



Security for Costs: The Best Security Is a Reserve of Knowledge, Experience, and Ability¹

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Eighteen months after filing suit, plaintiff suddenly wanted to take the depositions of twelve witnesses. It was a medical negligence case and our client would incur significant costs and legal expenses in the process. Since

filing suit, plaintiff had moved from Wisconsin to Illinois and had limited disposable income. Until that point, she had done little to prosecute her claims. In order to test plaintiff's confidence in her case, we moved the court for an order requiring plaintiff to file security for costs in the amount of \$8,000.00. The court granted the motion and upheld its order on reconsideration. Unable or unwilling to post the security, plaintiff voluntarily dismissed her case against our client.

Given the high cost of defense in many types of cases, an order for security for costs can be a useful and aggressive tool. But it is not always available. This article explores the process, requirements, and restrictions for obtaining an order for security for costs under Wisconsin law.

I. What is "Security for Costs?"

An order for security for costs requires the plaintiff to deposit with the clerk of court a payment in the form of cash, property, or bond equal in amount to the costs which will be taxable in the matter if the defendant prevails.² The purpose of security for costs is to prevent a plaintiff from prosecuting

meritless claims and to ensure payment of costs that may be awarded against a plaintiff from whom it may be difficult to collect.³ In Wisconsin, the right to security for costs is governed by sections 814.27 to 814.34 of the Statutes.

II. Right to Security for Costs

When certain criteria are met (e.g., the plaintiffs are all nonresidents and/or foreign corporations), the defendant is *entitled* to an order for security for costs in an amount determined reasonable by the court, but not less than \$250.⁴ Wisconsin Stat. § 814.28 provides as follows:

(1) Defendant may require. Except as otherwise provided by s. 814.29, the defendant may require the plaintiffs to file security for costs if the plaintiffs are all nonresidents; or are foreign corporations, nonresident personal representatives, guardians, trustees, or receivers; or are trustees or assignees of any debtor; or are imprisoned for crime for terms less than life; or shall take issue upon the answer of the garnishee.

(2) Order for security. Upon proof by affidavit entitling the defendant to security for costs, the court *shall* order the plaintiffs to file security for costs in a sum mentioned in the affidavit, not less than \$250, within 20 days after the service upon the plaintiffs of a copy of the order requiring the security for costs⁵

Wisconsin courts interpreting the language of section 814.28 have held that it imposes a positive duty on trial courts to grant requests for security for costs made under the section and vests no discretion in the court except as to the amount of security to be furnished.⁶

When the defendant is not entitled to an order for security for costs as a matter of law, however, the court may still require the plaintiff to file security for costs under Wis. Stat. § 814.27 “in all cases where it shall appear reasonable and proper.” Unlike an application made under section 814.28, section 814.27 is addressed to the sound discretion of the trial court.⁷ Section 814.27 applies where section 814.28 does not apply, for example, where only two of three plaintiffs are nonresidents.⁸

III. Security for Costs Procedure

In order to obtain an order for security for costs, a defendant must file a notice of motion and motion with the court with supporting affidavit.⁹ The affidavit must demonstrate either: (1) that the defendant is entitled to an order for security for costs under Wis. Stat. § 814.28; or (2) that the circumstances are such that it would be “reasonable and proper” for the court to enter an order for security for costs under Wis. Stat. § 814.27. The affidavit must also mention the desired amount of the security for costs, not less than \$250.¹⁰

When the court orders security for costs, the plaintiff has twenty days after service of the order to file the security.¹¹ All proceedings on the part of the plaintiff are stayed until security is filed.¹² If the plaintiff fails to timely file security for costs when required, the court may, upon motion of the defendant, dismiss the action.¹³ The Wisconsin Supreme Court has noted that “failure to give or furnish the required security for costs has been uniformly held to be a ground for dismissal of the action.”¹⁴

IV. Security for Costs and Subrogated Plaintiffs

Should the existence of a non-participating, non-appearing subrogated plaintiff who resides in Wisconsin defeat a motion for security for costs under Wis. Stat. § 814.28? Some courts may think so. After all, section 814.28(1) provides that “the defendant may require the plaintiffs to file security for costs if the plaintiffs are *all* nonresidents....” Thus, a trial court certainly has discretion to deny a motion for security for costs under Wis. Stat. § 814.28 if just one of many plaintiffs is a resident of Wisconsin.

