COURT OF APPEALS
DECISION
DATED AND FILED

October 25, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1346 **Cir. Ct. No. 2010CV000372**

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

ENBRIDGE ENERGY, LIMITED PARTNERSHIP, A DELAWARE LIMITED PARTNERSHIP AND ENBRIDGE PIPELINES (SOUTHERN LIGHTS) L.L.C., A DELAWARE LIMITED LIABILITY COMPANY,

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

V.

JEREMY D. ENGELKING, GERALD D. ENGELKING AND BARBARA A. ENGELKING,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Douglas County: KELLY J. THIMM, Judge. *Affirmed.*

Before Kessler, Brennan and Brash, JJ.

¶1 BRENNAN, J. This appeal and cross-appeal arise from a trial court's equitable decision resulting in a judgment determining the location and

scope of an easement on property owned by Jeremy, Gerald, and Barbara Engelking (the Engelkings). The trial court determined that the right of way was twenty-five feet on either side of a pipeline installed in 1949, for a total width of fifty feet, and it determined that the easement gave Enbridge Energy (Enbridge) the right to clear and use land outside the right of way in 2002 and 2009 during the construction of additional pipelines.

¶2 The Engelkings appeal the portion of the judgment and order concerning the right to clear and use land outside the right of way, as well as other rulings on arbitration, trial evidence, remedies and costs. Enbridge cross-appeals the determination that the width of the right of way is fifty feet, arguing instead that the law requires a finding that the easement gives Enbridge a right of way with a width of 154 feet, spanning the six pipelines laid between 1949 and 2009 and workspace on either side.

¶3 The case was tried and appealed once before; this court affirmed in part and, as relevant here, reversed the first trial court's determination that the right of way covered the entirety of the property. On remand, the trial court was directed to determine the location of the right of way. The second trial court adopted an advisory jury's verdicts and made its own findings and conclusions. We affirm on all nine issues (which we have organized into five sections, some with multiple subparts) because the trial court followed the proper law and reached reasonable conclusions of law on each issue, supported by findings of fact that were not clearly erroneous. *See* ***Spencer v. Kosir***, 2007 WI App 135, ¶13, 301 Wis. 2d 521, 733 N.W.2d 921.

BACKGROUND

The 1949 Right of Way (ROW) grant and the construction of six pipelines

¶4 In 1949, the predecessor owner of the Douglas County parcel now owned by the Englekings granted to Lakehead Pipe Line Company, Inc., "a right of way and easement for the purpose of laying … a pipe line … together with the right to clear the right of way … for a sufficient distance along both sides of said pipe line … together with the right of ingress and egress to and from said right of way …."

¶5 That Right of Way (ROW) grant is reproduced in full as follows, with relevant language emphasized:

> Know all men by these presents:
>
> That the undersigned, hereinafter called "Grantor," whether one or more, for and in the consideration of Sixty Only ($60.00) Dollars cash in hand paid, receipt of which is hereby acknowledged, does hereby grant and convey unto Lakehead Pipe Line Company, Inc., a Delaware corporation, hereinafter called "Grantee," its successors and assigns, *a right of way and easement for the purpose of laying, maintaining, operating, patrolling (including aerial patrol), altering, repairing, renewing and removing in whole or in part a pipe line* for the transportation of crude petroleum, its products and derivatives, whether liquid or gaseous, and/or mixtures thereof, together with the necessary fixtures, equipment and appurtenances, over, through, upon, under and across the following described land situated in Douglas County, State of Wisconsin, to-wit: E½ NW¼ NW¼ Section 11, Township 48-N, Range 14-W *together with the right to clear the right of way and remove or trim trees and brush, and remove other obstructions, for a sufficient distance along both sides of said pipe line* so as to prevent damage or interference with its efficient operation and patrol; and *together with the right of ingress and egress to and from said right of way* through and over said above described land for any and all purposes necessary to the exercise by Grantee of the rights herein granted.

> Grantor covenants with Grantee that he is the lawful owner of the aforesaid lands, that he has the right and authority to make this grant, and that he will forever warrant and defend the title thereto against all claims whatsoever. Said warranty, however, shall be limited to a return of the consideration paid for this grant, including damages.
>
> Grantee, its successors and assigns, *may at any time lay additional lines of pipe upon payment of like consideration per rod for each additional line so laid and subject to the same conditions*.
>
> To have and to hold the said right of way or easement unto said Lakehead Pipe Line Company, Inc., its successors and assigns.
>
> The Grantee, by the acceptance hereof, agrees to bury said pipe lines through cultivated land so that they will not interfere with the ordinary cultivation thereof, and also to pay any damage to crops, fences and timber which may arise from laying, maintaining, operating or removing said lines. *Said damages, if not mutually agreed upon, shall be ascertained and determined by three disinterested persons*, one to be appointed by Grantor, one by Grantee, its successors and assigns, and the third by the two persons aforesaid; and *the award of such three arbitrators or any two of them, in writing, shall be final and conclusive*. The cost of such arbitration shall be borne equally by Grantor and Grantee.
>
> The undersigned Grantor reserves the right to the full use and enjoyment of said premises except as the same may be necessary for the purposes herein granted; provided that said Grantor shall not erect over any line or lines of Grantee any improvement of a nature such as to interfere with the rights hereby granted.
>
> This instrument shall be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto.
>
> Executed this 7th day of November, 1949[.]

(Some capitalization omitted; emphasis added.)

¶6 Lakehead Pipe Line Company constructed pipelines across the parcel in 1949, 1957, and 1967. The 1957 construction specifications state, "The Company owns, in general a fifty foot Right-of-Way which the Contractor shall

use for laying the pipe line. Located therein is a high pressure crude oil pipe line." The 1957 and 1967 pipelines were laid near the 1949 pipeline: the construction specifications for the 1957 pipeline show that it was to be laid "at a distance of 10 feet from the existing line" and the specification for the 1967 pipeline show that it "in general, will be laid at least ten (10) feet south of the more southerly of the two existing pipe lines."

¶7 In 1976, Gerald Engelking purchased the property, and the Engelkings are currently the owners.[1]

¶8 In 2002, Enbridge, the successor to Lakehead Pipe Line Company, initiated negotiations with the Engelkings for the construction of a fourth pipeline. In 2009, Enbridge again initiated negotiations with the Engelkings for construction of a fifth and sixth pipeline. The parties were unable to reach an agreement either time. Enbridge built the fourth pipeline in 2002, then two more in 2009. On July 8, 2010, Enbridge commenced this action for breach of contract and sought a declaratory judgment and an injunction.

