



2005 SENATE BILL 501

January 6, 2006 - Introduced by Senators GROTHMAN, STEPP, ROESSLER, DARLING, REYNOLDS and LAZICH, cosponsored by Representatives GUNDRUM, TRAVIS, GARD, KESTELL, HAHN, LEMAHIEU, VAN ROY, HUNDERTMARK, MUSSER, JENSEN, PETTIS, NISCHKE, GOTTLIEB, VOS, GUNDERSON, BALLWEG, KRAWCZYK, OWENS, BIES and MCCORMICK. Referred to Committee on Judiciary, Corrections and Privacy.

1 **AN ACT** *to amend* 767.293 (6), 814.04 (intro.) and 814.29 (3) (a); and *to create*
2 808.03 (3) and 895.025 of the statutes; **relating to:** damages for frivolous
3 claims.

Analysis by the Legislative Reference Bureau

Before July 1, 2005, if a court determined that a claim made in a court action was frivolous, the court awarded the successful party court costs and reasonable fees. The costs and attorney fees could be assessed against the party bringing the action or the attorney representing the party, or a portion could be assessed against the party and the attorney. To find a claim frivolous, the court had to determine that the claim was used in bad faith, solely for the purpose of harassing or maliciously injuring another, or that the party or party's attorney knew that the claim was without reasonable basis in law or equity and could not be supported by an argument to extend, modify, or reverse current law. Effective July 1, 2005, the supreme court, by Supreme Court Order 03-06, repealed this provision.

This bill requires a court to award a successful party the actual costs of the action, including reasonable attorney fees, if the court finds that the action is frivolous. The bill uses the same standards for determining if an action is frivolous as were used in the law before July 1, 2005.

Under current law, if a person appeals a decision that an action or pleading is frivolous, the costs of responding to that appeal may be recovered by the successful party only if the court determines that all of the arguments made by the appealing party are frivolous. Under this bill, a circuit court action may not be appealed if a

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claim has been made that the action is frivolous until that claim is resolved. In addition, if the appellate court affirms the lower court decision that an action was frivolous, the appellate court must remand the action to the lower court and that court must award damages to the successful party to compensate for the costs incurred in responding to the appeal.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 767.293 (6) of the statutes, as affected by Supreme Court Order
2 03-06, is amended to read:

3 767.293 (6) Section ~~802.05 (2)~~ 895.025 applies to the filing of an affidavit under
4 this section.

5 **SECTION 2.** 808.03 (3) of the statutes is created to read:

6 808.03 (3) EXCEPTION. Notwithstanding subs. (1) and (2), a judgment or order
7 may not be appealed in an action in which a party makes a claim under s. 802.05,
8 804.12, or 895.025 until the circuit court has ruled on that claim.

9 **SECTION 3.** 814.04 (intro.) of the statutes, as affected by Supreme Court Order
10 03-06, is amended to read:

11 **814.04 Items of costs.** (intro.) Except as provided in ss. 93.20, 100.30 (5m),
12 106.50 (6) (i) and (6m) (a), 115.80 (9), 281.36 (2) (b) 1., 767.33 (4) (d), 769.313, ~~802.05~~
13 895.025, 814.245, 895.035 (4), 895.10 (3), 895.75 (3), 895.77 (2), 895.79 (3), 895.80 (3),
14 943.212 (2) (b), 943.245 (2) (d) and 943.51 (2) (b), when allowed costs shall be as
15 follows:

16 **SECTION 4.** 814.29 (3) (a) of the statutes, as affected by Supreme Court Order
17 03-06, is amended to read:

18 814.29 (3) (a) A request for leave to commence or defend an action, proceeding,
19 writ of error or appeal without being required to pay fees or costs or to give security

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1 for costs constitutes consent of the affiant and counsel for the affiant that if the
2 judgment is in favor of the affiant the court may order the opposing party to first pay
3 the amount of unpaid fees and costs, including attorney fees under ss. 802.05 and,
4 804.12 (1) (c), and 895.025 and under 42 USC 1988 and to pay the balance to the
5 plaintiff.

6 **SECTION 5.** 895.025 of the statutes is created to read:

7 **895.025 Damages for maintaining frivolous claims and counterclaims.**

8 **(1)** If a court finds, upon either party's motion made at any time during the
9 proceeding or upon judgement, an action or special proceeding commenced or
10 continued by a plaintiff or a counterclaim, defense, or cross complaint commenced,
11 used, or continued by a defendant to be frivolous, the court shall award to the
12 successful party, as damages, the actual costs of the action, including the actual
13 reasonable attorneys fees the party incurred in the action, including fees incurred
14 in any dispute over the application of this section.

15 **(2)** If an award under this section is affirmed upon appeal, the appellate court
16 action shall remand the action to the trial court upon completion of the appeal for the
17 award of damages by the trial court to compensate the successful party for the entire
18 actual reasonable attorneys fees the party incurred in the appeal.

19 **(3)** If the appellate court finds an appeal frivolous, the appellate court shall
20 remand the action to the trial court upon completion of the appeal for the award of
21 damages by the trial court to compensate the successful party for the entire actual
22 reasonable attorneys fees the party incurred in the appeal. An appeal is frivolous in
23 its entirety if any element necessary to succeed on the appeal is supported solely by
24 frivolous argument.

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1 (4) The fees awarded under subs. (1) to (3) may be assessed fully against the
2 party bringing the action, special proceeding, cross complaint, defense,
3 counterclaim, or appeal or the attorney representing the party, or both, jointly and
4 severally, or may be assessed so that the party and the attorney each pay a portion
5 of the costs and fees.

6 (5) To find an action, special proceeding, counterclaim, defense, cross
7 complaint, or appeal frivolous under subs. (1) to (3), the court must find, upon clear
8 and convincing evidence, at least one of the following:

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

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

16 **SECTION 6. Initial applicability.**

17 (1) This act first applies to actions or special proceedings that are commenced
18 on the effective date of this subsection or that are continued after the effective date
19 of this subsection.

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(END)