While there is no published appellate case addressing this issue, it was raised in the medical negligence case described in the introduction section of this Article. In that case, the plaintiff had named the Secretary of the U.S. Department of Health and Human Services (who had a mailing address in Milwaukee) as an involuntary plaintiff to the action. Plaintiff argued that the Department was technically a resident of Wisconsin and, therefore, section 814.28(a) did not apply. In response, we argued that the purpose of the statute would be defeated if plaintiff’s logic prevailed. The Wisconsin Supreme Court has stated that the statutes governing security for costs are remedial in nature and should be liberally construed to effectuate their purpose.¹⁵ Furthermore, the Department had already stated that it “would not appear or actively participate in the lawsuit” and had not asserted any claims against our client. Ultimately, the court agreed with our position and held that the existence of a non-participating, non-appearing involuntary plaintiff cannot defeat a motion for security for costs based on residency. Of course, even if the court had been unwilling to grant our request for security under section 814.28, it could have ordered plaintiff to pay security under section 814.27 as being the “reasonable and proper” thing to do.

V. Security for Costs and Poverty

The plaintiff in our medical negligence case also argued that she was not required to provide security for costs because of poverty. Section

814.29(1) of the Wisconsin Statutes provides that an impoverished person cannot be required to give security for costs:

[A]ny person may commence, prosecute or defend any action or special proceeding in any court, or any writ of error or appeal therein, without being required to give security for costs ... upon order of the court based on a finding that because of poverty the person is unable to ... give security for those costs.

While the plaintiff in our case argued that she qualified for a poverty waiver under Wis. Stat. § 814.29, she failed to follow the proper statutory procedure for establishing the same. The Wisconsin legislature stated, without ambiguity, that security for costs may be waived because of poverty *only* if the conditions of section 814.29(1)(b) are met.¹⁶ Accordingly, any person seeking a poverty waiver *must* produce an affidavit demonstrating that he or she is, in fact, impoverished.¹⁷ Rather than follow the proper statutory procedure, the plaintiff in our medical negligence case attached unauthenticated exhibits to a brief without a supporting affidavit. The court refused to accept the exhibits as sufficient proof of indigency.¹⁸

Even if plaintiff had submitted the proper affidavit, however, the trial court in our case indicated that it would have denied plaintiff's request for relief because she did not meet the statutory definition of impoverished. When determining whether a plaintiff is impoverished under Wis. Stat. § 814.29, Wisconsin courts must consider the following factors:

1. Whether the plaintiff is a recipient of means-tested public assistance (including welfare, supplemental security income, food stamps, veterans benefits, etc.);

2. Whether the plaintiff is represented by an attorney through a legal services program for indigent persons; and
3. Whether the plaintiff is otherwise unable, because of poverty, to give security for costs.¹⁹

Additionally, the court must consider the person's household size, income, expenses, assets, and debts, and the federal poverty guidelines.²⁰ Pursuant to Wis. Stat. § 814.29(2), the court may rescind a poverty waiver and enter an order for security for costs if the plaintiff no longer meets the statutory requirements described above. Additionally, the court may dismiss the action if it determines that a plaintiff's allegation of poverty is untrue.²¹

The following table sets forth the 2012-13 Federal Poverty Guidelines for persons living in the 48 contiguous states and the District of Columbia:

| Persons in household | Federal Poverty Guideline ²² (gross annual income) |
|----------------------|--|
| 1 | \$11,170 |
| 2 | \$15,130 |
| 3 | \$19,090 |
| 4 | \$23,050 |
| 5 | \$27,010 |
| 6 | \$30,970 |
| 7 | \$34,930 |
| 8 | \$38,890 |
| 9+ | For households with more than 8 persons, add \$3,960 for each additional person. |

