COURT OF APPEALS
DECISION
DATED AND FILED

May 30, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1304 **Cir. Ct. No. 98-CV-119**

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

TRINIDAD M. ALVAREZ,

PLAINTIFF-RESPONDENT,

V.

JACK FLANNERY D/B/A OFF ROAD LOGGING,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed in part and reversed in part*.

Before Vergeront, P.J., Roggensack and Lundsten, JJ.

¶1 ROGGENSACK, J. In an action brought by Trinidad Alvarez against Jack Flannery for the unlawful conversion of standing timber, a jury found in favor of Alvarez and awarded $18,000 in compensatory damages and $5,000 in

punitive damages. The circuit court doubled the compensatory damages pursuant to WIS. STAT. § 26.09 (1997-98).[1] Flannery appealed, contending several reversible errors occurred. We conclude that credible evidence supports the jury's finding that Flannery converted trees in which Alvarez had an ownership interest and the jury's finding of the damages Alvarez sustained. We further conclude that the circuit court properly doubled those damages under § 26.09; that if an evidentiary error occurred, it was harmless; and that a new trial in the interests of justice is not warranted. However, we reverse the award of punitive damages. Accordingly, we affirm the judgment of the circuit court in all respects, except with regard to the award of punitive damages.

BACKGROUND

¶2 On December 1, 1997, Trinidad Alvarez and Eli Miller entered into a contract with Kenneth King[2] that granted Alvarez and Miller "exclusive rights" to harvest certain trees from King's property. While the King-Alvarez contract was still in effect, King reached a separate agreement with Jack Flannery that allowed Flannery to cut timber on King's property. When Flannery cut trees that Alvarez had designated as his, Alverez sued for conversion, claiming compensatory and statutory double damages.

¶3 The jury found that Flannery converted Alvarez's trees, and it awarded $18,000 as damages. The jury also found that Flannery had acted maliciously or with an intentional disregard for Alvarez's rights and assessed

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] Neither Miller nor King is a party to this action.

punitive damages of $5,000. The circuit court granted Alvarez's motion to double the compensatory damages for wrongfully cutting the trees, pursuant to WIS. STAT. § 26.09. The total judgment entered against Flannery was $41,000 plus statutory costs and interest.

¶4 On appeal, Flannery asserts that: (1) he did not convert the trees he cut because Alvarez was not their lawful owner; (2) even if Alvarez did own the trees, the evidence was insufficient to support the jury's award of $18,000 in damages; (3) the jury erred in concluding that Alvarez did not fail to mitigate damages; (4) only the owner of the land may recover double damages under WIS. STAT. § 26.09 for unlawful cutting of trees; (5) punitive damages are not recoverable when statutory double damages are awarded; (6) the circuit court erred in admitting evidence regarding Alvarez's disability; and (7) a new trial should be granted in the interests of justice. We will address each issue in turn.

DISCUSSION

Standard of Review.

¶5 A jury's verdict must be sustained if there is any credible evidence to support it. ***Allied Processors, Inc. v. Western Nat'l Mut. Ins. Co.***, 2001 WI App 129, ¶¶ 12, 37-38, 246 Wis. 2d 579, 629 N.W.2d 329; ***D'Huyvetter v. A.O. Smith Harvestore Prods.***, 164 Wis. 2d 306, 320, 475 N.W.2d 587, 592 (Ct. App. 1991). However, statutory construction presents a question of law that we review without deference to the circuit court. ***Truttschel v. Martin***, 208 Wis. 2d 361, 364-65, 560 N.W.2d 315, 317 (Ct. App. 1997).[3] And finally, we review a circuit

[3] The parties agreed at the instructions conference that the application of WIS. STAT. § 26.09 was a question of law for the court to consider after the jury's verdict.

court's decisions regarding the admissibility of evidence under the erroneous exercise of discretion standard. ***State v. Oberlander***, 149 Wis. 2d 132, 140-41, 438 N.W.2d 580, 583 (1989).

Conversion of the Trees.

¶6 The jury found that Flannery converted property belonging to Alvarez. In order to do so it had to also find that Alvarez had an ownership interest in, or was entitled to immediate possession of, the two hundred trees that Flannery admitted he cut. ***Farm Credit Bank of St. Paul v. F&A Dairy***, 165 Wis. 2d 360, 371, 477 N.W.2d 357, 361 (Ct. App. 1991). Flannery argues that the language of the King-Alvarez contract and the parties' practices under that contract demonstrate that King was the owner of the trees until Alvarez paid for them. Alvarez responds that credible evidence supports the jury's finding that Flannery converted property in which Alvarez had an ownership interest. We agree with Alvarez.

