COURT OF APPEALS
DECISION
DATED AND FILED

August 25, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1180

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

MARGARET A. SCHAUER,

PLAINTIFF-RESPONDENT-
CROSS-APPELLANT,

v.

J. DENNIS THORNTON,

DEFENDANT-APPELLANT-
CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Affirmed and cause remanded.*

Before Nettesheim, Anderson and Wilk,[1] JJ.

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[1] Circuit Judge S. Michael Wilk is sitting by special assignment pursuant to the Judicial Exchange Program.

NETTESHEIM, J. J. Dennis Thornton, the former District Attorney of Washington County, appeals from a judgment awarding Margaret A. Schauer $500,000 in compensatory damages and $150,000 in punitive damages. The judgment is premised upon a jury verdict finding that Thornton, during his tenure as district attorney, defamed Schauer after she had resigned her position as an assistant district attorney with Thornton's office. The jury also determined that Thornton had invaded Schauer's privacy and awarded her an additional $500,000 in damages. However, the trial court ordered a new trial as to this claim. Schauer cross-appeals this ruling.

Thornton raises the following issues on appeal: (1) the Worker's Compensation Act (WCA), ch. 102, STATS., represents Schauer's exclusive remedy; (2) the trial court should have dismissed Schauer's action because she had not timely complied with the notice of claim provisions of § 893.82(3), STATS.; (3) the evidence is insufficient to support the jury's liability findings and damage awards; (4) the evidence is insufficient to support the jury's findings that Thornton abused his conditional privilege as to the defamation claim; (5) the trial court erroneously admitted prejudicial evidence at trial; and (6) Schauer's damages are capped at $250,000 pursuant to § 893.82(6) and the State of Wisconsin must indemnify Thornton in such amount because he was acting within the scope of his employment. *See* § 895.46(1), STATS. We reject Thornton's arguments and affirm the judgment as to the defamation claim.

Schauer cross-appeals, challenging the trial court's ruling granting Thornton a new trial as to the invasion of privacy claim. Schauer argues that: (1) Thornton waived his right to complain that the court failed to instruct the jury as to conditional privilege because Thornton did not object to the jury instructions or the special verdict, (2) the trial court's instructions were otherwise correct, and (3)

the invasion of privacy claim was fully tried and justice did not miscarry. We reject Schauer's arguments. We affirm the order granting a new trial on the invasion of privacy claim.

FACTS AND PROCEDURAL BACKGROUND

Schauer was employed as a Washington County Assistant District Attorney from June 1988 until she resigned on September 24, 1989. In September 1988, shortly after Schauer began her employment, Thornton became the Washington County District Attorney. In the spring of 1994, almost five years after leaving the district attorney's office, Schauer became aware of statements that Thornton had allegedly made to others regarding the circumstances of her departure from the office and a relationship that she had had with a married state trooper during her employment with Washington county. Specifically, Schauer learned that Thornton had stated that he had "fired" Schauer and that Schauer had engaged in sex with a state trooper on her desk in her office.

On September 22, 1995, Schauer filed her original complaint alleging invasion of privacy, intentional infliction of emotional distress and, in the alternative, negligent infliction of emotional distress. The case was assigned to Judge Patrick L. Snyder, who conducted all of the pretrial proceedings in this case. The case was later assigned to Judge James R. Kieffer who conducted the jury trial and postverdict proceedings. Save one, all of the rulings we review on this appeal were made by Judge Kieffer.

