COURT OF APPEALS
DECISION
DATED AND FILED

May 14, 2019

Sheila T. Reiff
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. 2017AP2338 **Cir. Ct. No. 2015CV365**

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

CYNTHIA R. WEIR AND KANE ROAD FARMS, LLC,

PLAINTIFFS-RESPONDENTS,

V.

DAVID HESTEKIN, TERESA HESTEKIN AND BRUCE REMINGTON,

DEFENDANTS-APPELLANTS,

COUNTRYWIDE HOME LOANS, INC. AND ABC BANK,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Eau Claire County: MICHAEL A. SCHUMACHER, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. David Hestekin, Teresa Hestekin, and Bruce Remington (collectively, "the Hestekins") appeal a summary judgment declaring they do not have a second easement over property owned by Cynthia Weir and Kane Road Farms, LLC (collectively, "Weir"), and awarding Weir damages for lost income resulting from her inability to farm the land upon which the Hestekins trespassed. The Hestekins argue that the circuit court utilized the wrong measure of damages and improperly abridged their due process and statutory rights to discovery. For the reasons set forth below, we reject these arguments and affirm the judgment.

BACKGROUND

¶2 It is undisputed that the Hestekins hold a general easement over 150 feet of Weir's property. The scope of that easement was litigated and decided in a 2004 lawsuit. When the Hestekins began using a separate strip of Weir's land, claiming a second easement over it, Weir filed the underlying action seeking a declaration of interest in real estate. Weir also sought damages for the Hestekins' "ongoing and continuous intentional and deliberate trespass and encroachment upon" Weir's property.

¶3 The Hestekins, then pro se, sought discovery from Weir, including fifty-five interrogatories and fifty-eight requests to admit. Weir moved to quash the discovery requests as unduly "burdensome and not reasonably calculated to produce relevant discoverable information." In turn, the Hestekins moved to compel discovery. While those motions were pending, Weir moved for summary judgment, asserting there was only one easement, which was resolved by the 2004 litigation. Weir also asserted that the Hestekins' trespass prevented her from farming the subject parcel, resulting in lost profits for 2015, based on the $3450

she made by "cropping the same land" in 2016. Weir argued no further discovery was needed as any question of easements on Weir's property had been resolved by the 2004 litigation. The circuit court set a deadline for the Hestekins both to respond to Weir's summary judgment motion and to file their own motion for summary judgment.

¶4 The Hestekins ultimately filed a cross-motion for summary judgment, but they did not file a response to Weir's pending summary judgment motion. Asserting her summary judgment motion was uncontested, Weir requested entry of summary judgment in her favor. The Hestekins opposed the request, arguing they had been denied their right to discovery and further asserting that the undisputed material facts required judgment in their favor as a matter of law. The circuit court entered summary judgment in Weir's favor, concluding, in relevant part, that: (1) the Hestekins held only one easement on the subject property; (2) the nature and extent of that easement had been fully litigated in the 2004 case; (3) the Hestekins' conduct constituted an intentional and deliberate trespass; and (4) the Hestekins' trespass resulted in lost income to Weir of $3500. This appeal follows.

DISCUSSION

¶5 On appeal, the Hestekins first argue that the circuit court utilized the wrong measure of damages. The proper measure of damages applicable to a specific claim presents a question of law that we review de novo. ***Schrubbe v. Peninsula Veterinary Serv., Inc.***, 204 Wis. 2d 37, 41-42, 552 N.W.2d 634 (Ct. App. 1996). Citing ***Krcmar v. Wisconsin River Power Co.***, 270 Wis. 640, 644, 72 N.W.2d 328 (1955), the Hestekins assert, in a cursory manner, that the

measure of damages for lost profits due to the inability to plant crops is only the reasonable rental value of the land for the season.

¶6 ***Krcmar***, however, is distinguishable on its facts. There, a farmer claimed damages to his land by water seepage from a lake that was created following Wisconsin River Power Company's construction of a dam across the Wisconsin River. ***Id.*** at 641. A jury awarded the farmer $1015 for the loss of crops. ***Id.*** at 644. Because a number of acres had not yet been planted due to the flooding, our supreme court held that "[t]he proper measure of damages for such acreage … was the fair rental value of the land." ***Id.*** In ***Krcmar***, unlike here, there was no suggestion that the defendant's conduct constituted an intentional or deliberate trespass on the property of another. Ultimately, the Hestekins fail to establish why Weir's damages for trespass must be limited consistent with ***Krcmar***.

