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## COMMENTS

# IS WISCONSIN'S FRIVOLOUS CLAIM STATUTE FRIVOLOUS? A CRITICAL ANALYSIS OF WIS. STAT. § 814.025

### I. INTRODUCTION

In recent years our courts have been plagued with a dramatic increase in litigation.<sup>1</sup> A few commentators maintain that the increasing congestion of the judicial system can be attributed to the influx of medical malpractice and product liability suits of the 1970s,<sup>2</sup> while others have attributed it to a

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1. The "litigation explosion" has received extensive treatment. See, e.g., Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982); Byrd, *Malicious Prosecution in North Carolina*, 47 N.C.L. REV. 285 (1969); Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); Gold, *Controlling Procedural Abuses: The Role of Costs and Inherent Judicial Authority*, 9 OTTAWA L. REV. 44 (1977); Harper, *Malicious Prosecution, False Imprisonment and Defamation*, 15 TEX. L. REV. 157 (1937); Meadows, *A Frivolous Lawsuit May Destroy the Career of a Professional: Is There No Remedy?*, 12 U. RICH. L. REV. 421 (1983); Owen, *Countersuits Against Attorneys — A Preface*, 33 S.C.L. REV. 313 (1981); Special Project, *Malicious Prosecution*, 33 S.C.L. REV. 317 (1981); Note, *Attorney's Liability to Clients' Adversaries for Instituting Frivolous Lawsuits: A Reassertion of Old Values*, 53 ST. JOHN'S L. REV. 775 (1979); Note, *Massachusetts Prohibits Withdrawal by Court-Appointed Counsel from Potentially Frivolous Appeals*, 16 SUFFOLK U.L. REV. 280 (1982); Comment, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U. CHI. L. REV. 619 (1977); Note, *Habitual Plaintiffs in Federal Court and the Surrogate Pleader Approach*, 45 U. CIN. L. REV. 577 (1976); Note, *Physician Countersuits: Malicious Prosecution, Defamation and Abuse of Process as Remedies for Meritless Medical Malpractice Suits*, 45 U. CIN. L. REV. 604 (1976); Note, *Liability for Proceeding with Unfounded Litigation*, 33 VAND. L. REV. 743 (1980) [hereinafter cited as Note, *Unfounded Litigation*]; Note, *A Lawyer's Duty to Reject Groundless Litigation*, 26 WAYNE L. REV. 1561 (1980) [hereinafter cited as Note, *A Lawyer's Duty*]; Comment, *Counterclaiming for Malicious Prosecution and Abuse of Process: Washington's Response to Unmeritorious Civil Suits*, 14 WILLAMETTE L.J. 401 (1978); Note, *Counterclaim For Malicious Prosecution in the Action Alleged to be Malicious*, 58 YALE L.J. 490 (1949) [hereinafter cited as Note, *Counterclaim*]. For an interesting investigation of ancient sanctions for meritless suits, see Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 YALE L.J. 1218, 1221-27 (1979) [hereinafter cited as Note, *Groundless Litigation*].

2. This litigious trend has risen to epidemic proportions in the medical arena. Consequently, numerous books, articles, and commentaries have been devoted to the medical malpractice crisis. For general comments on the subject, see R. COHEN, *MALPRACTICE* (1979); R. GOTS, *THE TRUTH ABOUT MEDICAL MALPRACTICE* (1975);

host of other reasons.<sup>3</sup> Irrespective of the origin of the present problem, the question still remains: Are there too many lawsuits?<sup>4</sup> This question invariably leads to a recognition of the need to control access to the courts. However, the competing policies that temper a remedy of this nature are society's interest in adjudicatory relief in an adversarial setting versus the individual's interest in freedom from unjustifiable litigation.

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J. GUNTER, *THE MALPRACTITIONERS* (1978); J. KING, *THE LAW OF MEDICAL MALPRACTICE IN A NUTSHELL* (1977); L. LANDER, *DEFECTIVE MEDICINE: RISK, ANGER, AND THE MALPRACTICE CRISIS* (1978); Adler, *Malicious Prosecution Suits as a Counterbalance to Medical Malpractice Suits*, 21 CLEV. ST. L. REV. 51 (1972); Bernstein, *Will No-Fault Insurance End the Medical Malpractice Crisis?*, 1978 HOSP. 40; Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 FORDHAM L. REV. 1003 (1977); Calabresi, *The Problem of Malpractice: Trying to Round Out the Circle*, 27 U. TORONTO L.J. 131 (1977); Gaudineer, *Ethics and Malpractice*, 26 DRAKE L. REV. 88 (1976); Greenbaum, *Physician Countersuits: A Cause Without Action*, 12 PAC. L.J. 745 (1981); Holloway, *Malicious Prosecution Actions by the Medical Profession Against Attorneys Who Unsuccessfully Pursue A Medical Malpractice Suit for a Patient*, TEX. B.J., May 1978, at 421; Schwartz & Komesar, *Doctors, Damages and Deterrence: An Economic View of Medical Malpractice*, 298 NEW ENG. J. MED. 1282 (1977); Yardley, *Malicious Prosecution: A Physician's Need for Reassessment*, 60 CHI.-KENT L. REV. 31 (1984); Note, *Physicians' Actions: The Aftermath of Drago v. Buonagurio*, 44 ALB. L. REV. 188 (1979); Note, *Malicious Prosecution: An Effective Attack on Spurious Medical Malpractice Claims?*, 26 CASE W. RES. L. REV. 653 (1976); Comment, *Countersuits to Legal and Medical Malpractice Actions: Any Chance for Success?*, 65 MARQ. L. REV. 93 (1981); Note, *Malicious Prosecution Liability of Plaintiff's Counsel for an Unwarranted Medical Malpractice Suit: New Developments in Physician Countersuits for Unfounded Medical Malpractice Claims*, 7 N. KY. L. REV. 265 (1980); Comment, *Attorney Liability for Malicious Prosecution and Legal Malpractice: Do They Overlap?*, 8 PAC. L.J. 897 (1977); Annot., 84 A.L.R.3D 555 (1978).

3. Reasons cited for the litigation explosion include: zealous medical malpractice lawyers, breakdown in relationships and the proliferation of lawyers at a rate too great for society to absorb, the heightened expectation of professional performance especially from the increasing number of specialists, the impersonality of professional service delivery, a breakdown in professional screening and discipline caused by the rapid growth in numbers of professionals, the general increase in consumer litigiousness, awareness of one's civil rights, increasing population, and industrial as well as commercial growth. See R. MALLEN & V. LEVIT, *LEGAL MALPRACTICE* 48 (2d ed. 1981); Specter, *Too Many Lawsuits?*, TRIAL, Aug. 1982, at 6. See also Bork, *Dealing With the Overload in Article III Courts*, 70 F.R.D. 231 (1976) ("The reason for increases so large seems apparent. We, along with every other western nation, are steadily transforming ourselves into a highly-regulated welfare state.").

4. The answer to the question of whether there is too much litigation does not turn simply on numbers of cases filed, numbers of months between filings and trials or numbers of dollars required to operate our judicial system. We must consider the kinds of cases that have been filed and the objectives and results of those cases before condemning or limiting citizens' rights of access to the courts. Specter, *supra* note 3, at 6.

If the basis for the increased litigation can be attributed to the fact that the litigation is less than meritorious or has little or no probability of success, there are a number of remedies available to the aggrieved victim. With their genesis stretching from the jurisprudence of ancient Rome,<sup>5</sup> present day remedies afford the victim of a frivolous suit inadequate protection at best.<sup>6</sup> These remedies are primarily judicial in nature. However, recently legislatures in a number of jurisdictions have recognized the need to enact legislation to stem the tide of frivolous actions, cross-complaints, counter-claims, defenses, and appeals.<sup>7</sup> Regardless of their source, these remedies are deficient because they require a finding of malice,<sup>8</sup> a nebulous and archaic concept that has escaped definition by both legislative and judicial lawmakers.

This Comment will analyze the remedies available to the victim of a frivolous claim. As a preliminary matter, the analysis begins with an overview of traditional judicial remedies, with an extended discussion on the element of malice.<sup>9</sup> Next,

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5. "In Rome, good or bad faith was irrelevant and, depending on the nature of their claims, losing complainants could be penalized up to a fifth of the amount for which they had sued." Note, *Groundless Litigation*, *supra* note 1, at 1218 n.3.

6. There have been a number of raging debates and comments written proclaiming the inadequacy of present judicial remedies and urging adoption of other methods. See Note, *A Lawyer's Duty*, *supra* note 1, at 1589 (advocating a suit in negligence for malicious prosecution). *Contra* Bickel v. Mackie, 447 F. Supp. 1376, 1381 (N.D. Iowa 1978) ("While it is true that the attorney owes a general duty to the judicial system, it is not the type of duty which translates into liability for negligence to an opposing party where there is no foreseeable reliance by that party on the attorney's conduct."). See also O'Toole v. Franklin, 279 Or. 513, —, 569 P.2d 561, 567 (1977) (leaving open the possibility of an injured opposing party's action against a negligent attorney, but holding that any such action could only reach injuries already covered by the malicious prosecution tort); Special Project, *supra* note 1, at 328-29 ("adopting the internal sanction that is the pillar of the English system"); Note, *Groundless Litigation*, *supra* note 1, at 1219 (arguing for a return to "historically proven solutions").

7. See, e.g., WIS. STAT. § 814.025 (1983-84). For the full text of the statute, see *infra* note 48. See generally Friedman v. Dozor, 412 Mich. 1, 312 N.W.2d 585 (1981).

8. See *infra* notes 32-46 and accompanying text.

9. Legal remedies most widely recognized by the courts in prosecuting a frivolous action are: (1) common-law tort of malicious prosecution, (2) abuse of process, (3) defamation, (4) professional negligence, (5) prima facie tort, (6) invasion of privacy, (7) intentional infliction of emotional distress, (8) judicially created federal bad faith, (9) contempt sanction, (10) Section 1927 of Title 28 of the United States Code, (11) Rule 37 of the Federal Rules of Civil Procedure, (12) inherent power of courts to promulgate rules affecting attorneys' conduct, and (13) bar disciplinary proceeding. See Friedman v. Dozor, 412 Mich. 1, 312 N.W.2d 585 (1981). See generally Birnbaum, *supra* note 2, at 1003; Special Project, *supra* note 1; Note, *Unfounded Litigation*, *supra* note 1.

the Comment reviews the Wisconsin frivolous claim statute. This review of the statute focuses on the statutory and case law development of the statute and describes the components of the statute. A critical assessment of the statute follows. The interrelationship of the statute and the Code of Professional Responsibility is also discussed. Finally, this Comment argues that the present statute is inequitable and suggests a more appropriate remedy.

## II. TRADITIONAL COMMON-LAW REMEDIES

### A. *Malicious Prosecution*

The tort of malicious prosecution was developed by the courts in response to criminal actions brought without probable cause.<sup>10</sup> Eventually, the courts extended the remedy to include unwarranted civil proceedings.<sup>11</sup> The tort attempts to balance the competing policies of keeping vexatious lawsuits out of court and giving justifiable claimants access to the courts without fear of reprisal by retaliatory litigation.<sup>12</sup> The plaintiff bringing an action for malicious prosecution is usually required to prove four elements<sup>13</sup> in a separate proceed-

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10. In some jurisdictions the phrase "malicious prosecution" applies only to unjustifiable criminal proceedings, while the phrase "wrongful use of civil proceedings" or "malicious use of civil process" is used to distinguish the criminal proceeding from the wrongful initiation of civil proceedings. See *Crawford v. Theo*, 112 Ga. App. 83, —, 143 S.E.2d 750, 753 (1965). See also RESTATEMENT (SECOND) OF TORTS §§ 674-681 (1977); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 120, 850-53 (4th ed. 1971). This Comment considers only wrongful use of civil proceedings.