Schauer's initial complaint named Thornton as a defendant both individually and as an employee of the State of Wisconsin, although the State was not a named defendant. Schauer did, however, name Washington county and its insurer, Employers Insurance of Wausau, as additional defendants. On

November 3, 1995, Schauer filed an amended complaint which added the defamation claim. On December 4, 1995, Thornton, represented by private counsel, filed a motion to dismiss, together with his answers and affirmative defenses to both the original and amended complaints. Thornton's affirmative defenses included a statute of limitations defense. On January 3, 1996, Thornton followed with an initial motion for summary judgment seeking dismissal of the action on statute of limitations grounds. On February 14, 1996, Schauer filed her second amended complaint, alleging that she did not discover that Thornton had made defamatory statements and invaded her privacy until the spring of 1994. The appellate record does not reveal any hearing on Thornton's initial summary judgment motion. We assume that Schauer's second amended complaint which refuted Thornton's statute of limitations defense rendered the motion moot.

Although the State of Wisconsin was not a named defendant, it nonetheless filed an answer on Thornton's behalf to Schauer's second amended complaint on February 23, 1996, "to the extent [Thornton] has been sued in his capacity as 'an employee of the State of Wisconsin.'" Thornton's private counsel also responded with an answer to Schauer's second amended complaint.

On July 2, 1996, Thornton filed a further motion for summary judgment alleging that Schauer's claims were barred by the exclusive remedy provisions of the WCA. On July 30, 1996, Judge Snyder issued a written decision denying Thornton's motion, ruling that the WCA did not apply because Schauer was not employed with Washington county at the time of Thornton's alleged tortious acts.

On July 15, 1996, Thornton, acting through counsel provided by the State, entered into a stipulation with Schauer providing that "the above-entitled

action against J. Dennis Thornton as an employee of the State of Wisconsin may be dismissed with prejudice." Based upon this stipulation, Judge Snyder signed an order on July 22, 1996, dismissing the action with prejudice against Thornton "as an employee of the State of Wisconsin." Thornton's appellate brief represents that the stipulation and order were based upon Schauer's failure to timely comply with the 120-day deadline for filing a notice of claim with the attorney general pursuant to § 893.82(3), STATS.

Judge Snyder also dismissed Schauer's action against Washington county and its insurer. This dismissal was based upon the fact that all of Thornton's alleged conduct occurred after January 1, 1990, when all district attorneys became state employees. *See* ***Association of State Prosecutors v. Milwaukee County***, 199 Wis.2d 549, 553, 544 N.W.2d 888, 889 (1996); § 978.12, STATS.

Therefore, after the State and Washington county were dismissed from the action, only Schauer's personal claims against Thornton remained.

On August 28, 1996, Thornton filed a third motion for summary judgment requesting that Schauer's claims against him personally also be dismissed for her failure to provide notice of claim pursuant to § 893.82(3), STATS. After hearing the arguments of counsel, Judge Snyder denied the motion based upon the existing state of the record. The judge indicated, however, that the issue could be revisited at trial.

Prior to trial, Thornton filed a motion in limine seeking to confine the evidence at trial to his alleged statements that he had fired Schauer and that Schauer had engaged in sex with a state trooper in her office. Judge Snyder granted Thornton's motion.

Judge Kieffer presided over the jury trial which lasted three days. At the close of Schauer's case-in-chief, Thornton moved to dismiss the claims contending that Schauer had failed to establish that he made the statements in question. Judge Kieffer denied Thornton's motion. On December 11, 1997, the jury returned a verdict finding in favor of Schauer on her claims of defamation and invasion of privacy[2]. The jury awarded $500,000 in compensatory damages and $150,000 in punitive damages for defamation, and $500,000 in compensatory damages for invasion of privacy.

Thornton filed postverdict motions. He requested a directed verdict based on lack of evidence to support the jury's liability findings and damage awards. Thornton also sought judgment notwithstanding the verdict, a new trial in the interest of justice and a remittitur of damages. Judge Kieffer granted Thornton's motion for a new trial on the invasion of privacy claim, ruling that the court had erred by failing to instruct the jury on the law of conditional privilege. However, Judge Kieffer denied Thornton's other motions.

Thornton appeals. Schauer cross-appeals. We will discuss additional facts as we discuss each issue.