The 2011 Arbitration

¶9 Early in the litigation, pursuant to language in the ROW grant, the circuit court—over the Engelkings' objection—granted Enbridge's motion to compel arbitration on disputes related to damages claimed by each party. Two issues of damages were addressed in arbitration in December 2011. The first was compensation for attorneys' fees and for "disruption and delay" Jeremy Engelking

[1] In 1983, Gerald Engelking deeded the entire property to himself and his wife Barbara Engelking. In 2009, Gerald and Barbara Engelking deeded about half of the twenty acres to their son Jeremy Engelking.

caused to Enbridge's operations, and Enbridge was awarded $45,360.37. The second was for damage Enbridge construction had caused to the Engelkings' trees. The arbitrator awarded the Engelkings $119.98 for this damage,[2] accepting the testimony of Enbridge's expert that that amount represented the total value of the damaged timber. Neither party appealed the arbitration award.

The first trial—2012

¶10 The matter proceeded to a bench trial.[3] At trial, the Engelkings took the positions: (1) that the easement consisted of the first three pipelines laid and twenty-five feet on either side; (2) that they were entitled to $15,000 for each of the three additional pipeline installations; and, (3) that the rights granted to Enbridge were contingent on payment to the Engelkings in advance of construction.

¶11 The trial court concluded that, contrary to the Engelkings' claim of a limited easement, the ROW grant "specifically grants Enbridge the right to lay additional pipelines…'over, through, upon, under and across' the entire 20 acres of land …." It concluded that the amount the Engelkings were due for the laying of the 2002 and 2009 pipelines was a total of $4037.[4] It also rejected the Engelkings' argument that the pipeline construction had been unlawful because Enbridge did not compensate them in advance, concluding that "determining the

[2] The Engelkings had sought $13.5 million for damage to the trees.

[3] The Honorable George L. Glonek presided.

[4] The trial court interpreted the term "like consideration" in the ROW Grant to mean twenty dollars per rod, given increased property values and inflation. It therefore concluded that Gerald and Barbara Engelking were entitled to $1200 for the 2002 construction and $1200 for the 2009 construction. It awarded Jeremy Engelking $1200 for the 2009 construction. It further awarded the Engelkings $437 for temporary workspace Enbridge used during the construction.

issue after the actual construction of the additional pipelines, rather than prior to construction" did not compromise the Engelkings' right to compensation under the right of way grant.

The 2012 appeal

¶12 The Engelkings appealed. This court affirmed the trial court on the issue of advance compensation but reversed and remanded for a determination of the scope of the easement. ***Enbridge Energy Ltd. P'ship v. Engelking***, No. 2012AP1188, unpublished slip op. ¶¶11, 15 (WI App Mar. 12, 2013) (***Enbridge I***). We relied on ***Atkinson v. Mentzel***, 211 Wis. 2d 628, 566 N.W.2d 158 (Ct. App. 1997), which states, "When the location of a right of way easement is not defined by the grant, a reasonably convenient and suitable way is presumed to be intended, and the right cannot be exercised over the whole of the land." *See* ***id.*** at 641. We remanded for the trial court to determine the location of the right of way and reinstated the Engelkings' ejectment claim and trespass counterclaims. ***Enbridge I***, No. 2012AP1188, unpublished slip op. ¶¶10, 11, 19, 24 (WI App Mar. 12, 2013).

The 2014 trial

¶13 When the case returned to the trial court, the trial court ruled that the claims presented equitable questions to be determined by the court and did not entail a right to a jury, so it denied the Engelkings' motion for a trial by jury. *See* ***Werkowski v. Waterford Homes, Inc.***, 30 Wis. 2d 410, 417, 141 N.W.2d 306 (1966) ("'If a location [of a right of way] is not selected by either the servient or the dominant owner and they cannot agree upon a location, a court of equity has the power affirmatively and specifically to determine the location of the servitude.'") (citation omitted). The trial court elected to submit questions of fact

to an advisory jury and no party objected. *See* ***Jolin v. Oster***, 55 Wis. 2d 199, 205, 198 N.W.2d 639 (1972) ("[I]n an action in equity the court may, … on its own motion, submit questions of fact to an advisory jury.").

¶14 Prior to trial, on March 3, 2014, the Engelkings moved the trial court to vacate the 2012 arbitration award and submit the damages questions to a jury arguing that under our holding in ***Enbridge I*** they had no liability for the damages the arbitrator required them to pay. Their motion was made approximately one year after the release of our ***Enbridge I*** decision. On March 27, 2014, the trial court denied the motion to vacate, noting that the motion was not timely and that no grounds exist to grant relief under WIS. STAT. § 806.07 (2013-14).[5]

¶15 The trial court and advisory jury heard testimony for three days. Verdict forms were submitted to the jury at the close of testimony on the third day. The jury submitted the following verdict answers:[6]

> Question No. 1:
>
> While considering what is reasonably convenient for both the Engelkings and Enbridge Energy, is the location of the Right of Way limited to 50 feet wide, located 25 feet on either side of the 1949 pipeline, as the Engelkings have asked you to find?
>
> Yes.
>
> Question No. 4:
>
> No matter how you answered any of the other questions answer this question:

[5] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[6] Questions 2 and 3 are omitted because they were to be answered only if the jury answered the first question "No."

> Do the rights granted by the 1949 Right of Way Grant include the right to clear and use land including the right to use any temporary work space during the construction of additional pipelines in 2002 and 2009?
>
> Yes.

¶16 The trial court adopted the jury's answers, stating, with regard to the jury's answer on the right of way location:

> [T]here was certainly evidence that supported it. There was the documents provided by Enbridge … I think it was reasonable for a jury to accept it so I don't have a problem with Question 1.
>
> And with Question 4 … what you have is you have an easement for that 50 feet that the jury found, and you have three pipelines … put there based upon the grant of the easement. As far as they could do the work on the site but they couldn't permanently be there ….
>
> So I'm going to grant judgment based upon the verdict.… I am accepting the verdict. The verdict says that the right-of-way is limited to 50-feet wide. I'm accepting that and I've stated the reasons why I'm accepting it. I'm also accepting the fact that the rights granted by the Right-of-Way Grant include the right to use the temporary work space and to clear and use the land during the construction. That was okay.

¶17 The trial court and advisory jury returned the following day to have evidence presented on the question of whether the last three pipelines were trespassing on the Engelkings' property and if so what damages are due as a result. At the close of the evidence, the jury deliberated and returned the verdicts as follows:

> Verdict #1:
>
> Are the presence of Plaintiffs' 2002 and 2009 pipelines on the Engelkings' property a trespass?
>
> Yes.

