

**Committee Name:**

**Assembly Committee – Rural Affairs and Forestry  
(AC–RAF)**

**Appointments**

99hr\_AC–RAF\_Appt\_pt00

**Committee Hearings**

99hr\_AC–RAF\_CH\_pt00

**Committee Reports**

99hr\_AC–RAF\_CR\_pt00

**Clearinghouse Rules**

99hr\_AC–RAF\_CRule\_99–

**Executive Sessions**

99hr\_AC–RAF\_ES\_pt00

# Hearing Records

## 99hr\_ab0504b

99hr\_sb0000

**Misc.**

99hr\_AC–RAF\_Misc\_pt00

**Record of Committee Proceedings**

99hr\_AC–RAF\_RCP\_pt00

11-18-99 PH

AB202, AB504, AB555

Committee Meeting Attendance Sheet

AB-504

**Assembly Committee on Rural Affairs and Forestry**

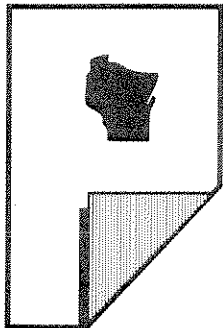
Date: 11/18/99 Meeting Type: Public Hearing  
Location: 328 Northwest - State Capitol

<u>Committee Member</u>	<u>Present</u>	<u>Absent</u>	<u>Excused</u>
Rep. John Ainsworth, Chair	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. Terry Musser	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. Kitty Rhoades	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. Stephen Freese	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. Judith Klusman	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. Mary Hubler	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. Barbara Gronemus	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. Donald Hasenohrl	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. Gary Sherman	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Totals:	<u>8</u>	<u>1</u>	<u>0</u>

Kristina Boardman  
Kristina Boardman, Committee Clerk

# WISCONSIN PAPER COUNCIL

250 N. GREEN BAY ROAD  
P.O. BOX 718  
NEENAH, WI 54957-0718  
PHONE: 920-722-1500  
FAX: 920-722-7541  
www.wipapercouncil.org



November 23, 1999

Representative John Ainsworth  
Wisconsin Assembly  
P.O. Box 8952  
Madison, WI 53708-8953

Dear Representative Ainsworth:

The Wisconsin Paper Council wishes to register its support for Assembly Bill 504 relating to timber harvesting. Due to a schedule conflict it was not possible for the Paper Council to appear at the November 18 public hearing before your committee.

The Paper Council has been involved with the development of AB 504 since its inception. We believe the legislation, developed through the efforts of a broad range of public and private forestry interests, including Paper Council members, provides a fair and practical means to address accidental over-cutting, while helping assure that landowners and timber purchasers accurately identify property boundaries prior to harvests.

Enactment of AB 504 will result in a timely and beneficial updating of Wisconsin's "timber theft" law. The Paper Council believes passage by the Committee on Rural Affairs and Forestry will be a positive step enhancing Wisconsin's long tradition of forest stewardship.

Sincerely,

A handwritten signature in cursive script that reads "Earl Gustafson".

Earl Gustafson  
Energy/Projects Manager

ss

Good morning Mr. Chairman and members of the committee. Thank you for allowing me to address you this morning.

I am Colette Matthews, Executive Secretary of the Wisconsin County Forests Association. Our association represents 29 member counties, who own and manage in excess of 2.35 million acres of public forest lands.

In March of 1997, more than two years ago, the Wisconsin County Forests Association met to discuss the growing problem of timber theft.

Two separate rulings had recently been delivered, which in effect allowed the timber thief to recoup expenses incurred during the theft.

During AB 504's development, our association worked with many groups who share our concern over the current interpretation of the law.

We worked closely with the DNR, along with Wisconsin Woodland Owners, Timber Producers Association, members of the Governor's Council on Forestry and others, in its development. We contacted all the groups and individuals we could think of, seeking their input, and asking them to help us address their concerns. Drafts of this bill have been widely circulated throughout the state.

The Wisconsin County Forests Association wholeheartedly supports AB 504. Our association feels this bill is a good, working document addressing a complicated issue.

Many people have put a great deal of time into draft before you today. We are asking that you support it, along with the amendments being requested today, and bring it to the floor of the assembly for a vote. Thank you.



