State of Wisconsin

LEGISLATIVE REFERENCE BUREAU

RESEARCH APPENDIX -

PLEASE DO NOT REMOVE FROM DRAFTING FILE

Date Transfer Requested: 12/29/2010 (Per: CMH)

A ☞ The 2011 drafting file for LRB–0358

B ☞ The 2011 drafting file for LRB–0368

C ☞ The 2011 drafting file for LRB–0369

D ☞ The 2011 drafting file for LRB–0370

E ☞ The 2011 drafting file for LRB–0371

F ☞ The 2011 drafting file for LRB–0372

G ☞ The 2011 drafting file for LRB–0671

☞Compile Draft – Appendix C

has been copied/added to the drafting file for

2011 LRB–0388

(Jr1 Special Session Draft)

2011 DRAFTING REQUEST

Bill

Received: **11/09/2010**

Received By: **phurley**

Wanted: **As time permits**

Companion to LRB:

For: **Governor-elect**

By/Representing: **Kevin Moore**

May Contact:

Drafter: **phurley**

Subject: **Courts - miscellaneous**

Addl. Drafters:

Extra Copies:

Submit via email: **YES**

Requester's email: **Kevin.Moore@wisconsin.gov**

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Damages for frivolous claims

Instructions:

redraft 05s0626

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	phurley 11/10/2010	nnatzke 11/11/2010		_____ _____			
/1			mduchek 11/11/2010	_____ _____	lparisi 11/11/2010		

FE Sent For:

<END>

2011 DRAFTING REQUEST

Bill

Received: **11/09/2010**

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Wanted: **As time permits**

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Instructions:

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Drafting History:

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/?	phurley	/1 nwn 11/11					

FE Sent For:

<END>

Champagne, Rick

From: Moore, Kevin E - GOT [Kevin.Moore@wisconsin.gov]
Sent: Tuesday, November 09, 2010 9:20 AM
To: Champagne, Rick
Subject: Drafting Request

Good Morning Rick-

The Governor-Elect would like the following bill drafted:

2005 LRBs0626/1 as separate legislation.

Please feel free to contact me should you have any questions.

Sincerely,

11-10-10
t/c to Kevin Moore: 2009 AB 197 contains same provisions (in s. 895.044) as s0626 (in s. 895.025) + updated cross-refs and refs to things like Dir. of equal rts. KM says to redraft 09 AB 197 but hold onto 05 materials for now.

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.

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

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:

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

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

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

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

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

814.04 Items of costs. (intro.) Except as provided in ss. 93.20, 100.30 (5m), 106.50 (6) (i) and (6m) (a), 115.80 (9), 281.36 (2) (b) 1., 767.33 (4) (d), 769.313, ~~802.05~~ 895.025, 814.245, 895.035 (4), 895.10 (3), 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:

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

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

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

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

895.025 Damages for maintaining frivolous claims and counterclaims. **(1)** If a court finds, upon either party's motion made at any time during the proceeding or upon judgement, 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 to be frivolous, the court shall award to the successful party, as damages, the actual costs of the action, including the actual reasonable attorneys fees the party incurred in the action, including fees incurred in any dispute over the application of this section.

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

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

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

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

SECTION 6. Initial applicability.

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

(END)

ASSEMBLY SUBSTITUTE AMENDMENT 1,

TO 2005 SENATE BILL 501

SB SD=
05-4125

March 7, 2006 – Offered by Representative GUNDRUM.

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

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

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

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

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

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

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

814.04 Items of costs. (intro.) Except as provided in ss. 93.20, 100.30 (5m), 106.50 (6) (i) and (6m) (a), 115.80 (9), 281.36 (2) (b) 1., 767.33 (4) (d), 769.313, ~~802.05~~ 895.025, 814.245, 895.035 (4), 895.10 (3), 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:

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

814.29 **(3)** (a) A request for leave to commence or defend an action, proceeding, writ of error or appeal without being required to pay fees or costs or to give security for costs constitutes consent of the affiant and counsel for the affiant that if the judgment is in favor of the affiant the court may order the opposing party to first pay the amount of unpaid fees and costs, including attorney fees under ss. 802.05 ~~and~~, 804.12 (1) (c), and 895.025 and under 42 USC 1988 and to pay the balance to the plaintiff.

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

895.025 Damages for maintaining certain claims and counterclaims. **(1)** A party or a party's attorney is subject to damages for costs and fees under this section for commencing, using, or continuing an action, special proceeding, counterclaim, defense, cross complaint, or appeal to which any of the following applies:

(a) The action, special proceeding, counterclaim, defense, cross complaint, or appeal 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, cross complaint, or appeal 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.

