2005 WI 38

SUPREME COURT OF WISCONSIN

NOTICE
This order is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 03-06

In the matter of the repeal of Wis. Stat. § 802.05, and Wis. Stat. § 814.025, and the adoption of Rule 11 of the Federal Rules of Civil Procedure in lieu thereof as amended Wis. Stat. § 802.05

FILED

MAR 31, 2005

Cornelia G. Clark
Clerk of Supreme Court
Madison, WI

On December 19, 2003, the court held a public hearing on the petition filed July 8, 2003, by the American Board of Trial Advocates (ABOTA), Wisconsin Chapter; the Civil Trial Counsel of Wisconsin (CTCW); the Wisconsin Academy of Trial Lawyers (WATL); and the Litigation Section of the State Bar of Wisconsin, seeking repeal of Wis. Stat. § 802.05, and Wis. Stat. § 814.025, and the adoption of the 1993 amendments to Rule 11 of the Federal Rules of Civil Procedure in lieu thereof as amended Wis. Stat. § 802.05.

At its ensuing open administrative conference the court approved the petition, subject to further consideration of certain issues, including the question whether sanctions should be discretionary or mandatory, whether compensation to persons

victimized by frivolous litigation was available, and the discovery exclusion. The court discussed these and other aspects of the petition, including the question of the court's authority under s. 751.12, at an open administrative conference on November 16, 2004. In response to the concerns regarding our decision to repeal s. 814.025, we note that in April 1988, the legislature adopted subsection (4) to s. 814.025 to explicitly provide that, "to the extent s. 802.05 is applicable and differs from this section, s. 802.05 applies." As we revise s. 802.05, we heed the legislative directive; the differences between these two provisions have engendered confusion. The legislature has indicated that to the extent the two provisions differ, Wis. Stat. (Rule) § 802.05 should control. Therefore, in order to prevent confusion for litigants and the courts, as we repeal and recreate s. 802.05, we also repeal s. 814.025. We conclude that this repeal is in keeping with the legislative directive set forth in s. 814.025(4).

The majority of the court now adopts the petition with certain modifications, as follows:

Section 1. Effective July 1, 2005 Wis. Stat. § 814.025 is repealed.

Section 2. Effective July 1, 2005, Wis. Stat. § 802.05 is repealed and is recreated to read as follows:

802.05. Signing of pleadings, motions, and other papers; Representations to court; Sanctions.

(1) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the

attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, and state bar number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(2) Representations to Court. By presenting to the court, whether by signing, filing, submitting, or later advocating a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following:

(a) The paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(b) The claims, defenses, and other legal contentions stated in the paper are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

(c) The allegations and other factual contentions stated in the paper have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

(d) The denials of factual contentions stated in the paper are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(3) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that sub. (2) has been violated, the court may impose an appropriate sanction upon the attorneys, law firms, or parties that have violated sub. (2) or are responsible for the violation in accordance with the following:

(a) How initiated. 1. 'By motion.' A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate sub. (2). The motion shall be served as provided in s. 801.14, but shall not be filed with or presented to the court unless, within 21 days after service of the motion or such other period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion reasonable expenses and attorney fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

2. 'On court's initiative.' On its own initiative, the court may enter an order describing the specific conduct that appears to violate sub. (2) and directing an attorney, law firm,

or party to show cause why it has not violated sub. (2) with the specific conduct described in the court's order.

(b) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subds. 1. and 2., the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation subject to all of the following:

1. Monetary sanctions may not be awarded against a represented party for a violation of sub. (2)(b).

2. Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(c) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(4) Prisoner litigation. (a) A court shall review the initial pleading as soon as practicable after the action or special proceeding is filed with the court if the action or special proceeding is commenced by a prisoner, as defined in s. 801.02(7)(a)(2).

(b) The court may dismiss the action or special proceeding under par. (a) http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=32025141&infobase=stats.nfo&jump=802.05%283%29%28a%29&softpage=Document - JUMPDEST_802.05(3)(a) without requiring the defendant to answer the pleading if the court determines that the action or special proceeding meets any of the following conditions:

1. The action or proceeding is frivolous, as determined under http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=32025141&infobase=stats.nfo&jump=814.025%283%29&softpage=Document - JUMPDEST_814.025(3)sub. (b).
2. The action or proceeding is used for any improper purpose, such as to harass, to cause unnecessary delay or to needlessly increase the cost of litigation.
3. The action of proceeding seeks monetary damages from a defendant who is immune from such relief.
4. The action or proceeding fails to state a claim upon which relief may be granted.

(c) If a court dismisses an action or special proceeding under par. (b) http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=32025141&infobase=stats.nfo&jump=802.05%283%29%28b%29&softpage=Document - JUMPDEST_802.05(3)(b)the court shall notify the department of justice or the attorney representing the political subdivision, as appropriate, of the dismissal by a procedure developed by the director of state courts in cooperation with the department of justice.