# GOVERNOR'S COUNCIL ON FORESTRY

## STATE OF WISCONSIN

Reply to: 241 Shore Acres Drive  
Wisconsin Rapids WI 54494  
715/423-7550  
Fax: 715/423-7550

Dan Meyer  
Chairman  
Wisconsin Rapids

William "Butch" Johnson  
Vice Chairman  
Hayward

John Ahl  
Black River Falls

Miles Benson  
Wisconsin Rapids

Sen. Roger M. Breske  
Eland

Leon Church  
Appleton

Richard Connor  
Long Lake

Robert Engelhard  
Stevens Point

Gene Francisco  
Madison

Steve Guthrie  
Tomahawk

Richard Hall  
Oshkosh

James Holperin  
Eagle River

Rachel Jordan  
Dodgeville

Paul Mikulak  
Montello

Nick Moncel  
Eau Claire

Cathy Nordine  
Land O'Lakes

Thomas Ourada  
Antigo

Thomas Schmidt  
Neenah

Eugene Schmit  
Tomahawk

Rep. Lorraine Seratti  
Spread Eagle

Robert Skiera  
Milwaukee

Linda Windmoeller  
Phillips

November 17, 1999

### Comments Regarding Assembly Bill 504

Mr. Chairman and Members of the Committee,

My name is Paul Mikulak and I am here representing the Governor's Council on Forestry.

We have, with great interest, watched the evolution of this bill over the past two years. Those groups, which have been active in this change, have spent a great deal of time and effort in bringing this bill before you. This cannot be considered to be some major piece of revolutionary legislation. Rather this bill is best exemplified as one which, streamlines and updates that which is already part of our rural landscape.

The measures proposed in this bill help to clarify specific points regarding damages from the activities of careless loggers or foresters. This bill addresses the differences in the notification process between counties and allows for more workable and practicable means of communication. This bill is a blue collar bill in application as well as its development. Certainly the Association of County Foresters and the Wisconsin Woodland Owners Association are to be commended in the care with which they approached a needed but not necessarily glamorous concern. The Governor's Council supports every aspect of this bill and urges your strong consideration to recommend it to the full Assembly for passage.

We appreciate your time and your attention.



500 SOUTH STEPHENSON AVENUE  
SUITE 301  
IRON MOUNTAIN, MICHIGAN 49801-3456

PH: (906) 774-6767  
FAX: (906) 774-7255

November 18, 1999

TO: Chairman John Ainsworth and Members,  
Assembly Rural Affairs and Forestry Committee

FR: Alice O'Connor  
*For the Lake States Lumber Association*

RE: Assembly Bill 504 -- Timber Harvesting

The purpose of this memo is to let the Committee know that the Lake States Lumber Association, comprised of 205 member companies across Wisconsin, Michigan and Minnesota, supports Assembly Bill 504 and urges its passage.

Members of the DNR, forest products industry and legislature have been working for several years to craft this language. The end result is a well thought out bill that provides protections for honest timber harvesters and strengthens the penalties for outright timber theft.

The Lake States Lumber Association thanks the legislators and organizations that have worked on this important change to the statutes. While there is no way to absolutely eliminate timber theft, we hope the tougher penalties contained in this bill will serve as a deterrent and also help landowners receive a more complete reimbursement for their loss.

We would like to thank the committee for devoting time to this very important issue. If there are any questions, please feel free to call me at 608-255-7211 and we will be happy to address them.

TIMBER PRODUCERS ASSOCIATION  
OF MICHIGAN & WISCONSIN

November 18, 1999

TO: Chairman John Ainsworth and Members, Assembly Rural Affairs and Forestry Committee

FR: Nadine Bailey, President  
Timber Producers Association of Michigan & Wisconsin

RE: Timber Harvesting Legislation -- Assembly Bill 504

Assembly Bill 504 has taken a very long road to get to your committee. Representatives of state government, the legislature and the forest products industry have been meeting for several years on this language. Their final product -- Assembly Bill 504 -- receives the full support of the Timber Producers Association of Michigan & Wisconsin.

Nearly half of Wisconsin's total 34.7 million acres is forested. 57% of that forest land is under private individual ownership with county and municipal governments owning the second-highest amount of forested land at 15%. This timber is a valuable product that is basically there for the taking.

The tougher penalties for timber theft outlined in Assembly Bill 504 may discourage timber theft and will also help landowners to better recover their losses. The bill's method of differing the penalties based on the timber harvester's intent makes sure that a landowner is fairly compensated for their loss while ensuring that honest loggers are not too heavily penalized for simple mistakes.

The Timber Producers Association urges the Committee to pass Assembly Bill 504 and thanks it for taking the time to discuss this issue. Please feel free to call me 608-255-7211 if you have any questions.



