

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 29, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP2485

Cir. Ct. No. 2006CV8

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

RANDY J. KEEFE,

PLAINTIFF-RESPONDENT,

**ANTOINETTE P. KEEFE, WILLIAM J. KEEFE AND LUMBERJACK
HOLLOW,**

PLAINTIFFS,

V.

ROBERT M. MARX,

DEFENDANT-APPELLANT,

**CUSTOM PRODUCTION GRINDING, RBR REAL ESTATE, LLC AND
DEERHAVEN,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for Adams County:
CHARLES A. POLLEX, Judge. *Affirmed.*

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Robert M. Marx appeals a judgment of the circuit court finding Marx liable for breach of contract and malicious prosecution. Both claims arose from dealings Marx had with Randy Keefe regarding the construction of a log home by Keefe for Marx. The court awarded Keefe \$1.00 in nominal damages on his breach of contract claim, and \$7,500 in compensatory damages and \$30,000 in punitive damages on his conspiracy to cause injury by malicious prosecution claim.¹ Marx challenges the circuit court's breach of contract damage award, the court's finding that he was liable for malicious prosecution and the related compensatory and punitive damages awards, and the court's denial of his motion for a directed verdict on the latter claim. We affirm.

BACKGROUND

¶2 Marx and Keefe entered into a written agreement, in December 2002, in which Keefe agreed to construct the exterior walls of a log home for Marx in return for compensation in the amount of \$30,000. Under the terms of their agreement, Marx was responsible for supplying white pine logs for the structure. The parties subsequently entered into the following three related oral agreements. In January 2003, Marx and Keefe agreed that Marx would pay Keefe \$8,000 to do additional work on the home. In February 2003, Marx and Keefe agreed that Marx would pay Keefe an additional \$5,000 to transport and saw wormy logs provided by Marx and to deliver them to a lumber company where

¹ Although there is some inconsistency in the circuit court's written decision regarding the \$7,500 amount, the judgment contains the \$7,500 figure, and we will treat the circuit court decision as if it consistently used this amount.

they would be kiln-dried and further sawed. In March 2003, Marx and Keefe agreed that Marx would pay Keefe an additional \$5,000 to debark, saw, mill, and return back to the building site fifty-six logs Marx had purchased.

¶3 On or about April 17, 2003, the Adams County planning and zoning department “red-tagged” the log structure because the structure’s “squash blocks” were not installed properly and, therefore, would not adequately support the weight of the structure. Keefe testified that, after the structure was “red-tagged,” he left the Marx job site and began constructing another log building, this one out of red pine logs. On or about April 25, Marx observed that Keefe was constructing another log structure and Marx accused Keefe of using Marx’s logs, and on or about April 26, Marx terminated their agreements. Both parties agree that, at the time Marx terminated the agreements, Keefe was in possession of a number of Marx’s logs.

¶4 In early May 2003, Marx contacted the Marquette County Sheriff’s Department and reported that Keefe had stolen 102 of Marx’s logs—100 white pine logs and 2 red pine logs. In his statement to police, Marx indicated that Keefe was using Marx’s logs to construct another home. Marx also stated that, when he asked Keefe why Keefe was using Marx’s logs, Keefe advised Marx “not to worry that [Keefe] would replace them when needed.” Later that month, Marx filed a second statement with police further detailing Keefe’s alleged theft.

¶5 Keefe was charged with misdemeanor theft in violation of WIS. STAT. § 943.20(1)(a) (2001-02).² The theft charge was dismissed with prejudice

² All further references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

approximately two years later. Thereafter, Keefe brought suit against Marx for, among other claims, breach of contract and conspiring to cause injury by malicious prosecution. The circuit court found that Marx breached the parties' agreements and awarded Keefe \$1.00 in nominal damages. The court also found that Marx was liable for conspiring to cause Keefe injury by malicious prosecution and awarded Keefe \$7,500 in compensatory damages and \$30,000 in punitive damages. Marx appeals. Additional facts will be discussed as necessary below.

