COURT OF APPEALS
DECISION
DATED AND FILED

July 7, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1532

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

KEVIN A. LAUFER AND JULIE R. LAUFER,

PLAINTIFFS-APPELLANTS,

V.

TOWN OF MERTON AND WESTCHESTER FIRE INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Affirmed*.

Before Snyder, P.J., Brown and English, JJ.[1]

PER CURIAM. Kevin and Julie Laufer appeal from a judgment of the circuit court dismissing their action against the Town of Merton and

[1] Circuit Judge Dale L. English is sitting by special assignment pursuant to the Judicial Exchange Program.

Westchester Fire Insurance Company (hereinafter collectively the Town) and an order denying their motion for reconsideration. The court dismissed the action at the conclusion of the Laufers' case, finding that they had not established a proper measure of damages. The Laufers argue that they offered sufficient evidence from which the court could establish damages and that their case should not have been dismissed. We disagree and affirm the judgment and the order of the trial court.

The Laufers brought this action against the Town alleging that the town clerk had negligently failed to notify them that the owners of the property immediately adjacent to theirs had filed for a conditional use permit to operate a commercial dog kennel. The Laufers further alleged that if they had known of the conditional use permit, they would not have built their house, at a cost of over $300,000, but instead would have sold the property.

The Laufers brought a claim in negligence against the Town. They alleged that the value of their house significantly depreciated as a result of the conditional use permit. A trial was held to the court. The Laufers offered the testimony of real estate appraiser Frank Hopp. Hopp testified to what he called the nuisance damages the Laufers had suffered. He determined the nuisance damages by depreciating the actual amount it cost the Laufers to build their home in 1992. He specifically testified that he had not determined the fair market value of the Laufers' home because he had not been asked to do so. At the close of the Laufers' case, the court granted the Town's motion to dismiss. The court found that the Laufers had not offered sufficient proof of damages.

The issue presented on appeal is whether the circuit court applied the proper method of determining damages. The proper measure of damages applicable to a specific claim presents a question of law which we review without

deference to the trial court. *See* ***Schrubbe v. Peninsula Veterinary Serv., Inc.***, 204 Wis.2d 37, 41-42, 552 N.W.2d 634, 635 (Ct. App. 1996).

While we are not required to defer to the circuit court's conclusion, we agree with the circuit court that WIS J I—CIVIL 1804 sets out the proper method for determining damages in this case. The instruction states that when personal property is damaged and can be repaired, the loss to the owner is determined by one of two measures of damages. The first is the fair market value rule. This rule measures the difference between the cost immediately before the harm and the cost immediately after. The second rule is the cost to repair rule. If the property can actually be restored, the measure of damages is the reasonable cost to restore the property to its original condition.

In this case, the Laufers did not suffer any real, physical damage to their house.[2] Therefore, the applicable measure of damages would be the fair market value rule. The only evidence of damages the Laufers offered was the testimony of their expert, Hopp. Hopp testified to what he called nuisance damages. He based his determination on the actual cost to construct the Laufers' home in 1992, and then depreciated it by a given percentage. Hopp testified that he did not determine the fair market value of the Laufers' house. Because the Laufers did not offer any evidence of the fair market value of their house, the circuit court properly determined that they failed to prove damages. The court, therefore, properly dismissed their action.

[2] The Laufers stipulated that they were seeking damages only for their house and not the land.

The Laufers argue that ***Schwalbach v. Antigo Electric & Gas, Inc.***, 27 Wis.2d 651, 660, 135 N.W.2d 263, 268 (1965), allows a replacement cost less depreciation method to determine damages. The experts in that case, however, used this method to determine the fair market value of the property. *See* ***id.*** They then testified to the fair market value. Here, the Laufers' expert specifically testified that he did not determine the fair market value of the Laufers' house. ***Schwalbach*** does not compel a different result.

The Laufers also argue that when the fact of damage is clear, but the amount uncertain, the trial court has the discretion to fix a reasonable amount. However, as the Laufers also note, the court did not determine whether their property had been damaged. The fact of damage, therefore, was not clear.

The Laufers next argue that damages are not required to be proven with mathematical certainty. This rule applies, however, when "the full extent of the damages is a matter of uncertainty by reason of the nature of the tort." ***Cutler Cranberry Co. v. Oakdale Elec. Coop.***, 78 Wis.2d 222, 233, 254 N.W.2d 234, 240 (1977). In this case, the full extent of the damages could have been proven at trial but was not. The Laufers could have had their expert determine the difference in the fair market value of their house. They did not. The damages were not uncertain; they simply were not proven.

By the Court.—Judgment and order affirmed.

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