In our case, the trial court gave great weight to the Federal Poverty Guidelines. According to the Federal Guidelines, the poverty threshold for plaintiff was a gross annual income of \$11,170 based on her household size. By comparison, plaintiff's actual annual income was approximately \$14,400. In addition, plaintiff had nearly \$9,000.00 in her checking account. Given the facts presented, the trial court could not find that plaintiff was exempt from having to file security for costs in the requested amount. On motion for reconsideration,

plaintiff attempted to submit to the trial court the affidavit that should have been filed in the first place. Her motion was denied.²³

VI. How to Calculate Security for Costs

When calculating the desired amount of the security for costs, counsel should include all amounts, past and future, which will be taxable in the matter if the defendant prevails, but not less than \$250.00.²⁴ Section 814.04 of the Wisconsin Statutes enumerates the items of costs taxable in civil actions:

- Statutory attorney fees²⁵;
- Referee fees;
- Service fees (not to exceed the authorized sheriff fee for the same service);
- Amounts actually paid out for certified and other copies of papers and records in any public office;
- The cost of telephone and e-mail communications, faxes, postage, photocopying, and express or overnight delivery;
- Deposition expenses, including transcript copies;
- Plats and photographs (not exceeding \$100 for each item);
- Expert witness fee not exceeding \$300 for each expert who testifies;
- Standard witness and mileage fees; and
- In actions relating to or affecting the title to land, the cost of procuring an abstract.

Other items of costs include, for example:

- Court costs and fees²⁶;
- Interpreters' fees²⁷; and
- Costs for pathological slides and copies of medical treatises.²⁸

But the following items of costs are not taxable:

- Mediation fees²⁹;
- Guardian *ad litem* fees³⁰;
- The cost of transcribing materials from CD-ROM³¹;
- The cost of reproducing documents into an electronic format³²; and
- Travel expenses.³³

It is recommended that counsel include an affidavit attesting to items of costs already incurred, with paid invoices attached as exhibits, and explaining how the defense calculated anticipated future costs (e.g., the number of depositions requested by plaintiff multiplied by the average cost of earlier depositions).

VII. Conclusion

Security for costs is an important defense tool. Although it cannot be used in every case, it can and should be used where appropriate. In a case where the taxable defense costs will be significant, an order for security for costs will test the plaintiff's confidence in his or her claims. While each court may approach the requirements of Wis. Stat. §§ 814.27 to 814.34 differently, knowledge of the proper statutory procedure and the experience and ability to use that procedure to your advantage is the best security.

