

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 6, 2012

Diane M. Fremgen
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. 2012AP50

Cir. Ct. No. 2009CV30

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

MARK MOIOFFER AND DEBRA MOIOFFER,

PLAINTIFFS-APPELLANTS,

V.

CHAD STENBERG AND HEIDI STENBERG,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Polk County:
KENNETH L. KUTZ, Judge. *Reversed in part and cause remanded with
directions.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve
Judge.

¶1 PER CURIAM. In this timber trespass case, the circuit court
concluded that Chad and Heidi Stenberg unlawfully harvested trees from Mark

and Debra Moioffer's property, and it awarded the Moioffers \$2015.40 in damages. The Moioffers contend they are entitled to recover an additional \$1200 as compensation for survey expenses they incurred to determine the location of their property's common boundary with the Stenbergs' property. We agree that the circuit court should have directed a verdict in favor of the Moioffers on the issue of survey expenses. We therefore reverse that portion of the judgment declining to award the Moioffers survey expenses and remand with directions that the court award them an additional \$1200.

¶2 The Moioffers also argue that, because the Stenbergs unreasonably refused to pay a pre-suit demand for damages, the circuit court should have awarded the Moioffers attorney fees and costs, pursuant to WIS. STAT. § 26.09(4).¹ The court held that the Stenbergs' refusal to pay was reasonable because the Moioffers' payment demand exceeded the amount they ultimately received at trial. However, the reasonableness of a party's refusal to pay a demand for damages must be assessed based on the conditions that existed at the time of the refusal, not in light of what eventually happened at trial. We therefore reverse that portion of the judgment denying the Moioffers their attorney fees and costs. We remand for the circuit court to determine, using the proper standard, whether the Stenbergs unreasonably rejected the Moioffers' payment demand.

BACKGROUND

¶3 The Moioffers own approximately 100 acres of property near Balsam Lake. The Stenbergs own adjacent property to the north and west of the

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Moioffer property. The properties share two common boundary lines—an east-west line, and a north-south line.

¶4 In early 2006, the Stenbergs hired a logger to harvest trees near the common boundary lines. Afterwards, Mark Moioffer accused the Stenbergs of harvesting trees from the Moioffers' property. The Stenbergs denied this allegation. The Moioffers subsequently had their entire property surveyed, at a cost of \$2500. The survey confirmed that the Stenbergs' logger harvested trees from the Moioffers' property along the common east-west boundary line. The Moioffers then hired forestry consultant Philip Stromberg to inventory the harvested timber and place a value on the loss. Stromberg estimated the stumpage value of the harvested trees at \$348.36.

¶5 In October 2009, the Stenbergs offered to pay the Moioffers \$1100 as compensation for the illegal harvest. The Moioffers rejected the Stenbergs' offer and instead demanded payment in the amount of \$3004.44. This amount consisted of: (1) four times the stumpage value of the harvested trees, or \$1393.44; *see* WIS. STAT. § 26.09(3)(b)3.; (2) Stromberg's fee to determine the stumpage value of the harvested timber, or \$411; *see* WIS. STAT. § 26.09(3)(d)3.; and (3) the cost to survey the two common boundary lines between the Moioffer and Stenberg properties, which the Moioffers alleged to be \$1200; *see* WIS. STAT. § 26.09(3)(d)4. The Stenbergs rejected the Moioffers' demand.

¶6 The Moioffers subsequently sued the Stenbergs, pursuant to the timber trespass statute, WIS. STAT. § 26.09. On February 23, 2010, the circuit court granted partial summary judgment in favor of the Moioffers. First, the court concluded the Moioffers were a party with standing to sue under WIS. STAT. § 26.09(2). Second, the court determined the Stenbergs harvested the Moioffers'

timber without taking reasonable precautions to identify the harvesting boundaries. The Moioffers were therefore entitled to recover four times the stumpage value of the harvested timber, pursuant to WIS. STAT. § 26.09(3)(b)3.² The court also awarded the Moioffers the fee they paid Stromberg, which had by then increased to \$622. *See* WIS. STAT. § 26.09(3)(d)3.