> Verdict #3:
>
> *No matter how you answered any other question, then answer this question*: What amount of money will fairly and adequately compensate the Engelkings for the lost use of their land due to the Enbridge Energy's trespass caused by the presence of the 2002 and 2009 pipelines on the Engelkings' property?
>
> Gerald and Barbara Engelking: $100,000
>
> Jeremy Engelking: $50,000
>
> Verdict #4:
>
> *If your answer to Question 1 was "Yes," then answer this question*: Has the presence of the Enbridge Energy's pipelines installed in 2002 and 2009 caused the Engelkings to be deprived of full possession and use of their property outside the right of way.
>
> Yes.
>
> Verdict #5:
>
> *If your answer to Question 4 was "Yes," then answer this question*: Should Enbridge Energy be required to remove the 2002 pipeline from the Engelkings' property?
>
> No.
>
> Verdict # 6:
>
> *If your answer to Question 4 was "No," then answer this question*: Should Enbridge Energy be required to remove the 2009 pipeline from the Engelkings' property?
>
> No.

¶18 The trial court again granted judgment on the verdict and accepted the verdict. Both parties brought multiple post-verdict motions.

Post-verdict motions

¶19 Enbridge sought a ruling rejecting the finding as to the location of the right of way. The trial court denied this motion, stating,

> The Court finds that there was sufficient evidence presented at trial to support the advisory jury verdict finding, and the Court's adoption of that finding, that the right of way is fifty feet wide and is located 25 feet north to 25 feet south of the first pipeline installed in 1949.

The trial court also granted Enbridge's motion for judgment confirming its rights to clear and use land outside the fifty foot right of way for construction of additional pipelines.

¶20 The trial court denied Enbridge's motion to change its finding on the issue of trespass and denied its motion for a new trial on the question of trespass liability. The court stated that "the jury verdict finding pipelines installed in 2002 and 2009 to be a trespass is not contrary to the weight of the evidence."

¶21 The trial court denied the Engelkings' motion to change the answer regarding Enbridge's right to clear and use land including the right to use any temporary work space; it held that the motion was not timely under WIS. STAT. §§ 805.14(5) and 805.16, but that even if it was timely, there was sufficient evidence to support the finding it had adopted. The trial court denied their renewed motion to vacate the arbitration award and motion for a new trial on the issue of tree damages on grounds that the motions were not timely under WIS. STAT. §§ 788.13 and 805.16. It further found "no evidence … to justify vacating the arbitration award."

¶22 Finally, the trial court denied the Engelkings' motion for a permanent injunction requiring Enbridge to remove the 2002 and 2009 pipelines. The trial court stated:

> Defendants submitted separate claims for trespass and ejectment to a jury and requested removal of the pipelines and money damages as remedies. The jury awarded money damages but rejected defendants' request for ejectment. The Court notes that granting the motion would have the

> effect of changing from "No" to "Yes" the answer to questions 5 and 6 on the June 13, 2014 verdict; however, defendants' motion was not timely under WIS. STAT. § 805.14(5) and 805.16.

The trial court noted that even if the motion were timely, it would still be denied:

> [T]here is no evidence that the continuing presence underground of the three additional pipelines has caused or will cause irreparable harm to defendants. The Court finds that plaintiffs did not act willfully or wantonly in disregard of the defendants' rights, but rather committed an honest mistake when they located the three additional pipelines in an area they erroneously believed, based on the language of the Right of Way Grant, was part of the conveyed right of way. The Court finds that defendants' request for, and the jury's award of, monetary damages for trespass demonstrates that any injury to defendants caused by the trespass is compensable with money damages and, therefore, is not irreparable.

¶23 The Engelkings appealed the finding that Enbridge had a right to conduct construction activities and tree-clearing outside of its right of way; they also appealed the trial court's denial of their motion to vacate the arbitration award, their ejectment motion, their motion for certain costs; and evidentiary rulings made during trial.

¶24 Enbridge appealed the finding of the location of the right of way, arguing that the trial court erred when it found the right of way to be located twenty-five feet on either side of the original 1949 pipeline and should have found a "154-foot wide pipeline right-of-way defined by Enbridge's actual use."

¶25 This court denominated the Engelkings the appellants and the Enbridge plaintiffs the cross-appellants. This court granted oral argument, which was held June 21, 2016.

DISCUSSION

1. The trial court properly exercised its discretion in determining that the *scope of the easement* was fifty feet located twenty-five feet on either side of the 1949 pipeline and included a *right to clear and use land outside the grant for construction*.

¶26 We begin by addressing the central issue of the appeal and cross-appeal, which is the location and scope of the right of way.

¶27 When the specific location of an easement is not defined and the parties to the easement cannot agree, "the court has the inherent power to affirmatively and specifically determine its location, after considering the rights and interests of both parties." ***Spencer***, 301 Wis. 2d 521, ¶13. A court must "look to the instrument which created the easement in construing the relative rights of the landowners." ***Atkinson***, 211 Wis. 2d at 637. "When the location of a right-of-way easement is not defined by the grant, a reasonably convenient and suitable way is presumed to be intended, and the right cannot be exercised over the whole of the land." ***Id.*** at 641. "'The reasonable convenience of both parties is of prime importance and the court cannot act arbitrarily, but must proceed with due regard for the rights of both parties.'" ***Werkowski***, 30 Wis. 2d at 417 (quoting 17A AM. JUR., Easements, § 101 (1962)).

¶28 "We review equitable remedies for erroneous exercise of discretion." ***Spencer***, 301 Wis. 2d 521, ¶13. We will uphold the court's exercise of discretion defining an easement "if it applies the appropriate law and the record shows there is a reasonable factual basis for its decision." ***Id.***

a. The trial court did not erroneously exercise its discretion in finding that the width of the right of way was fifty feet located twenty-five feet on either side of the 1949 pipeline.

¶29 Enbridge challenges the trial court's equitable ruling that determined that the width of the right of way easement was fifty feet located twenty-five feet on either side of the 1949 pipeline. In this second appeal, after first arguing that the easement should encompass the entire parcel, Enbridge argues that the easement should be 154 feet and that, in ruling to the contrary, the trial court improperly exercised its discretion. Relying on the language in ***Atkinson*** and the ROW grant itself, Enbridge argues for expansion of the easement to 154 feet on the grounds that: (1) the *original intent* of the easement, as expressed in the grant language permitting it to "lay additional pipe lines" in the future, shows that the parties' original intent was to expand it beyond fifty feet; and, (2) the record shows that *reasonable convenience* to Enbridge compels a wider easement based on the testimony of its expert witnesses that the fifty-foot corridor cleared in 1949 did not constitute a "reasonably convenient and suitable way" for Enbridge to exercise its rights and that there was no contrary evidence. In other words, Enbridge argues that a determination of what is "reasonably convenient" is erroneous if it is not big enough to cover what they chose to construct in 2002 and 2009.