(2) Upon either party's motion made at any time during the proceeding or upon judgment, if a court finds, upon clear and convincing evidence, that sub. (1) (a) or (b) applies to 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, the court:

(a) May, if the party served with the motion withdraws, or appropriately corrects, the action, special proceeding, counterclaim, defense, or cross complaint within 21 days after service of the motion, or within such other period as the court may prescribe, award to the party making the motion, as damages, the actual costs incurred by the party as a result of the action, special proceeding, counterclaim, defense, or cross complaint, including the actual reasonable attorney fees the party incurred, including fees incurred in any dispute over the application of this section. In determining whether to award, and the appropriate amount of, damages under this paragraph, the court shall take into consideration the timely withdrawal or correction made by the party served with the motion.

(b) Shall, if a withdrawal or correction under par. (a) is not timely made, award to the party making the motion, as damages, the actual costs incurred by the party as a result of the action, special proceeding, counterclaim, defense, or cross complaint, including the actual reasonable attorney fees the party incurred, including fees incurred in any dispute over the application of this section.

(2m) If a party makes a motion under sub. (2), a copy of that motion and a notice of the date of the hearing on that motion shall be served on any party who is not represented by counsel only by personal service or by sending the motion to the party by registered mail.

(3) If an award under this section is affirmed upon appeal, the appellate court shall, upon completion of the appeal, remand the action to the trial court to award damages to compensate the successful party for the actual reasonable attorneys fees the party incurred in the appeal.

(4) If the appellate court finds that sub. (1) (a) or (b) applies to an appeal, the appellate court shall, upon completion of the appeal, remand the action to the trial court to award damages to compensate the successful party for all the actual reasonable attorneys fees the party incurred in the appeal. An appeal is subject to this subsection in its entirety if any element necessary to succeed on the appeal is supported solely by an argument that is described under sub. (1) (a) or (b).

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

(6) This section does not apply to criminal actions or civil forfeiture actions. Subsection (4) does not apply to appeals under s. 809.107, 809.30, or 974.05 or to appeals of civil forfeiture actions.

SECTION 6. Initial applicability.

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

(END)

2005 WI 86

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

JUN 21, 2005

Cornelia G. Clark
Clerk of Supreme Court
Madison, WI

By order dated March 31, 2005, a majority of the court adopted a petition filed 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.

The court now issues this supplemental order, effective July 1, 2005, as follows:

Section 1. 230.85 (3) (b) of the statutes is amended to read:

230.85 (3) (b) If, after hearing, the division of equal rights finds that the respondent did not engage in or threaten a retaliatory action it shall order the complaint dismissed. The division of equal rights shall order the employee's appointing authority to insert a copy of the findings and orders into the employee's personnel file and, if the respondent is a natural person, order the respondent's appointing authority to insert such a copy into the respondent's personnel file. If the division of equal rights finds by unanimous vote that the employee filed a frivolous complaint it may order payment of the respondent's reasonable actual attorney fees and actual costs. Payment may be assessed against either the employee or the employee's attorney, or assessed so that the employee and the employee's attorney each pay a portion. To find a complaint frivolous the division of equal rights must find that ~~either s. 814.025 (3) (a) or (b) applies or that both s. 814.025 (3) (a) and (b) apply~~ s. 802.05 (2) has been violated.

NOTE: Amends cross-reference in accordance with the repeal and recreation of s. 802.05 by S. Ct. Order 03-06.

Section 2. 767.293 (6) of the statutes is amended to read:

767.293 (6) Section ~~814.025~~ 802.05 (2) applies to the filing of an affidavit under this section.

NOTE: Amends cross-reference in accordance with the repeal and recreation of s. 802.05 by S. Ct. Order 03-06.

Section 3. 801.02 (7) (d) of the statutes is amended to read:

801.02 (7) (d) If the prisoner seeks leave to proceed without giving security for costs or without the payment of any service or fee under s. 814.29, the court shall dismiss any action or special proceeding, including a petition for a common law writ of certiorari, commenced by any prisoner if that prisoner has, on 3 or more prior occasions, while he or she was incarcerated, imprisoned, confined or detained in a jail or prison, brought an appeal, writ of error, action or special proceeding, including a petition for a common law writ of certiorari, that was dismissed by a state or federal court for any of the reasons listed in s. 802.05 ~~(3)~~ (4) (b) 1. to 4. The court may permit a prisoner to commence the action or special proceeding, notwithstanding this paragraph, if the court determines that the prisoner is in imminent danger of serious physical injury.

NOTE: Amends cross-reference in accordance with the repeal and recreation of s. 802.05 by S. Ct. Order 03-06, which moves provisions relating to prisoner litigation from s. 802.05 (3) to s. 802.05 (4).

Section 4. 802.05 (4) (b) 1. of the statutes is amended to read:

802.05 (4) (b) 1. The action or proceeding is frivolous, as determined ~~under sub. (b)~~ by a violation of sub. (2).