¶7 Alvarez testified that he started logging on January 1, 1998 under his contract with King. The King-Alvarez contract, which was introduced at trial, states:

> This contract is written as to a verbal agreement made by and for the protection of Mr. Kenneth King, Mr. Eli Miller, and Trinidad Alvarez. These parties have agreed that the pine trees located on the King property will be harvested only by the persons authorized by Trinidad or Eli, and only with both parties being in agreement. The sum of 1.50 per tree over 8" in diameter will be paid for. Trees that are cut down that are 8" or less, 10" above the ground will not be paid for, Fore it be necessary to remove smaller trees to get to the larger ones. There will not be any trees removed from Mr. King[']s property before paying for them. Also, the parties that are harvesting the trees will have exclusive rights for a period of eighteen months or if needed for a longer period of time.

> The amount of trees to be harvested has not been determined, but any tree that is harvestable may be taken, which may be up to a [sic] 1,000 trees, or more. This written agreement is entered by us, and of our own free will, to be binding and can only be broken by the three of us.

Alvarez testified that he intended to build log homes with the trees.

¶8 King testified that prior to Flannery starting to work clearing trees from his property he showed him the contract he had made with Alvarez. King said that he and Flannery then called Alvarez and asked to meet. Alvarez confirmed that King had called and testified that they met so Flannery could cut trees on King's land while leaving those marked for Alvarez. After that meeting, Alvarez and King marked approximately 180 trees. Alvarez also said there were thirty to forty more that he wanted, but he and King ran out of spray paint which they had been using for marking. Flannery testified about his understanding as well:

> Q Now, on April 23 when you had the meeting—or April 22—between yourself and Mr. King and Mr. Alvarez, you knew that Mr. Alvarez was going to mark the trees he wanted yet to harvest with red paint, didn't you?
>
> A Correct.
>
> Q And when you went back there with your cutting machine, you deliberately cut the trees that were marked with red, didn't you?
>
> A After I had seen those trees taken off plot 3 after I had made the agreement with Mr. King and paid him up front in full for the trees on plot 3, yes, I did take the trees that were on plot 4 that had red dots on them.

Based on the above examples, we conclude that there was credible evidence presented at trial that is sufficient to support the jury's finding that Flannery converted trees to his own use in which Alvarez had an ownership interest.[4]

¶9 Flannery spends most of his brief arguing about how the contract between King and Alvarez should be interpreted, as though that were the only evidence of Alvarez's interest in the trees that Flannery cut. While it is true that parties to a contract for the sale of goods are free to reach an agreement as to when title to the goods passes from the seller to the buyer, *see* WIS. STAT. § 402.401(1); *see also* ***Roberts v. McWatty***, 123 Wis. 598, 601-02, 102 N.W. 18, 19 (1905) (stating the common law rule), here the jury was not instructed to interpret the contract to determine the intent of the parties about when ownership of the trees passed. Instead, the King-Alvarez agreement, as trial exhibit 3, was only one piece of evidence offered by Alvarez to show he had made an agreement with King which gave him an ownership interest in the trees Flannery cut.

¶10 Although the parties have never argued that the Uniform Commercial Code (UCC) should be applied to resolve any issue in this case, we also note that the jury's implicit finding regarding ownership of the trees at issue here generally tracks the UCC's treatment of transfer of title under contracts for the sale of goods.[5] Under the UCC, "[t]itle to goods cannot pass under a contract

[4] Because we conclude that credible evidence supports the jury's verdict on the conversion claim, we also affirm the circuit court's denial of Flannery's post-trial motion to change the jury's answer on question number one of the special verdict.

[5] Under Wisconsin law, contracts for the sale of timber to be cut are governed by ch. 402 of the UCC. *See* WIS. STAT. § 402.105(1)(c) ("'Goods' also includes … growing crops and other identified things attached to realty as described in s. 402.107 on goods to be severed from realty."). In particular the UCC provides:

(continued)

for sale prior to their identification to the contract." WIS. STAT. § 402.401(1). Similarly, there is a UCC rule stating that, unless the parties to the contract otherwise explicitly agree, title passes at the time and place of contracting in circumstances where (1) delivery is to be made without moving the goods, (2) no documents of title are to be delivered, and (3) the goods are already identified at the time of contracting. *See* § 402.401(3)(b). Each of the conditions specified in § 402.401(3)(b) had occurred by the time Flannery cut down the trees at issue here.

Compensatory Damages and Mitigation.