¶30 The Engelkings argue that the original intent of the easement was fifty feet based on the actual construction of the first three pipelines and the construction specification documents for the 1957 second line and the 1967 third line. They contend that Enbridge's "reasonable convenience" argument for 154 feet is essentially an unlimited easement and was already rejected by this court in ***Enbridge I***.

¶31 The advisory jury was asked to consider reasonable convenience to both parties and locate the easement, which it did, at fifty feet:

> Question No. 1:
>
> While considering what is reasonably convenient for both the Engelkings and Enbridge Energy, is the location of the Right of Way limited to 50 feet wide, located 25 feet on either side of the 1949 pipeline, as the Engelkings have asked you to find?
>
> Yes.

¶32 The trial court agreed with, and adopted, the jury's answer and later explained at the parties' post-verdict motions that the testimony, in particular the construction documents showed the original intent of the easement width was fifty feet and rejected Enbridge's argument for an ever-expanding easement as contrary to law, saying:

> They found the 50 foot being the right-of-way and do I have to accept it as advisory verdict? Ultimately I guess I don't have to accept it but the interesting part is they reviewed a lot of evidence. A lot of testimony. Documents including the construction documents which I'm supposing they gave a lot of weight to; but to say that the decision by the jury to give the right-of-way being at the 50 feet is somehow contrary to the evidence, I just think is wrong. [T]he evidence could support and did support the jury's verdict, and I'm going to adopt the jury's verdict as far as that location.…
>
> The argument being made by Enbridge seems to be kind of a slippery slope argument that we can keep expanding it and expanding it and that's specifically what Enbridge cannot do. There's a limit. It's not a blanket easement. There has to be due regards of rights of both parties, including the Engelkings.…
>
> What's reasonably convenient for both parties is the 50 feet. … [T]he evidence did support and I'm going to adopt the jury's advisory verdict locating the grant as the jury found.

We conclude that the trial court here properly exercised its discretion because its factual findings are not clearly erroneous and it properly followed the correct law. *See* ***Spencer***, 301 Wis. 2d 521, ¶13.

¶33 The chief flaw in Enbridge's argument is that it misapplies ***Atkinson***, the controlling case, and considers the reasonable convenience to Enbridge only. In ***Atkinson***, we held that when the easement is insufficiently described, the trial court must then determine the parties' original intent and fix the location after considering the *reasonable convenience* to *both* parties. ***Atkinson***, 211 Wis. 2d at 641. Applying those principles in ***Atkinson***, we affirmed two of the trial court's rulings expanding an easement on the grounds that they were necessary to accomplish the purpose of the easement. ***Id.*** at 643. But we reversed another because it went further than was necessary to serve the parties' original intent, saying that "[o]nce this purpose is served, further expansion of the easement is neither necessary nor warranted." ***Id.*** at 646. Thus, contrary to Enbridge's contention, ***Atkinson*** does not *require* expansion simply based on one party's statement of what would be reasonably convenient to that party.

¶34 Here, to determine the original parties' intent, the trial court looked at the testimony surrounding the original construction of the first three pipelines which occurred before Enbridge or the Engelkings acquired their respective rights. The evidence at trial showed that the original landowners gave Lakehead Pipe Line Company an easement for the "*purpose*" of constructing "*a pipe line*" on a twenty acre parcel, without specifically describing the width of the easement. Admittedly it also provided that Lakehead and its successors had the right to "at any time lay additional lines of pipe upon payment of like consideration per rod for each additional line so laid and subject to the same conditions."

¶35 The record shows that the first pipeline was built in 1949 and served as a reference point for the width of the easement on either side of that first line. Then in 1957 Lakehead constructed the second pipeline ten feet north of the existing line. In 1967 Lakehead constructed the third line about thirteen feet north of the second line. All three pipelines constructed by the original parties were within twenty-three feet of the 1949 pipeline, well within the trial court's fifty-foot width finding.

¶36 Additionally, as noted by the trial court in its decision, the original party's own construction specifications support the trial court's conclusion that the original intent was a fifty-foot easement. Lakehead's 1957 construction specifications expressly state that the easement is fifty feet: "The COMPANY owns, in general a 50 foot Right-of-Way which the CONTRACTOR shall use for laying the pipe line." The specifications further state that if more than fifty feet is needed, "… the COMPANY will use its best endeavor to obtain any additional Construction Right-of-Way necessary."

¶37 Despite that evidence, Enbridge argues that the "lay additional lines" reference in the initial grant evidenced an intent that the width be expanded as needed for the reasonable convenience of Enbridge. Here they argue that equates to 154 feet—enough to encompass the three additional lines it constructed in 2002 and 2009 because that is what was reasonably convenient to them as shown by their expert's testimony that: (1) a width of 154 feet was "a reasonably convenient way across the Property for the six pipelines"; and (2) "it would not have been possible to install the 2002 and 2009 pipelines within the 50-foot strip."

¶38 There are three problems with Enbridge's 154 foot argument. First, it is contradicted by the original parties' clear intent of a fifty-foot easement as

addressed above. Second, as the trial court pointed out here, it is a "slippery slope" of an endlessly expanding easement which we have already rejected in ***Enbridge I*** and where we specifically said that just because Enbridge went ahead and laid three more lines in 2002 and 2009, that "should not now operate as a benefit to Enbridge when considering the reasonable convenience of both parties." ***Enbridge I***, No. 2012AP1188, unpublished slip op. ¶11 (WI App Mar. 12, 2013). And third, it fails to follow the holding in ***Atkinson*** that accommodating *one* party's reasonable convenience ends when the original intent of the both parties is served.

¶39 The trial court determined that "what's reasonably convenient is what was done originally and Enbridge was allowed to use the easement, and they were allowed to have three pipelines where they started with one, and I think it's reasonably convenient for the parties." ***Atkinson*** does not require a different result. Because the trial court applied the appropriate law and because there is a reasonable factual basis for its decision, we affirm the trial court's decision on the location of the ROW grant.

b. The trial court did not err in concluding that the easement gave Enbridge the right to clear and use land outside the right of way during construction of the additional pipelines.

¶40 The Engelkings argue that it was error for the trial court to conclude that the easement also granted Enbridge the right to clear and use land outside the fifty-foot wide right of way during the construction of additional pipelines in 2002

and 2009. Their argument is that "[t]he Court's judgment in this regard is inherently inconsistent" and that it therefore must be vacated.[7]

¶41 The jury's verdict on the right to clear and use land outside the right of way was as follows:

> Question No. 4:
>
> No matter how you answered any of the other questions answer this question:
>
> Do the rights granted by the 1949 Right of Way Grant include the right to clear and use land including the right to use any temporary work space during the construction of additional pipelines in 2002 and 2009?
>
> Yes.