DISCUSSION

I. Breach Of Contract Damages

¶6 Marx does not dispute the circuit court's finding that he breached three of the four construction agreements he entered into with Keefe. Rather, Marx contends that the circuit court incorrectly determined damages. In his appellate argument on this topic, Marx begins by saying that he will "challenge" the circuit court's findings of fact and show that they are against the great weight and clear preponderance of the evidence and will "challenge" the circuit court's legal conclusions. In the ensuing three pages of argument, however, Marx does not present a developed argument showing that the circuit court's damages award is based on either erroneous fact finding or on a misapprehension of the law. Indeed, apart from a single instance in which Marx points to part of Keefe's testimony that seemingly conflicts with the circuit court's finding that Keefe fulfilled one of the oral agreements, Marx does not even draw our attention to which findings of fact are not supported by the record.

¶7 But Marx's argument is flawed at a more fundamental level. The item of damages he is challenging is the court's decision to order him to pay Keefe \$1.00 in "nominal compensatory damages." Marx says that this amount was

incorrectly determined, but Marx does not provide a calculation of damages amounting to less than \$1.00, much less support such a calculation with a coherent analysis of evidence.

¶8 Moreover, Marx seemingly fails to appreciate that, with regard to damages based on the breach of contract claim, he has done as well as he could have. The circuit court found that “Keefe has failed to prove facts which would constitute an adequate basis for the Court to award compensatory damages for the breach.” Although the court went on to label its award “nominal compensatory damages,” the \$1.00 awarded was plainly a nominal award.³

¶9 In the conclusion section of his appellate brief, Marx states that he “should be entitled to a return of some or all of the monies paid,” a reference to the \$32,000 that Marx paid to Keefe under the agreements. The circuit court did not, however, have before it a counter-claim against Keefe that would support awarding to Marx any portion of the amount Marx paid to Keefe.

II. Malicious Prosecution

¶10 Although Keefe’s complaint alleged a claim against Marx for conspiracy to cause injury by malicious prosecution, the parties’ arguments before the circuit court, and before this court, seem to assume that Keefe also maintained

³ Compensatory and nominal damages are two distinct types of damages. Compensatory damages are awarded to make whole an injured party who has suffered actual damage or loss. *Fletcher v. Eagle River Mem’l Hosp., Inc.*, 150 Wis. 2d 145, 155, 441 N.W.2d 297 (Ct. App. 1989), *rev’d on other grounds*, 156 Wis. 2d 165, 456 N.W.2d 788 (1990). Nominal damages, in contrast, “are granted irrespective of harm to the complainant or of a bad state of mind on the part of the defendant.” RESTATEMENT (SECOND) OF TORTS § 907 cmt. a, at 462-63 (1977). Nominal damages are a “trivial sum of money awarded to a litigant who has established a cause of action but has not established that he is entitled to compensatory damages.” RESTATEMENT (SECOND) OF TORTS § 907, at 462 (1977).

a separate cause of action for malicious prosecution. Not surprisingly, then, the circuit court's decision specifically addresses all of the elements of malicious prosecution, but does not address all of the elements of conspiracy to cause injury by malicious prosecution. While it is true that the circuit court states in the "conclusions of law" portion of its decision that Keefe has established his claim that Marx conspired to cause Keefe injury by malicious prosecution, the preceding reasoning is plainly based on the court's conclusion that Keefe proved a malicious prosecution claim. Finally, at no time below or on appeal does Marx argue that, because Keefe's complaint alleged only a conspiracy to cause injury by malicious prosecution claim, the circuit court should not have treated the matter as if Keefe had alleged a malicious prosecution claim.

¶11 Under these circumstances, we conclude that Marx has forfeited any argument that we should reverse the circuit court because Keefe failed to prove the elements of *conspiracy to cause injury by* malicious prosecution. We read the circuit court's decision as finding that Keefe proved a malicious prosecution claim, and we address the parties' arguments on that issue.

¶12 The parties address whether Keefe proved the six elements that comprise a claim of malicious prosecution. They agree that the six elements are as follows: (1) a prior institution or continuation of some regular judicial proceedings against the plaintiff in the action for malicious prosecution; (2) the former proceeding was by, or at the instance of, the defendant in the action for malicious prosecution; (3) the former proceeding was terminated in favor of the defendant therein who is the plaintiff in the action for malicious prosecution; (4) malice in the institution of the former proceeding; (5) a want of probable cause for the institution of the former proceeding; and (6) injury or damage suffered by the plaintiff in the malicious prosecution proceeding as a result of the former

proceeding. *Wisconsin Pub. Serv. Corp. v. Andrews*, 2009 WI App 30, ¶23, 316 Wis. 2d 734, 766 N.W.2d 232, *review denied*, 2009 WI 98, 321 Wis. 2d 47, 775 N.W.2d 254 (No. 2007AP2673). Marx challenges the sufficiency of the evidence regarding the second, fourth, fifth, and sixth elements. We address each argument below.