For an exhaustive discussion of the history of malicious prosecution, see Note, *Groundless Litigation*, *supra* note 1.

11. W. PROSSER, *supra* note 10, § 120, at 850. Due to the internal sanctions of the English system, that is, corporal punishment and costs, the English system has been reluctant to follow the American trend and expand this into the civil sector. See *id.* at 851. The English system provided for costs, and the burden of deterrence in the original action and subsequent suits for malicious prosecution were "developed for and limited to the extraordinary case for which the internal sanctions provided neither deterrent nor remedy." Note, *Groundless Litigation*, *supra* note 1, at 1229.

12. See Mallen, *An Attorney's Liability for Malicious Prosecution, A Misunderstood Tort*, 46 INS. COUNS. J. 407, 409 (1979).

13. In some jurisdictions, the number of elements to be proven varies from four to six under the English rule (requiring the extra element of special damage), or three to five under the American rule (not requiring the element of special damage). See RESTATEMENT (SECOND) OF TORTS § 674 (1977), which states:

ing:<sup>14</sup> (1) termination of the former proceeding in favor of the

One who takes an active part in the initiation, continuation or procurement of civil proceedings against another is subject to liability to the other for wrongful civil proceedings if

(a) he acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and

(b) except when they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.

See also *Maniaci v. Marquette University*, 50 Wis. 2d 287, 297-98, 184 N.W.2d 168, 173-74 (1971) (quoting *Elmer v. Chicago & N.W. Ry. Co.*, 257 Wis. 228, 231, 43 N.W.2d 244, 246 (1950)), in which the court stated:

The six essential elements in an action for malicious prosecution are:

1. There must have been a prior institution or continuation of some regular judicial proceedings against the plaintiff in this action for malicious prosecution.
2. Such former proceedings must have been by, or at the instance of, the defendant in this action for malicious prosecution.
3. The former proceedings must have terminated in favor of the defendant therein, the plaintiff in the action for malicious prosecution.
4. There must have been malice in instituting the former proceedings.
5. There must have been want of probable cause for the institution of the former proceedings.
6. There must have been injury or damage resulting to the plaintiff from the former proceedings.

*Id.* See also *Stidham v. Diamond State Brewery, Inc.*, 41 Del. 330, 21 A.2d 283 (1941).

14. A defendant cannot cross-claim or counterclaim in an original action. See, e.g., *Babb v. Superior Court*, 3 Cal. 3d 841, 847, 479 P.2d 379, 381, 92 Cal. Rptr. 179, 181 (1971). The reason generally cited is that one of the necessary elements to support an action for malicious prosecution is the need to prove the termination of the former proceeding in favor of the party bringing the action for malicious prosecution. Simply stated, the rationale for this element is that if the action for malicious prosecution is brought before the end of the original claim, there is a risk of conflicting judgments should the defendant win the malicious prosecution case and later lose the original claim. See *Universal Underwriters Ins. Co. v. Security Indus., Inc.*, 391 F. Supp. 826, 829 (W.D. Wash. 1974); Special Project, *supra* note 1, at 321; Note, *Counterclaim*, *supra* note 1, at 491. See also *Slaff v. Slaff*, 151 F. Supp. 124, 125 (S.D.N.Y. 1957) ("A claim which might arise out of the bringing of the main action or out of allegations in the pleadings, or proceedings taken in the main action, may not be made the subject of a counterclaim. Such a claim is premature and cannot ripen or mature until the main action has been determined.").

The Wisconsin Supreme Court has recognized that courts may not adjudicate premature actions. See *Attoe v. State Farm Mut. Auto. Ins. Co.*, 36 Wis. 2d 539, 544, 153 N.W.2d 575, 580 (1967). However, a few jurisdictions have experimented with the idea that suits for malicious prosecution can be brought in the same proceeding. See, e.g., *Eiteljorg v. Bogner*, 502 P.2d 970, 971 (Colo. Ct. App. 1972); *Sonnichsen v. Streeter*, 4 Conn. Cir. Ct. 659, \_\_\_, 239 A.2d 63, 68 (1967). Others suggest they would look favorably on such a course. See, e.g., *Mayflower Indus. v. Thor Corp.*, 15 N.J. Super. 139, \_\_\_, 83 A.2d 246, 251 (N.J. Ch. 1951), *aff'd per curiam*, 9 N.J. 605, 89 A.2d 242 (1952). Most, however, have rejected it. See, e.g., *Schwab v. Doelz*, 229 F.2d 749, 753 (7th Cir. 1956); *The Savage Is Loose Co. v. United Artists*, 413 F. Supp. 555, 562 (S.D.N.Y. 1976).

plaintiff;<sup>15</sup> (2) malice;<sup>16</sup> (3) absence of probable cause in the prior proceeding;<sup>17</sup> and (4) actual damages in excess of the costs recoverable in the original action.<sup>18</sup>

Since its common-law conception in England,<sup>19</sup> the tort of malicious prosecution in America has been divided into two separate and distinct theories: the English rule and the American, or Restatement, rule. These theories differ in terms of the requisite elements to be proved.<sup>20</sup> In the minority of juris-

15. The proceeding must conclude with judgment in favor of the victim or voluntary dismissal by the original plaintiff. See *Metro Chrysler-Plymouth, Inc. v. Pearce*, 121 Ga. App. 835, \_\_\_, 175 S.E.2d 910, 915 (1970); *Thompson v. Beecham*, 72 Wis. 2d 356, 360, 241 N.W.2d 163, 165 (1976); *Pollock v. Vilter Mfg. Corp.*, 23 Wis. 2d 29, 37, 126 N.W.2d 602, 607 (1964).

Termination by way of compromise or settlement is not sufficient to support the action. See, e.g., *Kolka v. Jones*, 6 N.D. 461, 71 N.W. 558 (1897); *Fenton Storage Co. v. Feinstein*, 129 Pa. Super. 125, 195 A. 176 (1937); *Lechner v. Ebenreiter*, 235 Wis. 244, 297 N.W. 913 (1940); W. PROSSER, *supra* note 10, § 120, at 853. See also *Webb v. Youmans*, 248 Cal. App. 2d 851, 57 Cal. Rptr. 11 (1967); *Nolan v. All State Home Equip. Co.*, 149 A.2d 426 (D.C. 1959); *Nichols v. Severtsen*, 39 Wash. 2d 836, 239 P.2d 349 (1951); RESTATEMENT (SECOND) OF TORTS § 674 comment j (1977).

"The phrase in his favor is absolutely central to the meaning of the quotation; a cause of action in malicious prosecution is dependent upon a termination of the preceding action in favor of the defendant therein (the plaintiff in the action for malicious prosecution)." *M. Bryce & Assoc., Inc. v. Gladstone*, 88 Wis. 2d 48, 58, 276 N.W.2d 335, 340 (1978) (citation omitted).

16. See *infra* notes 32-46 and accompanying text.

17. See *infra* notes 38-40 and accompanying text.

18. The special damage element most commonly associated with the English rule requires a showing of some injury beyond that generally attendant upon similar forms of litigation. See *Greer v. State Farm Fire & Cas. Co.*, 139 Ga. App. 74, \_\_\_, 227 S.E.2d 881, 885 (1976) (humiliation, embarrassment, emotional anguish, and ridicule are not special); *Rivers v. Dixie Broadcasting Corp.*, 88 Ga. App. 131, \_\_\_, 76 S.E.2d 229, 236 (1953) (business losses are special injuries); *Berlin v. Nathan*, 64 Ill. App. 3d 940, \_\_\_, 381 N.E.2d 1367, 1371 (1978) (injury to reputation and increased liability insurance premiums are not special injuries), *cert. denied*, 444 U.S. 828 (1979); *Carver v. Lykes*, 262 N.C. 345, \_\_\_, 137 S.E.2d 139, 145 (1964) (loss of the right to practice a profession is a special injury); *O'Toole v. Franklin*, 279 Or. 513, \_\_\_, 569 P.2d 561, 563 (1977) ("'[s]pecial injury' in this procedural sense excludes the kind of secondary consequences that are common and often unavoidable burden on defendants in 'all similar causes'"); *Alyyildiz v. Kidd*, 220 Va. 1080, \_\_\_, 266 S.E.2d 108, 111 (1980) ("costs to defend the malpractice action, injury to . . . professional reputation and good name, plus the loss of present and future earnings and profits" were not special damages).

19. The tort of malicious prosecution originally arose in medieval England by the enactment of the Statute of Marlbridge in 1269. See Special Project, *supra* note 1, at 318-20.

20. The reasoning most often proffered for the difference in the elements to be proven between the English and the American rule is that the tort of malicious prosecution is not a secondary remedy in the United States, as it is in the English system, and thus there are internal sanctions available in the English system, such as the imposition

dictions following the English rule,<sup>21</sup> the plaintiff has to prove all four elements. However, in those jurisdictions adhering to the American rule,<sup>22</sup> the plaintiff need not prove the fourth element commonly known as the special damage requirement, but must simply show "either material harm or the violation

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of costs. Costs are normally not available in the American system. *See infra* note 72 and accompanying text. Consequently, only when internal sanctions do not provide an adequate remedy for the extraordinary costs will the tort be invoked, thus the basis for the element of special damages in England and for those American jurisdictions following the English rule. *See* Special Project, *supra* note 1, at 320. *See also supra* note 11 and accompanying text. An added distinction between the American rule and the common law of England is that English courts refuse to apply the tort of malicious prosecution to an ordinary civil action. *See* W. PROSSER, *supra* note 10, § 120, at 851.

21. Sixteen jurisdictions follow the minority English rule. For a list of cases that established that rule, see *O'Toole v. Franklin*, 279 Or. 513, \_\_\_ n.3 569 P.2d 561, 564 n.3 (1977). Jurisdictions currently requiring special damages are: *Rodriguez v. Carroll*, 510 F. Supp. 547 (S.D. Tex. 1981) (applying Texas law); *Morowitz v. Marvel*, 423 A.2d 196 (D.C. 1980); *Taylor v. Greiner*, 156 Ga. App. 663, 275 S.E.2d 737 (1980); *Petrick v. Kaminski*, 68 Ill. App. 3d 649, 386 N.E.2d 636 (1979); *Brody v. Ruby*, 267 N.W.2d 902 (Iowa 1978); *Hooke v. Equitable Credit Corp.*, 402 A.2d 111 (Md. App. 1979); *Farmers Gin Co. v. Ward*, 73 N.M. 405, 389 P.2d 9 (1964); *Gross v. Newburger, Loeb & Co.*, 103 Misc. 2d 417, 426 N.Y.S.2d 667 (1980); *Koury v. John Meyer of Norwich*, 44 N.C. App. 392, 261 S.E.2d 217 (1980); *Dakters v. Shane*, 64 Ohio App. 196, 412 N.E.2d 399 (1978); *O'Toole v. Franklin*, 279 Or. 513, 569 P.2d 561 (1977); *Blumenfeld v. R.M. Shoemaker Co.*, 286 Pa. Super. 540, 429 A.2d 654 (1981); *Jacques v. McLaughlin*, 121 R.I. 523, 401 A.2d 430 (1979); *Alyyildiz v. Kidd*, 220 Va. 1080, 266 S.E.2d 108 (1980); *Fenner v. Lindsay*, 28 Wash. App. 626, 625 P.2d 180 (1981); *Krieg v. Dayton-Hudson Corp.*, 104 Wis. 2d 455, 311 N.W.2d 641 (1981).