(d) The dismissal of an action or special proceeding under par. (b) http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=32025141&infobase=stats.nfo&jump=802.05%283%29%28b%29&softpage=Document - JUMPDEST_802.05(3)(b) does not relieve the prisoner from paying the full filing fee related to that action or special proceeding.

(5) Inapplicability to Discovery. Subsections (1) to (3) do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to ss. 804.01 to 804.12.

Comments

When adopted in 1976, former ss. 802.05 was patterned on the original version of Rule 11 of the Federal Rules of Civil Procedure (FRCP 11). Subsequently, the legislature adopted in 1978 s. 814.025, entitled costs upon frivolous claims and counterclaims. Circuit courts have used essentially the same guidelines in the determination of frivolousness under both sections. See Jandrt v. Jerome Foods, 227 Wis. 2d 531, 549, 597 N.W.2d 744 (1999). Section 814.025(4), adopted in 1988, provided that "to the extent s. 802.05 is applicable and differs from this section, s. 802.05 applies." Subsection (4) was adopted pursuant to 1987 Act 256, the same Act that updated section 802.05 to conform with the 1983 amendments to FRCP Rule 11. However, FRCP 11 has since undergone substantial revision, most recently in 1993. The court now adopts the current version

of FRCP 11, pursuant its authority under s. 751.12 to regulate pleading, practice and procedure in judicial proceedings. The court's intent is to simplify and harmonize the rules of pleading, practice and procedure, and to promote the speedy determination of litigation on the merits. In adopting the 1993 amendments to FRCP 11, the court does not intend to deprive a party wronged by frivolous conduct of a right to recovery; rather, the court intends to provide Wisconsin courts with additional tools to deal with frivolous filing of pleadings and other papers. Judges and practitioners will now be able to look to applicable decisions of federal courts since 1993 for guidance in the interpretation and application of the mandates of FRCP 11 in Wisconsin.

802.05(3). Sanctions. Factors that the court may consider in imposing sanctions include the following: (1) Whether the alleged frivolous conduct was part of a pattern of activity or an isolated event; (2) Whether the conduct infected the entire pleading or was an isolated claim or defense; and (3) Whether the attorney or party has engaged in similar conduct in other litigation. Sanctions authorized under s. 802.05(3) may include an award of actual fees and costs to the party victimized by the frivolous conduct.

802.05(4) Prisoner litigation. On April 17, 1998, the legislature amended [former] section 802.05 as part of the Prisoner Litigation Reform Act. 1997 Act 133, § 14. The legislature added language that requires courts to perform an

initial review of pleadings filed by prisoners and permits dismissal if the pleadings are frivolous, used for an improper purpose, seek damages from a defendant who is immune, or fail to state a claim. This language has been retained in s. 802.05, as repealed and recreated by this Sup. Ct. Order.

1993 Federal Advisory Committee Notes to Rule 11 of the Federal Rules of Civil Procedure.

The 1993 Federal Advisory Committee Notes to Rule 11 of the Federal Rules of Civil Procedure are printed for information purposes and have not been adopted by the court.

> **Purpose of revision.** This revision is intended to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule. For empirical examination of experience under the 1983 rule, see, e.g., New York State Bar Committee on Federal Courts, Sanctions and Attorneys' Fees (1987); T. Willging, The Rule 11 Sanctioning Process (1989); American Judicature Society, Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11 (S. Burbank ed., 1989); E. Wiggins, T. Willging, and D. Stienstra, Report on Rule 11 (Federal Judicial Center 1991). For book-length analyses of the case law, see G. Joseph, Sanctions: The Federal Law of Litigation Abuse (1989); J. Solovy, The Federal Law of Sanctions (1991); G. Vairo, Rule 11 Sanctions: Case Law Perspectives and Preventive Measures (1991).
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> The rule retains the principle that attorneys and pro se litigants have an obligation to the court to refrain from conduct that frustrates the aims of Rule 1. The revision broadens the scope of this obligation, but places greater constraints on the imposition of sanctions and should reduce the number of motions for sanctions presented to the court. New subdivision (d) removes from the ambit of this rule all discovery requests, responses, objections, and motions subject to the provisions of Rule 26 through 37.

Subdivision (a). Retained in this subdivision are the provisions requiring signatures on pleadings, written motions, and other papers. Unsigned papers are to be received by the Clerk, but then are to be stricken if the omission of the signature is not corrected promptly after being called to the attention of the attorney or pro se litigant. Correction can be made by signing the paper on file or by submitting a duplicate that contains the signature. A court may require by local rule that papers contain additional identifying information regarding the parties or attorneys, such as telephone numbers to facilitate facsimile transmissions, though, as for omission of a signature, the paper should not be rejected for failure to provide such information.

The sentence in the former rule relating to the effect of answers under oath is no longer needed and has been eliminated. The provision in the former rule that signing a paper constitutes a certificate that it has been read by the signer also has been eliminated as unnecessary. The obligations imposed under subdivision (b) obviously require that a pleading, written motion, or other paper be read before it is filed or submitted to the court.