¶7 The court next addressed whether the Moioffers were entitled to recover the cost of having their property's common boundary lines with the Stenbergs' property surveyed. The court recognized that the timber trespass statute permits a landowner to recover costs paid to "determin[e] the location of property boundaries *necessary* for determining whether a [timber trespass] occurred." *See* WIS. STAT. § 26.09(3)(d)4. The court noted that "[t]he cost of the survey in this case was \$1,200.00." The court also acknowledged that the Stenbergs did not contest the necessity of the survey, but instead objected to two components of the survey cost. First, the total survey cost included the cost of "brushing" the boundary lines, which the Stenbergs alleged was unnecessary.³ Second, the \$1200 figure included the cost to survey both common boundary lines, but the Stenbergs argued it was unnecessary to survey the north-south line because no timber trespass occurred in that area.

¶8 Regarding the cost of brushing the lines, the court determined the uncontroverted evidence established that brushing was necessary to complete the

² It is undisputed that the trees harvested from the Moioffers' property had a stumpage value of \$348.36. Four times \$348.36 is \$1393.44. The circuit court awarded \$1393.40. The Moioffers do not raise any argument on appeal related to this four-cent discrepancy.

³ According to the Moioffers' expert witness, Wayne Swenson, "brushing" a property line refers to "tak[ing] a brush hook or chain saw and ... clear[ing] out a path going down the line."

survey. It therefore granted the Moioffers summary judgment on that component of the survey cost. However, the court determined there was a disputed issue of material fact as to whether it was necessary to survey the north-south line. Accordingly, the court “denie[d] summary judgment with regard to the survey expenses on the non-violated property line.”

¶9 Finally, the Moioffers alleged they were entitled to attorney fees and costs, pursuant to WIS. STAT. § 29.06(4), because the Stenbergs unreasonably refused to pay their pre-suit demand for damages. The court declined to grant summary judgment on this issue, concluding there was a genuine issue of material fact as to the reasonableness of the Stenbergs’ refusal to pay.

¶10 The case proceeded to a jury trial on the issue of the Moioffers’ survey expenses. The only witness to testify was Wayne Swenson, whose firm conducted the survey of the Moioffers’ property. The Moioffers tendered Swenson as an expert in the field of surveying, and the Stenbergs stipulated to his expertise. Swenson testified that his employees completed the field work required for the Moioffers’ survey, and he completed the office work. He testified that, in order to conduct an accurate survey of the east-west boundary line, where the timber trespass occurred, it was necessary first to survey the north-south boundary line, where no trespass occurred. Because Swenson’s testimony was uncontroverted, the court granted a directed verdict in favor of the Moioffers on the necessity of surveying the north-south boundary line.

¶11 Swenson also testified that he charged \$2500 to survey the Moioffers’ entire property. He further testified, without objection, that it cost \$1200 to survey the two common boundary lines between the Moioffer and Stenberg properties. However, when the Moioffers’ counsel asked Swenson what

portion of that \$1200 cost was attributable to the north-south boundary line, the Stenbergs objected, arguing no foundation had been laid to establish that Swenson was competent, either as an expert or a lay witness, to break down the total survey bill into individual components. The court sustained the Stenbergs' objection and prevented Swenson from testifying about how much it cost to survey each of the two common boundary lines. The court also determined Swenson could not testify as an expert witness about what he would charge, hypothetically, to survey each individual line.

¶12 The Stenbergs then moved to dismiss, arguing the Moioffers had not presented any evidence on which the jury could reasonably base an opinion about the cost to survey the common boundary lines. The court granted the Stenbergs' motion, concluding that, even though the Moioffers proved the necessity of surveying both common boundary lines, they failed to prove the amount of survey expenses to which they were entitled.

¶13 The Moioffers were awarded \$2015.40 in damages. Following a hearing, the court concluded the Moioffers were not entitled to recover their attorney fees and costs under WIS. STAT. § 26.09(4). The court found the Stenbergs did not unreasonably refuse to pay the Moioffers' pre-suit demand for damages, reasoning:

[T]he settlement demand here was over a thousand dollars more than what the [Moioffers] actually recovered at trial. Had the [Moioffers] been successful in recovering something even close to what they were originally demanding, I believe I would have been far more inclined to consider a ruling for attorney's fees even if they hadn't achieved the exact amount that they were requesting in their demand.