22. Twenty-two jurisdictions do not require special damages. *See, e.g., Turner v. J. Blach & Son*, 242 Ala. 127, 5 So. 2d 93 (1941); *Ackerman v. Kaufman*, 41 Ariz. 110, 15 P.2d 966 (1932); *Leek v. Brasfield*, 226 Ark. 316, 290 S.W.2d 632 (1956); *Eastin v. Bank of Stockton*, 66 Cal. 123, 4 P. 1106 (1884); *Slee v. Simpson*, 91 Colo. 461, 15 P.2d 1084 (1932); *Calvo v. Bartolotta*, 112 Conn. 396, 152 A. 311 (1930); *Burchell v. Bechert*, 356 So. 2d 377 (Fla. Dist. Ct. App. 1978); *McCardle v. McGinley*, 86 Ind. 538 (1882); *Carbondale Inv. Co. v. Burdick*, 67 Kan. 329, 72 P. 781 (1903); *Graffagnini v. Shnaider*, 164 La. 1108, 115 So. 287 (1927); *Hubbard v. Beatty & Hyde, Inc.*, 343 Mass. 258, 178 N.E.2d 485 (1961); *Brand v. Hinchman*, 68 Mich. 590, 36 N.W. 664 (1888); *O'Neill v. Johnson*, 53 Minn. 439, 55 N.W. 601 (1893); *Harvill v. Tabor*, 240 Miss. 750, 128 So. 2d 863 (1961); *Young v. Jack Boring's, Inc.*, 540 S.W.2d 887 (Mo. Ct. App. 1976); *McCormick Harvesting Mach. Co. v. Willan*, 63 Neb. 391, 88 N.W. 497 (1901); *Johnson v. Moser*, 181 Okla. 75, 72 P.2d 715 (1937); *Cisson v. Pickens Sav. and Loan Ass'n*, 258 S.C. 37, 186 S.E.2d 822 (1972); *Teesdale v. Liebschwager*, 42 S.D. 323, 174 N.W. 620 (1919); *Lipscomb v. Shofner*, 96 Tenn. 112, 33 S.W. 818 (1896); *Closson v. Staples*, 42 Vt. 209 (1869); *Van Hunter v. Beckley Newspapers Corp.*, 129 W. Va. 302, 40 S.E.2d 332 (1946).

The *Restatement of Torts* is in accord with the American rule and does not compel the victim to show special damages. *See* RESTATEMENT (SECOND) OF TORTS § 674 comment e (1977). *See also* W. PROSSER, *supra* note 10, § 120, at 853.



of a legal right that is in itself sufficient to support an action for damages."<sup>23</sup>

### B. Abuse of Process

An alternative to initiating a suit for malicious prosecution is an action for abuse of process.<sup>24</sup> Abuse of process lies against one who misuses or misapplies the judicial process for a collateral objective other than one for which it was designed to accomplish.<sup>25</sup> Abuse of process is misusing or misapplying the process, whereas malicious prosecution is based on commencement of an action without probable cause.

The plaintiff bringing an action for abuse of process must prove three elements: (1) an ulterior purpose; (2) a willful act in the use of the process not proper in the regular prosecution of the proceeding; and (3) actual damage.<sup>26</sup> The plaintiff need not prove a favorable termination of the proceeding<sup>27</sup> nor initiation of the proceeding without probable cause.<sup>28</sup> Notwithstanding these differences,<sup>29</sup> both torts are the result of judicial

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23. RESTATEMENT (SECOND) OF TORTS § 674 comment e (1977).

24. The leading English case on abuse of process is *Grainger v. Hill*, 132 Eng. Rep. 769 (1838) (defendant had plaintiff arrested to force plaintiff to relinquish a ship register, without which the plaintiff could not go to sea).

25. RESTATEMENT (SECOND) OF TORTS § 682 (1977), states: "One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process." See generally W. PROSSER, *supra* note 10, § 121, at 856. See also *Baird v. Aluminum Seal Co.*, 250 F.2d 595 (3d Cir. 1957) (abuse of process is the use of a justified process for an unjustifiable purpose); *Abernethy v. Burns*, 210 N.C. 636, 188 S.E. 97 (1936); *Fite v. Lee*, 11 Wash. App. 21, 521 P.2d 964 (1974); *Brownsell v. Klawitter*, 102 Wis. 2d 108, 306 N.W.2d 41 (1981).

26. See, e.g., *Templeton Feed & Grain Co. v. Ralston Purina Co.*, 69 Cal. 2d 461, 446 P.2d 152, 72 Cal. Rptr. 344 (1968); *Thompson v. Beecham*, 72 Wis. 2d 356, 241 N.W.2d 163 (1976).

27. "Abuse of process may even lie when the prior plaintiff has met with success in the former action." *Maniaci v. Marquette University*, 50 Wis. 2d 287, 298, 184 N.W.2d 168, 175 (1971). See also RESTATEMENT (SECOND) OF TORTS § 682 comment a (1977) ("it is immaterial . . . that the proceedings terminated in favor of the person instituting or initiating it").

28. An action for abuse of legal process will lie even though the plaintiff had probable cause in initiating a prior suit. See *Fite v. Lee*, 11 Wash. App. 21, —, 521 P.2d 964, 968 (1974). See also RESTATEMENT (SECOND) OF TORTS § 682 comment a (1977) ("it is immaterial that the process was . . . obtained in the course of proceedings that were brought with probable cause and for a proper purpose").

29. See RESTATEMENT (SECOND) OF TORTS § 682 comment a (1977); W. PROSSER, *supra* note 10, § 121, at 856. See, e.g., *Baird v. Aluminum Seal Co.*, 250 F.2d 595, 600 (3d Cir. 1957); *Huaser v. Bartow*, 273 N.Y. 370, —, 7 N.E.2d 268, 269 (1937).

creation and share the common element of an improper purpose<sup>30</sup> in the use of legal process beyond that anticipated by the process.<sup>31</sup>

### C. *A Common Element: Malice*

The malice or state of mind requirement is found in both the judicial and statutory remedies. Consequently, both types of remedies are fatally defective because malice is "hard to find and still harder to frame."<sup>32</sup> And although the malicious prosecution elements of malice and lack of probable cause form a "polemic link,"<sup>33</sup> the two concepts must be distinguished.<sup>34</sup> Both elements are questions of fact with the malice requirement measured by a subjective standard and the probable cause criterion measured by an objective standard.<sup>35</sup>

The issue of malice is directly linked to the individual's primary purpose or motive.<sup>36</sup> Malice can be characterized by

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30. Although the hallmark of an action for abuse of process is the use of a justified process for an improper purpose, a claim may be legitimate and still be considered an abuse of process. See *Baird v. Aluminum Seal Co.*, 250 F.2d 595, 600 (3d Cir. 1957).

31. See generally *W. PROSSER*, *supra* note 10, § 121, at 856. These torts also share two problems. First, both remedies are of marginal utility because they can only be brought in a separate suit, long after the injury; the expense of defending a meritless lawsuit has been inflicted. Consequently, this problem has prompted the legislatures in a number of states, including Wisconsin, to enact legislation that allows a similar remedy to be pursued in the same proceeding as the alleged frivolous action. See, e.g., WIS. STAT. § 814.025(1) (1983-84). Second, both remedies have traditionally been reserved for the defendant faced with a frivolous lawsuit. A party confronting a frivolous defense or a frivolous appeal was without recourse. Remedial legislation concerning this point has been instituted in many jurisdictions including Wisconsin. See *id.*

32. *Meshane v. Second Street Co.*, 197 Wis. 382, 387, 222 N.W. 320, 322 (1928).

33. *Tool Research & Eng'g Corp. v. Henigson*, 46 Cal. App. 3d 675, —, 120 Cal. Rptr. 291, 297 (1975).

34. See Note, *What Constitutes Malice and Want of Probable Cause in an Action for Malicious Prosecution in Pennsylvania*, 28 TEMP. L.Q. 242, 245 (1954) ("Briefly stated, the decision on the issue of want of probable cause establishes the *reasonableness* of the belief and the decision upon the issue of malice bears upon the *honesty* of the belief.") (emphasis in original).

35. Want of probable cause is measured by the objective standard of whether there was a reasonable belief, while malice is measured by the subjective standard of whether there is an honest belief.

36. Malice may consist of a primary motive of ill will, or a lack of belief in any probable success of the action. See *W. PROSSER*, *supra* note 10, § 119, at 847-50. See, e.g., *Johnson v. Mount Ogden Enterprises, Inc.*, 23 Utah 2d 169, 460 P.2d 333 (1969). At common law, malice meant an *intent* to a wrongful harm and injury. See *State ex rel Durner v. Huegen*, 110 Wis. 189, 85 N.W. 1046 (1901), *aff'd*, 195 U.S. 194 (1904). But see RESTATEMENT (SECOND) OF TORTS § 676 (1977) (defining malice in terms of reck-

ill-will, anger, evil intent, or by improper motive.<sup>37</sup> Each form of malice meets the malice requirement in a suit for malicious prosecution. On the other hand, lack of probable cause<sup>38</sup> is generally described as that which would not warrant a reasonable person to believe the cause of action is legally valid<sup>39</sup> given the known or reasonably ascertainable circumstances.<sup>40</sup>

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less disregard for the rights of the defendant); *Yelk v. Seefeldt*, 35 Wis. 2d 271, 278, 151 N.W.2d 4, 8 (1967) ("While . . . willful and wanton disregard for the fact may be the basis for malice, such *wanton and willful conduct* must be of such a nature and character as to evince a hostile or vindictive motive.") (emphasis added). See also *Ray v. City Bank & Trust Co.*, 358 F. Supp. 630, 638 (S.D. Ohio 1973).

Malice is a question of fact to be decided by the jury and can be inferred from showing a lack of probable cause. See *W. PROSSER*, *supra* note 10, § 121, at 855. See also *Crouter v. United Adjusters, Inc.*, 266 Or. 6, —, 510 P.2d 1328, 1330 (1973); *Yelk v. Seefeldt*, 35 Wis. 2d 271, 278, 151 N.W.2d 4, 8 (1967).

37. Typically, malice is characterized as actual (express) malice, and legal (implied) malice. Actual malice or malice in fact is ill-will, spite, or disregard for the rights of another. Legal malice or malice in law denotes an absence of a lawful excuse or privileged occasion. Both kinds of malice are actionable in a suit for malicious prosecution. See *Meyer v. Ewald*, 66 Wis. 2d 168, 224 N.W.2d 419 (1974). See also *Robinson v. Home Fire & Marine Ins. Co.*, 244 Iowa 1084, 59 N.W.2d 776 (1953); 15A WORDS & PHRASES, *Express Malice* 554 (1950).

38. One court has articulated the nature of probable cause as it exists in terms of a mixed question of law and fact involving a two-prong subjective-objective test. The first prong, the subjective test, is proving that there has been a reasonable investigation and an extensive search of the current status of the law to support an honest belief that the action is tenable in the forum in which it is brought. The second prong, the objective test, is proving that the good faith belief is reasonable. See *Tool Research & Eng'g Corp. v. Henigson*, 46 Cal. App. 3d 675, —, 120 Cal. Rptr. 291, 297 (1975).

39. See, e.g., *Ray v. City Bank & Trust Co.*, 358 F. Supp. 630, 638 (S.D. Ohio 1973) (reasonable belief in cause of action in light of the facts known or available on reasonable inquiry); *Masterson v. Pig 'n' Whistle Corp.*, 161 Cal. App. 2d 323, —, 326 P.2d 918, 926 (1958) ("an honest belief, founded upon facts sufficiently strong to justify his belief, that grounds exist for the proceeding"); *Cornegue v. Gogl Furniture Inc.*, 217 Kan. 564, —, 538 P.2d 659, 663 (1975); *Ruff v. Eckerd's Drugs, Inc.*, 265 S.C. 563, —, 220 S.E.2d 649, 652 (1975) ("the existence of such facts or circumstances as would excite the belief of a reasonable mind acting on facts within his knowledge"); *Hyde v. Southern Grocery Stores*, 197 S.C. 263, —, 15 S.E.2d 353, 359 (1941) ("reasonable belief in the existence of facts necessary to sustain an attachment, such belief being founded on circumstances which would be sufficient to produce such a belief in a man of ordinary caution"); *Elmer v. Chicago & N.W. Ry. Co.*, 257 Wis. 228, 232, 43 N.W.2d 244, 247 (1950) ("state of facts in the mind . . . as would lead a man of ordinary caution and prudence to believe or entertain an honest and strong suspicion").