Subdivisions (b) and (c). These subdivisions restate the provisions requiring attorneys and pro se litigants to conduct a reasonable inquiry into the law and facts before signing pleadings, written motions, and other documents, and prescribing sanctions for violation of these obligations. The revision in part expands the responsibilities of litigants to the court, while providing greater constraints and flexibility in dealing with infractions of the rule. The rule continues to require litigants to "stop-and-think" before initially making legal or factual contentions. It also, however, emphasizes the duty of candor by subjecting litigants to potential sanctions for insisting upon a position after it is no longer tenable and by generally providing protection against sanctions if they withdraw or correct contentions after a potential violation is called to their attention.

The rule applies only to assertions contained in

papers filed with or submitted to the court. It does not cover matters arising for the first time during oral presentations to the court, when counsel may make statements that would not have been made if there had been more time for study and reflection. However, a litigant's obligations with respect to the contents of these papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit. For example, an attorney who during a pretrial conference insists on a claim or defense should be viewed as "presenting to the court" that contention and would be subject to the obligations of subdivision (b) measured as of that time. Similarly, if after a notice of removal is filed, a party urges in federal court the allegations of a pleading filed in state court (whether as claims, defenses, or in disputes regarding removal or remand), it would be viewed as "presenting"--and hence certifying to the district court under Rule 11--those allegations.

The certification with respect to allegations and other factual contentions is revised in recognition that sometimes a litigant may have good reason to believe that a fact is true or false but may need discovery, formal or informal, from opposing parties or third persons to gather and confirm the evidentiary basis for the allegation. Tolerance of factual contentions in initial pleadings by plaintiffs or defendants when specifically identified as made on information and belief does not relieve litigants from the obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances; it is not a license to join parties, make claims, or present defenses without any factual basis or justification. Moreover, if evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty under the rule not to persist with that contention. Subdivision (b) does not require a formal amendment to pleadings for which evidentiary support is not obtained, but rather calls upon a litigant not thereafter to advocate such claims or defenses.

The certification is that there is (or likely will be)

"evidentiary support" for the allegation, not that the party will prevail with respect to its contention regarding the fact. That summary judgment is rendered against a party does not necessarily mean, for purposes of this certification, that it had no evidentiary support for its position. On the other hand, if a party has evidence with respect to a contention that would suffice to defeat a motion for summary judgment based thereon, it would have sufficient "evidentiary support" for purposes of Rule 11.

Denials of factual contentions involve somewhat different considerations. Often, of course, a denial is premised upon the existence of evidence contradicting the alleged fact. At other times a denial is permissible because, after an appropriate investigation, a party has no information concerning the matter or, indeed, has a reasonable basis for doubting the credibility of the only evidence relevant to the matter. A party should not deny an allegation it knows to be true; but it is not required, simply because it lacks contradictory evidence, to admit an allegation that it believes is not true.

The changes in subdivisions (b)(3) and (b)(4) will serve to equalize the burden of the rule upon plaintiffs and defendants, who under Rule 8(b) are in effect allowed to deny allegations by stating that from their initial investigation they lack sufficient information to form a belief as to the truth of the allegation. If, after further investigation or discovery, a denial is no longer warranted, the defendant should not continue to insist on that denial. While sometimes helpful, formal amendment of the pleadings to withdraw an allegation or denial is not required by subdivision (b).

Arguments for extensions, modifications, or reversals of existing law or for creation of new law do not violate subdivision (b)(2) provided they are "nonfrivolous." This establishes an objective standard, intended to eliminate any "empty-head pure-heart" justification for patently frivolous arguments. However, the extent to which a litigant has researched the issues and found some support for its theories even in minority opinions, in law review

articles, or through consultation with other attorneys should certainly be taken into account in determining whether paragraph (2) has been violated. Although arguments for a change of law are not required to be specifically so identified, a contention that is so identified should be viewed with greater tolerance under the rule.

The court has available a variety of possible sanctions to impose for violations, such as striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head), etc. See Manual for Complex Litigation, Second, § 42.3. The rule does not attempt to enumerate the factors a court should consider in deciding whether to impose a sanction or what sanctions would be appropriate in the circumstances; but, for emphasis, it does specifically note that a sanction may be nonmonetary as well as monetary. Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants: all of these may in a particular case be proper considerations. The court has significant discretion in determining what sanctions, if any, should be imposed for a violation, subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons.

Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily

be paid into court as a penalty. However, under unusual circumstances, particularly for (b)(1) violations, deterrence may be ineffective unless the sanction not only requires the person violating the rule to make a monetary payment, but also directs that some or all of this payment be made to those injured by the violation. Accordingly, the rule authorizes the court, if requested in a motion and if so warranted, to award attorney's fees to another party. Any such award to another party, however, should not exceed the expenses and attorneys' fees for the services directly and unavoidably caused by the violation of the certification requirement. If, for example, a wholly unsupportable count were included in a multi-count complaint or counterclaim for the purpose of needlessly increasing the cost of litigation to an impecunious adversary, any award of expenses should be limited to those directly caused by inclusion of the improper count, and not those resulting from the filing of the complaint or answer itself. The award should not provide compensation for services that could have been avoided by an earlier disclosure of evidence or an earlier challenge to the groundless claims or defenses. Moreover, partial reimbursement of fees may constitute a sufficient deterrent with respect to violations by persons having modest financial resources. In cases brought under statutes providing for fees to be awarded to prevailing parties, the court should not employ cost-shifting under this rule in a manner that would be inconsistent with the standards that govern the statutory award of fees, such as stated in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

The sanction should be imposed on the persons--whether attorneys, law firms, or parties--who have violated the rule or who may be determined to be responsible for the violation. The person signing, filing, submitting, or advocating a document has a nondelegable responsibility to the court, and in most situations is the person to be sanctioned for a violation. Absent exceptional circumstances, a law firm is to be held also responsible when, as a result of a motion under subdivision (c)(1)(A), one of its partners, associates, or employees is determined to have violated the rule. Since such a motion may be

filed only if the offending paper is not withdrawn or corrected within 21 days after service of the motion, it is appropriate that the law firm ordinarily be viewed as jointly responsible under established principles of agency. This provision is designed to remove the restrictions of the former rule. Cf. Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989) (1983 version of Rule 11 does not permit sanctions against law firm of attorney signing groundless complaint).

The revision permits the court to consider whether other attorneys in the firm, co-counsel, other law firms, or the party itself should be held accountable for their part in causing a violation. When appropriate, the court can make an additional inquiry in order to determine whether the sanction should be imposed on such persons, firms, or parties either in addition to or, in unusual circumstances, instead of the person actually making the presentation to the court. For example, such an inquiry may be appropriate in cases involving governmental agencies or other institutional parties that frequently impose substantial restrictions on the discretion of individual attorneys employed by it.

Sanctions that involve monetary awards (such as a fine or an award of attorney's fees) may not be imposed on a represented party for causing a violation of subdivision (b)(2), involving frivolous contentions of law. Monetary responsibility for such violations is more properly placed solely on the party's attorneys. With this limitation, the rule should not be subject to attack under the Rules Enabling Act. See Willy v. Coastal Corp., --- U.S. ---- (1992); Business Guides, Inc. v. Chromatic Communications Enter. Inc., --- U.S. ---- (1991). This restriction does not limit the court's power to impose sanctions or remedial orders that may have collateral financial consequences upon a party, such as dismissal of a claim, preclusion of a defense, or preparation of amended pleadings.

Explicit provision is made for litigants to be provided notice of the alleged violation and an opportunity to respond before sanctions are imposed. Whether the matter should be decided solely on the basis of written submissions or should be scheduled

for oral argument (or, indeed, for evidentiary presentation) will depend on the circumstances. If the court imposes a sanction, it must, unless waived, indicate its reasons in a written order or on the record; the court should not ordinarily have to explain its denial of a motion for sanctions. Whether a violation has occurred and what sanctions, if any, to impose for a violation are matters committed to the discretion of the trial court; accordingly, as under current law, the standard for appellate review of these decisions will be for abuse of discretion. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) (noting, however, that an abuse would be established if the court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence).

The revision leaves for resolution on a case-by-case basis, considering the particular circumstances involved, the question as to when a motion for violation of Rule 11 should be served and when, if filed, it should be decided. Ordinarily the motion should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely. In other circumstances, it should not be served until the other party has had a reasonable opportunity for discovery. Given the "safe harbor" provisions discussed below, a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention).

Rule 11 motions should not be made or threatened for minor, inconsequential violations of the standards prescribed by subdivision (b). They should not be employed as a discovery device or to test the legal sufficiency or efficacy of allegations in the pleadings; other motions are available for those purposes. Nor should Rule 11 motions be prepared to emphasize the merits of a party's position, to exact an unjust settlement, to intimidate an adversary into withdrawing contentions that are fairly debatable, to increase the costs of litigation, to create a conflict of interest between attorney and client, or to seek disclosure of matters otherwise protected by the attorney-client privilege or the work-product doctrine. As under the prior rule, the court may

defer its ruling (or its decision as to the identity of the persons to be sanctioned) until final resolution of the case in order to avoid immediate conflicts of interest and to reduce the disruption created if a disclosure of attorney- client communications is needed to determine whether a violation occurred or to identify the person responsible for the violation.

The rule provides that requests for sanctions must be made as a separate motion, i.e., not simply included as an additional prayer for relief contained in another motion. The motion for sanctions is not, however, to be filed until at least 21 days (or such other period as the court may set) after being served. If, during this period, the alleged violation is corrected, as by withdrawing (whether formally or informally) some allegation or contention, the motion should not be filed with the court. These provisions are intended to provide a type of "safe harbor" against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation. Under the former rule, parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11; under the revision, the timely withdrawal of a contention will protect a party against a motion for sanctions.

To stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the revision provides that the "safe harbor" period begins to run only upon service of the motion. In most cases, however, counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a Rule 11 motion.

