COURT OF APPEALS
DECISION
DATED AND RELEASED

FEBRUARY 27, 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, 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. 95-1119

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

RICK MONTGOMERY and
BETH MONTGOMERY, his wife,

Plaintiffs-Respondents,

v.

CARL J. MAHLER,

Defendant-Respondent,

EDWARD BERNDT and
ELIZABETH ANN BERNDT, his wife,

Intervenor-Appellant.

APPEAL from a judgment of the circuit court for Forest County: JAMES P. JANSEN, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Edward and Elizabeth Berndt, as trial court intervenors on the side of defendant Carl Mahler, appeal a judgment that awarded Rick and Beth Montgomery compensable and punitive damages

against Mahler. Mahler himself appeared at trial without counsel and has not filed an appeal. The trial court found that the Montgomerys suffered damage when Mahler maliciously cut down one of their birch trees and spread one-inch nails over 600 feet, beginning on the Montgomerys' driveway and continuing down a disputed roadway near their home. These nails caused eight flat tires on the Montgomerys' motor vehicles. The Montgomerys oppose the Berndts' appeal on the merits and also on the ground that the trial court improperly permitted the Berndts to intervene in the role of defendants. Because of the Berndts' improper intervention, the Montgomerys ask us to disregard the Berndts' appellate arguments and affirm the judgment by default.

The Berndts raise several arguments: (1) the Montgomerys' failure to file a cross-appeal bars them from challenging the trial court's intervention ruling; (2) the evidence did not show that Mahler was the perpetrator, that the tree was ornamental, or that the Montgomerys owned the tree; (3) the Montgomerys did not prove the amount of compensable damages; (4) the trial court erroneously admitted exhibits in violation of the rules of evidence governing authentication, identification, foundation and hearsay; (5) the Montgomerys offered insufficient proof on the punitive damage issues of wantonness, maliciousness, outrageousness and recklessness. We agree with the Montgomerys that the trial court improperly permitted the Berndts to intervene in this lawsuit. We therefore affirm the judgment on this basis and address their appellate arguments only as an alternative analysis to affirm the judgment.

The Berndts first argue that the Montgomerys, who did not file a cross-appeal, have no right to challenge the Berndts' right to intervene in the lawsuit on behalf of Mahler as defendants. The Berndts claim that the Montgomerys' challenge to intervention effectively attempts to modify the judgment by seeking reversal of the trial court's interlocutory ruling permitting intervention. The Berndts are correct that someone who seeks to modify a judgment must file a cross-appeal. ***Auric v. Continental Cas. Co.***, 111 Wis.2d 507, 516, 331 N.W.2d 325, 330 (1983). We conclude, however, that this rule required no cross-appeal in this case. The Montgomerys are challenging the Berndts' trial court intervention as a means to set aside the Berndts' right of appearance in the trial court. The Montgomerys thereby seek to block the Berndts' associated rights on appeal. In effect, the Montgomerys merely seek to protect their money judgment and have it stand on grounds other than its substantive merits. They do not seek an increase in the damage award or other

affirmative relief. Under these circumstances, the Montgomerys had no obligation to file a cross-appeal, and we now address the intervention issue.

The Montgomerys argue that the trial court wrongly evaluated the Berndts' interest as sufficient to warrant their intervention as defendants. As a result, the Montgomerys argue, we should disregard the Berndts' appellate arguments and affirm the judgment by default. The Montgomerys state that the Berndts did not satisfy the requirements for either mandatory or permissive intervention under the code of civil procedure. *See* § 803.09, STATS. We agree with their arguments. The Berndts sought to defend Mahler against the Montgomerys' action for the purpose of preserving his assets. By this strategy, the Berndts expected to enforce a future recovery against Mahler in another lawsuit. The Berndts had only an unliquidated claim against Mahler. Such claims provide no basis for intervention for the purpose of defeating other claims and thereby protecting Mahler's ability to satisfy a judgment the Berndts might later obtain against him. *See* ***Continental Vinyl Products Corp. v. Mead Corp.***, 103 Cal. Rptr. 806, 811 (Cal. App. 1972) (unsecured creditor's interest does not justify defense aligned intervention); *see also* ***SEC v. Flight Transport Corp.***, 699 F.2d 943, 947 (8th Cir. 1983); ***Liberty Mut. Ins. Co. v. Pacific Indemnity Co.***, 76 F.R.D. 656, 658-60 (W.D. Pa. 1977).

