

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 5, 1996

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(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1457

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHIRLEY R. NUSHART,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Marinette County: TIM A. DUKET, Judge. *Affirmed.*

MYSE, J. Shirley R. Nushart appeals the court's denial of her motion to reopen a judgment involving a forfeiture for violation of WIS. ADM. CODE § NR 10.02(1), the unlawful killing of a moose. Nushart argues that the court erred by applying the penalty for unlawfully hunting a moose under § 29.99(3m), STATS., rather than the general penalty of \$100 plus costs and assessments under § 29.99(4), STATS. Nushart asserts that in order to be subject to the penalties under § 29.99(3m), STATS., she must have been shot the moose knowing the animal was a moose and intending to kill the moose. Because this court concludes that § 29.99(3m), STATS., does not require any specific intent, the court, therefore, properly denied her motion to reopen the judgment. We affirm.

The facts are undisputed. Nushart was bow hunting for deer during the 1995 bow deer season from an elevated tree stand approximately twenty feet above the ground. A young bull moose approached the tree stand but was not observed by Nushart until it was under the tree stand. Nushart believed that it was a six-point antlered white tail deer when she shot and killed the animal. When she realized the animal was a moose, she contacted the DNR and reported the incident. The DNR confiscated the carcass and issued a citation for the violation of WIS. ADM. CODE § NR 10.02(1), which prohibits the unlawful hunting of a moose.

Section NR 10.02(1) does not have a specific penalty provision in it. Rather, it prohibits the hunting of protected animals and lists which animals are protected. As a result, Nushart argues that § 29.99(4), STATS., applies to this case. Section 29.99(4) states: "For any violation of any provision of this chapter or any department order for which no other penalty is prescribed, [the penalty will be] a forfeiture of not more than \$100." Nushart, however, was sentenced under § 29.99(3m), which provides:

For unlawfully hunting a moose, [punishment shall be] by a forfeiture of not less than \$1,000 nor more than \$2,000 and the mandatory revocation of all hunting approvals issued to the person. In addition, no hunting approval may be issued to the person for the period of time specified by the court. The time period specified shall be not less than 3 years nor more than 5 years following the date of conviction under the subsection.

Pursuant to the penalty provisions of this section, the court, following a plea of guilty, imposed the minimum punishment of \$1,000 plus costs and assessments and a revocation of hunting privileges for three years.

A determination of which penalty provision is applicable involves the construction of a statute and as such is a question of law which this court determines independently of the trial court's determination. *See State ex rel. Frederick v. McCaughtry*, 173 Wis.2d 222, 225, 496 N.W.2d 177, 179 (Ct. App. 1992). When construing a statute the intent of the legislature shall be determined by the plain language of the statute. *Id.* In determining the

legislative intent the more specific provisions of the statute must prevail over the more general provisions. *Kramer v. Hayward*, 57 Wis.2d 302, 311, 203 N.W.2d 871, 876 (1973).

Nushart argues that because she did not intend to kill a moose at the time she shot the animal she believed to be a deer, the penalty provision specified for the killing of a moose is inapplicable. This court disagrees. While this court accepts Nushart's contention that she had no intention of taking a protected wild animal, the statutory provision clearly prohibits the unlawful hunting of a moose. Section 29.99(3m), STATS. Further, the statutes define hunting to include the "shooting, shooting at, pursuing, taking, catching or killing any wild animal or animals" Section 29.01(8), STATS.

These definitions make it clear that the statute imposes strict liability for the killing of a moose. Notwithstanding Nushart's good faith belief that the animal was a deer, she violated the statute when she intentionally killed an animal that turned out to be a moose. Section 29.99(3m), STATS., specifies the penalty for the hunting of a moose to include a forfeiture of not less than \$1,000 and a suspension of hunting privileges for not less than three years. The penalty specifically provided for the killing of a moose is applicable over other general penalty provisions. Because a specific penalty is provided for the offense for which Nushart was convicted, the court properly imposed the minimum punishment required by law. The judgment of conviction and order refusing to reopen are therefore affirmed.

By the Court. — Judgment and order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.