

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 21, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 01-1764
STATE OF WISCONSIN**

Cir. Ct. No. 00-CV-2064

**IN COURT OF APPEALS
DISTRICT IV**

SUSAN BAUER,

PLAINTIFF-APPELLANT,

V.

VILLAGE OF DEFOREST,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
SARAH B. O'BRIEN, Judge. *Affirmed.*

Before Dykman, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Susan Bauer appeals an order which dismissed her declaratory relief action against the Village of DeForest and assessed attorney fees against her for pursuing a frivolous action. In recent years, the Village has issued several orders requiring Bauer to remove noxious weeds from her property, under its non-emergency nuisance abatement ordinance, § 11.08(3) of the DeForest

Municipal Code. Bauer has responded by commencing several lawsuits. In this action, Bauer sought a declaration that § 11.08(3) was unconstitutional. We affirm the court's dismissal of the action and the assessment of frivolousness costs.

¶2 In a 1997 proceeding, Bauer challenged the constitutionality of a prior version of § 11.08(3). The trial court held it constitutional, as did this court on appeal. Both decisions cited as authority the case of *Wilke v. City of Appleton*, 197 Wis. 2d 717, 541 N.W.2d 198 (Ct. App. 1995), which held constitutional Appleton's non-summary nuisance abatement ordinance.

¶3 In May 2000, DeForest amended § 11.08(3) by adopting a version virtually identical to the Appleton ordinance held valid in *Wilke*. Bauer commenced this action to challenge the amended version of § 11.08(3) after receiving an abatement order shortly after its enactment.

¶4 DeForest moved for summary judgment and for an award of costs and fees for having to respond to a frivolous action. The trial court granted the motion, relying on *Wilke*, and the court found the action frivolous because Bauer knew and understood the *Wilke* holding, and could not argue in good faith for its extension, modification or reversal. The court limited DeForest's attorney fee award to \$300, based on Bauer's financial circumstances. The court further ordered that Bauer could not file any further actions against DeForest or its employees relating to weed abatement, until she paid the \$300 fee. On appeal, Bauer contends that the trial court ignored disputes of material fact, erred by holding the ordinance constitutional, erred by holding the action frivolous and awarding \$300 in fees, and violated her due process rights by prohibiting further actions until the fee award was paid.

¶5 WISCONSIN STAT. § 814.025 (1999-2000)¹ authorizes the court to award reasonable attorney's fees and costs against a party who commences or maintains an action without any reasonable basis in law or equity, that cannot be supported by a good faith argument for an extension, modification or reversal of existing law. Whether an action is frivolous under § 814.025 presents a mixed question of fact and law, and we defer to the trial court's factual findings on what a party knew or should have known, unless they are clearly erroneous. *Kelly v. Clark*, 192 Wis. 2d 633, 646, 531 N.W.2d 455 (Ct. App. 1995). A conclusion as to whether what was known, or should have been known, warrants a frivolousness determination, is a question of law we review de novo. *Stern v. Thompson & Coates, Ltd.*, 185 Wis. 2d 220, 241, 517 N.W.2d 658 (1994).

¶6 The trial court properly resolved Bauer's challenge on summary judgment, as there were no disputed material facts. Bauer contends that a material dispute existed as to whether her property actually had noxious weeds when DeForest issued its abatement order. However, the issue in this action was whether § 11.08(3) provides due process to a person subject to an abatement order. Whether DeForest had a substantial factual basis for its order is a different question, one addressed in Bauer's simultaneous action for certiorari review of the order.

¶7 The trial court properly held the ordinance constitutional and the action frivolous. *Wilke* is published precedent and bound the trial court and this court. Bauer admitted that she knew and understood the *Wilke* holding, and knew

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

and understood that the DeForest ordinance was identical.² She did not argue that *Wilke* was wrongly decided. Her arguments were limited to factual issues which are irrelevant in determining whether the ordinance provides due process to those subject to it. Bauer also contends that WIS. STAT. § 814.025 does not apply to ordinance violation cases. This, however, was Bauer's declaratory relief action, not an ordinance violation prosecution.

¶8 Bauer next contends that any award of attorney fees is unreasonable because she is indigent. The \$300 award is a small portion of DeForest's legal expenses in the action. The record shows that Bauer has substantial equity in her house, and income that exceeds her expenses. She has not shown that \$300 exceeds the limits of reasonableness.

¶9 Bauer finally contends that the court violated due process by forbidding any new actions until the \$300 was paid. The record shows that with this case, Bauer has pursued five trial court actions and two appeals on weed abatement issues. She has obtained no relief while repeatedly subjecting DeForest to legal expense. It is well settled that continued access to the courts by repetitive, frivolous litigants may be conditioned on payment of sanctions. *See Minniecheske v. Griesbach*, 161 Wis. 2d 743, 748, 468 N.W.2d 760 (Ct. App. 1991).

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.

² Bauer told the trial court "I am very familiar with *Wilke* to the point of talking with the attorney who had the case."