¶11 The jury found that Alvarez suffered $18,000 in damages as a result of Flannery's conversion. Flannery challenges this amount as not supported by the evidence and as contrary to evidence that Alvarez failed to mitigate his damages. According to Alvarez, he had identified about two hundred spruce trees on King's property that were well-suited for building log homes.[6] He estimated that each tree he had identified offered about thirty linear feet of log, and that in total he could have harvested about 5,000 linear feet. He further estimated that the

---

> A contract for the sale apart from the land … of timber to be cut is a contract for the sale of goods within this chapter whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

WIS. STAT. § 402.107(2).

[6] Alvarez testified that trees that are well-suited for building log homes have particular characteristics, including straightness, a lack of branching, a particular diameter and a degree of uniformity in diameter. Alvarez also testified that spruce is a higher quality wood than white pine for his purposes.

logs were worth $3.00 to $3.50 per linear foot, and he calculated his damages at "around $17,000."

¶12 Ron Hanson, a log home builder, also testified for Alvarez on the issue of damages. He testified that spruce trees are used in the building of log homes and that in recent years he could recall paying $3.75 per linear foot to purchase logs for use in the building of a log home. Using Hanson's figure of $3.75 per linear foot and Alvarez's testimony that there were approximately 5,000 linear feet of usable logs in the trees he intended to harvest, the total damages would be $18,750. Therefore, the record provides credible evidence a reasonable jury could have relied on to determine that Alvarez suffered $18,000 in damages.

¶13 Flannery also contends that the jury erroneously determined that Alvarez did not unreasonably fail to mitigate his damages.[7] It is the defendant's burden to prove a plaintiff's failure to mitigate damages. ***Lobermeier v. General Tel. Co.***, 119 Wis. 2d 129, 148-49, 349 N.W.2d 466, 475 (1984). Flannery's evidence concerning mitigation was an aerial photograph of property near to King's where stands of pine or spruce trees were growing. Flannery argued that this photograph showed that it would have been easy for Alvarez to obtain replacement logs. However, Flannery did not present any evidence as to the specific characteristics of the trees in the photograph, the owners of the trees or whether any of those owners would have been willing to sell their trees to Alvarez. We conclude that the jury was not required to accept the aerial photograph as conclusive evidence of a failure to mitigate as it falls far short of establishing that Alvarez failed to mitigate his damages as a matter of law. *See* ***Garceau v.***

[7] Mitigation was not presented to the jury as a separate question.

Bunnell, 148 Wis. 2d 146, 155, 434 N.W.2d 794, 797 (Ct. App. 1988) (whether a party failed to mitigate damages is treated as a question of fact).

Statutory Double Damages.

¶14 Flannery also contends that even if Alvarez was the owner of the trees he cut at the time he cut them, the circuit court erred by doubling the jury's damages under WIS. STAT. § 26.09. He contends that at the time he cut down the trees at issue here, § 26.09 granted only the owner *of the land*, not the owner *of the trees*, the right to recover twice the damages sustained as a result of the unlawful cutting of trees. Alvarez contends that the protection afforded by the statute applies to the owner of the trees, regardless of whether that person also owns the land on which they grow.

¶15 When we construe a statute, our goal is to ascertain the intent of the legislature. ***Truttschel***, 208 Wis. 2d at 365, 560 N.W.2d at 317. We begin with the language of the statute itself, and if it clearly and unambiguously sets forth the intent of the legislature, it is our duty to apply that intent to the case at hand. ***Id.*** However, if the language chosen by the legislature is capable of more than one reasonable meaning, we determine legislative intent from the statute's context, subject matter, scope and history, as well as the purpose of the legislation. ***Id.*** at 365-66, 560 N.W.2d at 317.

¶16 WISCONSIN STAT. § 26.09 provides:

> In addition to the other penalties and costs, any person unlawfully cutting, removing or transporting raw forest products is liable to the owner or to the county holding a tax certificate, or to the board of commissioners of public lands holding a land contract certificate under ch. 24, to the land on which the unlawful cutting was done or from which it was removed, in a civil action, for double the amount of damages suffered. This section does not apply

> to the cutting, removal and transporting of timber for the emergency repair of a highway, fire lane or bridge upon or adjacent to the land.

¶17 Assuming without deciding that both parties have presented a reasonable interpretation of the statute, for the reasons set forth below we conclude that Alvarez's construction best comports with the intent of the legislature. First, the apparent purpose of WIS. STAT. § 26.09 is to protect persons with an interest in raw forest products. In circumstances when the land and the timber growing on it are not owned by the same person, we discern no reason that the legislature would choose to protect the owners of the land but not the owners of timber. When a landowner has sold his interest in the trees growing on his land, the purchaser is the person injured when a third party unlawfully harvests the timber.

