COURT OF APPEALS
DECISION
DATED AND RELEASED

December 12, 1995

NOTICE

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.

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

No. 95-0256

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

IN THE MATTER OF THE FINDING OF CONTEMPT IN STATE OF WISCONSIN AND CITY OF MILWAUKEE V. MISSIONARIES OF THE PREBORN, ET AL.:

STATE OF WISCONSIN and CITY OF MILWAUKEE,

Plaintiffs-Respondents,

v.

SHARON KISTER,

Appellant.

APPEAL from an order of the circuit court for Milwaukee County: ROBERT C. CANNON, Reserve Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

PER CURIAM. Sharon Kister appeals from an order issuing a contempt citation for violating a permanent injunction enjoining the activities of abortion protesters at various medical clinics in the City of Milwaukee. Kister claims that the trial court erred in issuing the contempt order against her because: (1) the finding of contempt was not supported by a preponderance of the evidence; (2) the trial court applied an improper definition of "in concert;" and (3) the trial court refused to dismiss the contempt motion based upon the equitable defense of laches.

On December 10, 1992, a Milwaukee trial court issued a permanent injunction restraining numerous individuals and anyone acting in concert with those individuals from engaging in certain activities at various medical clinics that provide abortions. The injunction prohibited protest activities within 25 feet of the entrance to the clinics and within 10 feet of individuals seeking access to the clinic facilities. Kister was not named in the permanent injunction but she admitted that she had received notice of it. On February 12, 1994, Kister engaged in anti-abortion protest activities at one of the clinics named in the injunction. Elizabeth Wagi, one of the named defendants in the injunction, also protested at the clinic. According to the record, when Kister first arrived at the clinic, she and Wagi were within a few feet of one another. Soon afterwards, Kister and Wagi separated and each patrolled the opposite ends of the street where the clinic was located. As persons would attempt to enter the clinic, Kister, Wagi and other protesters would stop them and try to talk to them. David Ritz testified at the contempt hearing that he saw Kister do these things within 25 feet of the entrance to the clinic and within 10 feet of the individuals seeking access to the clinic facilities.

On May 13, 1994, the City of Milwaukee commenced a contempt proceeding against Kister. On June 25, 1994, Kister was served with a copy of the motion for contempt. An affidavit supporting the motion was filed on July 14, 1994, detailing the specifics of Kister's alleged contempt. On November 4, 1994, Kister filed a motion to dismiss based upon the affirmative defense of laches. The motion was heard and denied on November 14, 1994. On that same date, the trial court found that Kister violated the injunction by protesting within 25 feet of the clinic entrance and by approaching within 10 feet of individuals attempting to enter the clinic. The trial court also determined that Kister was acting in concert with Wagi.

Kister first argues that the trial court's finding that she acted in concert with Wagi was not supported by the evidence. Persons not party to an injunction action who have knowledge of the injunction may be punished for contempt if they aid, abet, or act in concert with named parties. ***Dalton v. Meister***, 84 Wis.2d 303, 311–312, 267 N.W.2d 326, 330–331 (1978). These are questions of fact to be determined by the trial court. ***Id.***, 84 Wis.2d at 312, 267 N.W.2d at 331. The evidence here is ample to justify the conclusion that Kister acted in concert and participated in proscribed anti-abortion protest activities with Wagi, a named defendant. The trial court's findings are inherent in the citation for contempt punishing Kister, and are not clearly erroneous. *See* § 805.17(2), STATS.

Kister also argues that the trial court applied the wrong definition of "in concert," contending that the trial court based its findings on her mere presence at the anti-abortion demonstration. This argument raised by Kister was rejected by the trial court. The trial court applied the BLACK'S LAW DICTIONARY definition of "concerted action" in reaching its decision. BLACK'S LAW DICTIONARY defines "concerted action" as: "Action that has been planned, arranged, adjusted, agreed on and settled between parties acting together pursuant to some design or scheme." BLACK'S LAW DICTIONARY 289 (6th ed. 1990). We agree with the trial court that this definition sufficiently articulates the proper legal standard necessary to determine whether a non-party has acted in concert with a defendant named in an injunction. *See* ***Roe v. Operation Rescue***, 919 F.2d 857, 871 (3d Cir. 1990) ("The law does not permit the instigator of contemptuous conduct to absolve himself of contempt liability by leaving the physical performance of the forbidden conduct to others. As a result, those who have knowledge of a valid court order and abet others in violating it are subject to the court's contempt powers.").

Finally, Kister argues that the trial court should have dismissed the contempt charge based on laches. Laches is an equitable doctrine developed to prevent injustice from resulting in situations where a party unreasonably delays asserting his rights and in so doing causes the other party to be disadvantaged in asserting a defense. ***Smart v. Dane County Bd. of Adjustments***, 177 Wis.2d 445, 458, 501 N.W.2d 782, 787 (1993). The elements of laches are: (1) unreasonable delay; (2) lack of knowledge on the part of the party asserting the defense that the other party would assert the right on which he bases his suit; and (3) prejudice to the party asserting the defense in the event the action is maintained. ***Id.*** Laches is available only if all three elements are

established. "The determination whether the delay was so unreasonable, inexcusable, and prejudicial to the [party asserting laches] as to bar the [non-asserting party's] remedies rest[s] in the sound discretion of the trial judge." ***Blue Ribbon Feed Co., Inc. v. Farmers Union Cent. Exch., Inc.***, 731 F.2d 415, 420 (7th Cir. 1984).

Kister fails to allege any facts to support the element of prejudice. Although Kister insisted that she could not recall the events of the day in question, she declined to view some 52 pictures taken of her engaged in various forms of protest activity at the clinic on that day, thus deliberately avoiding a way to refresh her memory. Nevertheless, she apparently had sufficient memory of that day to deny doing any of the things in violation of the injunction with which she was charged. In light of this, and in light of her refusal to look at the photographs, we cannot conclude that the trial court erroneously exercised its discretion in determining that she had not established laches.

By the Court.—Order affirmed.

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