

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

March 14, 1996

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

NOTICE

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

No. 94-3055

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**DANNY R. HERTRAMPF
AND CINDY L. HERTRAMPF,**

Plaintiffs-Respondents,

v.

**JEROME M. OTT,
LAWTON & CATES, S.C.,
AND WISCONSIN LAWYERS
MUTUAL INSURANCE COMPANY,**

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Grant County:
GEORGE S. CURRY, Judge. *Affirmed.*

Before Eich, C.J., Gartzke, P.J., and Dykman, J.

PER CURIAM. Attorney Jerome Ott and his law firm, Lawton & Cates, S.C., appeal from a judgment awarding damages to Danny and Cindy Hertrampf on a legal malpractice claim. After a bench trial, the trial court found

that Ott negligently dismissed the Hertrampfs' 42 U.S.C. § 1983 claim against Attorney Gregory Knoke and Green County Deputy Sheriff Robert Rufer. The court further found that but for Ott's negligence, the Hertrampfs could have recovered \$100,000 in punitive damages on that claim, and entered judgment for that amount. The issues on appeal are whether Knoke and Rufer were immune from liability under § 1983, and whether the evidence supported a punitive damages award. We decide against Ott on those issues and therefore affirm.

The Hertrampfs formerly rented a dairy farm from Fred Scott. After they fell behind in the rent, Scott hired Knoke to evict them and to sue them for damages. Rufer and Knoke went to the farm and served the Hertrampfs with a summons and complaint on the damage claim and a fourteen-day eviction notice. At the same time, in Knoke's and Rufer's presence, several individuals acting on behalf of Scott, removed eighteen cows from the farm. They had no legal authority to do so.

The trial court later found that

Deputy Rufer's presence aided and helped with the removal of the cows. He restrained the Plaintiffs from stopping the removal of these cattle, which they claimed were their cattle under color of law.... Deputy Rufer threatened Danny and Cindy Hertrampf with arrest if they left their residence and indicated their children would be taken away from them if they interfered.... Deputy Rufer was not acting pursuant to any lawful order at that time nor could he reasonably have believed he was acting with any lawful authority in helping with the removal of the cows.

Rufer admitted that he never read the papers he served on the Hertrampfs.

The cows were subsequently destroyed. Lacking animals, the Hertrampfs were forced to abandon farming as an occupation. After a

liquidation sale of their assets, they remained indebted to the Farmers Home Administration.

The Hertrampfs' hired Ott to defend them in Scott's suit, and to counterclaim for damages against Scott, Knoke and Rufer. Through a misunderstanding, Ott dismissed Hertrampfs' counterclaims against all parties, although the Hertrampfs had requested a dismissal against only Scott.

The Hertrampfs then commenced this lawsuit against Ott, his law firm and its malpractice insurance carrier, alleging malpractice in dismissal of the claims against Rufer and Knoke. After concluding that Ott was negligent and that Rufer and Knoke would have been liable under § 1983, the court further concluded that the Hertrampfs would have recovered substantial punitive damages due to the "excessive degree of wanton and reckless conduct exhibited by Deputy Rufer and Attorney Knoke ... and the indelible effect it had on the Hertrampfs' person and property." The court set damages at \$100,000. The court did not compensate the Hertrampfs for lost compensatory damages, because any amount they recovered on that basis would have been offset by Scott's claim against them.

Ott first claims that Knoke and Rufer were immune from liability under § 1983, because Knoke acted in good faith on behalf of his client, and because Rufer's conduct did not violate clearly established statutory or constitutional rights known to a reasonable person. *Barnhill v. Board of Regents*, 166 Wis.2d 395, 406, 479 N.W.2d 917, 921 (1992). Rufer should have known that he was violating Hertrampfs' due process right to a hearing before seizure of goods in their possession. *Fuentes v. Shevin*, 407 U.S. 67, 96 (1972). As for Knoke, we need not address his claimed immunity because establishing Rufer's liability is sufficient to prove the case within the case on Ott's liability.

The trial court properly determined that Rufer's conduct gave rise to punitive damages. A jury may assess punitive damages in a § 1983 action when the defendant's conduct demonstrates an evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others. *Smith v. Wade*, 461 U.S. 30, 56 (1983). Here, Rufer acted without knowing the facts of the dispute, without reading the papers he served and without ascertaining the legal basis of the seizure. Nevertheless, he chose

Scott's side in the dispute and by his statements, actively assisted in removal of the cows. He exerted his authority by threatening the Hertrampfs with arrest and loss of their children. As a result he effectively became an agent of the party who, as it happened, was acting illegally in the situation. By doing so his actions amounted to reckless indifference to the Hertrampfs' statutory and constitutional rights.

One hundred thousand dollars in punitive damages would not have been an excessive award. Ott contends that the trial court could not have found damages in that amount without evidence of Rufer's and Knoke's ability to pay it. However, evidence of a defendant's wealth or ability to pay is prohibited where joint tortfeasors are sued for punitive damages. See *Fahrenberg v. Tengel*, 96 Wis.2d 211, 224-25, 291 N.W.2d 516, 522 (1980).

By the Court. – Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.