40. In some jurisdictions, the existence of probable cause is dependent on the application of facts to the law. Consequently, the law imposes on the party bringing the action a standard of reasonableness in ascertaining those facts that support a viable cause of action when viewed in light of the applicable law. Only those facts that are known or should have been known to the defendant at the time the original action was commenced may be considered when determining whether there is probable cause. See *Elletson v. Dixie Home Stores*, 231 S.C. 565, —, 99 S.E.2d 384, 387 (1957).

There are a number of reasons for not relying on the subjective motives of an alleged malicious prosecutor when there are objective grounds for determining whether there is malicious prosecution or abuse of process. First, "[l]ogically speaking, it is not feasible that the subjective intent of an individual should be used as a basis by which the objective manifestations of that individual could be established. However, objective manifestations may quite properly be used to establish the nature or quality of the subjective motivation."<sup>41</sup> Second, since it is unlikely there will be actual evidence about subjective beliefs,<sup>42</sup> rules on probable cause linked to a subjective belief force the trier of fact to consider a matter about which there is little or no evidence. Third, the subjective test accomplishes the same result that the objective test accomplishes:<sup>43</sup> if the malicious litigator commences a suit on grounds upon which no reasonable person would base an action, the subjective rule accomplishes the same as the subjective rule and in fact yields no material benefit.<sup>44</sup> Finally, this subjective element may punish one who does not possess a belief of liability on the part of the defendant but does perceive facts that would lead to an inference of liability and therefore support a finding of probable cause. This plaintiff would technically lack probable cause and be subject to a suit for malicious prosecution, even though the party was objectively

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41. Note, *supra* note 34, at 246. See also W. SEAVEY, LAW OF AGENCY § 9, at 18 (6th ed. 1964) ("knowledge . . . is subjective, although the evidence to prove it is objective. It is entirely factual . . .").

42. In Wisconsin, the statutory remedy for malicious prosecution requires the plaintiff in such an action to prove both lack of probable cause and malice or in the alternative, simply malice. To date, cases decided on this issue have refused to acknowledge the requirement of "good faith" or malice, but have been decided on the basis of an objective test, while making no mention of the subjective test. The most plausible reason for this is that there was no evidence in the record relating to malice — the subjective test. See *infra* notes 54-69 and accompanying text.

43. See Dobbs, *Belief and Doubt in Malicious Prosecution and Libel*, 21 ARIZ. L. REV. 607 (1979).

44. This argument is clearly evident from the generally recognized rule that malice can be inferred from a want of probable cause. See *Elmer v. Chicago & N.W. Ry.*, 257 Wis. 228, 232, 43 N.W.2d 244, 246 (1950). Allowing such an inference suggests that the subjective test is excess baggage. Furthermore, the allowance of such an inference suggests that the subjective test accomplishes nothing if the mere proof of probable cause automatically leads to a finding of malice. Therefore, it is all too clear that what can be accomplished through objective factors does not need any further buttressing through subjective factors.

justified in litigating the grievance.<sup>45</sup> In sum, the subjective test is deficient in many respects and is "worth little discussion in itself."<sup>46</sup>

### III. WISCONSIN'S FRIVOLOUS CLAIM STATUTE

Characteristic of the 1970s was the phenomenon of increasing litigiousness. In reaction to this phenomenon, the Wisconsin Legislature addressed the plight of vulnerable litigants who were being "sued when there was no reason for their legal involvement except bad faith, maliciousness or harassment by someone to injure them."<sup>47</sup> The legislators' concern resulted in Wisconsin's frivolous claim statute.<sup>48</sup> The statute not only gives a statutory protection against frivolous<sup>49</sup>

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45. This is based upon the assumption that the bare facts themselves do not support any kind of liability but only when the inference from these facts is drawn is there a link to liability on behalf of the defendant.

46. Dobbs, *supra* note 43, at 619.

47. See *Sommer v. Carr*, 99 Wis. 2d 789, 793, 299 N.W.2d 856, 858 (1981). A typical case clearly falling within the realm of harassment, maliciousness, and bad faith, and one which section 814.025 was designed to prevent, is *In re Cairo*, 115 Wis. 2d 5, 338 N.W.2d 702 (1983). In that case, the attorney filed three separate actions on three separate occasions for his client against the same defendants. In a related but separate matter, he simultaneously filed two different suits, one in the district court and one in circuit court against his client and variously named defendants.

48. WIS. STAT. § 814.025 (1983-84) provides:

(1) If an action or special proceeding commenced or continued by a plaintiff or a counterclaim, defense or cross complaint commenced, used or continued by a defendant is found, at any time during their proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs determined under § 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.

49. "Frivolous" is variously defined. See *BALLENTINE'S LAW DICTIONARY* 503 (3d ed. 1969) ("[s]o clearly and palpably bad and insufficient as to require no argument or illustration to show the character as indicative of bad faith upon a bare inspection; as

suits in terms of providing a statutory remedy, but also encompasses those actions satisfying the elements of malicious prosecution or abuse of process.<sup>50</sup>

Wisconsin's frivolous claim statute was enacted in 1978 for the purpose of offering a victim of a frivolous suit a means of recouping legal expenses<sup>51</sup> without starting a separate action for malicious prosecution or abuse of process. A further justification espoused by the Wisconsin Supreme Court was to prevent the blackmailing of innocent defendants "into paying something in settlement or else face costs of litigation."<sup>52</sup> Although the statute is relatively new, it has generated a handful of reported decisions.<sup>53</sup> Moreover, the recency of the statute has not detracted from a spectrum of issues presented

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a pleading argument, motion or objection." See also BLACK'S LAW DICTIONARY 712 (5th ed. 1979).

In *Cottrill v. Cramer*, 40 Wis. 555, 558 (1876), the court noted that a frivolous demurrer was one in which it "is so clearly untenable, or its insufficiency so manifest upon a bare inspection of the pleadings that its character may be determined without argument or research." The court concluded that the demurrer was not frivolous because of the necessity to provide extensive briefs. *Id.*

50. See *Sundby, Awarding Reasonable Attorney Fees Upon Frivolous Claims and Counterclaims Under § 814.025 Stats.*, WIS. B. BULL., May 1980, at 11.

51. See, e.g., *Sommer v. Carr*, 99 Wis. 2d 789, 299 N.W.2d 856 (1981); *Tower Special Facilities v. Investment Club, Inc.*, 104 Wis. 2d 221, 226, 311 N.W.2d 225, 228 (Ct. App. 1981).

52. *Sommer v. Carr*, 99 Wis. 2d 789, 793, 299 N.W.2d 856, 859 (1981). One commentator observed that given the nature and character of those groups supporting the enactment of the statute and "[i]f support for legislation indicate its purpose, it is apparent the legislation is designed as at least a partial deterrent to the commencing and maintaining of groundless litigation, particularly professional malpractice actions." *Sundby, supra* note 50, at 14. However, he further noted that it was quite ironic that "none of the cases in which reasonable attorney fees have been assessed or requested involved professional malpractice." *Id.* at 20.

53. Since 1978, sixteen cases have dealt with the frivolous claim statute. See *Stivarius v. DiVall*, 121 Wis. 2d 145, 358 N.W.2d 530 (1984); *In re Koenigsmark*, 119 Wis. 2d 394, 351 N.W.2d 169 (1984); *Fehring v. Republic Ins. Co.*, 118 Wis. 2d 299, 347 N.W.2d 595 (1984); *Radlein v. Industrial Fire & Cas. Ins. Co.*, 117 Wis. 2d 605, 345 N.W.2d 874 (1984); *In re Cairo*, 115 Wis. 2d 5, 338 N.W. 2d 702 (1983); *Robertson-Ryan v. Pohlhammer*, 112 Wis. 2d 583, 334 N.W.2d 246 (1983); *In re Laver*, 108 Wis. 2d 746, 324 N.W.2d 432 (1982); *County of Portage v. Steinpreis*, 104 Wis. 2d 466, 312 N.W.2d 731 (1981); *Hessenius v. Schmidt*, 102 Wis. 2d 697, 307 N.W.2d 232 (1981); *State v. State Farm Fire & Cas. Co.*, 100 Wis. 2d 582, 302 N.W.2d 827 (1981); *Sommer v. Carr*, 99 Wis. 2d 789, 299 N.W.2d 856 (1981); *Wengerd v. Rinehart*, 114 Wis. 2d 575, 338 N.W.2d 861 (Ct. App. 1983), *review denied*, 114 Wis. 2d 602, 340 N.W.2d 201 (1983); *Share Corp. v. Pro-Specialties, Inc.*, 107 Wis. 2d 318, 320 N.W.2d 224 (Ct. App. 1982); *Tower Special Facilities, Inc. v. Investment Club, Inc.*, 104 Wis. 2d 221, 311 N.W.2d 225 (Ct. App. 1981); *Nosek v. Stryker*, 103 Wis. 2d 633, 309 N.W.2d 868 (Ct. App. 1981); *In re Bilsie*, 100 Wis. 2d 342, 302 N.W.2d 508 (Ct. App. 1981).

and resolved in these cases. The issues range from constitutional challenges to questions concerning the appropriate statutory standard and application of that standard.

### A. Standard

Although section 814.025 had not been challenged prior to 1981 on a constitutional basis, the Wisconsin Court of Appeals in *In re Bilsie*<sup>54</sup> did rule on the appellant's challenge to the constitutionality of the statute, although it was never raised at the trial court level.<sup>55</sup> The plaintiffs argued that the statute was unconstitutional for vagueness because of lack of ascertainable standards.<sup>56</sup> The court emphatically ruled that the statutory standard in subsection (3)(b) was an objective standard<sup>57</sup> by nature because of the need to show that the attorney "knew or should have known" the position taken was frivolous. The court reasoned further that the standard is sufficiently definite

if it gives reasonable warning to one bent on obedience to the law when his conduct comes perilously close to that which is proscribed and if reasonable direction is given to the trier of fact to make a proper determination when that conduct has come too close to the proscribed conduct.<sup>58</sup>

The reasonable attorney standard enunciated in subsection (3)(b) also requires that there be lacking "a good faith argument for an extension, modification or reversal of existing law."<sup>59</sup> Until recently, the courts have side-stepped this sec-

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54. 100 Wis. 2d 342, 302 N.W.2d 508 (Ct. App. 1981).

55. An appellate court must review a constitutional challenge first made on appeal which raises a question of subject matter jurisdiction. See *State ex rel. Skinkis v. Trefert*, 90 Wis. 2d 528, 536, 280 N.W.2d 316, 320 (Ct. App. 1979).

56. *Bilsie*, 100 Wis. 2d at 348, 302 N.W.2d at 513. Appellants reasoned that "no standard is provided by which an attorney or a party can know prior to actual trial that the action, proceeding, cross-complaint, defense or counterclaim brought is, in the words of § 814.025 (3)(b), Stats., 'without any reasonable basis in law or equity.'" *Id.*

57. See *Bilsie*, 100 Wis. 2d at 350, 302 N.W.2d at 514. The statutory language "knew or should have known" connotes a subjective standard in terms of what was in the person's mind and whether those actions are intentional. However, in *Sommer v. Carr*, the Wisconsin Supreme Court found the objective standard of what would a reasonable attorney have done under the same or similar circumstances to be more appropriate than the subjective standard. See 95 Wis. 2d 789, 797, 299 N.W.2d 856, 860 (1981). See also *Radlein v. Industrial Fire & Cas. Ins. Co.*, 117 Wis. 2d 605, 345 N.W.2d 874 (1984).

58. *Bilsie*, 100 Wis. 2d at 348, 302 N.W.2d at 513.