A. Whether The Prior Proceeding Was At The Instance Of Marx

¶13 Marx argues that the second element is not satisfied because there must have been more of a nexus between his statements to the police and the filing of the criminal complaint. He claims that the decision to commence the criminal proceeding against Keefe was an independent decision on the part of law enforcement and the district attorney, a decision “not solely predicated upon information supplied by Marx,” and that he, therefore, cannot be “found to have initiated the criminal prosecution of Keefe.”

¶14 Marx misconstrues the phrase “at the instance of.” The question is not whether it was Marx’s decision to prosecute Keefe, nor is it whether the prosecution was formerly initiated by Marx, as Marx suggests.⁴ Rather, the question is whether the prior prosecution was put in motion by or at Marx’s instance or urging. Marx reported to police that Keefe stole one hundred white pine logs and two red pine logs from him and, contemporaneously with that report, Marx submitted a statement to police detailing that alleged theft. Marx filed a second statement with police that further detailed Keefe’s alleged theft and

⁴ A decision to prosecute is an independent decision of government agents, *see Pollock v. Vilter Mfg. Corp.*, 23 Wis. 2d 29, 37, 126 N.W.2d 602 (1964), and the criminal prosecution itself must be initiated by government agents, *see State ex rel. Ford v. Holm*, 2004 WI App 22, ¶27, 269 Wis. 2d 810, 676 N.W.2d 500.

provided an account as to his attempt to “work things out” with Keefe, which he claims ended with Keefe’s threat that “they will never fucking find you.” Under these circumstances, we agree with the circuit court that the prior criminal prosecution was *put in motion* by or at Marx’s instance or urging.

B. Whether There Was Malice

¶15 Marx argues that Keefe failed to prove that the former proceeding was instigated with malice. The court based its finding of malice in part on the following: (1) Marx made threats to Keefe’s father to the effect that he would see Keefe in jail and that Marx hoped Keefe would rot there; and (2) Marx knew or should have known that Keefe did not steal any of Marx’s logs.

¶16 We have reviewed the record and conclude that it supports the court’s factual findings. The record is replete with evidence that Marx’s purpose in complaining to the police was both vindictive and without a proper purpose.

C. Whether There Was “Want Of Probable Cause”

¶17 In an action for malicious prosecution, probable cause “is an objective standard, measured by the reasonably prudent person’s belief in the cause of action in light of the facts known or reasonably ascertainable.” ***Krieg v. Dayton-Hudson Corp.***, 104 Wis. 2d 455, 459 n.5, 311 N.W.2d 641 (1981). It is “that quantum of evidence which would lead a reasonable layman in the same circumstances to honestly suspect that another person had committed a crime.” ***Pollock v. Vilter Mfg. Corp.***, 23 Wis. 2d 29, 42, 126 N.W.2d 602 (1964).

¶18 Marx argues that there was no “want of probable cause” because it was reasonable for him to suspect that Keefe had stolen logs from Marx in light of the fact that on Keefe’s property Keefe had logs belonging to Marx. However, the

evidence presented supports a finding that the agreements between Marx and Keefe included Keefe transporting and sometimes storing logs belonging to Marx. For example, one of the oral agreements involved Keefe taking logs from Marx's site, re-cutting them, and returning them. Also, logs ordered by Marx were delivered to Keefe's work yard. The fact that Keefe was working on another project in Keefe's work yard involving similar logs does not provide a reasonable basis for Marx to believe that Keefe was using Marx's logs. Under these circumstances, it cannot be said that a reasonable person would honestly suspect that Keefe was guilty of theft.

D. Whether There Was Resulting Injury Or Damage

¶19 Marx argues that Keefe was required to prove that he suffered injuries or damages apart from the general expense of defending a lawsuit, loss of time, and the accompanying diminution of the quality of life. He points out that, in *Johnson v. Calado*, 159 Wis. 2d 446, 452, 453-54, 464 N.W.2d 647 (1991), the court reaffirmed the rule that damages for a malicious prosecution do not include “general expenses in defending a lawsuit, loss of time, and the diminution of the quality of life.” It follows, according to Marx, that the assertion by Keefe that he spent a lot of time defending the criminal prosecution is insufficient to support a finding by the court that Keefe suffered injury or damages. Assuming for argument sake that the limitation-on-damages rule addressed in *Johnson* applies here where the prior lawsuit was a criminal prosecution, we nonetheless reject Marx's argument.