NOTE: Corrects technical error in S. Ct. Order 03-06.

Section 5. 802.06 (1) of the statutes is amended to read:

802.06 (1) When presented. Except as provided in sub. (1m) or when a court dismisses an action or special proceeding under

s. 802.05 ~~(3)~~ (4), a defendant shall serve an answer within 45 days after the service of the complaint upon the defendant. Except as provided in sub. (1m), if a guardian ad litem is appointed for a defendant, the guardian ad litem shall have 45 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 45 days after the service upon the party. The plaintiff shall serve a reply to a counterclaim in the answer within 45 days after service of the answer. The state or an agency of the state or an officer, employee or agent of the state 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 45 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.

NOTE: Amends cross-reference in accordance with the repeal and recreation of s. 802.05 by S. Ct. Order 03-06, which moves provisions relating to prisoner litigation from s. 802.05 (3) to s. 802.05 (4).

Section 6. 809.103 (2) (a) of the statutes is amended to read:

809.103 (2) (a) Is frivolous, as determined under s. ~~814.025 (3)~~ 802.05 (2).

NOTE: Amends cross-reference in accordance with the repeal and recreation of s. 802.05 by S. Ct. Order 03-06.

Section 7. 814.04 (intro.) of the statutes is amended to read:

814.04 (intro.) Except as provided in ss. 93.20, 100.30 (5m), 106.50 (6) (i) and (6m) (a), 115.80 (9), 281.36 (2) (b) 1., 767.33 (4) (d), 769.313, ~~814.025~~ 802.05, 814.245, 895.035 (4), 895.10 (3), 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:

NOTE: Amends cross-reference in accordance with the repeal and recreation of s. 802.05 by S. Ct. Order 03-06.

Section 8. 814.29 (3) (a) of the statutes is amended to read:

814.29 (3) (a) A request for leave to commence or defend an action, proceeding, writ of error or appeal without being required to pay fees or costs or to give security for costs constitutes consent of the affiant and counsel for the affiant that if the judgment is in favor of the affiant the court may order the opposing party to first pay the amount of unpaid fees and costs, including attorney fees under ss. 802.05~~,~~ and 804.12 (1) (c) ~~and 814.025~~ and under 42 U.S.C. § 1988 and to pay the balance to the plaintiff.

NOTE: Amends cross-reference in accordance with the repeal of s. 814.025 and the repeal and recreation of s. 802.05 by S. Ct. Order 03-06.

IT IS ORDERED that notice of these amendments 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.

JUSTICE PATIENCE DRAKE ROGGENSACK wrote a dissent to the order adopting rules petition 03-06, joined by Justices JON P. WILCOX and DAVID T. PROSSER. JUSTICE DAVID T. PROSSER also wrote a brief dissent to the order, joined by JUSTICE JON P. WILCOX. See 2005 WI 38, S. Ct. Order 03-06, filed March 31, 2005.

Therefore for the reasons set forth in those written dissents, JUSTICES WILCOX, PROSSER and ROGGENSACK dissent from this supplemental order as well.

Dated at Madison, Wisconsin, this 21st day of June, 2005.

BY THE COURT:

Cornelia G. Clark
Clerk of Supreme Court

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 attorney 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) 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 by a violation of sub. (2).

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) 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) 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.

History: *Sup. Ct. Order, 67 Wis. 2d 585, 622 (1975); 1975 c. 218; 1987 a. 256; Sup. Ct. Order, 161 Wis. 2d xvii (1991); Sup. Ct. Order, 171 Wis. 2d xix (1992); 1997 a. 133; Sup. Ct. Order No. 03-06, 2005 WI 38, 278 Wis. 2d xiii; Sup. Ct. Order No. 03-06A, 2005 WI 86, 280 Wis. 2d xiii; 2005 a. 253.*

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, s. 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).*

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, s. 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., 503 U.S. 131 (1992); Business Guides, Inc. v. Chromatic Communications Enter. Inc., 498 U.S. 533 (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. s. 1927. See Chambers v. NASCO, 501 U.S. 32 (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.

This section does not allow a "good faith" defense, but imposes an affirmative duty of reasonable inquiry before filing. A party prevailing on appeal in defense of an award under this section is entitled to a further award without showing that the appeal itself is frivolous under s. 809.25 (3). Riley v. Isaacson, 156 Wis. 2d 249, 456 N.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. This section places a personal obligation on the attorney to assure 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 Wis. 2d 396, 542 N.W.2d 454 (1996), 94-2121.

The return of a writ of certiorari is an "other document" under this section. Attorney failure to verify its correctness before signing the return was ground for sanctions. State ex rel. Campbell v. Town of Delavan, 210 Wis. 2d 239, 565 N.W.2d 209 (Ct. App. 1997), 96-1291.