DISCUSSION

1. Jurisdiction

We first address our jurisdiction. Although Schauer does not raise any jurisdictional objections to Thornton's appeal, we nonetheless are permitted to make our own inquiry as to our jurisdiction. "That the question of appealability has not been raised by the parties is immaterial; such failure cannot confer

[2] Schauer's other claims were not submitted to the jury.

jurisdiction." ***Thomas/Van Dyken Joint Venture v. Van Dyken***, 90 Wis.2d 236, 241, 279 N.W.2d 459, 462 (1979).

We raise this question because this matter has not as yet been fully resolved in the trial court because of Judge Kieffer's postverdict order granting Thornton a new trial on Schauer's invasion of privacy claim. "Only orders or judgments which are final and which have been appropriately entered in the clerk's office are appealable as a matter of right." ***Wick v. Mueller***, 105 Wis.2d 191, 193-94, 313 N.W.2d 799, 800-01 (1982); §§ 808.03(1), 807.11(2), STATS. Finality is not defined in terms of a final resolution of one particular issue, but rather in terms of a final resolution of the entire matter in litigation. *See* ***Heaton v. Independent Mortuary Corp.***, 97 Wis.2d 379, 396, 294 N.W.2d 15, 24 (1980); *see also* ***K.W. v. Banas***, 191 Wis.2d 354, 356, 529 N.W.2d 253, 254 (Ct. App. 1995). Bifurcated proceedings do not render finality to the first issue determined. *See* ***State v. Gene R.***, 196 Wis.2d 789, 792, 540 N.W.2d 217, 218 (Ct. App. 1995). Under this law, the pending judgment in this case is not final and Thornton cannot take a direct appeal.

Therefore, we construe Thornton's notice of appeal as a petition for leave to appeal a nonfinal judgment pursuant to § 809.50(1), STATS., and we grant the petition. We construe Schauer's notice of cross-appeal in the same manner since the order for a new trial is not a final order appealable as of right. *See* ***Earl v. Marcus***, 92 Wis.2d 13, 15, 284 N.W.2d 690, 691 (Ct. App. 1979).

2. Thornton's Appeal

A. Worker's Compensation Act

We begin by addressing Thornton's contention that Judge Snyder erroneously denied his motion for dismissal of Schauer's claims because her

exclusive remedy was under the Worker's Compensation Act (WCA). Judge Kieffer later confirmed this ruling in his postverdict rulings.

We reject Thornton's argument. Schauer was not an employee of Washington county at the time of the alleged acts causing injury or at the time of the injury giving rise to the cause of action. Because the WCA does not cover torts committed after the employee leaves his or her employment, we affirm the trial court's ruling.

If an injury is covered by the WCA, "the right to the recovery of compensation under [the WCA] shall be the exclusive remedy against the employer, any other employe of the same employer and the worker's compensation insurance carrier." Section 102.03(2), STATS. Section 102.03(1) sets forth the conditions which must be met in order for an employer to be liable under the WCA. Section 102.03(1)(b) requires that both the employer and the employee be subject to the provisions of the WCA at the time of the injury. Paragraph (c) sets forth five situations in which an employee would be entitled to coverage—all five envision an employment relationship between the employee and the employer *at the time of injury*. *See* § 102.03(1)(c). Such a relationship simply did not exist between Schauer and the Washington County District Attorney's Office at the time of Schauer's injury in 1994. Indeed, such a relationship did not exist at any time following Schauer's resignation in September 1989.

Thornton contends that Schauer's injuries arose out of her employment. He contends that certain incidents occurred during Schauer's employment with the Washington County District Attorney's Office that, at least in part, caused Schauer's injury. However, none of these incidents are related to

Schauer's claims of defamation and invasion of privacy. Those claims are based solely on Thornton's comments to Lynne Van Hollen, a former Washington County Assistant District Attorney, and others *after Schauer had resigned from her position*.