¶42 The trial court adopted the jury's verdict, saying:

> And with Question 4 … what you have is you have an easement for that 50 feet that the jury found, and you have three pipelines … put there based upon the grant of the easement. As far as they could do the work on the site but they couldn't permanently be there.…
>
> So I'm going to grant judgment based upon the verdict.…
>
> I am accepting the verdict. The verdict says that the right-of-way is limited to 50-feet wide. I'm accepting that and I've stated the reasons why I'm accepting it. I'm also accepting the fact that the rights granted by the Right-of-Way Grant include the right to use the temporary work

[7] The Engelkings compare the trial court's finding to a perverse verdict resulting from a jury's refusal to follow the direction or instructions of the trial court upon a point of law. *See* ***Becker v. State Farm Mut. Auto. Ins. Co.***, 141 Wis. 2d 804, 820, 416 N.W.2d 906 (Ct. App. 1987). A trial court's decision on whether a jury verdict is perverse is upheld on appeal absent an erroneous exercise of discretion. ***Fahrenberg v. Tengel***, 96 Wis. 2d 211, 224, 291 N.W.2d 516 (1980). In this case, the trial court adopted the jury verdict, and what is presented for review is the trial court's equitable decision.

> space and to clear and use the land during the construction. That was okay.

¶43 The Engelkings argue that this trial court conclusion is inconsistent with its conclusion that the width of the easement was fifty feet. We are unpersuaded and conclude that the trial court's conclusion is a proper exercise of discretion based on the plain language of the easement.

¶44 The trial court addressed the claimed inconsistency in its rulings on post-verdict motions. It ruled, in response to motions from Enbridge and the Engelkings, as follows:

> The Court finds that there was sufficient evidence presented at trial to support the advisory jury verdict finding, and the Court's adoption of that finding, that pursuant to their easement rights [Enbridge] had the right to clear and use land outside the 50 foot right of way, including the right to use any temporary work space during the construction of additional pipelines in 2002 and 2009.
>
> …
>
> [T]here was sufficient evidence presented to the advisory jury to support the finding [on verdict question 4] and the Court concurs with and has adopted the advisory jury's finding.

The trial court cited the language in the easement granting rights of ingress and egress, and the rights to operate, maintain, repair and patrol the pipelines.

¶45 The Engelkings argue that a right of way is generally limited to that defined area, citing ***Hunter v. McDonald***, 78 Wis. 2d 338, 342, 254 N.W.2d 282 (1977), for that proposition. But this case differs from ***Hunter*** due to the plain language in this ROW grant in that it specifically permitted the laying of additional lines and the right to clear and remove obstructions from the right of

way for a sufficient distance along both sides of the pipeline to permit them to operate the lines.

¶46 As the trial court in this case correctly noted, the "terms and purposes of the grant" in this case did give Enbridge rights. Thus the trial court here made a reasonable reconciliation of the relative rights of the parties based on its findings, and because it applied the appropriate law and the record shows there is a reasonable factual basis for its decision, we will not disturb it.

2. The trial court did not err in denying the motion to vacate the arbitration award.

¶47 The Engelkings argue that the trial court erred in denying their motion to vacate the 2012 arbitration award, under WIS. STAT. § 806.07. Enbridge argues that the motion was untimely because the Engelkings had not challenged the award until long after the three-month window for challenging arbitration awards set forth in WIS. STAT. § 788.13. The trial court agreed with Enbridge. We also conclude that the motion was untimely. Accordingly we conclude the trial court did not improperly exercise its discretion in denying it.

¶48 At the beginning of this litigation, the first trial court ordered the parties to arbitrate damages issues pursuant to language of the ROW grant. An arbitration hearing resulted in awards to the Engelkings of $120.00 for tree damage and $45,360.00 to Enbridge for construction delay costs. The January 25, 2012 award was not appealed by either party within the three-month window for appeal for such awards under WIS. STAT. § 788.13.

¶49 On April 11, 2012, at the first trial, the court confirmed the arbitration award and ruled that the easement width encompassed the entire twenty acre parcel. Although the Engelkings appealed from the first trial rulings, they did

not appeal the confirmation of the arbitration award. ***Enbridge I*** was decided March 12, 2013, reversing the easement location and the case was remanded.

¶50 Upon remand, before trial, on March 27, 2014, the Engelkings moved the trial court to vacate the arbitration award on the grounds that the decision in ***Enbridge I*** rendered the arbitration damages award against the Engelkings inequitable because it changed the easement width. This was the first motion to vacate the award filed by the Engelkings and it was filed a full year after the decision in ***Enbridge I***. The trial court deferred decision until after the trial. Following the second trial, the Engelkings moved again to vacate the award, and this time the court denied the motion as untimely.[8]

¶51 The Engelkings frame their motion as an appeal of a denial for relief under WIS. STAT. § 806.07 which will not be reversed on appeal absent an erroneous exercise of discretion. ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis. 2d 536, 541, 363 N.W.2d 419 (1985). We will not find an erroneous exercise of discretion if the record shows that the trial court exercised its discretion and that there is a reasonable basis for its decision. *See* ***id.*** at 542.

¶52 On appeal, the Engelkings argue, first, that the arbitration award may be vacated despite the fact that it is beyond the time permitted in WIS. STAT. § 788.13 because WIS. STAT. § 806.07 gives the trial court authority under these circumstances. Second, they argue that given the holding of ***Enbridge I,*** the statute "mandates" vacating the arbitration award. They are wrong on both points

[8] The trial court also made other rulings on the merits which we need not address because we decide this issue on the timeliness basis. Appellate decisions should be decided on the narrowest grounds possible. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997).

because the statute on which they base their arguments does not apply here. Even if the statute did apply, it would merely give authority to the trial court to exercise its discretion as to vacating an award, and the standard of review would be the discretionary one. WISCONSIN STAT. § 806.07(1) states:

> On motion and upon such terms as are just, the court … *may* relieve a party or legal representative from *a judgment, order or stipulation* for the following reasons:
>
> …
>
> (f) *A prior judgment upon which the judgment is based has been reversed* or otherwise vacated;
>
> (g) It is *no longer equitable* that the judgment should have *prospective application*; or
>
> (h) Any other reasons justifying relief from the operation of the judgment.

(Emphasis added.)

¶53 The first question is whether an arbitration award is, for purposes of applying this statute, a "judgment, order or stipulation." If it is, the next question is whether any of the three reasons listed would apply such that the trial court would have discretion to vacate the arbitration award. There are reasons that it is unlikely that the legislature intended for WIS. STAT. § 806.07 to include arbitration awards; e.g., the very narrow grounds on which arbitration awards may be vacated, *see* ***City of Madison v. Madison Professional Police Officers Association***, 144 Wis. 2d 576, 586, 425 N.W.2d 8 (1988), and judicial interpretations of the statute that would imply that only orders from a court are covered, *see* ***Gittel v. Abram***, 2002 WI App 113, ¶18, 255 Wis. 2d 767, 649 N.W.2d 661. The Engelkings offer no legal support for the proposition that this statute applies to arbitration awards. We conclude, absent any reason to the contrary, that it does not.

