

Wis. Stat. § 895.044 and Frivolous Lawsuits:
Protecting Legal Creativity, Your Client and Yourself

Sarah J. Knutson
Associate Attorney
Urban & Taylor s.c.
4701 N Port Washington Road
Milwaukee, WI 53212
sknutson@wisconsininjury.com

I. Applicable Statutes and Rules

- a. Ethically, attorneys are required to only file non-frivolous, meritorious claims.

SCR 20:3.1: Meritorious claims and contentions states, in relevant part, the following:

- (a) Inrepresenting a client, a lawyer shall not:
- (1) knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law;
 - (2) knowingly advance a factual position unless there is a basis for doing so that is not frivolous; or
 - (3) file a suit, assert a position, conduct a defense, delay a trial or take other action on behalf of the client when the lawyer knows or when it is obvious that such an action would serve merely to harass or maliciously injure another.
- b. If attorneys or pro se persons file claims or defenses that are found to be frivolous then they will be subject to sanctions by the court. Below are three (3) statutes that currently and previously governed sanctions for frivolous claims or defenses:

Wis. Stat. § 895.044 (created by 2011 Wis. Act 2) states:

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. (emphasis added).

Wis. Stat. § 802.05, in relevant part, states:

(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 subs. 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.

Wis. Stat. § 814.025 (2003-2004) – repealed in 2005

Costs upon frivolous claims and counterclaims

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

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

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

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

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

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

1. The Wisconsin Supreme Court has rule making authority under Wis. Stat. § 751.12 and under its administrative authority over all courts conferred by Article VII, §3 of the Wisconsin Constitution.
2. Final Order dated March 31, 2005 (effective July 1, 2005), repealed section 814.025 Wis. Stats., and also repealed and recreated sec. 802.05.

3. The decision and order can be found here:
<http://www.wicourts.gov/sc/rulhear/DisplayDocument.html?content=html&seqNo=928>

c. **Key Points**

- i. The new section 895.044:
 1. Wis. Stat. § 895.044 was enacted as part of Governor Walker's "tort reform"
 2. Most significant impact of § 895.044:
 - a. Judges must award sanctions after the expiration of the 21-day safe harbor which includes all actual costs and reasonable attorneys' fees. This takes away the discretion of the trial judge to not only award sanctions but also sets a "minimum" sanction of actual costs and reasonable attorneys' fees.
 3. 895.044 further seeks to prevent "frivolous" claims by mandating that the trial judge exercise his discretion to impose even if the pleading is cured within the 21-day safe harbor.
 4. §895.044 also applies to appeals.
- ii. Wis. Stat. § 802.05
 1. It is not repealed. It was actually repealed and recreated in 2005 to accord with FRCP Rule 11.
 2. It is expected to work with 895.044. See Wis. Stat. § 802.10 (7).
- iii. There is still apparently a lot of overlap between § 895.044 and § 802.05 as there was between §814.025 and § 802.05.
- iv. The new § 895.044 retains the similar procedural steps for challenging a frivolous pleading which is a motion brought by either party or by the court's own initiative.
- v. The 21-day safe harbor to cure pleadings remains intact.
- vi. Procedural Difference
 1. Under §802.05, the motion is to only be served upon the party (not filed with the court) and if it is cured within the 21-day safe harbor then the motion is not filed. If the pleading is not cured then the motion is filed with the court.
 2. Under §895.044, the court must know consider the timely withdrawal or modification of the pleading and the court may still award sanctions even if the pleading is corrected within the 21-day safe harbor. This suggests that the motion must be served on the party and filed with the court to allow the court to consider it.

II. A Determination of Frivolousness

- a. Commencement – Whether actions are commenced frivolously:
 - i. The nature and extent of the investigation undertaken prior to filing suit
 - ii. The question of “how much” investigation is completely within the discretion of the trial court provided the court:
 1. Examined the relevant facts;
 2. Applied the proper law or standard;
 3. Demonstrated rational process; and
 4. Reached a conclusion that a reasonable judge could reach.
 - iii. Frivolous commencement is only an issue of fact.
 - iv. Clear and convincing standard
- b. Continued – Whether actions are continued frivolously:
 - i. Frivolous continuance is a mixed question of law and fact
 - ii. Fact: What the attorney knew or should have known
 - iii. Law: Whether the trial court’s determination of fact support a conclusion that the lawsuit was continued frivolously
- c. Case law and recent article
 - i. *Jandrt v. Jerome Foods*, 227 Wis. 2d 531, 597 N.W.2d 744 (1999)
 - ii. *Storms v. Action Wisconsin, Inc.*, 2008 WI 56, 750 N.W.2d 739
 - iii. *Keller v. Patterson*, 2012 WI App 78
 1. Note: These cases do not apply § 895.044; however, these decisions are instructive regarding the standards for a determination of frivolousness.
 - iv. Edwards, Timothy, *Tort Reform: Judges now have less discretion in finding frivolousness, imposing sanctions*, Wis. Lawyer, March 16, 2011.

III. Tool to Protect Your Legal Creativity, Your Client & Yourself

- a. Utilizing Wis. Stat. § 804.02 Perpetuation of testimony by deposition
 - i. § 804.02 states, in relevant part:

(1) BEFORE ACTION.

(a) *Petition*. A person who desires to perpetuate personal testimony or that of another person regarding any matter that may be cognizable in any court of this state may file a verified petition in any such court in this state. The petition shall be entitled in the name of the petitioner and shall show:

1. that the petitioner expects to be a party to an action;
2. the subject matter of the expected action and the petitioner's interest therein;
3. the facts which the petitioner desires to establish by the proposed testimony and the petitioner's reasons for desiring to perpetuate it;
4. the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known; and
5. the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(b)Notice and service. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will move the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served either within or without the state in the manner provided in s. [801.11](#) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in s. [801.11](#), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or is an individual adjudicated or alleged to be incompetent, s. [803.01 \(3\)](#) applies.

(c)Order and examination. If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with this chapter; and the court may make orders of the character provided for by ss. [804.09](#) and [804.10](#). For the purpose of applying this chapter to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

- b. This allows a party to file a petition under this statute to open a case file in court to take depositions and do pre-suit discovery. (Note: Opening this action is less expensive than filing suit)
- c. There is no time limit or discovery limit so long as the petition sets forth the requirement for the petitioning party to show. See § 804.02(1)(a)1
 - i. This allows for investigation without the constraints of the 21-day safe harbor
- d. Be conscious of the notice and service requirements set forth in subsection (1)(b).
- e. If the statute of limitations is a concern then this will not be effective because there is no tolling.

IV. Conclusion

- a. Only time will tell how Wis. Stat. § 895.044 is utilized by parties and enforced by the courts.