**PLEASE ENTER THIS MATERIAL,  
SUPPLIED BY WILLIAM WENGELER REPRESENTING  
LINCOLN COUNTY FORESTRY, LAND AND PARKS  
DEPARTMENT,  
INTO PERMANENT RECORD REGARDING HEARING  
HELD BEFORE THE RURAL AFFAIRS AND  
FORESTRY COMMITTEE  
ON 11/18/99 PERTAINING TO ASSEMBLY BILL #504.  
I AM APPEARING TO SPEAK IN FAVOR OF THIS BILL.**

Lincoln County Forestry, Land & Parks Department  
Lincoln County Courthouse Annex  
1106 East Eighth Street  
Merrill, WI 54452

Phone (715) 536-0327

Fax (715) 536-0369

RE: ASSEMBLY BILL #504

I. INTRODUCTION

1. A handout is being passed to the committee members. It contains an analysis and history of trespass cutting from Jim Christenson, DNR; court of appeals case Tydrich vs Bomkamp, a timber trespass scenario, and issues/problems sought to be addressed by the proposed legislation.

II. This decision, Tydrich vs Bomkamp, had a major influence on the settlement of a trespass case in Lincoln County.

1. Details

A. 60 acre trespass.

A1. The adjoining land owner was notified many years before their cabin was on the section line or property line. They cut 60 acres south of this line.

A2. The harvest did not follow proper forest management prescriptions. They clear-cut a very beautiful white pine stand, and high graded the northern hardwood stand.

B. 1,000 cords (logs included) – \$50,000 mill value.

C. 1991 - 1992 winter (large administrative and survey costs).

D. We settled out of court for a value of approx. \$50,000. Also a cabin involved in case (adverse possession claim).

- III. In our opinion, the state of this law leaves landowners (both public and private) at great risk of theft. While we can appreciate the reaction of the Legislature to move away from statutory scheme that distinguishes between willful and unintentional cutting/trespass, the practical result in today's market is, as we know, that the thief who steals 60 acres of timber is treated no differently than the cutter who accidentally cuts six trees. Additionally, given the steady rise in timber prices, the current state law creates a thieves market. Short of a stiff penalty and criminal conviction under WI Stats. 26.09, we contend, given our understanding of this case law, that willful/intentional theft is a gainful proposition.
- IV. In the handout you will find a simplified scenario of a trespass case using the process as described in the Tydrich vs Bomkamp lawsuit.
- V. NOTE: I present this scenario (pulpwood trespass) to give an idea of what could happen with a lesser valued forest product. As all of us know, there is a greater margin of profit in cutting of higher valued forest product.
- VI. We believe our legislators need to know that their best intentions in 1949 leaves a large "loophole" in the law, large enough to drive a logging truck through.

## **SIMPLIFIED TIMBER TRESPASS SCENARIO**

Applying the factors relating to Wisconsin history and  
Tydrich vs Bomkamp.

### **BACKGROUND:**

100 cords of aspen removed  
    \$53/cd value of aspen delivered to mill  
    \$25/cd cost to cut and skid  
    \$14/cd cost to haul wood to mill

### **BREAKDOWN:**

Total value of 100 cords of aspen .....	\$5,300.00
Minus cutting and skidding costs.....	- 2,500.00
Minus hauling costs .....	- 1,400.00
Equals total net proceeds .....	\$1,400.00
 Double net proceeds.....	 \$2,800.00

Net proceeds = \$2,800 divided by 100 cds = \$28/cd

\$28/cd is not even double stumpage; in our analysis, this is a far cry from double market value.

Our average bid stumpage rate for aspen is \$22.50/cd.

### **OTHER QUESTIONS:**

1. Who pays attorney fees?
2. Who pays surveying costs?
3. Future growth potential?

**Issues/Problems Sought to be Addressed by the Proposed Legislation Regarding Notices of Cutting, Penalties for Violations Affecting Timber, and Civil Damages for the Unlawful Cutting, Removal and Transportation of Raw Forest Products.**

**Section 26.03, Stats., (Notices of Cutting to the County)**

1. Authorize the County to stop cutting and collect taxes even if a tax deed or tax certificate is not held by the County.
2. Raise penalties for cutting on tax delinquent lands or cutting without submitting the Notice.
3. Allow each county to be flexible in their notice submission requirements.
4. Include the cutting or taking of seedlings, saplings, shrubs, and boughs.
5. Raise penalties to \$200 (from \$50) for failure to file a notice of cutting; and \$500 to \$10,000 for cutting timber from tax delinquent land (from \$50). (Value of timber often makes the current penalties meaningless).

**Section 26.05, Stats., (Timber Theft)**

1. Add seedlings, saplings, shrubs and boughs to its protection.

**Section 26.06, Stats., (Penalty for Removal of Seized Forest Products)**

1. Raise the penalty because of the increased value of forest products. (Not less than \$500; not more than \$10,000).

**Section 26.09, Stats., (Civil Liability for Unlawful Cutting and Removal of Raw Forest Products)**

1. Provide definitions used in the new text.
2. Return the civil damages available to a system similar to the law prior to 1949, and at the same time provide incentives for professional/reasonable performance by persons setting-up sales.
  - a. Single stumpage value is awarded if a person relied on a recorded survey, and is later found to be in error.
  - b. Two times stumpage value awarded if a recorded survey is not relied upon, but reasonable precautions were taken.
  - c. Four times stumpage value, or two times fair market value, if a recorded survey was not relied upon and reasonable precautions were not taken.

