COURT OF APPEALS
DECISION
DATED AND RELEASED

September 12, 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. 95-1554

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

ROBERT BOWEN and JUDITH BOWEN,

Plaintiffs-Appellants,

v.

DANE COUNTY FARMERS' MARKET, INC., a corporation, JOHN OOSTERWYK, WILLIAM WARNER, MARY CARPENTER, LYNN BEDNAREK, ALAN J. HOWERY, ALICE PAUSER, GLENN CLARK, TED BALWEG, ANNE TOPHAM, FRANK ROMANSKI, PAUL GRIEPENTROG, DAVID NEDVECK, MARK OLSON,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Dane County: GERALD C. NICHOL, Judge. *Affirmed*.

Before Eich, C.J., Dykman, P.J., and Robert D. Sundby, Reserve Judge.

PER CURIAM. Robert Bowen and his sister, Judith Bowen, appeal from a judgment awarding actual costs and reasonable attorneys' fees to the respondents, the Dane County Farmers' Market, Inc., its director Mary Carpenter, and various members of its board of directors. The court concluded that the Bowens commenced and prosecuted a frivolous action against the respondents. We also conclude that the action was frivolous, and therefore affirm.

For a number of years Robert Bowen sold bakery goods at the Dane County Farmers' Market. In June 1991 Carpenter suspended him for one year because he sold a product banned by the City of Madison health regulations and because he did not prepare at least 20% of the goods he offered for sale at the market. Robert appealed to the board of directors, which affirmed Carpenter's decision. At the appeal hearing, the board also found a third violation of Farmers' Market rules because Robert was not personally present at his stand during market hours.

Robert retained counsel, who sued the respondents for breach of contract, tortious interference with contract, intentional infliction of emotional distress and deprivation of due process under 42 U.S.C. § 1983. The complaint also stated a cause of action on behalf of Judith for violation of the Americans with Disabilities Act, 42 U.S.C. § 12182, based on discrimination because of her association with Robert, who is disabled. She alleged that during telephone conversations in January 1992, Carpenter intimidated her into dropping plans to apply for her own stand to sell bakery goods.

The respondents moved to dismiss. Because the parties submitted evidence in support of and opposing the motion, the court treated the matter as a summary judgment and dismissed all claims. Later, the court imposed costs and reasonable attorneys' fees on the Bowens and their counsel under §§ 814.025 and 802.05(1)(a), STATS., finding that with adequate investigation by counsel, they should have known that they had no basis to recover against the respondents.[1]

[1] Counsel for the Bowens has asked that the judgment be reversed as to him as well. However, he did not appeal the judgment, except on the Bowens' behalf. The subject of

Section 814.025(3)(b), STATS., allows recovery of costs and reasonable attorneys' fees against a party who knew or should have known that the claim lacked 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. Section 802.05(1)(a), STATS., imposes a requirement on counsel for a party to reasonably inquire whether a pleading is well grounded in fact and is warranted by existing law or good faith argument to extend, modify or reverse existing law. If the court determines that the attorney or party failed to make a reasonable inquiry, the court may impose sanctions including costs and reasonable attorneys' fees.

Determining what was known or should have been known to a party is a question of fact. ***Stern v. Thompson and Coates, Ltd.***, 185 Wis.2d 220, 241, 517 N.W.2d 658, 666 (1994). The ultimate conclusion about whether what was known or should have been known supports a determination of frivolousness under § 814.025(3)(b), STATS., is a question of law which we review independently. ***Id.***

With or without reasonable investigation by counsel, Robert should have known that he had no viable claims against the respondents. Robert has never offered evidence that he was innocent of the rule violations that led to his suspension despite opportunities to do so on administrative appeal, on summary judgment and on the respondents' § 814.025, STATS., motion. We must therefore regard his violation of those rules as an undisputed fact. Also undisputed is the plain language of the Farmers' Market written rules, which impose a one-year suspension for two violations such as those Robert committed. Because Robert knew or should have known that he was properly found in violation of the rules and properly punished for his violations, he should have known that all claims, whether in contract, tort or under 42 U.S.C. § 1983, lacked the necessary factual basis.[2]

(..continued)
this appeal is limited to the Bowens' liability for costs and attorneys' fees.

[2] Robert claims a dispute of fact remains as to whether Carpenter complied with notice requirements in the rules before imposing his suspension. There is no evidence of record to support that assertion. The Bowens apparently chose not to include the evidentiary submissions on summary judgment in the appellate record.

Robert also presented claims based on the third citation he received at the board of directors appeal hearing. However, it is undisputed that the board imposed no punishment for that violation. Robert should have known that an act that has no practical effect cannot form the basis for recovery.

Judith also had reason to know that her claim had no merit. She based it on 42 U.S.C. § 12182(b)(1)(E), which prohibits discrimination against an individual because that individual associates with a disabled person. Judith's allegations and proofs do not go beyond the fact, however, that she had three phone conversations with Carpenter during which Carpenter was rude and possibly insulting. Judith did not show any nexus between Carpenter's comments and a discriminatory event. Additionally, Judith offered no proof to show that the phone conversations occurred after the effective date of the applicable provisions of the Americans with Disabilities Act, which was January 26, 1992. *See* Pub. L. No. 101-336, § 246, 104 STAT. 353 (1990).

The Bowens contend, additionally, that the court erred by deciding the frivolousness issue without an evidentiary hearing. A hearing is unnecessary when the material facts are undisputed. ***Kelly v. Clark***, 192 Wis.2d 633, 653, 531 N.W.2d 455, 462 (Ct. App. 1995). For Robert, the undisputed material facts are that he violated rules of the market and was punished as provided in those rules. For Judith, the undisputed material facts are her failure to prove an act of discrimination and when it occurred. In each case the trial court properly made its determination without a hearing.

By the Court.—Judgment affirmed.

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