

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

April 9, 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. 95-1567

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

NANCY KOCH,

Plaintiff-Appellant,

v.

P. A. BERGNER & COMPANY,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL P. SULLIVAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Nancy Koch appeals from a judgment in favor of P.A. Bergner & Company dismissing her malicious prosecution action. Koch argues that the trial court incorrectly directed a verdict for P.A. Bergner & Company after ruling that a malicious prosecution case based on a municipal forfeiture prosecution required proof of special damages arising from interference with one's person or property. Koch also claims that the trial court

incorrectly concluded that she failed to prove special damages. We reject Koch's arguments and affirm.

Koch was fired from P.A. Bergner & Company (now known as Carson Pirie Scott & Company) based on the results of an investigation into allegations that she had been stealing merchandise. The City of Brookfield prosecuted Koch under its retail theft municipal ordinance, but the case was dismissed because the burden of proof had not been met. She then brought this malicious prosecution action against P.A. Bergner & Company. The case was tried to a jury. At the close of Koch's evidence, P.A. Bergner & Company moved for a directed verdict. The trial court reserved its ruling until after the jury returned its verdict. The jury returned a verdict in favor of Koch and awarded \$5,000 for emotional distress, \$30,000 for punitive damages, and \$600 for out-of-pocket expenses. The trial court granted P.A. Bergner & Company's post-verdict motion and dismissed the complaint, concluding that Koch failed to offer any evidence of special damages. Koch appeals.

Koch argues that the trial court improperly granted P.A. Bergner & Company's motion for a directed verdict. She contends that the trial court incorrectly concluded that the "special damages" requirement for malicious prosecutions arising from a civil suit is applicable to malicious prosecutions based on municipal forfeitures. She maintains that the "special damages" requirement is inapplicable to municipal forfeitures because they are "quasi-criminal."

Section 805.14(5)(d), STATS., permits a party who has made a motion for a directed verdict during trial to renew that motion after verdict. The Wisconsin Supreme Court has recently reiterated our standard of review:

A motion challenging the sufficiency of the evidence may not be granted "unless the court is satisfied that, considering all credible evidence in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such a party." This standard ... applies both to the circuit court and to "an appellate

court on review of the trial court's determination" of the motion.

...[A] circuit court may not grant the motion "unless it finds, as a matter of law, that no jury could disagree on the proper facts or the inferences to be drawn therefrom," and that there is no credible evidence to support a verdict for the plaintiff.

Because a circuit court is better positioned to decide the weight and relevancy of the testimony, an appellate court "must also give substantial deference to the trial court's better ability to assess the evidence." An appellate court should not overturn a circuit court's decision to dismiss for insufficient evidence unless the record reveals that the circuit court was "clearly wrong."

....

... [T]he "clearly wrong" standard and the "no credible evidence" standard must be read together. When a circuit court overturns a verdict supported by "any credible evidence," then the circuit court is "clearly wrong" in doing so. When there is *any* credible evidence to support a jury's verdict, "even though it be contradicted and the contradictory evidence be stronger and more convincing, nevertheless the verdict ... must stand."

Weiss v. United Fire & Cas. Co., 197 Wis.2d 365, 388-389, 541 N.W.2d 753, 761-762 (1995) (citations and footnote omitted; emphasis in original).

As the trial court correctly noted, the citation mailed to Koch for violation of the City of Brookfield's retail theft ordinance initiated a civil action. See § 800.02(1), STATS. ("An action in municipal court for violation of a municipal ordinance ... is a civil action ..."); see also § 66.12(1), STATS. A plaintiff bringing an action for malicious prosecution in a civil context must establish "special damages" that result from the interference or seizure of the person or the person's property in the underlying action. *Johnson v. Calado*, 159 Wis.2d

446, 460-461, 464 N.W.2d 647, 653 (1991). The trial court correctly concluded that the “special damages” requirement applied to Koch's case.

Koch also argues that the trial court incorrectly concluded that she did not present sufficient evidence of special damages at trial to sustain the jury's verdict. Koch claims she paid her attorney \$300 or \$400 to defend her in the underlying ordinance proceeding. She further claims:

The jury may have reasonably inferred that [she] incurred special damages in the form of mileage expenses to drive to and from the municipal court proceeding, in addition to her attorney's fees. The jury may have also inferred that [she] lost interest on the money that she paid to her attorney and compensated her for that.

General expenses in defending the underlying lawsuit, loss of time, and diminution of quality of life are not “special damages” resulting from interference with a person or the person's property. *See id.* at 452-453, 464 N.W.2d at 650; *see also* 1 THE LAW OF DAMAGES IN WISCONSIN § 1.6 at 1-4 & 1-5 (Russell M. Ware, ed., 2d ed. 1994-95) (“special damages are those attributable to the wrong by reason of circumstances not generally present in such situations”; “general damages are those that necessarily result from the injury regardless of its special character, the conditions under which the injury occurred, or the plaintiff's circumstances.”). Further, review of the trial transcript indicates that Koch offered no evidence of special damages that resulted from interference with either her person or her property. Accordingly, the trial court was not clearly wrong in concluding that Koch had failed to offer any credible evidence in support of any special damages relative to an interference with either her person or her property.

By the Court. – Judgment affirmed.

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