- d. A court can award damages using a different method, if the method to establish the boundary is reasonable and appropriate.
3. Additional damages (restoration, road grading, etc.) available if applicable.
4. Attorneys fees available if awarded by court for refusing to respond to fair offer of settlement.
5. Establish what the definition of "reasonable precaution" is for this statute.

The over-all goal of the persons involved in the proposal, including state, county and private representatives has been to assure reasonable treatment and damages liability for the cutting of forest products without the consent of the owner. It is thought by this group that a person engaged in a willful trespass and taking of timber ought to be liable for four times the stumpage value or two times the fair market value of the timber cut and/or removed. (They ought not be paid the cost for taking the timber). At the same time, it is thought that if reasonable precautions were taken, but nevertheless resulted in the unintentional taking of timber (mistake), that the action ought not subject the person to liability for more than double stumpage, as well as other incidental cost, e.g. cleanup, restoration, etc.

Thank you for your consideration in this matter, and again I want to reiterate that I am in favor of this bill.

CORRESPONDENCE/MEMORANDUM

State of Wisconsin

Department of Natural Resources  
Bureau of Legal Services

DATE: February 14, 1997

FILE REF: 8300

TO: Michael Rankin - Chippewa Falls

FROM: Jim Christenson *JAC*

RECEIVED FEB 23 1997

SUBJECT: Assessment of Damages Under S. 26.09, Stats.

Mike, you asked for information regarding the assessment of damages for the removal of timber without consent of the owner. The appropriate provision of the statutes is s. 26.09, Stats.

On December 26, 1996, the Wisconsin Court of Appeals, District IV, issued a decision interpreting s. 26.09, Stats., regarding the assessment of double damages for the removal of timber without consent. That decision, Tydrich v. Bomkamp, is attached. That decision will be published, therefore it has state-wide precedence. Also, for your information, I have included in this memorandum an analysis of the history of this issue. The analysis was prepared by Martha Milanowski, a law intern in our office.

Historical Analysis of s. 26.09

There is much case history regarding timber trespass in Wisconsin and the amount of damages awarded to the landowner. The cases date back to the mid 1800s, when logging was the primary activity in Wisconsin's North Woods. Judges were initially rather lenient on this issue, due most likely in part to the economic benefits of the logging industry. George Radler, Damages - Recovery of Double Damages for Conversion of Timber, 39 Marq. Law.Rev. 64 (1955).

The Wisconsin Legislature, in 1873, enacted Section 331.18, providing damages for the wrongful cutting of timber as the highest market value of the timber between the time of cutting and the trial. Good faith (mistake) was the only affirmative defense available. "...unless the defendant serve upon the plaintiff an affidavit that such cutting was done by mistake..." Section 331.18, Wis. Stats. (1873), repealed by Ch. 252 of the Wis. Session Laws (1949). If the cutting was done by mistake, the plaintiff could only receive damages equal to the value of the logs at the time of cutting, plus interest. Prior to this statute's enactment, damages were awarded in the amount of the stumpage value (value of the standing timber), and punitive damages were only available if malice was shown on behalf of the defendant. Weymouth v. Chicago & Northwestern Railway Co., 17 Wis. 567 (1863), Single v. Schneider, 24 Wis. 299 (1869).

The court, in Single, 24 Wis. 299, discussed whether the damages award should be reduced by the defendant's cost of cutting, hauling and manufacturing. "...direct the jury to find the actual entire value of the property, and to find specially the amount to which its value had been enhanced by the defendant's labor." Id. at 303. The court held that damages awarded were the difference between the two amounts. Id. There was evidence in this case that the defendants may have cut the timber by mistake, as they owned the adjoining land. The court took this into consideration in their ruling, and followed a case out of Pennsylvania, Herdic v. Young, 55 Pa.St. 176, which held that this "standard of damages is reasonable and does justice to both parties. It saves to the otherwise innocent defendant his labor and money, and gives to the owner the enhancement of the



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value of his property growing out of other circumstances, such as a rise in the market price, a difference in price between localities, and other adventitious causes."