In support of his contention that the WCA was Schauer's only avenue of recovery, Thornton relies on ***Becker v. Automatic Garage Door Co.***, 156 Wis.2d 409, 456 N.W.2d 888 (Ct. App. 1990), and ***Jenson v. Employers Mutual Casualty Co.***, 161 Wis.2d 253, 468 N.W.2d 1 (1991). Thornton's reliance is misplaced. While injury due to defamation was at issue in both ***Becker*** and ***Jenson***, both plaintiffs were employed at the time of the injury. *See* ***Becker***, 156 Wis.2d at 412, 456 N.W.2d at 889 (plaintiff brought a claim of sexual harassment by her supervisors "while she was employed"); ***Jenson***, 161 Wis.2d at 258-59, 468 N.W.2d at 3 (plaintiff did not resign until after she brought an action for intentional infliction of emotional distress). Here, Schauer was not an employee of the Washington County District Attorney's Office at the time of injury.

Thornton also relies on ***Wolf v. F & M Banks***, 193 Wis.2d 439, 534 N.W.2d 877 (Ct. App. 1995), for the proposition that the WCA applies to an employee injured postemployment. Wolf, the plaintiff, brought a defamation claim against F & M and two coemployees, Madonna Miller and Jodi Weiss. *See* ***id***. at 444-45, 534 N.W.2d at 879. Wolf had experienced difficulties with Miller and Weiss while employed at F & M. *See* ***id***. at 447, 534 N.W.2d at 880. In July 1991, Weiss accused Wolf of sexually harassing her. *See* ***id***. In December 1991, Weiss quit her position and wrote a letter to F & M detailing the alleged incidents of sexual harassment and accusing Wolf of illegal conduct with respect to his expense account and business records. *See* ***id***. As a result, F & M hired a psychologist to meet with bank employees. During these meetings, Miller

repeated the contents of Weiss's letter. Wolf was subsequently terminated for "poor performance." *See* ***id***. A member of the community later informed Wolf that he had heard Wolf was terminated for sexual harassment. *See* ***id***. at 447-48, 534 N.W.2d at 880.

Wolf alleged that Weiss's 1991 letter was defamatory, that F & M disseminated the defamatory information to other F & M employees and that Miller had made defamatory statements about him to a member of the business community. *See* ***id***. at 448, 534 N.W.2d at 880. Relying on ***Becker***, the trial court determined that Wolf's claims were preempted by the WCA. We affirmed. *See* ***Wolf***, 193 Wis.2d at 455-56, 534 N.W.2d at 883.

Thornton argues that ***Wolf*** supports the application of the WCA to postemployment injuries because one of the alleged defamatory statements occurred after the employee had resigned. While that statement is correct, Thornton overlooks that Wolf never argued, and the court of appeals did not address, whether the defamation that occurred after Wolf's employment would be preempted by the WCA. Unlike ***Wolf***, the issue is squarely presented in this case. Also unlike ***Wolf***, the only alleged defamatory statements in this case occurred after Schauer's resignation from the Washington County District Attorney's Office. Pursuant to ***Becker*** and ***Jenson*** and the WCA itself, the WCA does not cover postemployment injuries. Judge Snyder correctly determined that the WCA does not provide Schauer with a remedy, and Judge Kieffer correctly confirmed that ruling.

B. Notice of Claim

Next we address Thornton's argument that Judge Kieffer should have granted his motion for judgment notwithstanding the verdict because his allegedly defamatory statements were made while he was acting within the scope

of his state employment as a district attorney. As such, Thornton contends that Schauer's claims are barred because she failed to timely comply with the notice of claim provisions set out in § 893.82(3), STATS.

Schauer's original complaint asserted claims against Thornton both in his official capacity and personally. However, Judge Snyder later entered an order dismissing Schauer's claim against Thornton "as an employee of the State of Wisconsin." This order was based upon Thornton's written stipulation agreeing to the dismissal. As a result, the only claims remaining against Thornton were those leveled at him personally.