In determining the reasonableness of an attorney's inquiry, a court must consider: 1) the amount of time the attorney had to investigate the claims; 2) the extent to which the attorney had to rely on the client for the underlying facts; 3) whether the case was accepted from another attorney; 4) the complexity of the facts; and 5) whether discovery would benefit the factual record. At minimum some affirmative investigation is required. Belich v. Szymaszek, 224 Wis. 2d 419, 592 N.W.2d 254 (Ct. App. 1999), 97-3447.

The incorporation of this section by s. 814.025 allows the trial court on a motion filed under s. 814.025 to award attorney fees based on both sections. Belich v. Szymaszek, 224 Wis. 2d 419, 592 N.W.2d 254 (Ct. App. 1999), 97-3447.

A plaintiff need not as a matter of course exhaust outside sources of information before embarking on formal discovery. However, a plaintiff may not rely on formal discovery to establish the factual basis of its cause of action, thereby escaping the mandates of ss. 802.05 and 814.025, when the required factual basis could be established without discovery. Jandrt v. Jerome Foods, Inc. 227 Wis. 2d 531, 597 N.W.2d 744 (1999), 98-0885.

The standard for determining whether a claim may be dismissed under sub. (3) (b) 4. is the same standard applied in a normal civil case for failure to state a claim upon which relief can be granted. A case should be dismissed only if it is quite clear that under no circumstances can a plaintiff recover. State ex rel.

Adell v. Smith, 2001 WI App 168, 247 Wis. 2d 260, 633 N.W.2d 231, 00-0070.

A stamped reproduction of a signature does not satisfy s. 801.09 (3), and correcting the signature a year after receiving notice of the defect is not timely under sub. (1) (a). The error must be promptly corrected, or else the certification statute and the protection it was intended to afford is rendered meaningless. Novak v. Phillips, 2001 WI App 156, 246 Wis. 2d 673, 631 N.W.2d 635, 00-2416. See also Schaefer v. Riegelman, 2002 WI 18, 250 Wis. 2d 494, 639 N.W.2d N.W.2d 715, 00-2157 reversing the holding of Novak that the error was technical and not fundamental.

A summons and complaint signed by an attorney not licensed in the state contained a fundamental defect that deprived the circuit court of jurisdiction even though the signature was made on behalf and at the direction of a licensed attorney. Schaefer v. Riegelman, 2002 WI 18, 250 Wis. 2d 494, 639 N.W.2d N.W.2d 715, 00-2157.

The failure to sign a notice of appeal can be corrected and does not compel immediate dismissal. State v. Seay, 2002 WI App 37, 250 Wis. 2d 761, 641 N.W.2d 437, 00-3490.

The handwritten signature on a summons and complaint of an attorney of record who had been suspended from the practice of law was a fundamental defect. The defect was not cured when an amended complaint was filed with new counsel's signature but when no amended or corrected summons was ever filed. Town of Dunkirk v. City of Stoughton, 2002 WI App 280, 258 Wis. 2d 805, 654 N.W.2d 488, 02-0166.

The circuit court's sua sponte dismissal of a petition for a writ of certiorari did not violate the right to due process or equal protection. Due process was satisfied because of constructive notice under sub. (3) (b), together with post-dismissal procedures available to the prisoner. Equal protection was satisfied because the initial pleading review procedure satisfied the rational basis test. Schatz v. McCaughtry, 2003 WI 80, 263 Wis. 2d 83, 664 N.W.2d 596, 01-0793.

When petitioners and their counsel knew events related in their petition had not occurred when the petition was signed and sworn to and had not occurred when they filed the petition with the court, the trial court could reasonably decide that constituted a violation of the obligation to make a reasonable inquiry to insure that their petition was well-grounded in fact. The court properly rejected their rationale that the event did come about as expected. Robinson v. Town of Bristol, 2003 WI App 97, 264 Wis. 2d 318, 667 N.W.2d 14, 02-1247.

Sub. (1) expressly authorizes sanctions against a represented client who has not signed a pleading and does not require the signing attorney to personally have the improper purpose. Lack of evidence that a signing attorney was or should have been aware the client was using the complaint for an improper purpose does not result in the conclusion that the complaint was not used for an improper purpose, but is relevant to whom to sanction. Wisconsin Chiropractic Association v. Chiropractic Examining Board, 2004 WI App 30, 269 Wis. 2d 837, 676 N.W.2d 580, 03-0933.

In order to confer jurisdiction on the court of appeals, a notice of appeal filed by counsel must contain the handwritten signature of an attorney authorized to practice law in Wisconsin. Counsel cannot delegate the duty to affix a signature on a notice of appeal to a person not authorized to practice law in Wisconsin. When a notice of appeal is not signed by an attorney when an attorney is required, the notice of appeal is fundamentally defective and cannot confer jurisdiction. Brown v. MR Group, LLC 2004 WI App 121, 274 Wis. 2d 804, 683 N.W.2d 804, 03-2309.