As under former Rule 11, the filing of a motion for sanctions is itself subject to the requirements of the rule and can lead to sanctions. However, service of a cross motion under Rule 11 should rarely be needed since under the revision the court may award to the

person who prevails on a motion under Rule 11--whether the movant or the target of the motion--reasonable expenses, including attorney's fees, incurred in presenting or opposing the motion.

The power of the court to act on its own initiative is retained, but with the condition that this be done through a show cause order. This procedure provides the person with notice and an opportunity to respond. The revision provides that a monetary sanction imposed after a court-initiated show cause order be limited to a penalty payable to the court and that it be imposed only if the show cause order is issued before any voluntary dismissal or an agreement of the parties to settle the claims made by or against the litigant. Parties settling a case should not be subsequently faced with an unexpected order from the court leading to monetary sanctions that might have affected their willingness to settle or voluntarily dismiss a case. Since show cause orders will ordinarily be issued only in situations that are akin to a contempt of court, the rule does not provide a "safe harbor" to a litigant for withdrawing a claim, defense, etc., after a show cause order has been issued on the court's own initiative. Such corrective action, however, should be taken into account in deciding what--if any--sanction to impose if, after consideration of the litigant's response, the court concludes that a violation has occurred.

Subdivision (d). Rules 26(g) and 37 establish certification standards and sanctions that apply to discovery disclosures, requests, responses, objections, and motions. It is appropriate that Rules 26 through 37, which are specially designed for the discovery process, govern such documents and conduct rather than the more general provisions of Rule 11. Subdivision (d) has been added to accomplish this result.

Rule 11 is not the exclusive source for control of improper presentations of claims, defenses, or contentions. It does not supplant statutes permitting awards of attorney's fees to prevailing parties or alter the principles governing such awards. It does not inhibit the court in punishing for contempt, in exercising its inherent powers, or in imposing

> sanctions, awarding expenses, or directing remedial action authorized under other rules or under 28 U.S.C. § 1927. See Chambers v. NASCO, --- U.S. ---- (1991). Chambers cautions, however, against reliance upon inherent powers if appropriate sanctions can be imposed under provisions such as Rule 11, and the procedures specified in Rule 11--notice, opportunity to respond, and findings--should ordinarily be employed when imposing a sanction under the court's inherent powers. Finally, it should be noted that Rule 11 does not preclude a party from initiating an independent action for malicious prosecution or abuse of process.

IT IS ORDERED that notice of this repeal of § 814.025 and and repeal and recreation of § 802.05 be given by a single publication of a copy of this order in the official state newspaper and in an official publication of the State Bar of Wisconsin.

IT IS FURTHER ORDERED that the 1993 Federal Advisory Committee Notes to Rule 11 of the Federal Rules of Civil Procedure are not adopted but shall be printed for information purposes.

Dated at Madison, Wisconsin, this 31st day of March, 2005.

BY THE COURT:

Cornelia G. Clark
Clerk of Supreme Court

¶1 DAVID T. PROSSER, J. *(dissenting).* I join the dissent of Justice Roggensack in its entirety but write separately to emphasize my concern about the action taken by the court.

¶2 The legislature has enacted a statute that recognizes this court's inherent power to make "rules" relating to pleading, practice and procedure in judicial proceedings. Wis. Stat. § 751.12(1). The same statute permits the court to modify or suspend "statutes" relating to pleading, practice, and procedure [in judicial proceedings in all courts]." Wis. Stat. § 751.12(2). Because this latter power constitutes a significant departure from the plain text of the Wisconsin Constitution, it must be exercised with extraordinary care.

¶3 The legislature explicitly limited the power it delegated to this court to modify and suspend "statutes." The limitations include a prohibition that, "The rules shall not abridge, enlarge, or modify the substantive rights of any litigant." Wis. Stat. § 751.12(1).

¶4 The overriding issue presented in this petition is whether Wis. Stat. § 814.025 embodies "substantive rights" for litigants, because if it does, this court has no authority to "repeal" it and replace it with a revised rule.[1]

[1] In 1988 the legislature revised Wis. Stat. § 802.05, which was originally created by court rule. 1987 Wis. Act 256. As part of this legislation, the legislature added subsection (4) to Wis. Stat. § 814.025. The subsection reads: "To the extent s. 802.05 is applicable and differs from this section, s. 802.05 applies." I do not see subsection (4) as a legislative grant of authority to "repeal" and rewrite Wis. Stat. § 814.025.

¶5 I agree completely with the analysis of Justice Roggensack on this point. By its action, the court did not fill a void with a rule that is arguably substantive. Instead, the court obliterated a validly enacted statute. I could not join the court in this endeavor even if I agreed with the ultimate result.

¶6 I am authorized to state that JUSTICE JON P. WILCOX joins this dissent.