¶54 Even assuming that the statute applies to arbitration awards, under WIS. STAT. § 806.07(1)(f), it applies only to relieve a party from a judgment (here the January 2012 arbitration award) if a "prior judgment upon which the judgment is based has been reversed or is otherwise vacated." There are two problems for the Engelkings here: the judgment that was reversed here was the first trial decision that the easement was the whole twenty acres, and that decision was neither *prior to*, the arbitration award, nor was it *the basis* of the arbitration award. It was a *subsequent* judgment, not a prior. In rebuttal, the Engelkings merely argued that ***Enbridge I*** rendered the award "inequitable." They cite no case supporting application of the "other reasons" exception here.

¶55 In their reply brief the Engelkings respond to the untimeliness argument by saying they "had no viable challenge to the merits of the arbitration award until after the decision in ***Enbridge I*** was issued …." And that is precisely why their challenge fails. Additionally, the ***Enbridge I*** decision was released March 12, 2013, and they filed their motion to vacate on March 27, 2014. Even assuming that they had no grounds on which to seek WIS. STAT. § 806.07 relief until our decision in ***Enbridge I***, that does not explain why they waited one year to file their motion. For all of the foregoing reason, the Engelkings fail to show that the trial court here misinterpreted § 806.07 or erred in exercising its discretion when it denied the motion to vacate the arbitration award.

3. The trial court did not err in denying the Engelkings' motion for ejectment.

¶56 When this case was appealed following the first trial, the court of appeals reinstated the Engelkings' ejectment claim but in a footnote alerted the

Engelkings to deficiencies in their ejectment pleading.[9] At the second trial, and in a post judgment motion, the Engelkings moved for ejectment of the pipelines on the grounds that, as a matter of law, once the trial court had adopted the jury's finding and determined that the right of way was fifty feet wide, the Engelkings were entitled to have the pipelines outside of the right of way removed. The trial court denied the motion.

¶57 Where a party has installed permanent structures on land owned by another, a court has "the general power … to fashion an equitable remedy to meet the needs of a particular case." ***Soma v. Zurawski***, 2009 WI App 124, ¶9, 321 Wis. 2d 91, 772 N.W.2d 724. The most equitable remedy in such a case can be something other than removal of the structures. *See* ***Perpignani v. Vonasek***, 139 Wis. 2d 695, 736, 408 N.W.2d 1 (1987).

¶58 The Engelkings' position was that once there is a determination that the right of way is fifty feet wide, they were entitled as a matter of law to have the pipelines outside the right of way removed. They cite no law for the proposition that in an equitable action the sole remedy for a trespass is removal of the trespassing structures, and we find no support for that proposition. In fact, ***Perpignani*** holds exactly the opposite.

¶59 Furthermore, neither in their arguments to the trial court nor in their argument to this court do they acknowledge or respond in any way to the

[9] "We make no judgment as to whether a cause of action for ejectment exists in the first instance or, if so, what the elements are. The Engelkings fail to clearly identify the elements of an ejectment claim, and, in fact, assert that ejectment is merely a remedy available for a continuing trespass claim." ***Enbridge Energy Ltd. P'ship v. Engelking***, No. 2012AP1188, unpublished slip op. ¶23 n.7 (WI App Mar. 12, 2013).

discussion in ***Enbridge I*** of pleading deficiencies in their ejectment claim. This court set out what they would need to show with regard to the ejectment claim and pointed out that the arguments they had made to the first trial court were based on a statute that is no longer in effect. Even after a remand, new trial, and second appeal, the Engelkings still "fail to clearly identify the elements of an ejectment claim, and, in fact, assert that ejectment is merely a remedy available for a continuing trespass claim."

¶60 We therefore decline to construct a different legal framework for this claim[10] from the framework suggested by ***Perpignani***, 139 Wis. 2d at 736, in which an equitable ruling by a trial court was affirmed even though it did not "require the defendants to remove their buildings" that were illegally on another's land because another more reasonable remedy existed. On that basis, we reject the argument that the Engelkings are entitled to ejectment as a matter of law and affirm the trial court's ruling on this motion.

4. The trial court did not err in holding that some of the Engelkings' claimed costs were unnecessary under WIS. STAT. § 814.01(1) and denying them.

¶61 "Under WIS. STAT. § 814.01(1), a prevailing plaintiff is entitled to recover costs." ***DeWitt Ross & Stevens, S.C. v. Galaxy Gaming and Racing Ltd. P'ship***, 2004 WI 92, ¶53, 273 Wis. 2d 577, 682 N.W.2d 839. "WISCONSIN STAT. § 814.04(2) authorizes imposition of costs for 'all the necessary disbursements ... allowed by law.'" ***Id.***, ¶53. "A circuit court may, in its discretion, determine that

[10] We do not develop parties' arguments for them. *See* ***League of Women Voters v. Madison Cmty. Found.***, 2005 WI App 239, ¶19, 288 Wis. 2d 128, 707 N.W.2d 285. (Appellant "must present developed arguments if it desires this court to address them.")

the requested item of cost was not a 'necessary' disbursement, and deny a party costs on that basis." ***Id.***, 54 (citation omitted). "We will uphold the circuit court's exercise of discretion, so long as it examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, arrived at a conclusion that a reasonable judge could reach." ***Id.*** As our supreme court has clarified, the purely statutory right to recover taxable costs is narrowly construed:

> The terms "allowable costs" or "taxable costs" have a special meaning in the context of litigation. The right to recover costs is not synonymous with the right to recover the expense of litigation. This right is statutory in nature, and to the extent that a statute does not authorize the recovery of specific costs, they are not recoverable .... Many expenses of litigation are not allowable or taxable costs even though they are costs of litigation.
>
> Thus, any award of a "cost" which is not specifically authorized by a Wisconsin statute constitutes an error of law that must be reversed.

Kleinke v. Farmers Co-op. Supply & Shipping, 202 Wis. 2d 138, 146-47, 549 N.W.2d 714 (1996) (first paragraph quoting ***State v. Foster***, 100 Wis. 2d 103, 106, 301 N.W.2d 192 (1981)).

¶62 Here the Engelkings requested $20,842.20 in costs; the trial court held that the taxation of costs would stand as ordered by the deputy clerk, an order which denied $8,776.38 of the requested costs. It stated that the denied costs did not meet the statutory requirement of being necessary and reasonable.