To avoid permitting prisoners to easily avoid the judicial screening requirement that is central to the purpose s. 802.05 (3), prisoners may not amend their initial pleadings as a matter of course under s. 802.09 (1). A prisoner's amendment of an initial pleading is subject to the judicial screening requirement of s. 802.05 (3), and a court must review the proposed amended pleading under that subsection before granting the prisoner leave to amend. Lindell v. Litscher, 2005 WI App 39, 280 Wis. 2d 159, 694 N.W.2d 396, 03-2477.

If a pleading that does not conform to the subscription requirement of sub. (1) (a) is characterized as containing a fundamental defect that normally deprives the court of jurisdiction, that pleading is curable. Rabideau v. Stiller, 2006 WI App 155, 295 Wis. 2d 417, 720 N.W.2d 108, 05-2868.

The Effect of Jandrt on Satellite Litigation. Geske & Gleisner. Wis. Law. May 2000.

Frivolous Sanction Law in Wisconsin. Geske & Gleisner. Wis. Law. Feb. 2006.

NOTE: The above case annotations refer to s. 802.05 as it existed prior to its repeal and recreation by SCO 03-06.

This section is a procedural rule and procedural rules generally have retroactive application. However, this section, as affected by Supreme Court Order 03-06, is not to be applied retroactively when the new rule diminishes a contract, disturbs vested rights, or imposes an unreasonable burden on the party charged with complying with the new rule's requirements. Trinity Petroleum, Inc. v. Scott Oil Company, Inc. 2007 WI 88, 302 Wis. 2d 299, 735 N.W.2d 1, 05-2837.

Sub. (3) (a) 1. requires the party seeking sanctions to first serve the motion on the potentially sanctionable party, who then has 21 days to withdraw or appropriately correct the claimed violation. The movant cannot file a motion for sanctions unless that time period has expired without a withdrawal or correction. A postjudgment sanctions motion does not comply with sub. (3) (a) 1. It would wrench both the language and the purpose of the rule to permit an informal warning to substitute for service of the motion. Ten Mile Investments, LLC v. Sherman, 2007 WI App 253, 306 Wis. 2d 799, 743 N.W.2d 442, 06-0353.

Under sub. (1), every motion filed in court must be signed by an attorney or it shall be stricken. Sub. (1) required the circuit court to strike from the record an affidavit and proposed order submitted by a child support agency that was not executed by an attorney. Teasdale v. Marinette County Child Support Agency, 2009 WI App 152, 321 Wis. 2d 647, 775 N.W.2d 123, 08-2827.

State of Wisconsin
2009 – 2010 LEGISLATURE

LRB-2594/1
PJH:

2009 SENATE BILL 197

May 7, 2009 – Introduced by Senators GROTHMAN, OLSEN, SCHULTZ, A. LASEE, KEDZIE, LAZICH and DARLING, cosponsored by Representatives GUNDRUM, SUDER, KESTELL, LEMAHIEU, TAUCHEN, TOWNSEND, PETROWSKI, VOS, GUNDERSON, KNODL, LOTHIAN, BIES, BALLWEG, SPANBAUER, NASS, A. OTT and STRACHOTA. Referred to Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing.

AN ACT ***to amend*** 230.85 (3) (b), 802.10 (7), 809.103 (2) (a), 814.04 (intro.) and 814.29 (3) (a); and ***to create*** 895.044 of the statutes; **relating to:** damages for frivolous claims.

Analysis by the Legislative Reference Bureau

Under current law, every document submitted to the court must be signed by a party or, if the party has an attorney, by the attorney. By signing the document, current law provides that the person is certifying that the document is not presented for any improper purpose, such as to harass or cause unnecessary delay, that the claims made in the document are warranted by existing law or a nonfrivolous argument for the extension, modification, or reversal of the law, that the allegations presented in the document are likely to have evidentiary support, and that any factual denials in the document are warranted by evidence or, if so identified, reasonably based on a lack of information or belief. Currently, if the court determines that any of these certifications are not true, the court may impose an appropriate sanction on the responsible attorney or party. Under current law, the sanction must be limited to what is sufficient to deter repetition of the conduct, and may include payment of the reasonable attorney fees or other expenses resulting from the improper conduct. A court may not impose monetary sanctions upon a represented party for making a claim that is not based on existing law or a nonfrivolous argument for the extension, modification, or reversal of the law, and before the court imposes any monetary sanctions, the court must issue an order to show cause regarding the dismissal or settlement of the claim.