¶7 PATIENCE DRAKE ROGGENSACK, J. *(dissenting)*. In its Order on Rules Petition 03-06, a majority of the court strikes down Wis. Stat. § 814.025 and Wis. Stat. § 802.05, by "repealing" them. I dissent for two reasons. First, this court does not have the power under either a statute or the constitution to repeal § 814.025, because it is a substantive law that was duly created by acts of the legislature. Second, while this court has the power to revise § 802.05 in certain instances[2] because it began as a supreme court rule, the revisions made by the majority are contrary to the interests of the public. Therefore, I respectfully dissent.

A. Wisconsin Stat. § 814.025[3]

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[2] See Wis. Stat. § 751.12(1).

[3] Wisconsin Stat. § 814.025 provides:

> (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:

¶8 The Order from which I dissent began as a rules petition that asked the court to use its authority under Wis. Stat. § 751.12 to "repeal" Wis. Stat. § 814.025 and Wis. Stat. § 802.05. Section 751.12(1) provides in relevant part:

> The state supreme court shall, by rules promulgated by it from time to time, regulate pleading, practice, and procedure in judicial proceedings in all courts, for the purposes of simplifying the same and of promoting the speedy determination of litigation upon its merits. The rules shall not abridge, enlarge, or modify the substantive rights of any litigant.

(Emphasis added.) The majority granted all the relief the petitioners requested. However, in so doing, the majority violated the explicit prohibition of § 751.12 by removing substantive rights the legislature afforded to the public under § 814.025 and it exceeded the constitutional powers of this court by striking down § 814.025, the constitutional validity of which was not disputed.

¶9 The majority's order violates Wis. Stat. § 751.12 because the rights provided to the public under Wis. Stat. § 814.025 are substantive rights. One of those rights is the

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> (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.

requirement that if a circuit court concludes that a litigant has been the victim of frivolous litigation the court must grant the victim recovery of the reasonable attorney fees and costs that were incurred because of the frivolous nature of the proceedings.[4] Without this right, victims of frivolous litigation must pay their own attorney fees.[5] Stated another way, one of the rights the legislature provided under § 814.025 required courts to make victims of frivolous litigation whole for the financial harm they were forced to endure through no fault of their own.

¶10 Wisconsin Stat. § 802.05 and Wis. Stat. § 814.025 have never been interpreted as co-extensive in all their provisions. As § 814.025(4) acknowledges, there are differences between the two statutes. For example, both § 802.05 and § 814.025 apply to signing a frivolous pleading to commence an action, but "only § 814.025 also authorizes the imposition of sanctions for

[4] Wisconsin Stat. § 814.025 has been consistently interpreted as requiring the circuit court to award costs and reasonable attorney fees if the proceedings are held to be frivolous. See, e.g., Jandrt v. Jerome Foods, Inc., 227 Wis. 2d 531, 563, 597 N.W.2d 744 (1999); Sommer v. Carr, 99 Wis. 2d 789, 799, 299 N.W.2d 856 (1981); Stoll v. Adriansen, 122 Wis. 2d 503, 511, 362 N.W.2d 182 (Ct. App. 1984).

[5] Wisconsin lawsuits operate under the American Rule, wherein each party pays his or her own attorney fees, unless there is a statutory or a contractual right to be reimbursed for the reasonable attorney fees incurred. Winkelman v. Kraft Foods, Inc., 2005 WI App 25, ¶18, ___ Wis. 2d ___, ___ N.W.2d ___. Accordingly, Wis. Stat. § 814.025 provided a substantive right that changed the American Rule when the litigation was held to be frivolous.

continuing a frivolous action."[6] Therefore, in addition to providing a mandatory make whole remedy to victims of frivolous lawsuits that § 802.05 does not provide, § 814.025 also contains broader applicability than § 802.05. These two examples, where relief is mandatory and the application is broader under § 814.024, demonstrate that § 814.025 provides something more than a method of enforcing a right, as a procedural statute would. It grants substantive relief to victims of frivolous lawsuits.

¶11 Black's Law Dictionary's definition of "substantive law" supports my conclusion that the rights removed by the repeal of Wis. Stat. § 814.025 are substantive provisions of the law. Black's defines substantive law as:

> The part of the law that creates, defines, and regulates the rights, duties, and powers of parties. . . . "So far as the administration of justice is concerned with the application of remedies to violated rights, we may say that the substantive law defines the remedy and the right, while the law of procedure defines the modes and conditions of the application of the one to the other."

Black's Law Dictionary 1470 (8th ed. 2004) (quoting John Salmond, Jurisprudence 476 (Glanville L. Williams ed., 10th ed. 1947) (emphasis added)). Furthermore, § 814.025 was enacted with the objective of creating substantive rights.[7]

[6] Wisconsin Chiropractic Ass'n v. State of Wisconsin Chiropractic Examining Bd., 2004 WI App 30, ¶17, 269 Wis. 2d 837, 676 N.W.2d 580 (emphasis added).

[7] Letter from Thomas S. Hanson to the court (Oct. 29, 2004).

