***See Callaghan's Wisconsin Digest, same topic and section number.**

In determining whether statutory provision is directory or mandatory, prime object is to ascertain legislative intent (Stats § 227.55).

4. **Statutes § 281*—word "shall"—general rule—mandatory in statute.**

General rule has been that word "shall" is presumed to be mandatory when it appears in statute, although statutory time limits may be directory, despite use of word "shall," with question resolved by considering legislative intent, objective of statute, history of statute, consequences of alternative interpretations, and penalties for violation of statute.

5. **Statutes § 280*—time provisions—judicial rules and regulations.**

In appeal of court of appeals' decision reversing circuit court order granting plaintiff default judgment for failure of Wisconsin Medical Examining Board to comply with procedural requirements of statute, circuit court may not grant default judgment for failure of administrative agency to timely transmit administrative record and serve and file its response, since statute did not encompass remedy of default judgment and, although time provisions of statute are mandatory, other remedies were available to circuit court in order to enforce Board's compliance with statute (Stats §§ 227.53(2), 227.55, 806.02).

REVIEW of a decision of the Court of Appeals. *Affirmed.*

For the petitioner-respondent-petitioner there were briefs by *Steven C. Zach, Michael P. May* and *Boardman, Suhr, Curry & Field,* Madison and oral argument by *Michael P. May.*

For the respondent-appellant the cause was argued by *William H. Wilker,* assistant attorney general, with whom on the brief was *James E. Doyle,* attorney general.

*See Callaghan's Wisconsin Digest, same topic and section number.

JANINE P. GESKE, J. This is a review of a published decision of the court of appeals, *Wagner v. State Medical Examining Board,* 173 Wis. 2d 422, 496 N.W.2d 213 (Ct. App. 1992), which held that the default judgment procedure in sec. 806.02, Stats., could not be used in a ch. 227, Stats., review proceeding. The holding of the court of appeals reversed the decision of the Dane County circuit court, Moria Krueger, Circuit Judge. The circuit court granted William A. Wagner, M.D. (Wagner) a default judgment for the failure of the Wisconsin Medical Examining Board (Board) to comply with the procedural requirements of secs. 227.53(2) and 227.55, Stats.

The issue before this court is whether a circuit court in a ch. 227 review proceeding may grant a default judgment for the failure of an administrative agency to timely transmit the administrative record and serve and file its response. Because we believe that ch. 227 does not encompass the remedy of a default judgment, we affirm the decision of the court of appeals and remand the case to the circuit court for consideration of Wagner's petition for review of the Board's decision on its merits. We also conclude that the time provisions in secs. 227.53(2) and 227.55, Stats., are mandatory. Such a conclusion does not conflict with our holding that default judgment is not applicable in a ch. 227 proceeding, since other remedies were available to the circuit court in order to enforce the Board's compliance with the statute.

The facts of this case are as follows. In 1984, Wagner decided to retire due to poor health. However, he returned to practice on a part-time basis in order to facilitate a smooth transfer of his practice. During the course of this transition, Wagner neglected to reapply for active status, as well as to pay an assessment into

the Wisconsin Patients Compensation Fund. In 1986, the Board initiated a disciplinary proceeding against Wagner on these issues. At the hearing, Wagner agreed to voluntarily surrender his license.[1] The Board then ordered that any future reinstatement of a limited license to Wagner would be conditioned upon the fact that Wagner had taken and passed all medical board exams.

Subsequent to the Board's action, Wagner was contacted by the Avenue Counseling Center in Fond du Lac, Wisconsin, and the Health Department of Manatee County, Florida. Both requested that Wagner provide medical care on a part-time, voluntary basis. Wagner then applied to the Board for a waiver of the conditions imposed at the prior disciplinary hearing, i.e., that he retake the medical board exams prior to any relicensure. After the Board refused this request, a hearing was set for September, 1987. In March, 1988, the hearing examiner recommended that the Board reinstate Wagner's medical license for the limited purpose of volunteering at the Fond du Lac clinic, without requiring him to retake the medical exams. The Board refused this recommendation and, in a final order issued in April, 1988, it denied Wagner's request for relicensure for limited pro bono work.