¶7 Our supreme court has noted that nominal damages are always appropriate for a trespass but, if proved, compensatory damages may also be awarded. ***Grygiel v. Monches Fish & Game Club, Inc.***, 2010 WI 93, ¶44, 328 Wis. 2d 436, 787 N.W.2d 6. This court has further recognized that "[b]ecause recovery in trespass is based on a wrongful invasion of a plaintiff's rights, the rule of damages adopted should more carefully guard against failure to compensate the injured party than against possible overcharge to the wrongdoer." ***Gallagher v. Grant-Lafayette Elec. Co-op.***, 2001 WI App 276, ¶29, 249 Wis. 2d 115, 637 N.W.2d 80.

¶8 Damages for lost profits need not be proven with absolute certainty. ***Lindevig v. Dairy Equip. Co.***, 150 Wis. 2d 731, 740, 442 N.W.2d 504 (Ct. App. 1989). A claimant must simply provide sufficient evidence upon which to base a

"reasonable inference" as to a damage amount. ***Id.*** Here, Weir averred that the harvest of sixty-nine bales of hay in 2016 generated a profit of $3450, and that a comparable profit would have been generated in 2015 but for the trespass.[1] The circuit court reasonably determined, based on the evidence provided, that the Hestekins' trespass prevented Weir from farming the property, resulting in lost income of $3500.[2]

¶9 The Hestekins also argue they were deprived of their due process and statutory rights to discovery when the circuit court chose to decide Weir's summary judgment motion rather than address the parties' discovery dispute. The right to discovery, however, only extends to material relevant to the subject matter involved in a pending action. *See* ***Shibilski v. St. Joseph's Hosp. of Marshfield, Inc.***, 83 Wis. 2d 459, 470, 266 N.W.2d 264 (1978).

¶10 Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2017-18).[3] A party opposing summary judgment must set forth specific facts,

[1] In their reply brief, the Hestekins point out that Weir stated she was told by the sheriff's office not to farm the subject parcel in 2015. The Hestekins therefore assert that it was not their trespass but, rather, the sheriff that prevented Weir from planting crops that year. This assertion, however, ignores that Weir called the sheriff because of the trespass. Thus, the sheriff's instruction would not have occurred but for the Hestekins' trespass.

[2] On appeal, the Hestekins' only argument regarding damages is their claim that the circuit court used the wrong measure of damages. They do not develop any alternative argument to challenge the amount of damages that were ultimately awarded.

[3] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

evidentiary in nature and admissible in form, which show that a genuine issue exists for trial. ***Hellend v. Kurtis A. Froedtert Mem'l Lutheran Hosp.***, 229 Wis. 2d 751, 756, 601 N.W.2d 318 (Ct. App. 1999). If additional discovery is necessary to produce the evidence to rebut a motion for summary judgment, an opposing party may ask the circuit court to delay the matter until that discovery is completed. *See* WIS. STAT. § 802.08(4); *see also* ***Kinnick v. Schierl, Inc.***, 197 Wis. 2d 855, 865, 541 N.W.2d 803 (Ct. App. 1995). The opposing party, however, must show more than mere speculation that the discovery is relevant to a genuine issue of material fact. *See* ***Kinnick***, 197 Wis. 2d at 864-65.

¶11 "[W]hether to refuse a motion for summary judgment in order to give an opposing party additional time to obtain essential facts to defeat summary judgment is a highly discretionary ruling." ***Id.*** at 865. When reviewing a discretionary decision, this court examines the record to determine if the circuit court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a reasonable conclusion. ***State v. Keith***, 216 Wis. 2d 61, 69, 573 N.W.2d 888 (Ct. App. 1997). Furthermore, a reviewing court may search the record for reasons to sustain the circuit court's exercise of discretion. ***State v. Pharr***, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983).

¶12 Here, Weir moved for summary judgment premised upon the undisputed facts that the existence and scope of the single easement on her property were settled in the 2004 litigation and, therefore, judgment in this matter was appropriate as a matter of law. To avoid summary judgment, the Hestekins had to show that there was a genuine issue of material fact as to the existence of a second easement. Although the Hestekins argued that the discovery sought was necessary "to accurately respond directly" to Weir's summary judgment motion, they never established how any of that discovery could produce a triable issue of

material fact. They simply assert, again in conclusory fashion, that they were denied a chance to collect discovery "which *could* be used to support their defense against summary judgment." The Hestekins' vague assertions fall far short of what is required to delay summary judgment so as to permit discovery.

¶13 The Hestekins also assert the denial of discovery violated their due process rights by depriving them of the "fair opportunity to be heard." Defendants do have a due process right to be heard in civil cases. *See* ***Galpin v. Page***, 85 U.S. 350, 368-69 (1873). As outlined above, however, the rules of civil procedure provide a path for delaying summary judgment in order to obtain discovery, when warranted. Because the Hestekins failed to provide the circuit court with any indication that their discovery requests related to an essential fact, the court's decision to resolve the summary judgment motion instead of addressing the discovery dispute did not violate due process.

By the Court.—Judgment affirmed.

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