¶12 Twenty-seven years ago, in 1978, the combined efforts of the legislature and the governor created Wis. Stat. § 814.025. 1977 Assembly Bill 237, which began the process to create § 814.025, was authored by then Representative Thomas S. Hanson. Twenty-eight colleagues in the Assembly joined Representative Hanson as sponsors of the bill. The analysis by the Legislative Reference Bureau shows that the bill's purpose was to create a substantive right of payment for those who had been victimized by frivolous lawsuits:

> Under this proposal, if a court, upon judgment determines that an action, special proceeding, counterclaim or cross complaint is frivolous, the court will be required to award reasonable court costs and attorney fees to the successful party. The costs and fees may be assessed fully against either the unsuccessful party or his or her attorney or assessed to require partial payment by both the party and the attorney. "Frivolous" refers to situations where the realistic chances of ultimate success are slight.[8]

¶13 During the hearings on Rules Petition 03-06, Mr. Hanson wrote to the court objecting to the petitioners' request that the court strike down Wis. Stat. § 814.025. He stated that "[t]he purpose [of § 814.025] was to make the victim of a frivolous action whole again." He explained that "[m]aking sanctions discretionary and permitting something less than a 'make whole' recovery for the victim are clearly contrary to what I intended when we passed § 814.025." Mr. Hanson voiced his strong disagreement with "eliminating the victim's right to recover." As he explained, in enacting § 814.025, the

[8] Legislative Reference Bureau drafting file for 1977 A.B. 237 (emphasis added).

legislature was not passing a procedural statute; rather, it was creating a "substantive right of recovery" for members of the public who are victimized by frivolous lawsuits.[9]

¶14 In addition to having no statutory authority to strike down Wis. Stat. § 814.025, this court has no constitutional power to do so. The Wisconsin Supreme Court derives its constitutional powers from Article VII of the Wisconsin Constitution. The constitution provides that the supreme court has superintending and administrative authority over all Wisconsin courts;[10] it has both appellate and original action jurisdiction;[11] and it has the power to remove cases from the Wisconsin Court of Appeals and to accept certifications from that court.[12] Neither Article VII, nor any other provision of the Wisconsin Constitution, gives this court the power to strike down a substantive law created by the legislature and the governor under the constitutional powers granted to those two branches of government,[13] unless the statute is unconstitutional, under either the Wisconsin Constitution or the United States

[9] Hanson, supra note 6.

[10] See Wisconsin Constitution, Article VII, § 3(1).

[11] See id. at § 3(2).

[12] See id. at § 3(3).

[13] Article IV, § 1 provides that "[t]he legislative power shall be vested in a senate and assembly." Article V, § 10 grants the governor the power to approve or to veto bills enacted by the legislature.

Constitution.[14] However, a majority of this court refused to hear Mr. Hanson's plea or to consider the constitutional confrontation with the legislature that its actions create. By striking down § 814.025, the majority causes this court to invade the province of the legislature.[15]

¶15 The Wisconsin Supreme Court has no power to strike down substantive statutes that it concludes are not good public policy or for which it believes it has a better plan than the legislature for the subject addressed in a statute. To do so is a violation of the separation of powers, a principle that is not expressly stated in the constitution, but "implicit in the

[14] As we explained in City of Milwaukee v. State, 193 Wis. 423, 428, 214 N.W. 820 (1927), "Where the legislature has enacted statutes within the proper field of legislation and not violative of the provisions of the federal and state constitutions, its edicts are supreme, and they cannot be interfered with by the courts . . . . "

[15] In Door County v. Hayes-Brook, 153 Wis. 2d 1, 449 N.W.2d 601 (1990), Chief Justice Abrahamson explained her concerns for the proper interaction of this court with acts of the legislature. In Door County, a circuit court had appointed an attorney to represent an indigent defendant at county expense at a higher rate than SCR 80.02 set out. The majority held that the higher rate was permissible, notwithstanding SCR 80.01 or 80.02. In concurrence, Chief Justice Abrahamson reviewed the underpinnings of SCR 81.01 and 81.02 and explained "the court has no power analogous to the legislature's to repeal a legislatively enacted statute." Id. at 27 (Abrahamson, J., concurring). The Chief Justice also voiced strong concerns that "[t]he majority opinion thus raises a significant constitutional question of judicial usurpation of legislative powers and creates a confrontation of constitutional magnitude between the legislature and this court." Id. at 29.

provisions vesting legislative, executive and judicial powers in three separate branches of state government."[16]

¶16 The petitioners should have been directed by this court to take their concerns about Wis. Stat. § 814.025 to the legislature. That is the correct constitutional route for repeal of a substantive statute. In order to prevail on that route to repeal, the petitioners would have had to have convinced a majority of the Assembly and a majority of the Senate that their cause was just to all affected by § 814.025. However, under Rules Petition 03-06, the petitioners needed to persuade only four justices that § 814.025 should be struck down, a much more limited undertaking. That a majority of this court assists the petitioners in subverting the role of the legislature in our tripartite system of government is poor precedent that has the potential for far-reaching consequences.