In June of 1988, Wagner filed a petition for review of the Board's order. In November, 1989, Wagner moved for default judgment, citing the Board's failure, as respondent in the action, to timely file and serve its

[1] There exists some conflict regarding the motivations underlying the stipulation between the Board and Wagner. According to Wagner, poor health prompted the surrender of his license. However, the Board contends that the stipulation was prompted by its concern with Wagner's ability to meet the minimum standards of the medical profession.

notice of appearance, as well as the failure to file the original or a certified copy of the administrative record.[2] In December of 1989, the Board filed the record. Finally, in May, 1990, the circuit court granted the default judgment. The court held that the time requirements established in secs. 227.53(2) and 227.55, Stats., were mandatory. The court found that the failure of the Board to respond within the prescribed time limits created a patently unfair situation for Wagner and harmed his ability to practice medicine, thereby depriving prospective patients of the right to receive his care.

Additionally, the circuit court found that it maintained the inherent power to grant a default judgment when the Board failed to comply with the time provisions in secs. 227.53(2) and 227.55. The court concluded that default judgment was a remedy which did not conflict with ch. 227. Rather, such a remedy was necessary in order to maintain the integrity of the chapter's provisions. The circuit court then remanded the case to the Board, instructing it to grant Wagner a medical license for the purpose of engaging in limited pro bono work.

On appeal,[3] the Board argued that (1) the time provisions in secs. 227.53(2) and 227.55 are directory,

[2] The Board maintains that its untimely compliance with secs. 227.53(2) and 227.55, Stats., was due to an internal administrative lapse. However, it must also be noted that Wagner did not seek a response from the Board from the time of the filing of his petition for review until the motion for default judgment. The Board did not file its notice of appearance and statement of position until February, 1990.

[3] The court of appeals, on its own motion, raised the issue as to whether the Board's appeal from the circuit court decision was timely, since it was taken from the judgment and not the

not mandatory, and (2) the circuit court has no power to enforce these time provisions by means of default judgment, because such a remedy is in conflict with the court's scope of review under sec. 227.57(2), Stats.

In its decision, the court of appeals held that the time provisions of secs. 227.53(2) and 227.55 were in fact mandatory. However, the court also held that the circuit court did not have the power to enforce the time provisions by means of granting a default judgment. Stating that a default judgment procedure was in conflict with sec. 227.57(2), the court remanded the case to the circuit court for further proceedings on the merits of the case.

Wagner argues that default judgment under sec. 806.02, Stats., is a remedy which may be utilized in a ch. 227 review proceeding. Wagner also argues that the circuit court acted within its discretion when it granted a default judgment for the Board's failure to comply with the procedural requirements of secs. 227.53(2) and 227.55, Stats. We disagree with both of these arguments and conclude that (1) a ch. 227 review proceeding does not encompass a default judgment procedure and (2) a circuit court's discretion for judicial review in a ch. 227 review proceeding is limited to the parameters outlined in sec. 227.57, Stats. Both the circuit court and the court of appeals were correct in concluding that the time provisions in secs. 227.53(2) and 227.55 are mandatory.

order in the memorandum decision. On February 11, 1992, the court of appeals concluded that it had jurisdiction of the appeal from the judgment of the circuit court. In an order entered on the same day, the court stated that the circuit court's order in its memorandum decision was not final, because the circuit court lacked the power to reinstate Wagner's license.

[1]

The applicability of the rules of civil procedure to a ch. 227 administrative review proceeding is a question of law, which is answered without deference to the decisions of the lower courts. *Pulsfus Farms v. Town of Leeds,* 149 Wis. 2d 797, 803–04, 440 N.W.2d 329 (1989).

[2]

In 1977, this court considered the issue of whether a rule of civil procedure was applicable in a ch. 227 administrative review proceeding. In *Wis. Environmental Decade v. Public Service Comm.,* 79 Wis. 2d 161, 169, 255 N.W.2d 917 (1977), the court held that the summary judgment procedure under sec. 802.08, Stats., was not compatible with a ch. 227 proceeding because "judicial review of administrative decisions under ch. 227 envisages a review upon the record, and there is no trial de novo in the circuit court during such proceedings." *Id.* at 170; sec. 227.20(1), Stats. The circuit court's function on summary judgment is to decide, as a matter of law, whether there are any issues of material fact to be tried. That function is in conflict with the court's role in a ch. 227 proceeding: to *review* findings of fact already established during the initial administrative agency proceedings. This court has since concluded that when a conflict occurs between the rules of civil procedure and ch. 227, the dictates of ch. 227 must prevail. *State v. Walworth County Circuit Court,* 167 Wis. 2d 719, 727, 482 N.W.2d 899 (1992).