¶18 Second, the language Flannery contends qualifies the right to double damages begins with the prepositional phrase "to the land." If that phrase were meant to qualify the term "owner" as Flannery contends, one would reasonably expect the legislature to have used the preposition "of" rather than "to." The phrase "to the land" is most reasonably read to qualify "tax certificate" and "land contract certificate." This reading of the statute is bolstered by 1999 Wis. Act 190, which amended WIS. STAT. § 26.09 and reorganized the statute into several subsections. The amended version of the statute now expressly states that "owner" means the owner of raw forest products. *See* § 26.09(2)(a) (1999-2000). In addition, the qualifying language in dispute (*i.e.*, the phrase beginning "to the land") has been moved to a newly created definitions section of the statute. Paragraph (1b)(f) of § 26.09 (1999-2000) provides that "'Owner' includes the board of commissioners of public lands if the board holds a land contract certificate under ch. 24 *to the land from which the raw forest products were*

harvested." (Emphasis added.) We conclude that the relevant changes were made by 1999 Wis. Act 190 to clarify, rather than to substantively change, the meaning of the statute. WIS. STAT. § 990.001(7). Therefore, we conclude that Alvarez was the owner of raw forest products within the contemplation of § 26.09.

¶19 Furthermore, none of the cases that Flannery cites in support of his construction of the statute addresses the question of whether a person who owns the raw forest products, but not the land, is an "owner" for purposes of WIS. STAT. § 26.09. For example, in ***Klitzke v. Ebert***, 244 Wis. 225, 12 N.W.2d 144 (1943), the supreme court reversed a judgment for the plaintiff under an older version of WIS. STAT. § 26.09 because the plaintiff failed to prove title to the land. The plaintiff in ***Klitzke***, however, had not argued that he was the owner of *only* the timber. Rather, it appears to have been implicit in ***Klitzke*** that the owner of the land and the owner of the timber were one and the same.

Punitive Damages.

¶20 The jury also found that Flannery acted maliciously or with an intentional disregard of Alvarez's rights, and it awarded $5,000 in punitive damages as a result. Flannery contends that if we affirm the circuit court's decision to award statutory double damages, which we have done, we should strike the award of punitive damages because the supreme court has held that it is inappropriate to permit recovery of both statutory multiple damages and common law punitive damages for the same conduct. In support of this proposition, Flannery cites ***John Mohr & Sons, Inc. v. Jahnke***, 55 Wis. 2d 402, 198 N.W.2d 363 (1972). Alvarez has provided no response to this argument. Because Flannery correctly states the rule of ***Jahnke*** and because Alvarez has not argued that ***Jahnke*** does not apply, we conclude that it is appropriate to apply ***Jahnke***.

See ***State ex rel. Sahagian v. Young***, 141 Wis. 2d 495, 500-01, 415 N.W.2d 568, 570-71 (Ct. App. 1987); ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493, 499 (Ct. App. 1979). Accordingly, we reverse the award of punitive damages.

Evidentiary Issue.

¶21 Flannery asserts that the circuit court erred in allowing Alvarez to testify regarding his medical disabilities and his status as a Vietnam veteran. Flannery argues that the evidence was not relevant to any fact of consequence in the case, that it was introduced solely for the improper purpose of arousing sympathy for the plaintiff and that it was prejudicial to Flannery, causing the jury to award excessive damages.

¶22 We will sustain a circuit court's discretionary decision to admit evidence if the court logically interpreted the facts, applied the proper legal standard and used a demonstrated, rational process to reach a conclusion that a reasonable judge could reach. *See* ***Crawford County v. Masel***, 2000 WI App 172, ¶5, 238 Wis. 2d 380, 617 N.W.2d 188. However, even when evidence has been erroneously admitted, a reversal is required only if the error has affected the substantial rights of the party seeking to set aside the judgment. WIS. STAT. §§ 805.18(2) and 901.03; *see also* ***Martindale v. Ripp***, 2001 WI 113, ¶¶30-32, 246 Wis. 2d 67, 629 N.W.2d 698. An evidentiary error affects the substantial rights of a party when there is "a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue. A reasonable possibility of a different outcome is a possibility sufficient to 'undermine confidence in the outcome.'" ***Martindale***, 2001 WI 113 at ¶32 (citation omitted). The test requires us to examine the entire record and weigh the effect of the inadmissible evidence

against the totality of credible evidence supporting the verdict. ***Nowatske v. Osterloh***, 201 Wis. 2d 497, 506-07, 549 N.W.2d 256, 259 (Ct. App. 1996).