Section 893.82(3), STATS., provides in relevant part:

> Except as provided in sub. (5m), no civil action or civil proceeding may be brought against any state officer, employe or agent for or on account of any act growing out of or committed in the course of the discharge of the officer's, employe's or agent's duties … unless within 120 days of the event causing the injury, damage or death giving rise to the civil action or civil proceeding, the claimant in the action or proceeding serves upon the attorney general written notice of a claim ….

The purpose of the notice of claim statute is to provide the attorney general with adequate time to investigate claims that might result in judgments to be paid by the State. *See* § 893.82(1).

We construe Thornton's stipulation as a waiver of his argument under § 893.82(3), STATS. By entering into the stipulation, Thornton agreed that Schauer's action would be narrowed to the claims which she was asserting against him personally. Thornton's conduct also borders on judicial estoppel. A party will not be heard on appeal to assert a position clearly inconsistent with a position taken in the trial court. *See* ***State v. Lettice***, 221 Wis.2d 69, 77, 585 N.W.2d 171, 176 (Ct. App. 1998). In the trial court, Thornton agreed that Schauer's action

should be narrowed to only the claims against him personally. That being the case, the notice of claim statute did not apply. But now on appeal, Thornton seeks to resurrect the notice of claim statute as a shield against Schauer's personal claims. We hold that Thornton has waived this argument.

Our decision on this issue should not be overread. Simply because a plaintiff asserts a personal claim against a defendant does not mean that the defendant was not acting in an official capacity, that the provisions of § 893.82(3), STATS., do not apply, or that the defendant is deprived of the protections afforded by the statute. But in this case, Thornton's own stipulation converted Schauer's action into a solely personal claim. If Thornton wanted to retain the protections of the statute, he should not have entered into the stipulation. We conclude that Schauer's personal claims against Thornton were not barred for failing to provide timely notice pursuant to § 893.82(3) of her claim against Thornton as a private individual.[3]

C. Sufficiency of Evidence

Thornton challenges the sufficiency of the evidence to support the jury's verdict on both the defamation and invasion of privacy claims. He also contends that the evidence is insufficient to support the jury's finding that he abused his conditional privilege in making the alleged statements. Finally, he challenges the sufficiency of the evidence to support the jury's damage awards. We conclude that there was sufficient evidence to support each of the jury's findings.

[3] In light of our holding, we reject Thornton's contention that the damages are limited to $250,000 pursuant to § 893.82(6), STATS. That statute addresses only civil actions against state officers or employees—not an action brought against a private individual.

Motions to change answers in a verdict may be granted on the ground of insufficiency of the evidence to sustain the answer. *See* § 805.14(5)(c), STATS. Motions challenging the sufficiency of the evidence to support a verdict may not be granted "unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom 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 party." Section 805.14(1). This standard applies both to the trial court and to the appellate court, although the reviewing court must also give substantial deference to the trial court's better ability to assess the evidence. *See* ***Weiss v. United Fire & Cas. Co.***, 197 Wis.2d 365, 388-89, 541 N.W.2d 753, 761 (1995). When there is any credible evidence to support a jury's verdict, even though that evidence is contradicted and the contradictory evidence is stronger and more convincing, the verdict must nevertheless stand. *See* ***id***. at 390, 541 N.W.2d at 762.

1. Defamation

"A communication is defamatory if it tends to harm the reputation of another so as to lower that person in the estimation of the community or deter third persons from associating or dealing with him or her." ***Vultaggio v. Yasko***, 215 Wis.2d 326, 330, 572 N.W.2d 450, 452 (1998). Here, the jury determined that Thornton defamed Schauer by telling others that he had "fired" her and that she had engaged in sexual relations in her office.