To resolve potential conflicts, we look to the language of ch. 227 and the legislative intent underlying its design. Section 227.02, Stats., provides:

> **227.02 Compliance with other statutes.** Compliance with this chapter does not

eliminate the necessity of complying with a procedure required by another statute.

Such compliance, however, must be subsequent to the "implicit prerequisite that that section only requires compliance with those procedures required by other statutes which do not conflict with ch. 227." *Walworth County,* 167 Wis. 2d at 723. This statement is in harmony with the legislative intent to establish a uniform procedure for judicial review in contested cases. Ralph M. Hoyt, *The Wisconsin Administrative Procedure Act,* 1944 Wis. L. Rev. 214 [hereinafter *Administrative Procedure].*[4]

Additional language in ch. 227 underscores the legislative intent to maintain a single, uniform system of review in most cases. Section 227.52, Stats., provides in relevant part:

[4] Hoyt noted that:

> The Wisconsin Administrative Procedure Act of 1943 represent[ed] almost the first attempt by any state legislature to codify in a single chapter of the statutes, and make applicable to virtually all state-wide administrative agencies, the procedure to be followed by administrative agencies with reference to their rules and regulations and their conduct of contested cases, and to the method of judicially reviewing their determinations.

Id. at 214 (footnote omitted). Prior to 1943, at least seventy-four statutes established methods for judicial review of administrative agency actions in contested cases. *Id.* at 226–27. The Wisconsin Administrative Procedure Act was designed to establish a more simple and uniform system of judicial review "with full definition of the procedure to be followed and specification of the grounds on which the [circuit] court may set aside the administrative determination." *Id.* at 229. One product of this legislation was the establishment of a subsection defining the scope of judicial review. In the present form of ch. 227, the scope of judicial review is defined in sec. 227.57.

> **227.52 Judicial review; decisions reviewable.** Administrative decisions which adversely affect the substantial interests of any person . . . are subject to review *as provided in this chapter* . . ..

(Emphasis added.) Section 227.53, Stats., provides in relevant part:

> **227.53 Parties and proceedings for review.** **(1)** Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof *as provided in this chapter.*

(Emphasis added.) Therefore, as this court concluded in *Walworth County,* and we now affirm here, ch. 227 "contemplates the *limited* use of those civil procedure statutes which do not conflict with ch. 227." *Walworth County,* 167 Wis. 2d at 724 (emphasis added).[5]

[5] Since this court's decision in *Wis. Environmental Decade* in 1977, Wisconsin courts have issued a number of opinions holding that various civil procedure statutes may apply to ch. 227 judicial reviews if there is no conflict between the specific procedure and ch. 227. Those cases include: *Cruz v. ILHR Department,* 81 Wis. 2d 442, 260 N.W.2d 692 (1978) (sec. 807.07 (1) (then sec. 269.51), Stats., allowing for the correction of minor irregularities on appeal, does not conflict with a circuit court's reviewing function in a ch. 227 proceeding); *Shopper Advertiser v. Department of Rev.,* 117 Wis. 2d 223, 344 N.W.2d 115 (1984) (the transfer of judicial review from one circuit to another under sec. 807.07(2) is not in conflict with ch. 227); *Tatum v. LIRC,* 132 Wis. 2d 411, 392 N.W.2d 840 (Ct. App. 1986) (sec. 814.025 frivolous costs may be awarded in a ch. 227 proceeding); *Metro. Greyhound Mgt. Corp. v. Racing Bd.,* 157 Wis. 2d 678, 460 N.W.2d 802 (Ct. App. 1990) (circuit courts may grant relief pending appeal, under secs. 808.07(2) and 808.075(1), without conflicting with ch. 227 scope of judicial review).