¶63 The Engelkings argue only that the costs denied by the trial court are ones "typically allowed" by courts and that it thus was "error" to deny the requested costs. They make no argument even that the individual costs were necessary as the statute requires. They make no argument showing how the ruling fails to withstand the discretionary standard of review. Their brief contains no

legal argument at all and cites to no law on this issue. Because the court applied the correct law and arrived at a conclusion that a reasonable judge could reach, we affirm the trial court's ruling on costs.

5. The trial court did not err in its discretionary evidentiary rulings.

¶64 The Engelkings appeal the following three evidentiary rulings: (1) permitting the use of the term "blanket easement" by Enbridge witnesses during their testimony; (2) excluding evidence of Jeremy Engelking's arrest; (3) excluding evidence of Enbridge's operations and finances to show profits relevant to the Engelkings' claim for punitive and mesne damages.[11]

¶65 "The general rule is that while rules of evidence apply on actions tried to the court it will be presumed if there is proper evidence to support the findings of the trial court that the court disregarded any evidence improperly admitted." ***McCoy v. May***, 255 Wis. 20, 25, 38 N.W.2d 15 (1949). A trial court's admission or exclusion of evidence is a discretionary decision that we will sustain if it is consistent with the law. *See* ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." WIS. STAT. § 904.03. "An erroneous exercise of discretion in admitting or excluding

[11] The Engelkings also appeal an evidentiary ruling permitting the testimony of Floyd Mott, an Enbridge witness. However, the record clearly reflects a stipulation by the parties on the admissibility of Mott's testimony, and counsel for the Engelkings, when asked by the court to confirm the stipulation, stated, "That is true, Your Honor." A stipulation, validly made, is binding on the parties. ***Wyandotte Chemicals Corp. v. Royal Electric Mfg. Co., Inc.***, 66 Wis. 2d 577, 589, 225 N.W.2d 648 (1975). There is no challenge to the stipulation's validity, and we do not address this argument further.

evidence does not necessarily lead to a new trial." ***Martindale v. Ripp***, 2001 WI 113, ¶30, 246 Wis. 2d 67, 629 N.W.2d 698. "The appellate court must conduct a harmless error analysis to determine whether the error 'affected the substantial rights of the party.'" ***Id.*** "If the error did not affect the substantial rights of the party, the error is considered harmless." ***Id.***

¶66 While the trial court elected to employ an advisory jury, this was an equitable action tried to the court; thus, in addition to the normally deferential review of such decisions, we apply the presumption that the trial court disregarded any improperly admitted evidence. *See* ***McCoy***, 255 Wis. at 25.

a. Permitting the words "blanket easement."

¶67 The trial court declined to prohibit use of the words "blanket easement" by Enbridge counsel and witnesses. The Engelkings argue that this use was prejudicial and was improper because it called for a legal conclusion on the definition of the scope of the easement. When the Engelkings moved *in limine* to prohibit it, the trial court denied the motion on the grounds that the phrase was "just argument." This is a ruling well within the trial court's discretion, and the Engelkings have failed to show how it is inconsistent with the law to permit the opposing party to characterize the easement in an argumentative way. Nor have they explained how this ruling, even if error, prejudiced them given that the court rejected Enbridge's claim for an endlessly expanding easement and accepted the Engelkings argument that the right of way was fifty feet wide. We therefore affirm.

b. Excluding the arrest testimony.

¶68 As far as this court understands the Engelkings' argument, it appears to be that the trial court's ultimate finding that Enbridge trespassed shows that the

court erred in denying their request to present evidence surrounding Jeremy Engelking's arrest. Their theory seems to be that because Enbridge called the sheriff who arrested Jeremy, Enbridge's trespass was the *cause* of Jeremy Engelking's arrest. Thus, they argue, they are entitled to damages for Enbridge's trespass, citing cases on trespass generally. They claim, without any legal support, that they are entitled to damages for all consequences that flowed from Enbridge's trespass, which includes Jeremy Engelking's arrest. And accordingly, they argue, the trial court erred in denying the Engelking's request to put this evidence and theory before the jury and court.

¶69 The trial court excluded testimony regarding Jeremy Engelking's arrest by law enforcement when he attempted to prevent Enbridge from continuing construction activities on the disputed land. The trial court heard arguments and excluded evidence of the arrest on the grounds that it was not relevant:

> As far as the arrest goes, that's not something that Enbridge did. That's something that a third party did and in my opinion the probative value is so low and the prejudicial affect with a jury hearing about an arrest that Enbridge Energy wasn't a party to is high. So in light of relevancy, I'm not going to allow this testimony of the arrest.

This, too, is a decision well within the discretion of the trial court that is certainly justifiable to avoid undue delays and waste of time. The Engelkings have not shown that it is inconsistent with the law. We therefore affirm.

c. Denial of discovery of Enbridge's profits to support claims for punitive damages and mesne profits.

¶70 The trial court denied the Engelkings' attempt to compel discovery of evidence of Enbridge's profits as relevant to damages. The Engelkings argue

that the evidence is relevant to calculate mesne profits[12] from a trespasser, which, they contend, are properly calculated not as the rental value of the land, but as all profits Enbridge received from the trespassing pipelines for the six years prior to the bringing of the action. They also argue that they had made a prima facie case of entitlement to punitive damages, and the profits and wealth of the plaintiffs were therefore relevant and admissible.[13]

¶71 The question here is whether the decisions of the trial court are consistent with the law on punitive damages and the measure of profits. If the decision is consistent with the law, we sustain it. *See* ***Pharr***, 115 Wis. 2d at 342.

Punitive damages.

¶72 Punitive damages are available "if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff." WIS. STAT. § 895.043(3). *See also* § 895.043(4)(a) ("If the plaintiff establishes a prima facie case for the allowance of punitive damages, … [t]he plaintiff may introduce evidence of the wealth of a defendant.").

¶73 When the Engelkings moved to compel discovery of evidence of Enbridge's profits and wealth, the trial court denied the motion on the grounds that

[12] Mesne profits are defined as the profits accrued between two points in time, such as during a period of trespass. *See* Black's Law Dictionary (7th ed.).

[13] The Engelkings also argue on appeal that the trial court erred in denying their post-judgment argument for a declaration that verdict number four did not prohibit a claim for future damages due to Enbridge's continuing trespass. However, the Engelkings did not file any such motion below. Rather they simply argued in response to a motion Enbridge filed below seeking the opposite declaration. Enbridge however did not appeal the denial of their post-judgment motion. Accordingly we need not reach the Engelking's argument on future damages.

the Engelkings had failed to present a prima facie case that punitive damages were recoverable. The trial court described the submitted evidence as "at best speculation" and stated:

> As far as punitive damages go in general … I don't think there's been any evidence in my review of all the file of the prima facie case that it takes to get to the point of showing that there's this punitive damages. There's statements by the defendant that it's--that they should have known…. [I]t's a lot of supposition and the reality of it is it wasn't this Court but it was another Court that found that … they acted within the scope of the easement so to then say, well, the Enbridge employees should have known … that they were going beyond the scope of the easement and somehow … showing an intentional disregard of rights, I just--it hasn't been there.