B. Wisconsin Stat. § 802.05

¶17 I also have significant concerns about the court's striking down Wis. Stat. § 802.05 and replacing it with the current version of Rule 11 of the Federal Rules of Civil Procedure. While some of the provisions in § 802.05 are procedural and therefore within the constitutional power of the court to revise,[17] we were presented with no information from any of Wisconsin's many courts that § 802.05 was causing problems

[16] State v. Holmes, 106 Wis. 2d 31, 42, 315 N.W.2d 703 (1982).

[17] See In re Constitutionality of Section 251.18 of the Wisconsin Statutes, 204 Wis. 501, 502, 236 N.W. 717 (1931).

for them.[18] Furthermore, the revised rule does not apply to discovery costs generated in a frivolous lawsuit, even though in a civil lawsuit, discovery is often one of the most costly items. Also, the revised rule directs that the usual recipient of any payment will be the court rather than the injured party. This change shifts the focus of the statute away from compensation to the victim. All in all, the revised § 802.05 that is provided for in the Order does much to protect lawyers, but it does so at the expense of protecting the public from the expenses incurred in needless litigation. As the only attorney who argued against granting the requested rule change said:

> The proposed rule has no teeth. It represents a substantial financial "hit" for the unfortunate client[s], stuck in a frivolous lawsuit, through no fault of their own. Nobody is going to bother applying for sanctions that may not even recover the costs of the application. The client[s] do[] not want a moral victory——they want to be made whole.[19]

¶18 During the hearings on Rules Petition 03-06, the court's attention was directed to our decision in Jandrt v.

[18] After receiving the petition, we should have solicited input from the circuit courts of Wisconsin to determine whether Wis. Stat. § 802.05 was causing problems in our courts, but we did not. We simply patterned the revised § 802.05 on the 1993 revisions to Federal Rule 11. Federal Rule 11 was also revised at the request of attorneys when 80% of the district court judges believed former Rule 11 had a positive effect and should have been retained in its then current form. See Advisory Committee on Civil Rules, Interim Report on Rule 11 (1991), reprinted in Georgene M. Vairo, Rule 11 Sanctions: Case Law Perspectives and Preventive Measures, App. I-8-I-10 (2d ed. 1992).

[19] Letter from Anthony R. Varda to the court (Sept. 30, 2004).

Jerome Foods, Inc.,[20] which addressed both Wis. Stat. § 802.05 and Wis. Stat. § 814.025. This court affirmed a circuit court award of substantial attorney fees and costs pursuant to § 814.025.[21] In Jandrt, the plaintiffs' attorneys were found to have continued a lawsuit after it became frivolous.[22] The motion to find the lawsuit frivolous was not brought until after the plaintiffs had voluntarily dismissed. While that decision and the valid concerns for access to justice that it raised are not forgotten, the concerns of the dissent in Jandrt[23] could have been addressed without the wholesale revision of § 802.05 or the repeal of § 814.025.

¶19 For example, adding a procedural safe harbor provision to statutes dealing with frivolous actions would have prevented chilling a plaintiff's right of access to the courts and at the same time protected a defendant's right not to be subjected to legal fees incurred defending a lawsuit that should not have continued.[24] The addition of a safe harbor provision would not have violated the mandatory make whole remedy established by the legislature in Wis. Stat. § 814.025 or the remedies for

[20] 227 Wis. 2d 531, 597 N.W.2d 744 (1999).

[21] Id. at 539.

[22] Id.

[23] Chief Justice Abrahamson and Justice Bradley dissented in Jandrt. They are two of the justices who make up the four-member majority for the Order that strikes down Wis. Stat. § 814.025 and Wis. Stat. § 802.05.

[24] See John Shapard, et al., Federal Judicial Center, Report of a Survey Concerning Rule 11, Federal Rules of Civil Procedure 4 (1995).

discovery undertaken in a frivolous proceeding that are currently provided in both § 814.025 and Wis. Stat. § 802.05. A procedural safe harbor had the unanimous support of the court.

¶20 In my view, the court chose a drastic approach to the problem that was presented because, with only one exception, all the attorneys who participated in the process requested the court to repeal Wis. Stat. § 814.025 and Wis. Stat. § 802.05. Lawyers are accustomed to presenting their wishes in a persuasive fashion, and when members of both the plaintiff's bar and the defense bar joined in the request, a majority of the court listened. But who listens to the public? Who looks out for the public——for the "little guy" who can so easily be overwhelmed by judicial process? Who makes certain that the public knows that a hearing is being held where the court is being asked to eliminate substantive rights that the legislature created to benefit the public?[25] The highest duty of this court is to protect the public interest. Accordingly, I cannot join the Order granting the relief requested in Rules Petition 03-06.

¶21 For the foregoing reasons, I respectfully dissent.

¶22 I am authorized to state that Justices JON P. WILCOX and DAVID T. PROSSER, JR. join in this dissent.

[25] While this court has fully complied with the notice requirements for a rule-making hearing, in my view the notices are insufficient to adequately inform the public about the proceedings. Only one person spoke on behalf of the public interest at the court's hearings.