But when we get to a point where the actual recovery is only about two-thirds of what the actual demand is, I think

under the circumstances the [Stenbergs] were reasonable in their rejection of the settlement offer in this case.

The Moioffers now appeal.

DISCUSSION

I. Survey expenses

¶14 The Moioffers first contend that, based on Swenson’s undisputed trial testimony, the circuit court should have awarded them \$1200 as compensation for their survey expenses. The Moioffers essentially contend the court should have directed a verdict in their favor. A directed verdict is appropriate “where there is no conflicting evidence as to any material issue and the evidence permits only one reasonable inference or conclusion.” *Millonig v. Bakken*, 112 Wis. 2d 445, 451, 334 N.W.2d 80 (1983). Here, based on Swenson’s uncontroverted trial testimony and the Stenbergs’ pretrial concessions, the only reasonable conclusion was that the Moioffers were entitled to recover \$1200 in survey expenses. Consequently, we agree that the court should have directed a verdict in favor of the Moioffers and awarded them \$1200.

¶15 Before trial, the Stenbergs conceded that the Moioffers were entitled to recover the cost of “[d]etermining the location of property boundaries *necessary* for determining whether a [timber trespass] occurred.” *See* WIS. STAT. § 26.09(3)(d)4. (emphasis added). They also conceded it was necessary to survey the east-west boundary line to determine whether a timber trespass took place. Thus, the only issues for the jury’s consideration at trial were: (1) the necessity of surveying the north-south line; and (2) the cost to survey both lines. At trial, Swenson testified it was necessary to survey the north-south boundary line in order to complete an accurate survey of the east-west line. His testimony was

undisputed. Consequently, the court properly entered a directed verdict for the Moioffers on the necessity of surveying the north-south line.

¶16 Nonetheless, the court refused to award the Moioffers any damages for their survey expenses because it concluded there was no evidence on which the jury could determine the cost of surveying the common boundary lines.⁴ However, Swenson testified, without objection, that the cost to survey the common boundary lines was \$1200. Swenson's testimony was uncontroverted. Thus, the only reasonable conclusion from the evidence adduced at trial was that it cost \$1200 to survey the two common boundary lines. Because it was necessary to survey both lines, the court should have entered a directed verdict in favor of the Moioffers and awarded them \$1200 as compensation for their survey expenses.

¶17 The Stenbergs argue Swenson was not competent to allocate any portion of the total \$2500 survey bill to the two common boundary lines. They therefore contend the circuit court properly refused to award the Moioffers any damages for their survey expenses. However, the Stenbergs did not object at trial when Swenson testified that it cost \$1200 to survey the two common boundary lines. They only objected after the Moioffers' attorney asked Swenson what portion of the \$1200 fee was attributable to the north-south line. Yet, once the necessity of surveying the north-south line was established, it was no longer necessary to divide the \$1200 cost between the two lines. If it was necessary to survey both lines, and the cost of surveying both lines was \$1200, then the

⁴ Notably, although the circuit court determined at trial that there was no evidence of the cost to survey the common boundary lines, its earlier summary judgment decision stated, "The cost of the survey in this case was \$1,200.00." Thus, in the summary judgment phase of the case, the court apparently accepted Swenson's assertion that it cost \$1200 to survey the common boundary lines.

Moioffers were entitled to recover \$1200. It is irrelevant that Swenson could not allocate a portion of the \$1200 fee to the north-south line.⁵ We therefore reverse that portion of the judgment declining to award the Moioffers survey expenses and remand with directions that the court award them \$1200.