The awarding of treble damages for timber conversion was considered in 18726, in Cohn v. Neeves, 40 Wis. 393 (1876). The issue in this case involved the interpretation of Section 5, Ch. 42, Tay. Stats.: "Whoever shall convert to his own use, without consent of the owner thereof, any logs... floating in any waters of this state... or shores where the same may have drifted...shall be liable to the owner thereof in treble the amount of damages." The court considered the statute's "fair" meaning, in order to maintain the legislature's intent. Id. at 398. In doing so, the court decided that there must be a wilful or wanton intent present on the part of the defendant in order to award treble damages for the conversion of timber. The awarding of treble damages serves not only to redress the injured plaintiff, but also to punish the wrongdoer. Id. at 399. Without a wilful intent, only single damages were awarded under this statute.

This issue was revisited in Webber v. Quaw, 46 Wis. 118 (1879), when the court held that it was the legislature's intent to adopt one damages rule to all timber conversions, that of the highest market value of the logs between the time cut and the trial of action. Id. at 122. As in Weymouth, supra, the only defense available was an affidavit of mistake. Id. at 123. The court interpreted "wrongful" as "... any unlawful or unauthorized cutting of logs or timber upon the lands of another..." Id. at 121.

The next major change regarding this issue occurred in 1905, with Section 1494-60, Wis. Stats. This statute provided for double damages in the case of wilful timber trespass. Then nearly fifty years later, the legislature again revised this statute, with Chapter 252 (1949). The requisite intent for awarding double damages was changed from "wilful" to "unlawful," and "trespass" was changed to "cutting of timber." Double damages now applied to all instances of timber trespass, regardless of intent. George Radler, Damages - Recovery of Double Damages for Conversion of Timber, 39 Marq. Law. Rev. 64 (1955).

The revised statute's intent was tested in Swedowski v. Westgor, 14 Wis.2d 47 (1961), with the court explaining that the earlier statute provided double damages in the case of any wilful trespass. Id. at 49. Yet by 1961, Section 26.09, Stats., had changed, and the legislature's intent was now to award double damages in the unauthorized cutting of timber regardless of intent or wilfulness. Id. at 52. The court held that "the new section is to cover the field and that intent or wilfulness would be immaterial under the new section." Id. at 53. It's unclear in this case whether the unlawful cutting was purposeful or by mistake. It was stipulated that the defendant cut seven trees out of necessity, for skidways, while 35 other trees were unlawfully cut. Id. at 48. Furthermore, there was no proof of wilfulness on behalf of the defendant.

More recently, the court, interpreting Section 26.09, Wis. Stats., again stated that double damages are to be awarded for the unlawful cutting of timber, regardless of the defendant's intent. Hartland Cicero Mutual Ins. Co. v. Elmer, 122 Wis.2d 481 (Wis. Ct. App., 1984). The unlawful cutting in this case was characterized in the complaint as having occurred "in the mistaken belief that [the defendant] owned the property." Id. at 483. Likewise, the court found no intentional act on the part of the defendant. Emphasizing that only one rule of damages shall be applied to timber trespass, whether intentional or by mistake, the court awarded double damages, as per Section 26.09, Wis. Stats. The court also stressed that the double damages awarded in this type of case were not the same as punitive damages. The former requires no specific state of mind and are awarded whenever all the elements of the statute are met. Id. at 485. The latter would only arise if the defendant showed elements of malicious, wanton or wilful conduct, and are awarded in the amount necessary for both punishment and deterrence. Id.

The most recent case dealing with this issue is Tydrich v. Bomkamp, et. al., issued in December, 1996. The plaintiff had discovered that his trees had been cut by the defendant and



proceeded to sell the timber before the defendant had a chance to return. The court applied Section 26.09, Stats., and held that it was ambiguous as to the method for computing damages suffered in the unlawful cutting of timber. After discussing the statute's legislative history and Swedowski, supra, the court concluded that the market value of the logs (reduced by the defendant's cutting costs) constitutes "the amount of damages suffered" under the statute. The trial court's judgment was therefore affirmed. The court rejected the plaintiff's contention that damages should be based on "the highest market value" of the trees. This measure of damages was contained in the repealed Section 331.18, Stats., and the new statute did not specify any other method of computing damages. The court therefore held that it was the legislature's intent to have Section 26.09 damages measured as they were in case law prior to the enactment of Section 331.18. This method consisted of determining the market value of the logs, less the cutting costs. Single, supra. The Law of Damages in Wisconsin, Section 18.16 (1994), likewise, states that damages from the unlawful cutting of timber are "established by proof of the fair market value of the standing timber..."

It appears, therefore, that Swedowski, supra, is the controlling law on this issue, and that double damages are to be awarded under Section 26.09, Stats., regardless of intent or mistake. Furthermore, damages are to be offset by the cutting costs incurred by the defendant, an expense that the plaintiff would have had to absorb if he/she had cut the timber.