¶74 The Engelkings argue that Enbridge's attempts to acquire new agreements with them prior to installation of the 2002 and 2009 pipelines are evidence that Enbridge "knew it did not have sufficient rights under the ROW Grant." They argue that this knowledge, combined with Enbridge's conduct in installing the pipelines without a determination of payment in advance, demonstrates intentional disregard of their rights. They cite to cases involving trespass where punitive damages were awarded, such as ***Jacque v. Steenberg Homes, Inc.***, 209 Wis. 2d 605, 563 N.W.2d 154 (1997), and ***Gilman v. Brown***, 115 Wis. 1, 91 N.W. 227 (1902), as proof that punitive damages can be awarded in trespass cases.

¶75 The trial court in this case, however, considered the fact that the right of way grant was written in a way that even a prior court ruling had interpreted as broadly as Enbridge did. In light of the broad language of the right of way grant at issue in this case, we agree with the trial court that Enbridge's broad reading of the grant cannot by itself be evidence of malicious intent. And the Engelkings' argument that Enbridge's conduct—moving ahead with

construction prior to a determination of its rights—is proof of its malicious intent cannot be reconciled with our holding in ***Enbridge I.*** We affirmed the circuit court's decision that the easement grant did not require Enbridge to ascertain and make payment prior to installation. ***Enbridge I***, No. 2012AP1188, unpublished slip op., ¶7 (WI App Mar. 12, 2013). We stated:

> We agree with the circuit court that, considering the language of the deed as a whole and the broad powers it grants, it would be unreasonable to interpret it such that the Engelkings could significantly delay an entire large-scale construction project by—reasonably or not—rejecting what may ultimately be determined to constitute "like consideration." Further, this construction is consistent with the procedure applicable in condemnation proceedings.

Id., ¶15.

For those reasons, we conclude that it was not error to find that there was insufficient evidence to support allowing evidence relevant to punitive damages.

¶76 We note that even if the trial court erred in ruling as to the availability of punitive damages (and the corresponding admissibility of the evidence of profits), that error would be harmless because the trial court ultimately found that even though Enbridge's construction of the 2002 and 2009 pipelines constituted trespass, the right of way grant gave them the right to clear the land, so no punitive damages would have been awarded.

The measure of mesne profits.

¶77 The Engelkings moved unsuccessfully to compel discovery of evidence of Enbridge's profits from the 2002 and 2009 pipelines and present it as evidence relevant to a determination of mesne profits. There is no dispute that the Engelkings are entitled to recover mesne profits as a result of any trespass by

Enbridge; the question they raise is how do you measure mesne profits—rental value of the land or all of the profit Enbridge earned during the trespass.

¶78 The trial court held that under Wisconsin law, the measure of those profits to which a landowner is entitled from a trespasser is the rental value of the land for the duration of the trespass. It relied on ***Blodgett v. Hitt***, 29 Wis. 169, 181 (1871), which held that the measure of mesne profits for unlawfully occupying another's land is the value of "the rent of the *land* occupied." ***Id.*** The trial court noted, "[t]he reality of it is ***Blodgett*** was also consistent with the other cases on mesne profit that it's really the rent of the land."

¶79 The Engelkings argue that the law entitles them to force Enbridge to "disgorge all ill-gotten profits [Enbridge] earned from the trespass of pipelines 4-6 from 2004 onward." For this consequential proposition they rely on a few sentences in a single 1823 decision by the United States Supreme Court, ***Green v. Biddle***, 21 U.S. 1 (1823). That case arose from the secession of Kentucky from Virginia and the resulting litigation over disputed titles to land. In the course of a ninety-four page opinion, the Court defined liability for mesne profits as "liab[ility] to the true owner for the profits [the trespasser] has received, of whatever nature they may be …." ***Id.*** at 80. The Engelkings seize on this sentence and argue that this general measure of mesne profits represents a common law rule to which Wisconsin "reverted" after its statute on the measure of mesne profits applied in ***Blodgett*** was repealed. For this reason, they argue, ***Blodgett*** is no longer controlling, and the measure of profits from ***Green*** is controlling.

¶80 The Engelkings have directed us to no cases in Wisconsin or elsewhere holding that ***Green*** entitles landowners to the kind of profits they seek.

Nor have they directed us to any other cases, in Wisconsin or any other jurisdiction, in the last century that have interpreted the language of ***Green*** with regard to the definition of profits in a trespass or ejectment action as the rule of the common law. Although the language used in relevant cases varies, we have found none in which the court measured mesne profits the way the Engelkings ask us to.

¶81 In contrast, the proposition that mesne profits are ordinarily measured by the rental value of the land is routinely stated in case law, treatises and current legal reference authorities. *See*, e.g., 9 Powell on Real Property § 64A.05 ("Compensation for injury from trespass has included payment for diminution of market value or the cost of restoration, loss of use of the property, and discomfort and annoyance to the property owner."); *see also* 25 AM. JUR. 2d Ejectment § 50 (2014). ("[T]he recovery [of mesne profits] is ordinarily measured by the rental value of the property or the value of the use and occupation of the land.").

¶82 The cases Enbridge cites in its brief from Maryland and Minnesota are instructive. Each rejected the all profits argument that Enbridge makes here, instead defining the mesne measure as land rental. *See* ***Van Ruymbeke v. Patapsco Indus. Park***, 276 A.2d 61, 73 (Md. Ct. App. 1971) ("The trial judge was correct in his conclusion that … the best test of damages was the rental value of the property."). *See also* ***Ford Motor Co. v. City of Minneapolis***, 179 N.W. 907, 908 (1920) ("[A] sufficient answer to this contention is the absurdity of the result …. The method of measuring the value of the use of the alley by the profits made in the business carried on upon the entire plant must be rejected.").

¶83 We recognize that the statute at issue in ***Blodgett*** is no longer in force. But the Engelkings have directed us to no legislative history that would

indicate that the legislature intended by their repeal to replace the measure of mesne profits with the rule the Engelkings propose. It would be inconsistent with normal rules of legal analysis to give a snippet of language from a case of the vintage of ***Green***, with analysis tailored to its distinguishable and unique facts, the force of binding authority as to the definition of mesne profits. This is especially true because there is no Wisconsin law to support that definition, and other jurisdictions have specifically rejected it. We are persuaded that the unreversed holding of ***Blodgett*** remains good law. We therefore conclude that the trial court's evidentiary ruling on this point is consistent with the law and we sustain it.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.