It is undisputed that Schauer was not fired; she resigned her position. The crucial factual dispute was whether Thornton said that he had fired Schauer or used words to that effect. Thornton's denial of the statements attributed to him was countered by Van Hollen, a key witness in support of Schauer's claims. Van Hollen informed Schauer in the spring of 1994 that Thornton had told her that he

had fired Schauer. At trial, Van Hollen testified: "I can tell you that Mr. Thornton used the word 'firing' and 'terminating' and 'getting rid of' interchangeably" with respect to Schauer. Although Van Hollen could not specify the dates of these comments or the exact comments made, she indicated at various times in her testimony that Thornton often referred to his "firing" of Schauer. In addition, although his testimony was less direct and less certain, Washington County Corporation Counsel Patrick Faragher testified that Thornton, together with others, may have been the source of his information that Schauer had been fired.

We acknowledge that other employees of the district attorney's office and other courthouse personnel testified that they did not hear Thornton say that he had fired Schauer, nor that they had heard Thornton use equivalent language when speaking of Schauer's departure from the office. But that does not mean that Thornton did not make the comments attributed to him by Van Hollen. It is for the jury, not this court, to determine the credibility of witnesses and the weight to be given their testimony. *See* ***Gedicks v. State***, 62 Wis.2d 74, 79, 214 N.W.2d 569, 572 (1974). We may overrule a jury verdict only if the jury relied on evidence that was inherently or patently incredible. *See* ***Beavers v. State***, 63 Wis.2d 597, 603-04, 217 N.W.2d 307, 310 (1974). Our role is to determine if there was "no credible evidence to sustain [the] finding in favor of [Schauer's claims]." Section 805.14(1), STATS. Van Hollen's and Faragher's testimony is not suspect under this test. The jury was entitled to believe this testimony over Thornton's denial.

The same analysis applies to Thornton's challenge to the sufficiency of the evidence regarding the "sex in the office" statement. Here again, Van Hollen's testimony is key. When asked whether "Thornton ma[de] comments about [Schauer] having sex on her desk or in her office with a trooper," Van

Hollen replied, "I believe Mr. Thornton did as well as [another assistant district attorney]." Although Thornton points to inconsistencies in Van Hollen's testimony, we note again that we are not the proper court to assess the credibility of Van Hollen's testimony on this point. *See* ***Gedicks***, 62 Wis.2d at 79, 214 N.W.2d at 572. And there is certainly nothing inherently or patently incredible about Van Hollen's testimony. *See* ***Beavers***, 63 Wis.2d at 603-04, 217 N.W.2d at 310. We hold that the jury's finding that Thornton made the challenged statement is supported by the evidence.

Thornton also contends that this statement was not defamatory because Schauer's relationship with the trooper was already common knowledge. Given that knowledge, Thornton reasons that his statements did not lower Schauer's reputation in the estimation of the community. *See* ***Vultaggio***, 215 Wis.2d at 330, 572 N.W.2d at 452. Assuming arguendo that Schauer's relationship was common knowledge, we nonetheless see a marked difference between general knowledge that a person is romantically involved with another and a false statement that the relationship has extended to sexual trysts in the office of the person who holds a position of public trust. In fact, Van Hollen testified that if Schauer had not presented her with the true facts, she "would have thought very poorly of [Schauer]."

We uphold the jury's determination that Thornton defamed Schauer.

2. Invasion of Privacy

Next, Thornton challenges the sufficiency of the evidence to support the jury's determination that he invaded Schauer's privacy. The jury found that Thornton invaded Schauer's privacy by discussing with others her personal relationship with the trooper after she had resigned from the Washington county

office. Because of possible issue preclusion, we address this issue despite the fact that Judge Kieffer has ordered a new trial as to this claim—a ruling which we affirm on Schauer's cross-appeal.

Section 895.50(2), STATS., creates a right of privacy. Paragraph (2)(c) defines "invasion of privacy" as follows:

> Publicity given to a matter concerning the private life of another, of a kind highly offensive to a reasonable person, if the defendant has acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter involved, or with actual knowledge that none existed. It is not an invasion of privacy to communicate any information available to the public as a matter of public record.