¶23 On appeal, Alvarez has abandoned any attempt to argue that the disputed evidence was relevant or that the circuit court otherwise properly exercised its discretion in admitting it. Instead, Alvarez asserts that if there was an evidentiary error, the error was harmless. We agree.

¶24 There are two issues we have sustained that were decided adversely to Flannery: (1) Alvarez's interest in the trees and (2) Alvarez's damages. With regard to the question of whether Alvarez owned the marked trees, we note that while ownership has become a central issue on appeal, it was not central during the trial itself. Flannery's counsel did not mention the issue even once during his closing argument to the jury. We fail to see how any feelings of sympathy for Alvarez would have changed the outcome of the trial as far as the jury's implicit decision on this issue.

¶25 In regard to the damages the jury assigned for the loss of the trees, Flannery contends that the magnitude of the jury's award demonstrates a reasonable possibility that the jury acted on feelings of sympathy rather than its unbiased judgment. We are not persuaded.

¶26 First, over the course of a two-day trial, Alvarez or his counsel mentioned Alvarez's disability only briefly. Alvarez's disability was not a "theme" that was referenced repeatedly throughout the trial, and no mention of it was made in closing arguments. *See, e.g.*, ***Nowatske***, 201 Wis. 2d at 507, 549 N.W.2d at 260 (holding that evidentiary error was harmless; erroneously admitted evidence had received "mild and isolated treatment" during the trial).

¶27 Second, as discussed above, the jury's verdict on compensatory damages was within the range supported by credible evidence. Accordingly, the damages awarded by the jury were not excessive. *Cf.* ***Roeske v. Schmitt***, 266 Wis. 557, 573, 64 N.W.2d 394, 402 (1954) (stating that the prejudicial effect of improper remarks by counsel is often indicated by an excessive or inadequate award of damages).

¶28 Third, the circuit court expressly instructed the jury that, in calculating any compensatory damages, "[n]othing should be added to or subtracted from … your answer … because of sympathy or resentment."[8] The supreme court has explained that a circuit court's instructions to the jury can mitigate prejudice that might arise from an evidentiary error. *See* ***Koffman v. Leichtfuss***, 2001 WI 111, ¶53, 246 Wis. 2d 31, 630 N.W.2d 201.

¶29 Flannery has cited ***Lease Am. Corp. v. Insurance Co. of N. Am.***, 88 Wis. 2d 395, 276 N.W.2d 767 (1979), which affirmed a circuit court's discretionary decision to grant a new trial in the interests of justice due to an evidentiary error. The testimony erroneously admitted during the trial in ***Lease America*** concerned unexpected evidence that injected a new defense in the case. It directly undercut the plaintiff's main theory of liability and raised the implication that the insured had committed fraud. ***Id.*** at 401-02, 276 N.W.2d at 770. Flannery's suggestion that the jury in this case acted out of sympathy in determining Alvarez's compensatory damages does not raise issues comparable to those presented in ***Lease America***. The testimony concerning Alvarez's disability did not directly touch any of the substantive issues before the jury or hinder

[8] The circuit court also instructed the jury that opening statements are not evidence.

Flannery's ability to present evidence on those issues. Therefore, we conclude that if an evidentiary error occurred, it was harmless.

Interests of Justice.

¶30 Flannery's last issue is a request that we exercise our discretionary power under WIS. STAT. § 752.35 (1999-2000) to order a new trial in the interests of justice. The supreme court has recognized that this discretionary power may be properly exercised "when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case" or "when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435, 439-40 (1996).

¶31 We have considered all of Flannery's arguments, and we are not persuaded that exceptional circumstances are present in this case that would warrant our granting a new trial under WIS. STAT. § 752.35. It appears to us that the case was fully and completely tried; accordingly, we decline Flannery's request to order a new trial in the interests of justice.

CONCLUSION

¶32 We conclude that credible evidence supports the jury's finding that Flannery converted trees in which Alvarez had an ownership interest and the jury's finding of the damages Alvarez sustained. We further conclude that the circuit court properly doubled those damages under WIS. STAT. § 26.09; that if an evidentiary error occurred, it was harmless; and that a new trial in the interests of justice is not warranted. However, we reverse the award of punitive damages.

Accordingly, we affirm the judgment of the circuit court in all respects except with regard to the award of punitive damages.

By the Court.—Judgment affirmed in part and reversed in part.

Not recommended for publication in the official reports.