59. WIS. STAT. § 814.025(3)(b) (1983-84).

and statutory requirement when assessing frivolous claims under the (3)(b) standard. In *Radlein v. Industrial Fire & Casualty Insurance Co.*,<sup>60</sup> the supreme court stated that the application of the standard necessarily involves a two-pronged test. "First, is the law ready for extension, modification or reversal, and, if not, then secondly, was the argument for such change made in good faith even though not successful."<sup>61</sup> The argument need not be successful as long as it is made in good faith and made by a reasonable attorney.<sup>62</sup>

The ascertainment of the relevant facts, their application to the legal theory, and the determination of frivolousness must be made by the trial court<sup>63</sup> "during the proceedings or upon judgment."<sup>64</sup> If, however, the court is unable to make these findings for purposes of ruling on the issue of frivolousness, "then the trial court must conduct a hearing<sup>65</sup> for the purpose of reaching such findings and resulting conclusion."<sup>66</sup>

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60. 117 Wis. 2d 605, 345 N.W.2d 874 (1984).

61. *Id.* at 612, 345 N.W.2d at 878.

62. *Id.* at 614, 345 N.W.2d at 879.

63. The supreme court in *Hessenius v. Schmidt*, 102 Wis. 2d 697, 307 N.W.2d 232 (1981), concluded that "only a court is empowered to find frivolousness or assess costs and reasonable attorney fees whether it [is] during a hearing or not." *Id.* at 704, 307 N.W.2d at 237. The *Hessenius* court, after reviewing the court commissioner's role since 1874, declined to grant the court commissioner the right to make determinations and assessments under section 814.025. The court reasoned that the legislature had chosen to provide court commissioners with certain powers and that the right to assess costs and attorney fees and to determine the frivolousness of a procedure was not one of those rights under sections 799.25(13) and 814.025(1). *See* 102 Wis. 2d at 702-04, 307 N.W.2d at 235-36. *See also* *Haight v. Lucia*, 36 Wis. 355, 360 (1874) (court commissioner's power under the then prevailing statutes "must be expressly conferred by law, or it does not exist."). *But see* *State ex rel. Perry v. Wolke*, 71 Wis. 2d 100, 103, 104, 237 N.W.2d 678, 681 (1976).

64. In *In re Bilsie*, 100 Wis. 2d 342, 302 N.W.2d 508 (Ct. App. 1981), the Wisconsin Court of Appeals ruled that a decision of frivolousness can be made before or at the time of judgment or even after judgment for the purpose of giving the party against whom a charge is leveled an opportunity to be heard.

65. *See* *Hessenius v. Schmidt*, 102 Wis. 2d 697, 701, 307 N.W.2d 232, 235 (1981); *Sommer v. Carr*, 99 Wis. 2d 789, 793, 299 N.W.2d 856, 858 (1981); *Tower Special Facilities, Inc. v. Investment Club, Inc.*, 104 Wis. 2d 221, 225, 311 N.W.2d 225, 228 (Ct. App. 1981).

66. *Sommer v. Carr*, 99 Wis. 2d 789, 793, 299 N.W.2d 856, 858 (1981). The trial court, by hearing or otherwise, is obligated to make specific findings under the frivolous claim statute. *See* *Radlein v. Industrial Fire & Cas. Ins. Co.*, 117 Wis. 2d 605, 612, 345 N.W.2d 874, 878 (1984). In *Fehring v. Republic Ins. Co.*, 118 Wis. 2d 299, 347 N.W.2d 595 (1984), the supreme court acknowledged the trial court's error in denying the defendant's motion for fees and costs under section 814.025(3) without making any findings.



A finding of frivolousness cannot be raised in a separate action.<sup>67</sup> And the trial court must state which standard, subsection (3)(a) or (3)(b), was relied upon in finding a violation of the statute.<sup>68</sup> "The statute does not allow the trial judge to conclude frivolousness or lack of it without findings stating which statutory criteria were present, harassment or knowledge or imputed knowledge that there was not 'any reasonable basis in law or equity' for the proposition taken."<sup>69</sup>

### B. Awards of Reasonable Costs and Fees

The statute emulates the English tradition and stands out as an exception to the American rule on attorney fees.<sup>70</sup> England has allowed prevailing litigants to recover attorney fees from the loser,<sup>71</sup> but in the United States, the loser of a court battle generally does not have to account to the victor for reasonable attorney's fees.<sup>72</sup> Subsection two of the Wisconsin

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67. One court acknowledged that the statutory language does not *expressly* limit a section 814.025 action to a finding in an original action, but rather implies such a limitation. No other case had raised a section 814.025 recovery in a separate action. See *Tower Special Facilities, Inc. v. Investment Club, Inc.*, 104 Wis. 2d 221, 226, 311 N.W.2d 225, 228 (Ct. App. 1981). See, e.g., *Hessenius v. Schmidt*, 102 Wis. 2d 697, 307 N.W.2d 232 (1981) (raised by counterclaim in original proceeding); *State v. State Farm Fire & Cas. Co.*, 100 Wis. 2d 582, 302 N.W.2d 827 (1981) (motion during original proceeding upon dismissal of third-party complaint); *Sommer v. Carr*, 99 Wis. 2d 789, 299 N.W.2d 856 (1981) (requested during original proceeding upon dismissal of third-party complaint); *City of Janesville v. Wiskia*, 97 Wis. 2d 473, 293 N.W.2d 522 (1980) (post-judgment motion before same trial court).

68. See, e.g., *Radlein v. Industrial Fire & Cas. Ins. Co.*, 117 Wis. 2d 605, 345 N.W.2d 874 (1984); *Badger Bearing, Inc. v. Drives & Bearings, Inc.*, 111 Wis. 2d 659, 331 N.W.2d 847 (Ct. App. 1983) (remanded to the trial court to draw conclusions concerning the presence or absence of the statutory criteria).

69. *Sommer v. Carr*, 99 Wis. 2d 789, 792, 299 N.W.2d 856, 857 (1981).

70. See *infra* note 72 and accompanying text.

71. See C. MCCORMICK, *LAW OF DAMAGES* 234-36 (1935); Ehrensweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966).

72. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). The majority's denial of attorney fees in *Alyeska* was influenced by the enactment of specific provisions by Congress for the recovery of attorney fees. For a comprehensive list of these provisions, see *Alyeska*, 421 U.S. at 254-71.

An added justification for refusing to award fees is to ensure ready access to the courts by reducing penalties for failure. However, to the litigant who prevails, its effect is a partial denial of justice. See Dawson, *Lawyers and Involuntary Clients: Attorney Fees From Funds*, 87 HARV. L. REV. 1597 (1974). Additionally, the American rule is riddled with court formulated exceptions allowing attorney fees. Some of these include the common fund exception, see *Trustees v. Greenough*, 105 U.S. 527 (1882); the willful disobedience exception, see *Toledo Seale Co. v. Computing Seale Co.*, 261 U.S. 399

statute authorizes the assessment of costs and fees<sup>73</sup> against either the attorney or the party bringing the action.<sup>74</sup>

In assessing costs and fees, there are three areas to be cognizant of. First, the use of "shall" in subsection one requires the court to award costs and fees upon the finding of a frivolous action.<sup>75</sup> Second, although the costs referred to are already recoverable under section 814.04,<sup>76</sup> those very same costs may be awarded by the court against the offending attor-

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(1923); and the bad faith exception, see *Vaughan v. Atkinson*, 369 U.S. 527 (1962). See generally *Dawson*, *supra* note 72.

Wisconsin strictly adheres to the American rule and has not recognized any of the court made exceptions to the rule. However, Wisconsin does allow recovery of fees under specific statutory provisions. See *Milwaukee v. Leschke*, 57 Wis. 2d 159, 161, 203 N.W.2d 669, 670-71 (1972) ("in this state, costs are regulated exclusively by statute as a matter of legislative discretion"); *City of Beloit v. Town of Beloit*, 47 Wis. 2d 377, 393, 177 N.W.2d 361, 370-71 (1970) ("the award of costs is wholly dependent upon statutory provisions"). See also *Gustin v. Johannes*, 36 Wis. 2d 195, 208, 153 N.W.2d 70, 78 (1967); *Rheingans v. Hepfler*, 243 Wis. 126, 134, 9 N.W.2d 585, 589 (1943).

For general commentary on the topic, see *Ehrenzweig*, *supra* note 71; *Kuenzel*, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75 (1963); *McCormick*, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619 (1931); *McLaughlin*, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 FORDHAM L. REV. 761 (1972); *Stoebuck*, *Counsel Fees Included in Costs: A Logical Development*, 38 U. COLO. L. REV. 202 (1966); *Comment*, *Court Awarded Attorney's Fees and Equal Access to the Court*, 122 U. PA. L. REV. 636, 648-55 (1974); *Note*, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216 (1967).

73. WIS. STAT. § 814.025(1) (1983-84). For the full text of the statute, see *supra* note 48.

74. WIS. STAT. § 814.025(2) (1983-84).

75. See *Karow v. Milwaukee County Civil Serv. Comm'n*, 82 Wis. 2d 565, 570, 263 N.W.2d 214, 217 (1978). The recognition by the legislature in the meaning of the two words is clearly demonstrated when the legislature provides that costs and fees "may" be assessed to either the party or attorney in subsection two and when the legislature uses "shall" in subsection one. Consequently, the court is not vested with discretion in whether to award fees and costs upon finding frivolousness, but is only granted discretion in determining against whom they will be awarded. See *Sommer v. Carr*, 99 Wis. 2d 789, 299 N.W.2d 856 (1981). See generally *Sundby*, *supra* note 50.

76. WIS. STAT. § 814.04 (1983-84) provides in pertinent part:

Except as provided in § 814.025, when allowed costs shall be as follows:

(1) ATTORNEY FEES. (a) When the amount recovered or the value of the property involved is \$1,000 or over, attorney fees shall be \$100; when it is less than \$1000 and is \$500 or over, \$50; when it is less than \$500 and \$200 or over, \$25; and when it is less than \$200, \$15.

(b) When no money judgment is demanded and no specific property is involved, or where it is not practical to ascertain the money value of the rights

ney as well as the party.<sup>77</sup> And third, the use of the word "reasonable" in subsection one granted courts not only discretion as to who will be assessed the costs and fees under subsection two but also discretion as to what constitutes reasonable fees<sup>78</sup> and what items are properly included in the award for costs and fees.<sup>79</sup>

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involved, attorney fees under par. (a) shall be fixed by the court, but shall not be less than \$15 nor more than \$100.

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

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

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

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

(7) JUDGMENT OFFER NOT ACCEPTED. If the offer of judgment pursuant to sec. 807.01 is not accepted and the plaintiff fails to recover a more favorable judgment he shall not recover costs but the defendant shall have full costs to be computed on the demand of the complaint.

.....  
77. See WIS. STAT. § 814.025(2) (1983-84).

78. To establish reasonableness, record evidence is required in those cases where the fees are in dispute. In all other cases, reasonableness of fees can be determined by the trial court's inherent power which is premised on the court's supervisory control of the practice of law, and on the judge's expert knowledge regarding the value of legal services. See *Stivarius v. DiVall*, 117 Wis. 2d 62, 342 N.W.2d 782 (Ct. App. 1983), for a list of various means of establishing reasonable attorney fees.

79. See WIS. STAT. § 814.025(1) (1983-84).

*C. Proceedings Covered by Section 814.025(2)*

The frivolous claims statute applies to five areas:<sup>80</sup> (1) actions, (2) special proceedings,<sup>81</sup> (3) counterclaims, (4) defenses, and (5) cross-complaints. Because appeals are not included within this list of proceedings, the Wisconsin Court of Appeals has ruled that appeals could not be considered frivolous.<sup>82</sup> The court reasoned that an appellate procedure does not fit within the ambit of determining the frivolousness of an action. Subsection one requires a finding of frivolousness to be found "at any time during the proceedings or upon judgment."<sup>83</sup> Because an appellate procedure does not occur immediately after judgment, the court ruled that it does not come within the time periods covered by the statute.<sup>84</sup> Irrespective of this ruling, the Wisconsin Legislature has enacted legislation under section 809.25(3)<sup>85</sup> to curb initiation of frivolous appeals. Section 809.25(3) is very similar in wording to

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80. *See* WIS. STAT. § 814.025(3) (1983-84).

