

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

February 22, 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. 94-3151

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

PETER J. WHITEMAN,

Plaintiff-Respondent,

v.

KIM M. EPPS,

Respondent-Appellant.

APPEAL from a judgment of the circuit court for Monroe County:
JAMES W. RICE, Judge. *Affirmed.*

Before Eich, C.J., Dykman and Vergeront, JJ.

PER CURIAM. Kim M. Epps appeals from a judgment awarding money damages to Peter J. Whiteman on his malicious prosecution claim. She raises several issues concerning the proceedings and the verdict. All are waived, and we therefore affirm.

In October 1990, Epps alleged that Whiteman had sexually assaulted her nine months previously. As a result, the State charged Whiteman with first-degree sexual assault. However, the prosecutor quickly dismissed the complaint when Whiteman established an airtight alibi. Whiteman later commenced this action, alleging that Epps falsely and maliciously accused him of the crime to deprive him of visitation rights with their child.

The matter went to trial, and the jury found that Epps had maliciously prosecuted Whiteman. He received an award of \$70,000 for humiliation and damage to his reputation, and \$1,500 for the attorney fees he expended in defending himself against the criminal charge. He also received \$30,000 in punitive damages. On appeal, Epps contends that the trial court should have dismissed the complaint for failing to plead or prove special damages, that the evidence did not support the verdict and that the verdict was both perverse and excessive. Epps did not raise any of these issues in a motion after the verdict.

In a judicially created exception to the notice pleading rule, § 802.02(1), STATS., the supreme court has held that to recover for malicious prosecution of a civil claim the plaintiff must plead, and then prove, special damages. *Johnson v. Calado*, 159 Wis.2d 446, 460-61, 464 N.W.2d 647, 653 (1991). "[A]n allegation that plaintiff incurred expense in defending himself against the prosecution alleged to be malicious is not an allegation of such special damage" *Schier v. Denny*, 9 Wis.2d 340, 345, 101 N.W.2d 35, 38 (1960).

Here, Whiteman failed to allege special damages, and at trial, Epps moved to dismiss. Because she did not bring her motion before the trial commenced, it was untimely under § 802.06(4), STATS. (motion to dismiss complaint shall be heard and determined before trial unless the court defers the hearing until trial). The trial court so concluded.¹

¹ Epps brought her motion at the beginning of the trial. That is not, as she argues, before its commencement. Section 802.06(4), STATS., requires a motion before the trial commences. The motion was also defective because it was not made in writing or served in advance. Sections 802.01(2)(a) and 801.15(4), STATS.

At the close of Whiteman's case, the trial court denied Epps's second motion to dismiss based on Whiteman's failure not only to plead but to prove special damages. Although Epps could argue that proving special damages is also necessary on a malicious criminal prosecution claim, she has not properly preserved the issue for appeal because she failed to raise it on motions after the verdict. Even where a proper objection is made during the trial, one must raise the issue in a motion after the verdict in order to preserve the issue for appeal. *Ford Motor Co. v. Lyons*, 137 Wis.2d 397, 417, 405 N.W.2d 354, 362 (Ct. App. 1987). For the same reason, Epps's remaining issues are also waived.

By the Court.—Judgment affirmed.

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