In an action for invasion of privacy under § 895.50(2)(c), STATS., the plaintiff must prove: (1) that there has been a "public disclosure" of true facts regarding the plaintiff, (2) that the facts disclosed were private facts, (3) that the private matter is one which would be highly offensive to a reasonable person of ordinary sensibilities, and (4) that the defendant acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter or with actual knowledge that none existed. *See* ***Zinda v. Louisiana Pac. Corp.***, 149 Wis.2d 913, 929-30, 440 N.W.2d 548, 555 (1989). We take particular note that this cause of action does not concern or require false statements. Rather, an invasion of privacy claim assumes true facts. Therefore, this claim does not concern Thornton's defamatory statements but rather his alleged dissemination of Schauer's admitted affair with the trooper.

Here again, Thornton's basic argument is that Schauer's relationship with the married trooper was "common knowledge" and that therefore his discussion about the affair with a limited number of courthouse personnel did not

invade Schauer's privacy. Thornton theorizes that because Schauer and the trooper were romantically involved, occasionally worked together in law enforcement activities and were sometimes seen together in public, knowledge of their affair was common as a matter of law under the evidence. Thornton also speculates that the trooper might well have divulged the affair to others.

Schauer, however, testified that Thornton was the only person in Washington county in whom she confided about the affair and that Thornton assured her that their conversation would not go "beyond [the] four walls" of his office. Thornton acknowledged that after Schauer's resignation he informed the county personnel director and the corporation counsel about the relationship in an effort to explain the reasons for Schauer's resignation. He additionally testified that he informed three of his assistant district attorneys of the affair for purposes of advising them about improper employee conduct. Thus, according to Thornton's own testimony, he informed five people of Schauer's affair.

Judge Kieffer saw the question as to the source of the public's knowledge as a factual issue for the jury. We agree. Schauer and Thornton each offered competing theories as to how the matter became public knowledge. Either theory was plausible, although Thornton's had ingredients of speculation. The jury opted for Schauer's theory. When there is any credible evidence to support a jury's verdict, even though that evidence is contradicted and the contradictory evidence is stronger and more convincing, the verdict must nevertheless stand. *See* ***Weiss***, 197 Wis.2d at 390, 541 N.W.2d at 762. Schauer's evidence, obviously believed by the jury, supports the finding that Thornton invaded Schauer's privacy.

3. Conditional Privilege

Next, Thornton contends that his allegedly defamatory statements were conditionally privileged because they were made in the context of his employment as a district attorney and that there was insufficient evidence for the jury to find he had abused this privilege.

A defamation is not actionable if it falls under a privileged class of conduct. *See* ***Vultaggio***, 215 Wis.2d at 330, 572 N.W.2d at 452. Communications between employers and persons having a common interest in the employee's conduct have been conferred a conditional privilege by the Wisconsin courts. *See* ***Zinda***, 149 Wis.2d at 923, 440 N.W.2d at 552. However, a conditional privilege is not absolute and may be forfeited if the privilege is abused. *See* ***Vultaggio***, 215 Wis.2d at 331, 572 N.W.2d at 452.

> The Restatement lists five conditions which may constitute an abuse of the privilege, and *the occurrence of any one causes the loss of the privilege*. The privilege may be abused, (1) because of the publisher's knowledge or reckless disregard as to the falsity of the defamatory matter (*see* §§ 600-602); (2) because the defamatory matter is published for some purpose other than that for which the particular privilege is given (*see* § 603); (3) because the publication is made to some person not reasonably believed to be necessary for the accomplishment of the purpose of the particular privilege (*see* § 604); (4) because the publication includes defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged (*see* § 605); or (5) the publication includes unprivileged matter as well as privileged matter (*see* § 605A).