81. In *Share Corp. v. Pro-Specialties, Inc.* 107 Wis. 2d 318, 320 N.W.2d 24 (1982), the issue before the court was whether in a nonsummary criminal contempt proceeding, costs and fees could be awarded under section 814.025 after the defendant's defense was ruled to be frivolous. The court ruled that such a proceeding was not a criminal proceeding as argued by the defendant and therefore not subject to the rule espoused in *City of Janesville v. Wiskia*, 97 Wis. 2d 473, 293 N.W.2d 522 (1980), that criminal proceedings are excluded from section 814.025. The plaintiff erroneously based his argument on the distinction that the proceeding was a special proceeding and therefore covered under section 814.025. The proper analysis is whether the proceeding is criminal in nature or noncriminal and therefore not excluded from section 814.025. The next step is to determine whether it is a frivolous action, special proceeding, counterclaim, defense, or cross-complaint. Therefore in *Share*, since the trial court had already categorized the frivolousness as one of defense, the appropriate argument to be made by the plaintiff is that it was a frivolous defense after the plaintiff had successfully argued that it was not a criminal procedure. Arguing that it was not a criminal procedure does nothing to establish whether it is criminal in nature or not. Clearly, a special procedure can have a criminal overtone to it and thereby be excludable.

82. In *re* *Bilsie*, 100 Wis. 2d 342, 356-57, 302 N.W.2d 508, 517 (Ct. App. 1981).

83. WIS. STAT. § 814.025(1).

84. *See In re Bilsie*, 100 Wis. 2d 342, 356-57, 302 N.W.2d 508, 517 (Ct. App. 1981).

85. WIS. STAT. § 809.25(3) (1983-84) states in full:

(3) Frivolous appeals. (a) If an appeal or cross-appeal is found to be frivolous by the court, the court shall award to the successful party costs and fees under this section.

(b) The costs and fees awarded under par. (a) may be assessed fully against the appellant or cross-appellant or the attorney representing the appellant or

that found in section 814.025.<sup>86</sup> Consequently, interpretation of this statute can be drawn from the growing body of case law interpreting section 814.025.<sup>87</sup>

#### IV. SCRUTINIZING SECTION 814.025

##### A. *Critical Analysis*

The chief virtue of Wisconsin's frivolous claim statute is that it allows the victim of a frivolous action to pursue a remedy against the perpetrator in the same proceeding as the original action. Before this section was adopted there was no method by which the innocent party could recoup legal expenses without starting a separate action.<sup>88</sup> Additionally, the statute takes aim not only at frivolous lawsuits but also at frivolous defenses, counterclaims, and cross-claims.<sup>89</sup> However, the major drawback of this section is that it still requires a finding of malice.

Upon reviewing the elements of malicious prosecution and abuse of process<sup>90</sup> and comparing those with the elements in a suit for frivolousness under section 814.025, it is clear that by its very terms the statute requires two of the elements composing a claim for malicious prosecution.<sup>91</sup> The legislature has essentially codified the common law torts of malicious prosecution and abuse of process. A brief review of section

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cross-appellant or may be assessed so that the appellant or cross-appellant and the attorney each pay a portion of the costs and fees.

(c) In order to find an appeal or cross-appeal to be frivolous under par. (a), the court must find one or more of the following:

1. The appeal or cross-appeal was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

2. The party or the party's attorney knew, or should have known, that the appeal or cross-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.

86. See *supra* note 48.

87. See *In re Koenigsmark*, 119 Wis. 2d 394, 351 N.W.2d 169 (Ct. App. 1984).

88. See *Sommer v. Carr*, 99 Wis. 2d 789, 793, 299 N.W.2d 856, 858 (1981).

89. See WIS. STAT. § 814.025(1) (1983-84).

90. See *supra* text accompanying notes 13-18 & 26-28 for a categorized listing of the elements of both torts.

91. The (3)(b) standard requires an absence of any reasonable basis in law or equity, which translates into a probable cause standard. Additionally, it calls for a good faith argument which is essentially the subjective standard pertaining to motive or malice. See WIS. STAT. § 814.025(3)(a), (b) (1983-84).

814.025 demonstrates that the standard under subsection 3(a) — “bad faith” — is in essence a standard of malice. Likewise, the standard in section 3(b) — “good faith” — is a standard of malice. Therefore, both standards have an element of subjectivity to them.

The statute is entitled “Costs upon frivolous claims and counterclaims.” This title suggests that the statute is aimed at preventing frivolous actions regardless of the form they may take and what source they originate from. Clearly, frivolous actions by statutory definition include not only those that are malicious but also those that are prosecuted without any reasonable basis in law or equity.<sup>92</sup> Additionally, the legislative history of the original bill defined frivolous as “not honestly debatable under law,” and the case law suggests that frivolous can be defined as an “indefensible” position.<sup>93</sup> Given the definitions of what constitutes frivolousness, the statute’s primary purpose must be to eliminate frivolous actions as that term is broadly understood. Accordingly, frivolous pursuits include more than malicious prosecutions and many times do not have an element of malice to them. In fact, many frivolous actions are not the result of malice but rather the result of two specific factors: shortage of facts and attorney incompetency.

The first category, shortage of facts, stems from the attorney’s inability to obtain facts without which an attorney cannot satisfactorily appraise the merits of a case.<sup>94</sup> Facts of paramount importance are often in the possession of the opposing party and therefore not discoverable until the lawsuit is filed. Consequently, an attorney may proceed with an action that is meritless in the hope of discovering the crucial facts. However, this attorney will be faced with two procedural obstacles that hamper the truth-finding process. The first obstacle is the streamlined notice pleading rules. These rules may permit the opposing party to withhold the details underlying

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92. For the full text of WIS. STAT. § 814.025 (1983-84), see *supra* note 48.

93. See *Sommer v. Carr*, 99 Wis. 2d 789, 797, 299 N.W.2d 856, 859 (1981).

94. An illustrative case on this point is *In re Bilsie*, 100 Wis. 2d 342, 302 N.W.2d 508 (Ct. App. 1981). In that case the plaintiff commenced an action with less than all the facts. Later, the defendant under court order provided facts to the plaintiff which showed the untenable nature of the plaintiff’s case. Nonetheless, the plaintiff continued to prosecute his action which was then ruled to be frivolous.

an action.<sup>95</sup> The second obstacle is the increasing cost of discovery.<sup>96</sup> This cost may contribute to a lack of relevant facts with which to appraise a case when the amount in controversy does not justify the expense of obtaining additional information.<sup>97</sup> The alternative to proceeding in light of the missing data is to forego any further advancement and possibly risk a suit for legal malpractice. Thus, many lawsuits may be frivolous not because of maliciousness but rather because of an honest lack of facts that is promoted by the judicial system itself.

Attorney incompetency likewise contributes to the flood of frivolous litigation. An attorney with little knowledge in an area of law may take a position not supported under any interpretation or reading of the law.<sup>98</sup> Even if this attorney harbors a good faith belief that the position is supported by the law, the result is a frivolous pursuit. Also, a position with no legal support may be deemed frivolous at first glance, but if argued rationally and logically, can soon be turned into an arguable position, much to the credit of the attorney. By the same token, the mere inability of an attorney to articulate the client's position in an appropriate and rational manner can turn a credible action into a frivolous one.<sup>99</sup> Because frivolous actions include actions that stem from something other than

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95. See *Conley v. Gibson*, 355 U.S. 41 (1957) (purpose of today's pleadings is to give fair notice without all the details).

96. Costs of discovery includes: out-of-pocket expenses for employing discovery mechanisms, the expense of responding to the opponent's discovery demands, preparing discovery requests, and the client's time spent in assisting in discovery, such as appearing in a deposition or submitting to a medical examination. These all contribute to inflated discovery costs which in many cases are not justified. See Note, *Discovery Abuse Under the Federal Rules: Causes and Cures*, 92 YALE L.J. 352 (1982).

97. See Note, *supra* note 96, at 357. The costs of discovery and the amount of information to be gathered are controlling factors in two situations: (1) when the suit is being prosecuted on a contingent fee basis, and (2) when the client monitors the attorney's expenditures which accrue to the client. If these two conditions do not occur, discovery is less of a limiting factor on the amount of material retrieved because attorney fees (discovery costs) are a cost to the client but a benefit to the attorney. "The interests of attorney and client in this respect are thus diametrically opposed." *Id.* at 358 n.36.

98. See *In re Swartwout*, 116 Wis. 2d 380, 342 N.W.2d 406 (1984) (the court found negligent and incompetent handling of the client's claim in that he knew or should have known that the action he commenced on behalf of his client was barred by the Federal Employees Compensation Act).

99. See *Dobbs*, *supra* note 43. Similarly, an attorney's inability to articulate either the law or the facts or both should not turn a credible lawsuit into a frivolous one.

malice and the statute's purpose is to eliminate frivolous actions regardless of their source or motivation, it is astonishing that the Wisconsin Legislature still requires a finding of malice before an action can be deemed frivolous. Requiring a finding of malice is an inappropriate standard when objective factors can be used as argued above.<sup>100</sup> Since frivolous lawsuits are generally composed of the very same ingredients that contribute to a finding of want of probable cause in a suit for malicious prosecutions, the statute should be constructed along the lines of a probable cause theory rather than tying it to an element of malice.

### B. Case Law Commentary

After Wisconsin's frivolous claims statute became effective in 1978, no published appellate opinion considered the section until nearly two years later in *Sommer v. Carr*.<sup>101</sup> In *Sommer*, the Wisconsin Supreme Court determined that the issue was not whether there was a reasonable basis in law or equity for the action but rather whether the attorney knew or should have known that the claim was frivolous.<sup>102</sup> By framing the issue in this manner, the court impliedly chose to put emphasis on the first half of the subsection 3(b) standard<sup>103</sup> rather than the last half.<sup>104</sup> Consequently, the court interjected considerable confusion into its holding. The problem can be more readily understood in the following manner. The purpose of section 814.025 is to award costs and fees for frivolous actions, and subsection 3(b) attempts to determine what actions are frivolous.<sup>105</sup> Since the proper question in any section 814.025 case is whether the challenged act is frivolous, to state that an

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100. See *supra* notes 32-46 and accompanying text for a review of the inadequacies of the malice element.

101. 95 Wis. 2d 651, 291 N.W.2d 301 (Ct. App. 1980), *rev'd*, 99 Wis. 2d 789, 299 N.W.2d 856 (1981).

102. See 99 Wis. 2d at 797, 299 N.W.2d at 859.

103. The court chose to emphasize the following language of section 814.025(3) as the appropriate determinate of a frivolous action: "[t]he attorney knew or should have known . . . ." See 99 Wis. 2d at 799, 299 N.W.2d at 860.

104. The court did not address and failed to explain the significance of the following language of section 814.025(3)(b): "[W]ithout any reasonable basis in law or equity and could not be supported by a good faith argument . . . ." See 99 Wis. 2d at 799, 299 N.W.2d at 860.

105. See 99 Wis. 2d at 792, 299 N.W.2d at 857.



action is frivolous because the attorney knew or should have known the action is frivolous begs the question. Instead, a better understanding is gained by giving credence to the statutory words "reasonable basis in law or equity"<sup>106</sup> and by reading both phrases together.

