COURT OF APPEALS
DECISION
DATED AND FILED

March 19, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

Nos. 96-1018
96-2221

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

No. 96-1018

MELVINA YOUNG, GREG STREICH, TOMIKA S. GRAY,

PLAINTIFFS-APPELLANTS-
CROSS-RESPONDENTS,

FAIR HOUSING COUNCIL OF DANE COUNTY,

PLAINTIFF-CROSS-RESPONDENT,

V.

JOHN S. WRIGHT,

DEFENDANT-RESPONDENT-
CROSS-APPELLANT.

No. 96-2221

MELVINA YOUNG, GREG STREICH, TOMIKA S. GRAY,

PLAINTIFFS-APPELLANTS,

FAIR HOUSING COUNCIL OF DANE COUNTY,

PLAINTIFF,

V.

JOHN S. WRIGHT,

DEFENDANT-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Dane County: PAUL B. HIGGINBOTHAM, Judge. *Affirmed in part; reversed in part and cause remanded.*

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

PER CURIAM. Melvina Young, Greg Streich, and Tomika Gray appeal a judgment dismissing their complaint against John Wright. Wright cross-appeals that part of the judgment denying costs against the appellants and their co-plaintiff, the Fair Housing Council of Dane County. The appellants contend the trial court erred by excluding evidence that Wright submitted false evidence in a previous, unrelated litigation. They also contend that the trial court should have ordered a new trial on highly relevant evidence discovered shortly after the trial. We reject the appellants' contentions and affirm on the appeal. On the cross-appeal, we reverse the judgment insofar as it denies Wright his costs under § 814.03, STATS.

Wright owns numerous rental properties in Madison. The appellants alleged that he practiced racial discrimination against them in their efforts to rent an apartment from him.

In a pretrial motion, Wright moved to exclude from evidence the transcript from a 1989 small claims proceeding in which the trial court found that Wright had submitted false documentary evidence. The appellants wished to introduce the transcript, or question Wright about it during cross-examination, but the trial court refused to allow that unless Wright opened the door by first introducing testimony concerning his reputation for truthfulness.

At trial, the appellants presented evidence that Wright broke appointments to show apartments to Young and Gray after learning that they were African-American, and that he rented to white persons apartments that he represented to them were not available. Wright and his witnesses provided explanations for each alleged act of discrimination. He did not introduce evidence of his reputation for truthfulness, and consequently the appellants were not able to use the trial court's finding in the 1989 action.

The jury found for Wright on all claims against him. Before entry of judgment, the appellants filed a post-verdict motion for a new trial, in part relying on the assertion that they had just discovered highly relevant evidence. The circumstances were as follows. A woman named Andrea Potter had testified at trial and had referred to a conversation with an unidentified African-American woman but could not testify to its content due to a hearsay objection. After the trial, Young called Potter for information about that woman and Potter recalled that she was affiliated with the University of Wisconsin's African-American Studies Department in 1992. Young then called various people affiliated with the department at that time, including one who identified Charlotte Frascona as a source of information about Wright. Young reached Frascona on the same day she spoke with Potter, and received highly damaging information about Wright's past discriminatory practices.

The court concluded that Frascona's story was highly relevant and would likely have changed the outcome of the trial. The court also concluded, however, that the information had been available to the plaintiffs ever since they first spoke with Potter more than six months before trial. The court further concluded that a diligent attorney would and should have followed "this obvious trail" at that time.

The trial court therefore entered a judgment dismissing all claims. However, the court ruled that under § 101.22(6m)(a), STATS., 1993-94, renumbered § 106.04(10)(e), STATS., only successful plaintiffs may receive costs in housing discrimination lawsuits.

The trial court did not erroneously exercise its discretion when it excluded evidence from Wright's previous small claims proceeding. The evidence was inadmissible under § 906.08(2), STATS., as a specific instance of Wright's conduct for the purpose of attacking his credibility. It was also inadmissible under § 904.04(1), STATS., as character evidence used to prove Wright's conduct in this matter. The trial court did not erroneously exercise its discretion when it ruled the evidence admissible only if Wright opened the door to it.

The trial court also properly denied appellant's motion for a new trial. A new trial shall be ordered on newly discovered evidence if the evidence is first discovered after trial, the moving party's failure to discover it earlier did not arise from lack of diligence, the evidence is material, and it would probably change the result. Section 805.15(3), STATS. The trial court's decision on this issue is discretionary. ***Mathias v. St. Catherine's Hosp., Inc.,*** 212 Wis.2d 540, 558, 569 N.W.2d 330, 337 (1997). Here, the trial court reasonably exercised that discretion. Potter's story was known to the appellants more than six months

before trial. Three months before trial she testified in a deposition and mentioned the unidentified woman. In other words, months before trial the appellants had the same information from Potter that prompted Young's post-trial investigation. The only inference reasonably available is that the appellants and counsel were not diligent. As the trial court noted, the trail was obvious and, once investigated, easily led to Frascona.

The trial court erroneously denied Wright costs. Section 101.22(6m)(a), STATS., 1993-94, provides that the prevailing plaintiff in an action under the Wisconsin open housing law may recover court costs and reasonable attorney fees. The trial court denied costs upon concluding that no costs were allowable in a housing discrimination action except as provided to plaintiffs under this section. However, the supreme court has held that a statute which expressly allows recovery of costs to a prevailing plaintiff in a particular type of action, does not bar an award of costs to the prevailing defendant under the general sections on costs. ***City of Milwaukee v. Leschke***, 57 Wis.2d 159, 164-65, 203 N.W.2d 669, 672 (1973). "The absence of legislative action is not the equivalent of the prescription of a differing procedure…. [T]his court should not by implication, or otherwise, construe statutes so as to create a conflict." ***Id***. at 164, 203 N.W.2d at 672. Although it addressed costs under different statutes in a different type of action, we cannot distinguish the holding in ***Leschke***. Wright is therefore entitled to the standard costs allowed under § 814.03, STATS.[1] On remand, the trial court shall amend the judgment accordingly.

[1] Section 814.03(1), STATS., provides that "[i]f the plaintiff is not entitled to costs under § 814.01(1) or (3), the defendant shall be allowed costs to be computed on the basis of the demands of the complaint."

By the Court.—Judgment affirmed in part; reversed in part and cause remanded.

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