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References

- 1 “If money is your hope for independence, you will never have it. The only real security that a man can have in this world is a reserve of knowledge, experience and ability.” —Henry Ford. See <http://www.goodreads.com/quotes/191722-if-money-is-your-hope-for-independence-you-will-never> (last visited February 26, 2013).
- 2 Wis. Stat. § 814.28; Black’s Law Dictionary 945 (6th ed. 1991).
- 3 See *In re Westinghouse Securities Litigation*, 832 F. Supp. 989, 1002 (W.D. Pa. 1993); *Maniccia v. Johnson & Gibbs, P.C.*, 876 S.W.2d 398, 401 (Tex. Ct. App. 1994); *Midwest Broadcasting Co. v. Dolero Hotel Co.*, 273 Wis. 508, 515, 78 N.W. 898 (1956) (holding that it is reasonable to award security for costs where party has no assets, address, or office in Wisconsin).
- 4 Wis. Stat. § 814.28.
- 5 (Emphasis added).
- 6 *State v. Hoppmann*, 207 Wis. 481, 240 N.W. 884, 885 (1932).
- 7 *Joint School-District No. 7 v. Kemen*, 72 Wis. 179, 39 N.W. 131, 132 (1888); *Fulton v. Vogt*, 1998 WL 313409, at *5 (Wis. Ct. App. 1998) (unpublished opinion).
- 8 *Colbeth v. Colbeth*, 117 Wis. 90, 93 N.W. 829, 829-30 (1903)
- 9 Wis. Stat. § 814.28(2).
- 10 *Id.*
- 11 *Id.*
- 12 *Id.*
- 13 Wis. Stat. § 814.28(3).
- 14 *Sheldon v. Nick & Sons*, 253 Wis. 162, 165, 33 N.W.2d 260 (1948) (citing *Colbeth*, 117 Wis. at 91 and *Joint School-District*, 39 N.W. at 132 (1888)); see also *Felton v. Hopkins*, 89 Wis. 143, 61 N.W. 77, 78 (1894).
- 15 *Smith v. Lockwood*, 34 Wis. 72, 1874 WL 6260, at *3 (1874).
- 16 See *State ex rel. Girouard v. Circuit Court for Jackson County*, 155 Wis. 2d 148, 159, 454 N.W.2d 792 (1990).
- 17 Wis. Stat. § 814.29(1)(b).
- 18 A trial court may refuse to waive entry of an order for security for costs because of poverty if the proper affidavit is not filed. See *State ex rel. Amek bin Rilla v. Circuit Court for Dodge County*, 76 Wis. 2d 429, 433, 251 N.W.2d 476 (1977); *Girouard*, 155 Wis. 2d at 159.
- 19 Wis. Stat. § 814.29(1)(d).
- 20 Wis. Stat. § 814.29(1)(d)3.
- 21 Wis. Stat. § 814.29(2).
- 22 <http://aspe.hhs.gov/poverty/12poverty.shtml/12fedreg.shtml> (citing *Federal Register*, Vol. 77, No. 17, January 26, 2012, pp. 4034-35). As of the date this Article was published, the 2013 Federal Poverty Guidelines had not been made available.
- 23 “[A] motion for reconsideration is not a vehicle for making new arguments or submitting new evidentiary materials after the court has decided a motion.” *Lynch v. Crossroads Counseling Ctr., Inc.*, 2004 WI App 114, ¶ 23, 275 Wis. 2d 171, 684 N.W.2d 141. “A party may not use a motion for reconsideration to introduce new evidence that could have been presented earlier.” *Koepsell’s Olde Popcorn Wagons, Inc. v. Koepsell’s Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶ 46, 275 Wis. 2d 397, 685 N.W.2d 853 (quoting *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000)).
- 24 Wis. Stat. § 814.28.
- 25 See Wis. Stat. § 814.04(1) for the schedule for taxing attorney fees.
- 26 *Cedarburg L. & W. Comm. v. Glens Falls Ins. Co.*, 42 Wis. 2d 120, 124-25, 166 N.W.2d 165 (1969).
- 27 *Meyer v. Foster*, 16 Wis. 294, 1862 WL 1071, at *2 (1862).
- 28 *Zintek v. Perchik*, 163 Wis. 2d 439, 475, 471 N.W.2d 522 (Ct. App. 1991).
- 29 *Kleinke v. Farmers Coop. Supply & Shipping*, 202 Wis. 2d 138, 146-48, 549 N.W.2d 714 (1996).
- 30 Wis. Stat. § 814.04(2).
- 31 *Alswager v. Roundy’s Inc.*, 2005 WI App 3, ¶ 2, 278 Wis. 2d 598, 692 N.W.2d 333.
- 32 *Zurich Am. Ins. Co. v. Wisconsin Phys. Servs. Ins. Corp.*, 2007 WI App 259, ¶ 43, 306 Wis. 2d 617, 743 N.W.2d 710.
- 33 *Allied Processors, Inc. v. Western Nat. Mut. Ins. Co.*, 2001 WI App 129, ¶ 48, 246 Wis. 2d 579, 629 N.W.2d 329.