#### Summary

Section 26.09, Stats., provides that "double damages", as discussed in Tydrich, is the appropriate assessment. Please note that the analysis in that case uses the "highest market value". Therefore, I suggest that the damages be developed using comparable sale data, not our average stumpage rates we develop for appraisal or yield and severance tax computation. Also, as noted in the case, the damages figure is not limited to the value of the timber. In Tydrich, the court allowed "clean-up" costs. Other costs may be appropriate if arising out of the unauthorized removal. A final note: In Tydrich, as well as many of the other cases analyzed, it appears that the removal was unintentional. Although the cases seem to conclude that the intent of the person removing the timber is irrelevant, one might wonder whether all courts in the future will consider it reasonable to give credit to the person removing the timber for the costs of such removal?

Mike, please feel free to call with further questions.

cc. Martha Milanowski - LS/5  
Robert Mather - FR/4  
James R. Miller - FR/4

timdam.jsc

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

December 27, 1996

**NOTICE**

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.

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

No. 96-2086

STATE OF WISCONSIN

IN COURT OF APPEALS  
DISTRICT IV

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MARTIN TYDRICH,

Plaintiff-Appellant,

v.

DENNIS BOMKAMP,  
WISCONSIN RIVERVALLEY HARDWOODS,  
HERITAGE MUTUAL INSURANCE COMPANY,

Defendants-Respondents.

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APPEAL from a judgment of the circuit court for Richland County: KENT

C. HOUCK, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

No. 96-2086

DEININGER, J. Martin Tydrich appeals from a judgment awarding him damages under § 26.09, STATS.,<sup>1</sup> for the unlawful cutting of thirty-five large maple trees on his farm. He claims the trial court erred in computing damages: (1) by deducting the cost of cutting the trees from the market value of the timber; and (2) by allowing an offset against double damages for the net amount Tydrich received upon sale of the timber. We conclude the damages awarded are not improper under § 26.09 and thus affirm the judgment.

#### BACKGROUND

There are no facts in dispute. Dennis Bomkamp was cutting trees on a farm adjoining Tydrich's and negligently cut thirty-five trees on the Tydrich farm. He was acting under the direction of Wisconsin Rivervalley Hardwoods, Inc., which paid Bomkamp \$1,180 for cutting and skidding Tydrich's trees. Tydrich discovered the

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<sup>1</sup> Section 26.09, STATS., provides as follows:

**26.09 Civil liability for unlawful cutting, removal and transport.** 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.

downed logs before they were removed from his land. He sold them to a third party for \$7,650. The trial court found the cost to clean up brush from the cut trees on Tydrich's land was \$600.

The trial court computed Tydrich's damages as follows: the market value of the logs (\$7,650) was reduced by the cost of cutting the trees (\$1,180) and increased by the land clean up cost (\$600); that amount (\$7,070) was doubled per § 26.09, STATS., to arrive at \$14,140. The court then applied an offset of \$6,724.35 to account for the net proceeds Tydrich received when he sold the logs (\$7,650 less \$925.65 for income taxes paid on the proceeds). A judgment in favor of Tydrich for \$7,415.65, plus allowable costs, was entered against Bomkamp, Wisconsin Rivervalley Hardwoods, Inc., and Heritage Mutual Insurance Company (Defendants).

#### ANALYSIS

Construction of a statute, or its application to a particular set of facts is a question of law, which we decide independently, owing no deference to the trial court's determination. *Minuteman, Inc. v. Alexander*, 147 Wis.2d 842, 853, 434 N.W.2d 773, 778 (1989).

*a. "Stumpage" Versus Market Value*

Tydrich argues that the plain language of § 26.09, STATS., i.e., "the amount of damages suffered," requires that damages be based upon the market value of the logs. He further argues that even if the statute is ambiguous, the legislative history of the statute supports his interpretation. Tydrich thus claims that the trial court erred by deducting tree cutting costs from the market value of the timber, thereby awarding him only "stumpage" value for the trees that were cut by Bomkamp.<sup>2</sup> He maintains that this approach to computing damages improperly rewards wrongdoers by compensating them for the unlawful cutting, and it is therefore inconsistent with the deterrent purpose of § 26.09. He points to cases from Washington which reject "stumpage" value and embrace market value as the measure of damages under a similar statute.<sup>3</sup>

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<sup>2</sup> The Washington Court of Appeals has defined stumpage as "the value of timber as it stands before it is cut, or put another way, the amount a purchaser would pay for standing timber to be cut and removed." *Pearce v. G. R. Kirk Co.*, 589 P.2d 302, 328 (Wash. App.), *aff'd*, 602 P.2d 357 (Wash. 1979). The rationale behind "stumpage" value for evaluating damages is that logs which have been cut, trimmed, and stacked for removal to a mill are worth more than the trees standing because of the value added by the labor in preparing the logs for market.