Although ***Liberty Mutual*** is not directly analogous, involving an unsecured creditor who sought to intervene as a plaintiff, the ***Liberty Mutual*** court explained its rationale for rejecting mandatory and permissive intervention under the federal rules corresponding to Wisconsin's intervention statute. Under § 803.09(1), STATS.'s mandatory intervention rules, trial courts must allow intervention if the movant claims an interest relating to the property or transaction which is the subject of the action, so long as the movant meets other criteria. Under § 803.09(2), STATS.'s permissive intervention rules, trial courts may permit intervention for movants without the above mentioned interest if the movant's claim or defense and the main action have a question of law or fact in common. The ***Liberty Mutual*** court explained that unsecured creditors do not have the requisite subsection (1) interest and that the unsecured creditor did not have a question of law or fact in common. The same rationale applied here. As unsecured creditors with unliquidated claims, the Berndts did not have the requisite subsection (1) interest for mandatory intervention. Likewise, they identified no issue of law or fact in common between their lawsuit against Mahler and the Montgomerys' suit.

Rather, in order to intervene for the purpose of defending a defendant in a lawsuit, the proposed intervenor needs a more substantial interest than an unliquidated, unsecured claim against the defendant. In fact, the only precedents permitting defense aligned intervention involve stockholders of corporations whose officers improperly refuse to defend the corporation. *See* ***Clayton v. Mimms & Co.***, 386 N.E.2d 452, 454 (Ill. App. 1979) (corporate stockholders); ***Kobernick v. Shaw***, 139 Cal. Rptr. 188, 190 (Cal. App. 1977) (corporate stockholders); ***Rugee v. Hadley Products, Inc.***, 241 P.2d 798, 800 (Ariz. 1952) (corporate stockholders); *see also* ***Price v. Gurney***, 324 U.S. 100, 105 (1945) (corporate stockholders). The Berndts did not have any interest comparable to the direct proprietary interest held by stockholders. We are satisfied that an unsecured, unliquidated creditor's interest is insufficient to warrant either mandatory or permissive intervention for the purpose of opposing another unsecured creditor's lawsuit. In sum, the trial court erroneously permitted the Berndts' defense aligned intervention, and we therefore affirm the money judgment on this ground. However, we will address the Berndts' substantive arguments arguendo to show that the evidence itself also justified the judgment.

The Berndts argue that the Montgomerys did not prove Mahler's involvement in the incidents. The Berndts point out that the Montgomerys have no direct proof of his complicity. We affirm trial court findings unless they are clearly erroneous. ***Noll v. Dimiceli's, Inc.***, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983). Fact finders may base their findings on circumstantial evidence and the reasonable inferences such evidence permits. *See* ***Priske v. Gen. Mot. Corp.***, 89 Wis.2d 642, 654, 279 N.W.2d 227, 232 (1979). Here, circumstantial evidence showed Mahler's guilt. He and the Montgomerys had boundary disputes. He also had a history of confrontations with the Montgomerys and others concerning rights in the roadway on which the nails were strewn. He had made threats against others in the past, including one in a letter to the district attorney. He also acted belligerently toward a town road crew when it arrived at the scene, attempting to destroy a culvert, and he shot Edward Berndt, the local police chief, when the chief appeared a short time later. Further, Mahler had arrived from Indiana a short time before the vandalism occurred. Last, the Berndts identified no one else who could have harbored a motive to cut the tree and spread nails. From this circumstantial evidence, a rational fact finder could reasonably infer that Mahler was the one who cut the tree and spread the nails on the driveway and the roadway. As a result, the trial court's finding was not clearly erroneous.

The Berndts next argue that the tree Mahler cut was not an ornamental tree and therefore did not support a damage award. As the Berndts point out, although owners of ornamental trees may recover the tree's individual value, owners of nonornamental trees may recover only damages equal to the amount that their real estate declines in value as a result of the destruction. ***Otto v. Cornell***, 119 Wis.2d 4, 9-11, 349 N.W.2d 703, 706-07 (Ct. App. 1984). The Montgomerys essentially admitted that their real estate suffered no decline in value as a result of the damage. Here, however, the trial court reasonably found that the ten-inch diameter birch tree was ornamental. Rick Montgomery testified that they used the tree to shield their home from view from the roadway. This was an ornamental use and qualified the tree as ornamental, in spite of the fact that the tree was wild. Rick Montgomery's testimony was consistent with the scene, which the trial court inspected, and the trial court could rationally accept his testimony. In sum, the trial court's finding on this issue was not clearly erroneous.