Less than three weeks later, the court of appeals had an opportunity to construe section 814.025. In *In re Bilsie*,<sup>107</sup> the court found that the objection raised by the opponent of a will was not frivolous while the attorney was assessing the case, but was frivolous when the opponent continued to object after being presented with additional evidence of testamentary capacity.<sup>108</sup> The court rejected the opponent's contention that there need only be "some credible evidence" to support the litigant's action and thereby avoid a finding of frivolousness.<sup>109</sup> The court concluded that the better test for purposes of avoiding a claim of frivolousness was whether a party has the requisite amount of evidence to meet a party's applicable burden of proof.<sup>110</sup>

A 1983 Wisconsin Supreme Court decision involved an action brought by a plaintiff to collect the premium for an insurance policy ordered by the defendant. In *Robertson-Ryan v. Pohlhammer*<sup>111</sup> the defendant failed to appear for trial. The counsel for defendant attempted to find his client, but was unsuccessful. After the trial judge told defense counsel that a default judgment would be entered against him if the trial did not proceed immediately, counsel elected to try the case without his client present for purposes of avoiding a default judgment. After the plaintiff presented one witness, the defendant did not introduce any direct evidence, but instead cross-ex-

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106. WIS. STAT. § 814.025(3)(b) (1983-84).

107. 100 Wis. 2d 342, 302 N.W.2d 508 (Ct. App. 1981).

108. *Id.* at 345, 302 N.W.2d at 511 (medical records indicating testamentary capacity).

109. *Id.* at 353, 302 N.W.2d at 515.

110. *See id.* The court noted that in a case alleging lack of testamentary capacity, the party making such an allegation has the burden of proving that incapacity to the trier of fact by clear and satisfactory evidence. *Id.* Therefore, whether an action has a reasonable basis in law or equity depends on whether the person advancing the action has sufficient evidentiary facts to provide "any reasonable basis" to meet the party's burden of proof or that claim or defense. *Id.* at 354, 302 N.W.2d at 516.

111. 112 Wis. 2d 583, 334 N.W.2d 246 (1983).

amined the plaintiff's witness. The trial court found the defense to be frivolous; the supreme court reversed.

Initially, the supreme court recognized that a lack of affirmative evidence does not in itself establish that the defense is frivolous.<sup>112</sup> Furthermore, the court noted that the defendant pleaded a defense which had a reasonable basis in law and equity.<sup>113</sup> However, the court did not give sufficient consideration to the disappearance of the defendant's only witness, nor did it measure the defendant's sufficiency of evidence in accordance with the burden of proof standard as enunciated in *Bilsie* when it required the party to produce the requisite amount of evidence to meet the applicable burden of proof throughout the entire court action for purposes of being deemed to have "any reasonable basis" in law or equity.<sup>114</sup> Therefore, the supreme court was obligated to assess the defendant's defense in terms of whether it was frivolous before the disappearance of his evidence and after the disappearance of his evidence. Instead of continuing to monitor the sufficiency of defendant's evidence throughout the pretrial period, the court assumed that once it was determined at the pleading stage that the party had enough evidence to support a viable defense, the defendant would continue to have enough evidence and thereby avoid a ruling of frivolousness. The holding in *Robertson-Ryan*, thus, allows a party to effectively circumvent the *Bilsie* holding. It is entirely possible that it cannot be determined whether a party's act has a reasonable basis in law or equity until the trial is complete, since the party's act could conceivably be determined to be reasonable only on cross-examination at trial, as was the case in *Robertson-Ryan*.

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112. See *id.* at 590, 334 N.W.2d at 250.

113. "The answer alleged that Pohlhammer was not liable for the premium because he cancelled the application for insurance." *Id.*

114. The *Bilsie* court determined that the objector's claim to mental incompetency was not frivolous while the attorney was assessing the case but was frivolous after new facts as to the competency of the decedent had entered the picture. Therefore, when the objector continued to press her claim in light of the new evidence, the court awarded attorneys and guardian ad litem fees for services after the date in which the new evidence was introduced. The introduction of new evidence essentially made it impossible for the objector to meet her burden of proof. See *Bilsie*, 100 Wis. 2d at 346, 302 N.W.2d at 512.

In each case decided on the basis of subsection (3)(b), the court has ignored the second element that must be established before an action can be deemed frivolous. In failing to put the party to its burden of proof on the element of good faith and in failing to address this element in its opinions, the court has affirmatively altered the legislative mandates. In *Radlein v. Industrial Fire and Casualty Insurance Co.*,<sup>115</sup> the only case to mention the good faith element, the supreme court gave it a cursory treatment and summarily dismissed the case. In the sixteen cases<sup>116</sup> decided in this area the courts appear to be sending the legislature a clear message. Simply stated, the courts believe that the element has no place in the determination of frivolous actions and is rectifying this deficiency by deleting it. Therefore, the victim of a frivolous proceeding should be able to rely on objective factual evidence in an attempt to meet the second standard of section 814.025.

#### V. DISCIPLINARY PROCEEDINGS AND SECTION 814.025

One of the arguments most frequently cited against the frivolous claim statute is that assessment of fees and costs against the attorney infringes upon the attorney-client relationship by preventing attorneys from zealously representing their clients, and espousing new theories of law.<sup>117</sup> The opposing argument is that a lawyer is an officer of the court whose duties to the public at certain points transcend the fiduciary duty owed to the client. Moreover, an attorney has an obligation to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice. However, the Code of Professional Responsibility notes that these duties are not inconsistent. The attorney's duty to both the legal system and to the client "are the same: to represent one's client zealously within the bounds of the law."<sup>118</sup> A closer examination of section 814.025 in conjunction with pro-

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115. 117 Wis. 2d 605, 345 N.W.2d 874 (1984).

116. See *supra* note 53 for a listing of these cases.

117. "Frivolous action claims are an especially delicate area since it is here that ingenuity, foresightedness and competency of the bar must be encouraged and not stifled." *Radlein v. Industrial Fire & Cas. Ins. Co.*, 117 Wis. 2d 605, 613, 345 N.W.2d 874, 879 (1984). For constitutional considerations, see *NAACP v. Button*, 371 U.S. 415 (1963) (access to courts).

118. ABA Code of Professional Responsibility, EC 7-19.

visions of the supreme court rules reveals that the requisite facts to establish a violation of section 814.025 also provide the foundation for a violation of the Supreme Court Rules.<sup>119</sup>

### A. Canon Seven

Canon seven imposes the duty to represent one's client "zealously within the bounds of the law."<sup>120</sup> The Ethical Considerations restate this idea of zealous representation and Disciplinary Rules DR 7-101 and DR 7-102 require a lawyer to seek "the lawful objectives of his client through reasonable available means permitted by law,"<sup>121</sup> but to do so in a manner that does not serve "to harass or maliciously injure another."<sup>122</sup> Unlike the double standard in section 814.025,<sup>123</sup> Canon seven adheres to a single subjective standard.<sup>124</sup> Disciplinary Rule 7-102 states that a "lawyer shall not file a suit, assert a position, conduct a defense, delay a trial, or take other action . . . when he knows it is obvious that such action would serve merely to harass or maliciously injure another."<sup>125</sup> Additionally, an attorney is not allowed to "knowingly advance a claim or defense that is unwarranted under existing law . . . unless supported by a good faith argument for an extension [or] modification . . ."<sup>126</sup> Nonetheless, "a lawyer is not justified in asserting a position in litigation that is frivolous."<sup>127</sup> Therefore, the language of the Code suggests that a violation of its provisions will only be found by applying the subjective standard and that the provisions of the Code may aid a party in properly determining what meets the subjective standard of bad faith in section 814.025(3)(a).

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119. In formulating section 814.025 the legislature used wording nearly identical to that of Supreme Court Rule 20.36 (ABA Code, *supra* note 118, DR 7-102). "Under these circumstances, a court making a finding that sec. 814.025 is applicable must find the facts which indicate possible violation of the disciplinary rule in SCR 20.36." *See Sommer v. Carr*, 99 Wis. 2d 789, 794 n.4, 299 N.W.2d 856, 860 n.4 (1981).

120. ABA Code, *supra* note 118, Canon 7.

121. *Id.*, DR 7-101(A)(1).

122. *Id.*, DR 7-102(A)(1).

123. Section 814.025(3)(a) provides the litigants with a subjective standard while subsection (3)(b) provides for an objective standard. *See generally supra* notes 54-62 and accompanying text.

124. *See Note, Unfounded Litigation, supra* note 1, at 769-70.

125. ABA Code, *supra* note 118, DR 7-102(A)(1).

126. *Id.*, DR 7-102(A)(2).

127. *Id.*, EC 7-4.

### B. Canon Two

In *State v. State Farm Fire & Casualty Co.*<sup>128</sup> the Wisconsin Supreme Court discussed the similarity of section 814.025 and the Code as it is incorporated into the Wisconsin Supreme Court rules. When counsel for the plaintiff realized that the court intended to assess costs and fees against both his client and himself, he moved to withdraw from representation. In denying counsel's motion the trial court noted the duty imposed on an attorney under Disciplinary Rule 2-109, which precludes a lawyer in the first instance from accepting employment in which the client seeks to assert either a malicious claim or one not supported by a good faith argument in law.<sup>129</sup> Additionally, the court noted the attorney's duty to withdraw if, in the course of employment, it becomes obvious to the lawyer that the employment violates Disciplinary Rule 2-110.<sup>130</sup> The trial court stated that a lawyer wishing to represent a client must be prepared to accept the penalty if the court awards costs and fees under section 814.025. The Wisconsin Supreme Court reversed, and Justice Abrahamson, concurring, stated that "the lawyer's obligation to comply with the Code and the lawyer's desire to avoid the adverse financial consequences imposed under section 814.025 may conflict."<sup>131</sup> She concluded by noting that "[t]he Code . . . and section 814.025 . . . are in some respects related, but the nature of the relationship is far from clear."<sup>132</sup>

The significant factor with respect to withdrawal from employment under Disciplinary Rule 2-110 is that in some cases the attorney is required to withdraw<sup>133</sup> and in other cases is permitted to withdraw.<sup>134</sup> Additionally, this provision of the Code requires the attorney to request the permission of the

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128. 100 Wis. 2d 582, 302 N.W.2d 827 (1981).

129. See ABA Code, *supra* note 118, DR 2-109.

130. See *id.* DR 2-110.

131. *State Farm*, 100 Wis. 2d at 608, 302 N.W.2d at 840 (Abrahamson, J. concurring).

132. *Id.* at 609, 302 N.W.2d at 840.

133. ABA Code, *supra* note 118, DR 2-110(B).

134. *Id.*, DR 2-110(C).

court before withdrawing.<sup>135</sup> Generally, "the Code adopts a limited view of what constitutes grounds for withdrawal."<sup>136</sup>

### C. *Canons One, Six, and Nine*

The other provisions necessarily impacting on frivolous proceedings are Canons one, six, and nine.<sup>137</sup> Canon six imposes on the attorney a minimum level of competency. Ethical Consideration 6-1 suggests that a "lawyer should act with competence and proper care in representing clients,"<sup>138</sup> and Disciplinary Rule 6-101 forbids a lawyer from handling "a legal matter without preparation adequate in the circumstances."<sup>139</sup> The impact of this provision of the Code on section 814.025 is clear. Although the Code prohibits an attorney from incompetently handling a legal matter, the Wisconsin Court of Appeals in *In re Bilsie*<sup>140</sup> did not require the highest level of competence or legal ability.<sup>141</sup> In determining whether the statutory standard is met, the objective standard would be used.<sup>142</sup> Likewise, a violation of Disciplinary Rule 6-101 would be measured in accordance with an objective standard, since the purposes underlying the Code provisions are to maintain a minimum level of competency. However, the use of the objective standard with respect to the statute promotes a separate interest in the efficiency of the adversarial process, the preservation of judicial resources, and the reduction of cost.

While Canon six can be characterized as client-oriented, Canons one and nine are oriented toward protecting the interests of the judiciary, members of the bar, and the administration of justice. Canon one requires attorneys to "assist in maintaining the integrity and competence of the legal profes-

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135. *Id.*, DR 2-110(A)(1).