<sup>3</sup> See, e.g., *Pearce*, 589 P.2d at 329-30:

Under [Washington's statute] we hold that for a plaintiff who intended to market trees personally and realize a retail profit, the proper measure of damages to be trebled is the proven market value of those trees. That value is not to be reduced or mitigated by a wrongdoer under a punitive statute such as this, bearing in mind that "(t)he statutory purpose is to protect the right of the owner to use or preserve his trees as he sees fit, and not force compensation upon him when undamaged, growing trees were what he would have possessed but for the willful intrusion of the

(continued...)

Defendants assert that the plain language of the statute supports the trial court's determination of damages based upon stumpage value. They argue that "the true value of plaintiff's loss is the difference between the value of plaintiff's land before the cutting and immediately after the 35 trees were cut."<sup>4</sup> Diminished land value may properly be equated with the standing value of the trees that have been cut. *Nelson v. Churchill*, 117 Wis. 10, 12-13, 93 N.W. 799, 799 (1903). Thus, Defendants maintain that the trial court did not err by determining damages based upon the standing value of the trees. Defendants do not object to the \$600 awarded for "clean up costs" as a part of Tydrich's damages.

The parties' disagreement as to the meaning of § 26.09, STATS., does not render the statute ambiguous. *National Amusement Co. v. DOR*, 41 Wis.2d 261, 267, 163 N.W.2d 625, 628 (1969). A statute may be said to be ambiguous when it is capable of being understood by reasonably well-informed persons in either of two senses. *Id.* Whether a statute is ambiguous is a question of law. *Boltz v. Boltz*, 133 Wis.2d 278, 284, 395 N.W.2d 605, 607 (Ct. App. 1986). We conclude that § 26.09 is ambiguous because it does not specify the method for computing "the amount of damages suffered," and

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<sup>3</sup>(...continued)  
trespasser."

(Quoted source omitted).

<sup>4</sup> The only evidence offered on the change in land value was a comparison showing that the assessed value of Tydrich's land actually increased after the cutting.

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either market value of the logs or stumpage value are reasonable possibilities. When a statute is ambiguous, we may construe it in light of its history, context, subject matter and scope to determine the legislature's intent. *Kluth v. General Cas. Co.*, 178 Wis.2d 808, 815, 505 N.W.2d 442, 445 (Ct. App. 1993).

The legislative history of § 26.09, STATS., is discussed at length in *Swedowski v. Westgor*, 14 Wis.2d 47, 109 N.W.2d 549 (1961), and in GEORGE RADLER, Note, *Damages—Recovery of Double Damages for Conversion of Timber*, 39 Marq. L. Rev. 64 (1955). Prior to 1873, Wisconsin courts were awarding victims of unlawful timber cutting only stumpage value, regardless of whether the cutting was intentional or by mistake. In response, because it wished to enhance economic sanctions against those who commit "timber trespass," the legislature enacted the following provision as Laws of 1873, ch. 263, § 1, later renumbered § 331.18, STATS.:

In all actions to recover the possession or value of logs, timber or lumber wrongfully cut ... *the highest market value of such logs, timber or lumber, in whatsoever place, shape, or condition, manufactured or unmanufactured, the same may be between the time of such cutting and the time of the trial of the action ... shall be found or awarded to the plaintiff ....*

(Emphasis added).

Following enactment of § 331.18, STATS., the supreme court held that the legislative directive for "highest market value" damages applied in all cases of "unlawful

and unauthorized cutting of logs," whether intentional or inadvertent. *Webber v. Quaw*, 46 Wis. 118, 122-23, 49 N.W. 830, 831 (1879). In 1905, the legislature enacted another provision, a predecessor to the present § 26.09, STATS., which authorized double damages in cases of "wilful trespass."<sup>5</sup> The double damages provision applied in suits for the unlawful cutting of timber, but only if the unlawful cutting was intentional. *Boneck v. Herman*, 247 Wis. 592, 596-97, 20 N.W.2d 664, 667 (1945); see also *Swedowski*, 14 Wis.2d at 49, 109 N.W.2d at 551.

Then, in 1949, the legislature extensively revised the statutes in this area, repealing § 331.18, STATS., and enacting the present § 26.09, STATS.<sup>6</sup> Under the revised § 26.09, double damages can be sought from "any person unlawfully cutting ... raw forest products." There is no longer a reference to "wilful trespass." The supreme court in *Swedowski* held that the 1949 revisions, and particularly the revised § 26.09, were intended to "cover the field," such that the doubling of damages is now intended by the legislature to apply to all unauthorized cutting, not just that which is "wilful." *Swedowski*, 14 Wis.2d at 52-53, 109 N.W.2d at 553.