The Berndts next argue that the Montgomerys did not own the tree. The trial court found that the tree grew on the boundary of the Montgomerys' real estate and that they therefore owned at least part of the tree. The record supported the trial court's finding. The trial court viewed the scene before making its findings. The evidence showed that the tree grew on or next to an ancient fence line. The trial court found that the fence line represented the real estate's boundary, at least for purposes of resolving the Montgomerys' lawsuit, even if it would not definitively set the boundary in a quiet title action. We have viewed the photographs and conclude that the trial court's finding was not clearly erroneous. They show the damaged tree and the remnants of the ancient fence. From this evidence, the trial court could reasonably rule that the tree grew on the boundary of the Montgomerys' property. Under the common law, they therefore had an ownership interest in the tree. *See, e.g.*, ***Patterson v. Oye***, 333 N.W.2d 389, 391 (Neb. 1983); ***Holmberg v. Bergin***, 172 N.W.2d 739, 742 (Minn. 1969).

The Berndts next argue that the trial court erroneously based its $75 damage award for the ten-inch diameter birch tree and its $700 damage award for the eight damaged tires entirely on conjecture and speculation. He points out that the Montgomerys offered no evidence of the tree's value and that Rick Montgomery's testimony of the tires' replacement cost was the only evidence on that issue. Litigants need only prove damages with reasonable certainty. ***Production Credit Assoc. v. Nowatzski***, 90 Wis.2d 344, 356, 280

N.W.2d 118, 124 (1970). Here, we are satisfied that the trial court had sufficient evidence for its damage award. The trial court could reasonably find that a ten-inch diameter birch tree was worth at least $75. This amount was nominal under the circumstances, and any error was de minimus. *See* ***Ziegler v. Wonn***, 18 Wis.2d 382, 389, 118 N.W.2d 706, 710 (1963). In addition, Rick Montgomery provided sufficient testimony on the tires' replacement cost. He testified that he bought replacement tires. He estimated that they cost him from $700 to $750. The trial court could reasonably find his testimony adequate without receipts or other evidence. Like the trial court, which relied partially on common knowledge on these issues, we cannot say that $700 for eight tires was excessive as a matter of law.

The Berndts next argue that the trial court erroneously admitted several exhibits without following rules of evidence on identification, authentication, foundation and hearsay. These exhibits consisted of various documents, including real estate conveyances, maps, a letter written by Mahler, and state publications. We reject the Berndts' arguments. First, the Berndts have not established that the trial court put significant weight on any of these documents in reaching its decision. The Berndts have cited nothing in these documents that they believe had a material effect on the trial court's decision. In fact, they have not indicated what these documents contain in any respect. Under these circumstances, they have shown no prejudice from the trial court's decision. ***Canadian Pac. Ltd. v. Omark-Prentice Hydraulics***, 86 Wis.2d 369, 372, 272 N.W.2d 407, 408-09 (Ct. App. 1978). We have no obligation to search these documents for possible prejudicial material.

Second, the trial court referred to a time shortage at the beginning of the trial. It conducted proceedings in a manner to conserve time, attempting to resolve the dispute as expeditiously as possible. In light of the constraints, the trial court effectively dispensed with some of the procedures normally required for the introduction of evidence. The trial court apparently believed that the Montgomerys would have little trouble meeting the applicable identification, authentication and foundation requirements. If the Berndts had specific objections demonstrating the prejudice of specific documents, they could have mitigated the time constraints by submitting posttrial arguments to the trial court. They did not, despite the fact that the trial court sought and received posttrial letter briefs on other issues. Under these circumstances, where the Montgomerys would have met all evidentiary requirements in all likelihood, we are satisfied that the trial court conducted this aspect of the

proceedings in a fair manner. We see nothing in the trial court's admission of the exhibits that requires a new trial.

Finally, the Berndts argue that the trial court improperly awarded punitive damages without any proof of Mahler's recklessness and maliciousness. These items, along with outrageousness and wantonness, are essential elements of a claim for punitive damages. ***Wangen v. Ford Motor Co.***, 97 Wis.2d 260, 267-69, 294 N.W.2d 437, 442-43 (1980). Litigants must establish these matters by clear and convincing evidence. ***Id***. at 299-301, 294 N.W.2d at 457-58. Here, the trial court reasonably found the requisite recklessness, maliciousness, outrageousness and wantonness. Ordinary people do not cut down someone else's tree and spread nails on driveways and roadways without recklessness, maliciousness, outrageousness and wantonness. The trial court could rationally infer such matters from the facts of the offense itself. No direct proof was necessary. Although the Berndts could conceivably argue that Mahler cut the tree under the mistaken belief it was his, they can make no similar claims of mistake about the nails. Last, Mahler's conduct with the road crew and police chief furnished circumstantial evidence on these issues. In sum, the evidence permitted an award of punitive damages.

By the Court.—Judgment affirmed.

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