Default judgment under sec. 806.02, Stats., however, is in conflict with the scope of review in a ch. 227 proceeding. The circuit court must conduct an independent review of the record, pursuant to sec. 227.57(2), Stats. This review must occur even if the Board has failed to submit a notice of appearance stating its position on review. Section 227.53(2), Stats. Section 227.57(2) specifically sets forth the parameters of judicial review:

> Unless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agency's action.

Neither the language of this subsection nor the legislative intent underlying ch. 227 contemplates outright dismissal of the action without a review of the merits of the underlying decision.

[3–5]

We agree with the circuit and appeals courts' findings that the time provisions in secs. 227.53(2) and 227.55, Stats., are mandatory and not directory. Section 227.53(2) provides in relevant part:

> Every person served with the petition for review as provided in this section and who desires to participate in the proceedings for review thereby instituted *shall* serve upon the petitioner, within 20 days after service of the petition upon such person, a notice of appearance clearly stating the person's position with reference to each material allegation in the petition and to the affirmance, vacation or modification of the order or decision under review.
> . . .

(Emphasis added.) Section 227.55 provides in relevant part:

> Within 30 days after service of the petition for review upon the agency, or within such further time as the court may allow, the agency *shall* transmit to the reviewing court the original or a certified copy of the entire record of the proceedings in which the decision under review was made, including all pleadings, notices, testimony, exhibits, findings, decisions, orders, and exceptions therein . . ..

(Emphasis added.) In determining whether a statutory provision is directory or mandatory, " 'the prime object is to ascertain the legislative intent.' " *State v. R.R.E.*, 162 Wis. 2d 698, 707, 470 N.W.2d 283 (1991) (quoting *Worachek v. Stephenson Town School Dist.*, 270 Wis. 116, 120, 70 N.W.2d 657 (1955)). The general rule has been that the word "shall" is presumed to be mandatory when it appears in a statute. *Karow v. Milwaukee County Civil Serv. Comm.*, 82 Wis. 2d 565, 570, 263 N.W.2d 214 (1978) (citing *Scanlon v. Menasha,* 16 Wis. 2d 437, 443, 114 N.W.2d 791 (1962)). However, this court has held on more than one occasion that statutory time limits may be directory, despite the use of the word "shall." *R.R.E.*, 162 Wis. 2d at 707 (citing *Eby v. Kozarek,* 153 Wis. 2d 75, 79–80, 450 N.W.2d 249 (1990)). Key to the resolution of such a conflict is the legislative intent, reflected in the following factors: the objective of the statute, the history of the statute, consequences of alternative interpretations, and penalties for violation of the statute. *Id.* at 708. Applied to the instant case, we conclude that the time provisions in secs. 227.53(2) and 227.55, Stats., are mandatory, reflecting the legislative intent to establish (a) a uniform method of promulgating, publishing, and judicially reviewing rules and regulations; (b) a uniform procedure for the issuance and judicial review of declaratory rulings; and (c) a uniform procedure for

judicial review in contested cases. *Administrative Procedure,* 1944 Wis. L. Rev. at 214. The underlying goals of ch. 227 would not be met if both parties were not required to comply with the mandatory time provisions.

Wagner argues that such a conclusion would be in conflict with our holding that default judgment is not a remedy in a ch. 227 proceeding, since we would remove from the circuit courts an enforcement vehicle to force timely compliance. We disagree. Rather, we affirm the holding of the court of appeals that the Board's failure to both timely file its notice of appearance and submit an original or certified copy of the record does not empower the circuit court to grant a default judgment to Wagner. The circuit court had within its discretion other remedies compatible with the ch. 227 scope of judicial review. For example, the circuit court, upon motion or petition, could have (a) issued a writ of mandamus, ordering compliance by the Board; (b) issued an order to show cause as to why the Board should not be held in contempt for noncompliance; (c) ordered production of the record; or (d) refused to consider the Board's statement of position because it failed to timely file its notice of appearance. All the aforementioned remedies would have been consistent with the purpose of sec. 227.57, Stats., which requires a circuit court's independent review of the record.

As a result of our holdings, we remand this case to the circuit court for its review of the record and consideration of Wagner's petition for review of the Board's decision on its merits.

By the Court.—The decision of the court of appeals is affirmed and the cause remanded to the circuit court with directions.