Under this bill, in civil actions, a party or his or her attorney may be liable for costs and fees for beginning, using, or continuing an action if that is done solely for the purpose of harassing or maliciously injuring another and the party or attorney knew that there was no reasonable basis in law for the conduct or no good faith argument for an extension, modification, or reversal of the law. The bill allows a party to an action to ask the court by motion to determine if another party has violated these provisions, and if, by clear and convincing evidence, the court so finds, the court may do one of the following: decide whether to must

1. If the offending party withdraws or corrects the improper conduct within 21 days or a time set by the court, award the moving party the actual costs incurred as a result of the conduct, including reasonable attorney fees, taking into consideration the offending party's mitigating conduct.

2. If the offending party does not timely withdraw or correct the improper conduct, award the moving party the actual costs incurred as a result of the conduct, including reasonable attorney fees.

Under the bill, if an award of costs for violating these provisions is affirmed on appeal, the appellate court is required to send the action to the lower court to award the damages necessary to compensate the successful party for the actual reasonable attorney fees incurred in the appeal. In addition, if the appellate court finds that a party has committed a violation of one of these provisions in an appeal, the appellate court must, after completion of the appeal, send the action back to the lower court to award the damages necessary to compensate the offended party for the actual reasonable attorney fees incurred in the appeal.

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

SECTION 1. 230.85 (3) (b) of the statutes is amended to read:

230.85 **(3)** (b) If, after hearing, the division of equal rights finds that the respondent did not engage in or threaten a retaliatory action it shall order the complaint dismissed. The division of equal rights shall order the employee's appointing authority to insert a copy of the findings and orders into the employee's personnel file and, if the respondent is a natural person, order the respondent's appointing authority to insert such a copy into the respondent's personnel file. If the division of equal rights finds by unanimous vote that the employee filed a frivolous complaint it may order payment of the respondent's reasonable actual attorney fees and actual costs. Payment may be assessed against either the employee or the

employee's attorney, or assessed so that the employee and the employee's attorney each pay a portion. To find a complaint frivolous the division of equal rights must find that s. 802.05 (2) or 895.044 has been violated.

SECTION 2. 802.10 (7) of the statutes is amended to read:

802.10 **(7)** SANCTIONS. Violations of a scheduling or pretrial order are subject to ss. 802.05, 804.12 ~~and~~, 805.03, and 895.044.

SECTION 3. 809.103 (2) (a) of the statutes is amended to read:

809.103 **(2)** (a) Is frivolous, as determined under s. 802.05 (2) or 895.044.

SECTION 4. 814.04 (intro.) of the statutes is amended to read:

814.04 Items of costs. (intro.) Except as provided in ss. 93.20, 100.195 (5m) (b), 100.30 (5m), 106.50 (6) (i) and (6m) (a), 115.80 (9), 281.36 (2) (b) 1., 767.553 (4) (d), 769.313, 802.05, 814.245, 895.035 (4), 895.044, 895.443 (3), 895.444 (2), 895.445 (3), 895.446 (3), 895.506, 943.212 (2) (b), 943.245 (2) (d), 943.51 (2) (b), and 995.10 (3), when allowed costs shall be as follows:

SECTION 5. 814.29 (3) (a) of the statutes is amended to read:

814.29 **(3)** (a) A request for leave to commence or defend an action, proceeding, writ of error or appeal without being required to pay fees or costs or to give security for costs constitutes consent of the affiant and counsel for the affiant that if the judgment is in favor of the affiant the court may order the opposing party to first pay the amount of unpaid fees and costs, including attorney fees under ss. 802.05 ~~and~~, 804.12 (1) (c), and 895.044 and under 42 USC 1988 and to pay the balance to the plaintiff.

SECTION 6. 895.044 of the statutes is created to read:

895.044 Damages for maintaining certain claims and counterclaims.

(1) A party or a party's attorney may be liable for costs and fees under this section

for commencing, using, or continuing an action, special proceeding, counterclaim, defense, cross complaint, or appeal to which any of the following applies:

(a) The action, special proceeding, counterclaim, defense, cross complaint, or appeal 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, cross complaint, or appeal 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.

(2) Upon either party's motion made at any time during the proceeding or upon judgment, if a court finds, upon clear and convincing evidence, that sub. (1) (a) or (b) applies to 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, the court:

(a) May, if the party served with the motion withdraws, or appropriately corrects, the action, special proceeding, counterclaim, defense, or cross complaint within 21 days after service of the motion, or within such other period as the court may prescribe, award to the party making the motion, as damages, the actual costs incurred by the party as a result of the action, special proceeding, counterclaim, defense, or cross complaint, including the actual reasonable attorney fees the party incurred, including fees incurred in any dispute over the application of this section. In determining whether to award, and the appropriate amount of, damages under this paragraph, the court shall take into consideration the timely withdrawal or correction made by the party served with the motion.

(b) Shall, if a withdrawal or correction under par. (a) is not timely made, award to the party making the motion, as damages, the actual costs incurred by the party as a result of the action, special proceeding, counterclaim, defense, or cross complaint, including the actual reasonable attorney fees the party incurred, including fees incurred in any dispute over the application of this section.

