

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 9, 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.

No. 97-3756-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

DIANE S. BURNS,

PLAINTIFF-RESPONDENT,

v.

MELVIN G. SCHROEPFER AND PEGGY SCHROEPFER,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Langlade County:
JAMES P. JANSEN, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Melvin and Peggy Schroeffer appeal a trial court order that denied them frivolous claim attorney fees under § 814.025, STATS., and granted Diane Burns real estate survey costs in her quiet title lawsuit on

boundaries.¹ Before trial, the parties settled the merits of the lawsuit, leaving only costs issues for the trial court to decide. Burns sought attorney fees and survey costs; relying on § 814.025 the Schroepfers sought attorney fees incurred to oppose Burns's attorney fees request. On appeal, the Schroepfers make two claims: (1) Burns frivolously sought to recover her own attorney fees, in violation of the American Rule barring such recoveries, and should have to reimburse the Schroepfers under § 814.025 for the attorney fees they incurred to defeat Burns's attorney fee claim; and (2) the trial court erroneously awarded Burns real estate survey costs. Burns's attorney fee claim was frivolous if it had no reasonable basis in law or equity. See *Wengerd v. Rinehart*, 114 Wis.2d, 575, 583, 338 N.W.2d 861, 866 (Ct. App. 1983). We conclude that the trial court correctly denied the Schroepfers attorney fees under § 814.025 but wrongly awarded Burns her survey costs. We affirm the attorney fees ruling, reverse the survey cost award, and remand the matter for a new taxation of costs.

We first uphold the trial court's refusal to hold Burns's attorney fee request frivolous. Burns claimed that the Schroepfers' actions caused a real estate sale to fall through and interfered with other prospective buyers. In essence, Burns brought the lawsuit to protect her interests in her real estate and the right to sell it. As long as she was protecting her interests in relation to third parties, such as third-party buyers, she could try to recover attorney fees incurred in that effort as consequential damages. See *Weinhagen v. Hayes*, 179 Wis. 62, 65, 190 N.W. 1002, 1003 (1922). We are satisfied that Burns in effect used the rationale in *Weinhagen*, arguing that the costs incurred for an attorney were consequential damages flowing from the groundless claim that the Schroepfers had an interest in

¹ This is an expedited appeal under RULE 809.17, STATS.

this property. The Schroepfers had continued to contest Burns's ownership in the face of Burns's survey showing the boundary, without securing a survey of their own or demonstrating bona fide adverse possession. This allegedly interfered with buyers. These facts could arguably support a nonfrivolous *Weinhagen* claim even if the trial court would have ultimately denied Burns attorney fees. In short, Burns's attorney fee request was not frivolous, and we uphold the court's ruling denying the Schroepfers attorney fees expended to defend Burns's claim for attorney fees and consequential damages.

We reverse, however, the trial court's decision to grant Burns survey costs. The trial court incorrectly ruled that these were recoverable under the omnibus costs provision. See § 814.036, STATS. The Wisconsin Supreme Court has stated that this statute expresses a "when," not a "what," in terms of costs recovery. See *Kleinke v. Farmers Coop. Supply & Shipping*, 202 Wis.2d 138, 149, 549 N.W.2d 714, 718 (1996). In other words, the statute gives no substantive rights to recover costs not listed as recoverable elsewhere in the costs statutes; it simply sets the times and circumstances when such costs are recoverable. Here, no other statute permits Burns to recover survey costs. The case Burns has cited, *Perpignani v. Vonasek*, 139 Wis.2d 695, 709, 408 N.W.2d 1, 7 (1987), merely mentioned as a background fact that the trial court had awarded survey costs; they evidently were not an issue on appeal, for the supreme court did not go on to pass judgment on the validity of that award. As a result, *Perpignani* is not precedent for Burns to secure survey costs. We reverse the survey costs award and remand the matter to the trial court for a new taxation of costs consistent with this opinion.

By the Court.—Order affirmed in part and reversed in part; cause remanded for proceedings consistent with this opinion; no costs to either party on

appeal; the Schroepfers' request for frivolous appeal costs and attorney fees is denied.

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