II. Attorney fees and costs

¶18 The Moioffers next argue they are entitled to recover their attorney fees and costs, pursuant to WIS. STAT. § 26.09(4). Subsection 26.09(4) provides that a court “shall award” court costs and reasonable attorney fees to the successful party in a timber trespass case “if the unsuccessful party, before the commencement of the action, unreasonably refused to pay a demand for damages[.]” The circuit court concluded the Stenbergs’ refusal to pay the Moioffers’ pre-suit demand was reasonable because the Moioffers demanded a greater amount than they ultimately received at trial.⁶ The Moioffers argue that, under the plain language of § 26.09(4), whether a party unreasonably refused to

⁵ Moreover, during trial, the Stenbergs’ attorney twice asserted that the court had already determined the cost to survey the east-west line was \$400. Counsel noted, “Judge, you only approved \$400 for the line where the timber trespass took place.” He later stated, “I’m intending to cross-examine [Swenson], not about the 400—you have already determined—but about the necessity and the value of the 800 as it relates to the 2500.” These statements are inconsistent with the Stenbergs’ position on appeal that the court properly declined to award the Moioffers any survey expenses. Nonetheless, even assuming there was no basis to allocate the \$1200 fee between the two lines, the Moioffers were still entitled to recover the full \$1200 fee based on Swenson’s undisputed testimony that it was necessary to survey both lines and the cost to survey both lines was \$1200.

⁶ We note that, in its summary judgment decision, the court found there was a “material issue of fact” as to whether the Stenbergs unreasonably refused the Moioffers’ payment demand. The court therefore stated the issue would “need[] to be determined at trial.” However, the court, not the jury, ultimately determined that the Stenbergs’ refusal was reasonable. We question whether the reasonableness of the Stenbergs’ refusal was actually a factual issue that should have been submitted to the jury. Neither of the parties makes this argument, though, so we do not address it further.

pay a demand for damages must be assessed based on the conditions that existed at the time of the refusal, not in light of what eventually happened at trial.

¶19 Statutory interpretation presents a question of law that we review independently. See *Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, ¶16, 300 Wis. 2d 290, 731 N.W.2d 240. “[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.” *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. Statutory interpretation begins with the language of the statute, and if the statute’s meaning is plain, our inquiry goes no further. *Id.*, ¶45.

¶20 We agree with the Moioffers that, based on the plain language of WIS. STAT. § 26.09(4), whether a demand for damages was unreasonably refused must be judged based on the facts that existed at the time of the refusal. Under the statute, the relevant inquiry is whether the unsuccessful party unreasonably refused to pay a demand for damages “before the commencement of the action[.]” WIS. STAT. § 26.09(4) (emphasis added). This places the unsuccessful party’s decision-making squarely in the pre-suit context. A decision made “before commencement of the action” is necessarily made without reference to later developments during the lawsuit and at trial. The decision, if unreasonable when made, cannot become reasonable based on subsequent events. Instead, the decision’s reasonableness must be judged in light of the facts that existed at the time, without the benefit of hindsight.

¶21 Moreover, aside from stating that attorney fees and costs shall be awarded to “the successful party,” WIS. STAT. § 26.09(4) does not tie the award of attorney fees and costs to the final result of the lawsuit. In other statutes, the

legislature has explicitly provided that a plaintiff may receive enhanced damages if the defendant rejects the plaintiff's settlement offer and the plaintiff ultimately receives a better result. For instance, WIS. STAT. § 807.01(3) allows a plaintiff to recover double costs if the defendant rejects the plaintiff's settlement offer and the plaintiff "recovers a *more favorable* judgment[.]" (Emphasis added.) Similarly, under § 807.01(4), if a "party recovers a judgment which is *greater than or equal to* the amount specified in [a previously rejected] offer of settlement[.]" the party is entitled to interest on the amount recovered from the date of the settlement offer until the amount is paid. (Emphasis added.) Thus, when the legislature intends the availability of enhanced damages to be based on a comparison between a settlement offer and the final result of the lawsuit, it explicitly says so. Section 26.09(4) contains no such requirement.

¶22 On appeal, the Stenbergs concede that whether they reasonably rejected the Moioffers' pre-suit payment demand must be assessed based on the information they had at the time they refused to pay. They acknowledge that WIS. STAT. § 26.09(4) does not link the award of attorney fees and costs to the final result of the case. They therefore concede the circuit court used the incorrect standard to determine whether the Moioffers were entitled to attorney fees and costs. Accordingly, we reverse that portion of the judgment declining to award the Moioffers attorney fees and costs. We remand for the circuit court to reconsider the issue using the proper standard.

By the Court.—Judgment reversed in part and cause remanded with directions.

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