~~(2m)~~ (B)—(3) If a party makes a motion under sub. (2), a copy of that motion and a notice of the date of the hearing on that motion shall be served on any party who is not represented by counsel only by personal service or by sending the motion to the party by registered mail.

~~(3)~~ (B)—(4) If an award under this section is affirmed upon appeal, the appellate court shall, upon completion of the appeal, remand the action to the trial court to award damages to compensate the successful party for the actual reasonable attorney fees the party incurred in the appeal.

~~(4)~~ (B)—(5) If the appellate court finds that sub. (1) (a) or (b) applies to an appeal, the appellate court shall, upon completion of the appeal, remand the action to the trial court to award damages to compensate the successful party for all the actual reasonable attorney fees the party incurred in the appeal. An appeal is subject to this subsection in its entirety if any element necessary to succeed on the appeal is supported solely by an argument that is described under sub. (1) (a) or (b).

~~(5)~~ (B)—(6) The costs and fees awarded under subs. (2), ~~(3)~~ (4), and ~~(4)~~ (5) may be assessed fully against the party bringing the action, special proceeding, cross complaint, defense, counterclaim, or appeal or the attorney representing the party, or both, jointly and severally, or may be assessed so that the party and the attorney each pay a portion of the costs and fees.

(B) (7) **(6)** This section does not apply to criminal actions or civil forfeiture actions. Subsection (4) (5) does not apply to appeals under s. 809.107, 809.30, or 974.05 or to appeals of civil forfeiture actions. criminal or

SECTION 7. Initial applicability.

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

SECTION 8. Effective date.

(1) This act takes effect on the first day of the 4th month beginning after publication.

(END)

State of Wisconsin
2011 - 2012 LEGISLATURE

LRB-0369/1
PJH:nwn:md

2011 BILL

AN ACT ***to amend*** 230.85 (3) (b), 802.10 (7), 809.103 (2) (a), 814.04 (intro.) and 814.29 (3) (a); and ***to create*** 895.044 of the statutes; **relating to:** damages for frivolous claims.

Analysis by the Legislative Reference Bureau

Under current law, every document submitted to a court in a civil case must be signed by a party or, if the party has an attorney, by the attorney. Current law provides that the person, by signing the document, is certifying that the document is not presented for any improper purpose, such as to harass or cause unnecessary delay, that the claims made in the document are warranted by existing law or a nonfrivolous argument for the extension, modification, or reversal of the law, that the allegations presented in the document are likely to have evidentiary support, and that any factual denials in the document are warranted by evidence or, if so identified, are reasonably based on a lack of information or belief. Currently, if the court determines that any of these certifications are not true, the court may impose an appropriate sanction on the responsible attorney or party. Under current law, the sanction must be limited to what is sufficient to deter repetition of the conduct, and may include payment of the reasonable attorney fees or other expenses resulting from the improper conduct. A court may not impose monetary sanctions upon a represented party for making a claim that is not based on existing law or a nonfrivolous argument for the extension, modification, or reversal of the law, and before the court imposes any monetary sanctions, the court must issue an order to show cause regarding the dismissal or settlement of the claim.

Under this bill, in civil actions, a party or his or her attorney may be liable for costs and fees for beginning, using, or continuing an action if that is done solely for the purpose of harassing or maliciously injuring another and the party or attorney knew that there was no reasonable basis in law for the conduct or no good faith argument for an extension, modification, or reversal of the law. The bill allows a party to an action to ask the court by motion to determine if another party has violated these provisions, and if, by clear and convincing evidence, the court so finds, the court must do one of the following:

1. If the offending party withdraws or corrects the improper conduct within 21 days or a time set by the court, decide whether to award the moving party the actual costs incurred as a result of the conduct, including reasonable attorney fees, taking into consideration the offending party's mitigating conduct.

2. If the offending party does not timely withdraw or correct the improper conduct, award the moving party the actual costs incurred as a result of the conduct, including reasonable attorney fees.

Under the bill, if an award of costs for violating these provisions is affirmed on appeal, the appellate court is required to send the action to the lower court to award the damages necessary to compensate the successful party for the actual reasonable attorney fees incurred in the appeal. In addition, if the appellate court finds that a party has committed a violation of one of these provisions in an appeal, the appellate court must, after completion of the appeal, send the action back to the lower court to award the damages necessary to compensate the offended party for the actual reasonable attorney fees incurred in the appeal.