136. Note, *A Lawyer's Duty*, *supra* note 1, at 1588.

137. Canon one provides: "A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession." ABA Code, *supra* note 118, Canon 1. Canon six provides: "A Lawyer Should Represent a Client Competently." *Id.*, Canon 6. Canon nine provides: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." *Id.*, Canon 9.

138. *Id.*, EC 6-1.

139. *Id.*, DR 6-101(A)(2).

140. 100 Wis. 2d 342, 302 N.W.2d 508 (Ct. App. 1981).

141. *Id.* at 350, 302 N.W.2d at 514.

142. *Id.*

sion.”<sup>143</sup> Pursuant to Canon one, Disciplinary Rule 1-102(A) forbids lawyers from engaging in conduct that involves “dishonesty, fraud, deceit, or misrepresentation” or that which is “prejudicial to the administration of justice.”<sup>144</sup> Finally, Canon nine promotes the interest of the legal system.<sup>145</sup> The Ethical Considerations challenge the attorney to “promote public confidence in our system and in the legal profession.”<sup>146</sup> Therefore, the promotion of frivolous claims would hamper the efficiency of the adversarial system and defeat the purpose of Canon nine.

In summary,<sup>147</sup> the Code and its wealth of case law may prove to be an invaluable tool in resolving disputes arising under section 814.025. Furthermore, it may provide a useful guide as to the types of conduct that will be a basis for a frivolous claim action under section 814.025.

#### D. Code of Professional Responsibility Standard

Four years after the enactment of section 814.025, the Wisconsin Supreme Court had its first opportunity to rule on a matter involving violations of both section 814.025 and the Code. In *In re Lauer*,<sup>148</sup> the primary issue was whether the disciplinary proceeding was based on the belief that a violation of section 814.025 was a per se violation of the Code. The court, after recognizing that although the statute and rule 20.36 were similar but not identical, stated that “assessment of

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143. ABA Code, *supra* note 118, Canon 1.

144. *Id.*, DR 1-102(A)(4), (5).

145. *Id.*, Canon 9.

146. *Id.*, EC 9-1.

147. For a more thorough examination of the relevant canons and disciplinary rules, see Sutton, *The American Bar Association Code of Professional Responsibility*, 48 TEX. L. REV. 255 (1970). See also Cady, *Canons to the Code of Professional Responsibility*, 2 CONN. L. REV. 222 (1969-70).

148. 108 Wis. 2d 746, 324 N.W.2d 432 (1982). Lauer commenced an action in mandamus on behalf of his client against a town board and three board members. The trial court dismissed the action. Later, Lauer started a second action against the same board members for negligence. The trial court dismissed the action and awarded costs and fees under section 814.025. The court ruled that in light of the 1978 judgment, any suit based on the alleged negligent acts concerning compliance with statutory regulations would be prohibited by the doctrine of *res judicata*. Subsequently, the Board of Attorneys Professional Responsibility informed him that they would investigate him for a violation of Supreme Court Rule 20.36 based on the violation of section 814.025. The board subsequently found Lauer in violation of the Code.

costs under the statute does not, of itself, constitute a violation of our rule of professional responsibility.”<sup>149</sup> As pointed out by the court, the fundamental difference between the statute and the Code is that under the statute the attorney must know, or should know, that the action has no reasonable basis in law or equity, while a violation of the Code requires the attorney to knowingly advance a claim not warranted under existing law.<sup>150</sup> Finally, the supreme court noted that the standard to be applied in the disciplinary proceeding is not the same standard as applied under section 814.025.<sup>151</sup> The court concluded that the subjective standard of whether the attorney knew the proceeding had no basis in law or equity and could not be supported by a good faith argument was the appropriate standard.<sup>152</sup> Therefore, the assessment of costs against the attorney under section 814.025 does not per se result in a violation of the Code.

## VI. CONCLUSION

Although Wisconsin, by enacting section 814.025, has made major strides in recognizing that meritless suits should not be left to common-law remedies, the task confronting both the legislature and the courts is to resolve the problem of how to implement the section fairly, efficiently, and unambiguously.

### A. *The Standard of Culpability*

Section 814.025(3)(b) requires both a finding of no reasonable basis in law or equity to support the act and a good faith

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149. *Lauer*, 108 Wis. 2d at 756-57, 324 N.W.2d at 438. “It does not follow that where there is a violation of the statute there must be a violation of the disciplinary rule.” *Id.* at 757, 324 N.W.2d at 438. See *supra* note 119 and accompanying text for a review of the similarity between the code and section 814.025.

150. See *Lauer*, 108 Wis. 2d at 757, 324 N.W.2d at 438.

151. See *id.* at 756-57, 324 N.W.2d at 438.

152. See *supra* notes 120-27 and accompanying text. The *Lauer* court found that because of the different policies being advanced by the Code and the statute, different standards had to be applied. The statute is concerned with the costs, both in terms of time and money, incurred by litigants and the court system itself as a result of the frivolous action. On the other hand, the Code is promoting the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. See *Lauer*, 108 Wis. 2d at 757, 324 N.W.2d at 439.



argument.<sup>153</sup> The added requirement of good faith could be dealt with in two ways. First, the legislature could amend subsection (3)(b) by eliminating this particular phraseology, since the idea of good faith or bad faith is already incorporated into subsection (3)(a). In the alternative, the clause could remain but with some added guidance as to what the legislature means by this requirement, either in the form of a comment or in the form of a definitional subsection. If the legislature does not believe it proper to effect a change, the judiciary should recognize the dual requirement in subsection (3)(b) and give it meaning when rendering a decision based on (3)(b). With the exception of the *Radlein* court,<sup>154</sup> the courts have generally glossed over this requirement. And even when deliberately recognizing this second requirement, the supreme court has not determined what exactly is good faith. The problem still facing the court is what constitutes good faith. Finally, out of a desire to minimize the risk of a chilling effect on the advancement of innovative legal theories,<sup>155</sup> it may be best to delete the element of malice and add the element of lack of probable cause before a proceeding can be found to be frivolous.

### B. Costs

Sanctions against meritless claimants should be graded primarily according to the magnitude of the injury inflicted. The sanction should be designed to compensate the wronged parties for all damages suffered or expenses reasonably incurred as a result of the unfounded suit. Factual dishonesty and other extreme abuses could justify punitive damages.

With respect to assessment of costs and fees against attorneys, it is clear that withdrawal as suggested by the Code<sup>156</sup> is not a viable solution in attempting to control frivolous pursuits. If an attorney incorrectly decides that the client is attempting to maliciously injure another, the attorney may be subject to a malpractice claim. On the other hand, an attor-

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153. See WIS. STAT § 814.025(3)(b) (1983-84).

154. *Radlein v. Industrial Fire & Cas. Ins. Co.*, 117 Wis. 2d 605, 345 N.W.2d 874 (1984).

155. See Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1 (1976).

156. See ABA Code, *supra* note 118, DR 2-110.

ney could withdraw from a case due to some underlying reason and justify such withdrawal under the pretense that the client's wishes involved the bringing of a frivolous action. Therefore, the court or the legislature needs to face the issue of whether an attorney should be assessed costs and fees after advising the client not to proceed, but the client refuses.

### C. *Alternative Solution*

An entirely different and more practical approach to the problem of deterring frivolous actions can be found in the recently proposed amendments to the Federal Rules of Civil Procedure.<sup>157</sup> Rule 68, "Pertaining to Offers of Judgment," would be deleted and replaced with "Offer of Settlement; Sanctions."<sup>158</sup> Simply stated, proposed Rule 68 would penalize a party who "refuses an offer that turns out to match or

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157. In September 1984, the Committee on Rules of Practice and Procedure of Judicial Conference proposed various new rules and amendments to the existing rules. See *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure, Federal Rules of Civil Procedure, Federal Rules of Criminal Procedures and Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States District Courts* (September 1984).

158. Proposed Rule 68 states in full:

At any time more than 60 days after the service of the summons and complaint on a party but not less than 90 days (or 75 days if it is a counter-offer) before trial, either party may serve upon the other party but shall not file with the court a written offer, denominated as a [sic] offer under this rule, to settle a claim for the money, property, or relief specified in the offer and to enter into a stipulation dismissing the claim or to allow judgment to be entered accordingly. The offer shall remain open for 60 days unless sooner withdrawn by a writing served on the offeree prior to acceptance by the offeree. An offer that remains open may be accepted or rejected in writing by the offeree. An offer that is neither withdrawn nor accepted within 60 days shall be deemed rejected. The fact that an offer is made but not accepted does not preclude a subsequent offer. Evidence of an offer is not admissible except in proceedings to enforce a settlement or to determine sanctions under this rule.

If, upon a motion by the offeror within 10 days after the entry of judgment, the court determines that an offer was rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of litigation, it may impose an appropriate sanction upon the offeree. In making this determination the court shall consider all of the relevant circumstances at the time of the rejection, including (1) the then apparent merit or lack of merit in the claim that was the subject of the offer, (2) the closeness of the questions of fact and law at issue, (3) whether the offeror had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer, (4) whether the suit was in the nature of a "test case," presenting questions of far-reaching importance affecting non-parties, (5) the relief that might reasonably have been expected if the claimant should prevail, and (6) the amount of the additional delay, cost, and expense that

exceed the amount finally awarded."<sup>159</sup> Through this method, frivolousness is determined on the basis of six objective factors and the only question remaining for the appellate courts is whether the trial court abused its discretion. Although this rule would determine whether a suit is frivolous or not, it is much broader since it includes within its application those claims that are both nonfrivolous and frivolous. Additionally, it is broader in an important respect: the sanction allowed under these cases is much broader than simply awarding costs and attorney fees. For example, an "appropriate sanction" can also include interest that could have been earned.

This rule eliminates any need for determining whether an action is commenced with malice,<sup>160</sup> thereby dispensing with the primary problem of defining malice. The legislature, by adopting a version similar to Rule 68 would eliminate the entire problem of what constitutes good or bad faith and additionally prevent any further judicial disobedience of its legislative directives.

As clearly stated in the committee notes to Rule 68, the rule still preserves the chief virtue of section 814.025: this rule would apply with equal force to both plaintiffs and defendants, as does section 814.025.<sup>161</sup> And unlike former rule 68, but in tune with section 814.025, the sanction includes both attorney fees and costs.<sup>162</sup> Furthermore, the rule, in relying

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the offeror reasonably would be expected to incur if the litigation should be prolonged.

In determining the amount of any sanction to be imposed under this rule the court also shall take into account (1) the extent of the delay, (2) the amount of the parties' costs and expenses, including any reasonable attorney's fees incurred by the offeror as a result of the offeree's rejection, (3) the interest that could have been earned at prevailing rates on the amount that claimant offered to accept to the extent that the interest is not otherwise included in the judgment, and (4) the burden of the sanction on the offeree.

This rule shall not apply to class or derivative actions under Rules 23, 23.1, and 23.2.

159. Frank, *On the Merits: Frivolous Suits Targeted*, 70 A.B.A. J., July 1984, at 28.

160. In Wisconsin, both statutory standards require a subjective finding of malice. In subsection 814.025(3)(a), there must be "bad faith," and in subsection (3)(b), there must be lack of a "good faith argument."

161. The Committee attributed the rule's past failure to the fact that it was available only to defendants and not to plaintiffs.

162. Previously, the rule only allowed "costs." This limitation contributed to the rule's failure since costs absent attorney fees were considered too small a factor to motivate parties to use the rule.

on six enumerated objective factors, of which malice is not one, suggests that meritless litigation may be attributable to something other than malice.

*D. A Final Word*

In the final analysis, Wisconsin's frivolous claim statute does not answer the initial question posed in this Comment concerning the number of lawsuits. However, the statute does challenge the legal profession to consider the nebulous concept of justice and to adhere to at least a minimal standard of care. In this way, the statute may affect the quality of the lawsuits more than their quantity and thus avoid being labelled frivolous.

JAY W. ENDRESS