¶20 Marx assumes that the circuit court's compensatory damages award was designed to compensate Keefe for the time and expense of defending himself against the criminal theft charge. We disagree with this assumption. Although it

is true that the circuit court mentioned the “voluminous” record in the criminal proceeding, the court went on to much more generally state that the compensatory damage award is “[b]ased upon the evidence presented on this issue and the reasonable inferences drawn therefrom.” As we explain in the next section of this decision, the evidence before the court supports a finding that Keefe’s business was injured. Thus, assuming Keefe was required to prove damages apart from the expense and time involved in defending himself in the prior suit, that requirement was met with proof that Marx’s false charges damaged Keefe’s business.

III. Damages

A. Compensatory Damages

¶21 Keefe was awarded \$7,500 in compensatory damages on his claim for malicious prosecution. Marx challenges the sufficiency of the evidence supporting that award, arguing that, aside from Keefe’s claim that he expended time in defending the criminal complaint in the prior proceeding, Keefe failed to present any evidence supporting the court’s award. As indicated, we find support for the court’s award in evidence showing that Keefe’s business was harmed.

¶22 Our review of a challenge to an award of damages is highly deferential. If there is any credible evidence which under any reasonable view supports the findings as to the amount of damages, we will not disturb the award. See *D.L. Anderson’s Lakeside Leisure Co. v. Anderson*, 2008 WI 126, ¶26, 314 Wis. 2d 560, 757 N.W.2d 803. Just as it is often difficult to quantify lost business owing to damage to a company’s name, see *id.* ¶¶60-74 (discussing why there is no need for specific evidence of losses when proving trademark infringement), it is difficult to quantify losses resulting from damage to the reputation of a small business owner like Keefe. Consequently, in such cases, damages need not be

supported by evidence of specific losses. *See id.* (compensatory damages award of \$75,000 for diminution of business goodwill affirmed based on evidence that \$200,000 was paid for the goodwill and the purchaser’s testimony that he would not have paid as much for the business, or purchased it at all, had he known there would be confusion over the trade name, and on anecdotal evidence of customer and supplier confusion).

¶23 First, there was evidence that word had spread of Marx’s report that Keefe stole logs from Marx. Three witnesses who had done construction business with either Keefe or Marx testified that they had heard about Marx’s allegation. Second, there was evidence that Keefe lost business as a result. Keefe testified that Marx’s action interfered with other contracts. Keefe said that Marx “held up my work for a long time and has done everything in his best power to cause problems for me and I can’t put a dollar amount on that.” More specifically, Keefe testified that he was building log homes in the “Dells for Wilderness” and was told he “could be looking at building two more.” Keefe testified that he later learned that the project went to a builder who finished work for Marx, rather than to Keefe.

¶24 We conclude that this testimony is general, but no more general than the testimony deemed sufficient to support compensatory damages in *Johnson*.

B. Punitive Damages

¶25 Marx’s argument that the circuit court erred in awarding punitive damages adds nothing to his earlier arguments. He repeats his factual assertion that he acted innocently when he reported to the police that Keefe misappropriated some of Marx’s logs, but this factual assertion was rejected by the circuit court.

For reasons that are clear by now, we decline to second guess the circuit court's fact finding on this topic.

IV. Directed Verdict

¶26 Marx argues that the circuit court erred when it declined to order a directed verdict in his favor. Because we have affirmed the circuit court's findings and conclusions on the merits of these claims, it follows that Marx was not entitled to a directed verdict.

CONCLUSION

¶27 For the reasons discussed above, we affirm the circuit court in all respects.⁵

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

⁵ In his reply brief, Marx argues that portions of Keefe's brief should be stricken because they are not contained in the record, are irrelevant, or are not properly cited to the trial court record as required by WIS. STAT. § 809.19(1)(d). See § 809.19(3)(a). We decline Marx's request. His request to strike portions of Keefe's brief is more appropriately raised in a motion to strike. Furthermore, we observe that Marx's brief also does not fully "comport with statute and case law" pertaining to appellate briefing.

Keefe moves this court for sanctions against Marx pursuant to WIS. STAT. § 809.83(1)(a)(b) and (2). We have reviewed the alleged violations and conclude that sanctions are not warranted.