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

SECTION 1. 230.85 (3) (b) of the statutes is amended to read:

230.85 **(3)** (b) If, after hearing, the division of equal rights finds that the respondent did not engage in or threaten a retaliatory action it shall order the complaint dismissed. The division of equal rights shall order the employee's appointing authority to insert a copy of the findings and orders into the employee's personnel file and, if the respondent is a natural person, order the respondent's appointing authority to insert such a copy into the respondent's personnel file. If the division of equal rights finds by unanimous vote that the employee filed a frivolous complaint it may order payment of the respondent's reasonable actual attorney fees and actual costs. Payment may be assessed against either the employee or the

employee's attorney, or assessed so that the employee and the employee's attorney each pay a portion. To find a complaint frivolous the division of equal rights must find that s. 802.05 (2) or 895.044 has been violated.

SECTION 2. 802.10 (7) of the statutes is amended to read:

802.10 **(7)** SANCTIONS. Violations of a scheduling or pretrial order are subject to ss. 802.05, 804.12 ~~and~~, 805.03, and 895.044.

SECTION 3. 809.103 (2) (a) of the statutes is amended to read:

809.103 **(2)** (a) Is frivolous, as determined under s. 802.05 (2) or 895.044.

SECTION 4. 814.04 (intro.) of the statutes is amended to read:

814.04 Items of costs. (intro.) Except as provided in ss. 93.20, 100.195 (5m) (b), 100.30 (5m), 106.50 (6) (i) and (6m) (a), 111.397 (2) (a), 115.80 (9), 281.36 (2) (b) 1., 767.553 (4) (d), 769.313, 802.05, 814.245, 895.035 (4), 895.044, 895.443 (3), 895.444 (2), 895.445 (3), 895.446 (3), 895.506, 943.212 (2) (b), 943.245 (2) (d), 943.51 (2) (b), and 995.10 (3), when allowed costs shall be as follows:

SECTION 5. 814.29 (3) (a) of the statutes is amended to read:

814.29 **(3)** (a) A request for leave to commence or defend an action, proceeding, writ of error or appeal without being required to pay fees or costs or to give security for costs constitutes consent of the affiant and counsel for the affiant that if the judgment is in favor of the affiant the court may order the opposing party to first pay the amount of unpaid fees and costs, including attorney fees under ss. 802.05 ~~and~~, 804.12 (1) (c), and 895.044 and under 42 USC 1988 and to pay the balance to the plaintiff.

SECTION 6. 895.044 of the statutes is created to read:

895.044 Damages for maintaining certain claims and counterclaims. **(1)** A party or a party's attorney may be liable for costs and fees under this section

for commencing, using, or continuing an action, special proceeding, counterclaim, defense, cross complaint, or appeal to which any of the following applies:

(a) The action, special proceeding, counterclaim, defense, cross complaint, or appeal 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, cross complaint, or appeal 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.

(2) Upon either party's motion made at any time during the proceeding or upon judgment, if a court finds, upon clear and convincing evidence, that sub. (1) (a) or (b) applies to 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, the court:

(a) May, if the party served with the motion withdraws, or appropriately corrects, the action, special proceeding, counterclaim, defense, or cross complaint within 21 days after service of the motion, or within such other period as the court may prescribe, award to the party making the motion, as damages, the actual costs incurred by the party as a result of the action, special proceeding, counterclaim, defense, or cross complaint, including the actual reasonable attorney fees the party incurred, including fees incurred in any dispute over the application of this section. In determining whether to award, and the appropriate amount of, damages under this paragraph, the court shall take into consideration the timely withdrawal or correction made by the party served with the motion.

(b) Shall, if a withdrawal or correction under par. (a) is not timely made, award to the party making the motion, as damages, the actual costs incurred by the party as a result of the action, special proceeding, counterclaim, defense, or cross complaint, including the actual reasonable attorney fees the party incurred, including fees incurred in any dispute over the application of this section.

(3) If a party makes a motion under sub. (2), a copy of that motion and a notice of the date of the hearing on that motion shall be served on any party who is not represented by counsel only by personal service or by sending the motion to the party by registered mail.

(4) If an award under this section is affirmed upon appeal, the appellate court shall, upon completion of the appeal, remand the action to the trial court to award damages to compensate the successful party for the actual reasonable attorney fees the party incurred in the appeal.

(5) If the appellate court finds that sub. (1) (a) or (b) applies to an appeal, the appellate court shall, upon completion of the appeal, remand the action to the trial court to award damages to compensate the successful party for all the actual reasonable attorney fees the party incurred in the appeal. An appeal is subject to this subsection in its entirety if any element necessary to succeed on the appeal is supported solely by an argument that is described under sub. (1) (a) or (b).

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

(7) This section does not apply to criminal actions or civil forfeiture actions. Subsection (5) does not apply to appeals under s. 809.107, 809.30, or 974.05 or to appeals of criminal or civil forfeiture actions.

SECTION 7. Initial applicability.

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

SECTION 8. Effective date.

(1) This act takes effect on the first day of the 4th month beginning after publication.

(END)