From this history, Tydrich argues that the former "highest market value" measure of damages from the repealed § 331.18, STATS., must be applied to "damages suffered" in § 26.09, STATS. We must presume, however, that the 1949 Legislature was aware of the case law which predated the enactment of § 331.18, STATS. See *Reiter v.*

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<sup>5</sup> Laws of 1905, ch. 264, § 1494-60.

<sup>6</sup> Laws of 1949, ch. 252.



*Dyken*, 95 Wis.2d 461, 471-72, 290 N.W.2d 510, 515-16 (1980). By repealing the "highest market value" provision and failing to specify any other measure of damages, we conclude that the legislature intended to have damages computed under § 26.09, STATS., in accordance with the common law of damages for unlawful tree cutting as it had developed prior to enactment of the repealed provision. Had the legislature intended to continue a "highest market value" determination of damages, or to establish some measure other than that developed by case law, it would have specifically so provided, especially given the history described above.

Support for this interpretation of § 26.09, STATS., is found in the *Swedowski* case. There, as here, a direct evaluation of the decrease in real estate value due to tree removal was apparently not feasible. The supreme court affirmed a double damage award under § 26.09 based upon the standing value of the trees that had been cut.<sup>7</sup> We note also the supreme court's emphasis in *Swedowski* on the legislature's failure to carry over the "wilful trespass" language to the revised § 26.09 in concluding that the statute now covers negligent cutting. See *Swedowski*, 14 Wis.2d at 52-53, 109 N.W.2d at 553. We similarly conclude that the repeal of "highest market value" was purposeful and indicative of legislative intent to change the method by which damages are determined for unlawful cutting of forest products.

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<sup>7</sup> In *Swedowski*, the standing value of the trees was actually higher than their value cut. These were young trees worth approximately \$2.00 to \$2.50 apiece after cutting, but the trial court awarded a higher figure, \$5.00 per tree, on the rationale that the trees had future growth potential, and thus were worth more standing. *Swedowski v. Westgor*, 14 Wis.2d 47, 56, 109 N.W.2d 549, 555 (1961).

Thus, we conclude the trial court's determination that the "amount of damages suffered" under § 26.09, STATS., is the market value of the logs reduced by the costs of cutting, is consistent with the legislative history, context, subject matter and scope of § 26.09.<sup>8</sup>

*b. Offset for Log Sale Proceeds*

Tydrich also argues that the trial court improperly offset the net sale proceeds Tydrich received for the logs against the doubled damages. He notes correctly that since he was the owner of the logs, he was entitled to repossess them under § 26.06, STATS., (sheriff may seize and hold for owner any forest products unlawfully severed or removed). Therefore, since § 26.09 provides for the award of double damages "[i]n addition to the other penalties and costs," Tydrich claims the legislature intended that there be no offset to double damages when a landowner gains possession of wrongfully cut logs and sells them. We disagree.

Tydrich's argument is premised on a strained reading of these sections. In this regard, we conclude § 26.09, STATS., is not ambiguous. The plain language of the statute requires that a plaintiff be awarded "double the amount of damages suffered." The trial court correctly noted that not offsetting the double damages by Tydrich's sale

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<sup>8</sup> Further support for this interpretation is found in *THE LAW OF DAMAGES IN WISCONSIN*, § 18.16 (State Bar of Wisconsin CLE Books, ed., 1994). Preceding a paragraph that describes the availability of double damages under § 26.09, STATS., the text states that "[i]n most of the reported cases" diminished land value after timber has been destroyed "is established by proof of the fair market value of the standing timber (sometimes referred to as stumpage value)."

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proceeds would result in him receiving treble damages. The additional "other penalties and costs" for which a wrongful timber cutter may be liable are civil forfeitures and criminal penalties. See §§ 26.05, 26.06, 943.20 and 943.34, STATS.

As we have discussed, the "amount of damages suffered" by Tydrich is the value of the standing trees that were cut. He is entitled to recover twice that value. To read the statute as Tydrich urges has the effect of rewarding timber trespassers for stealth and speed. Had the defendants been quicker or more secretive in cutting and removing the trees, *they* would have received the proceeds from selling the logs and would have been liable to Tydrich for full double damages of \$14,140. Since Tydrich directly received the sale proceeds for the logs, however, he had already recovered a portion of his entitlement under § 26.09, STATS. The trial court did not err by awarding Tydrich only the balance of his statutory damages.

*By the Court.*—Judgment affirmed.

Recommended for publication in the official reports.