Vultaggio, 215 Wis.2d at 331-32, 572 N.W.2d at 452-53 (citation omitted; emphasis added); *see also* WIS J I—CIVIL 2507. "[W]hether a conditional privilege has been abused is a factual question for the jury, unless the facts are such that only one conclusion can be reasonably drawn." ***Zinda***, 149 Wis.2d at 926, 440 N.W.2d at 553-54.

Thornton argues, as he did before the trial court, that the alleged statements were conditionally privileged because they were made in the context of his employment setting and used to provide examples of conduct that would not be tolerated in the workplace and that could lead to termination. He contends that the alleged statements were made in the context of office "tutorials" for the purpose of informing new assistant district attorneys, such as Van Hollen, about proper office conduct.

Schauer does not dispute that Thornton had a conditional privilege to instruct his assistants about such matters. And, the jury was instructed on the law of conditional privilege as to Schauer's defamation claim. However, Schauer maintains that Thornton is nonetheless liable because he abused his conditional privilege. Specifically, Schauer contends that the alleged statements were not necessary to accomplish Thornton's purpose—to inform new employees of proper office conduct. Schauer argues that the use of her name in conjunction with prohibited conduct was unnecessary and that Thornton could have achieved the same ends by providing a generic explanation of prohibited conduct without referring to her by name. Here again, the parties offered competing, plausible theories which created a jury issue. Given the jury's verdict, we reject Thornton's appellate challenge on this issue. *See* ***Weiss***, 197 Wis.2d at 390, 541 N.W.2d at 762.

In addition, we take note that the jury awarded Schauer punitive damages on the defamation claim based on its additional finding that Thornton acted with malice in making the defamatory statements. A statement made with knowledge or reckless disregard as to the falsity of the defamatory matter will occasion the loss of the privilege. *See* ***Vultaggio***, 215 Wis.2d at 331, 572 N.W.2d at 452. We deem a statement made with malice the equivalent of one made with

knowledge or reckless disregard. The United States Supreme Court has reached a similar conclusion. *See* ***New York Times Co. v. Sullivan***, 376 U.S. 254, 279-80 (1964) ("actual malice" equated with knowledge of falsity or reckless disregard of whether the statement was false or not). The jury's additional finding that Thornton acted maliciously lends support to the jury's finding that he abused the privilege.

4. Damages

The jury awarded Schauer $500,000 in compensatory damages and $150,000 in punitive damages for the defamation claim. Thornton argues that the evidence does not support these awards and that they are excessive.[4] We candidly state that we view these awards to be generous. Nonetheless, under our standard of review, we conclude that credible evidence supports the jury's awards.

As with all challenges to the sufficiency of evidence, we view the evidence in the light most favorable to the verdict. *See* ***Fahrenberg v. Tengel***, 96 Wis.2d 211, 231, 291 N.W.2d 516, 525 (1980). If there is credible evidence in the record to support the amount of damages awarded, we will not deem the award excessive. *See* ***Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Corp***., 96 Wis.2d 314, 340, 291 N.W.2d 825, 838 (1980).

[4] Thornton's brief-in-chief addresses only the defamation damages. Schauer, however, defends both the defamation and invasion of privacy awards in her respondent's brief. Thornton then broadens his reply brief to address all of the damages. However, we construe Judge Kieffer's grant of a new trial on the invasion of privacy claim as covering both liability and damages. The order grants "a new trial on the *cause of action* for invasion of privacy." (Emphasis added.) A traditional tort cause of action encompasses three elements: (1) tortious conduct, (2) causation, and (3) injury. *See* ***Bowen v. Lumbermens Mut. Cas. Co.***, 183 Wis.2d 627, 652, 517 N.W.2d 432, 442 (1994).

We construe the order for a new trial as a full and complete trial on all elements of Schauer's cause of action for invasion of privacy, including damages. We therefore do not address whether the evidence is sufficient to support the jury's damage award on this claim.

To prove damages resulting from defamation, it is not required that the plaintiff prove out-of-pocket losses. *See* ***Denny v. Mertz***, 106 Wis.2d 636, 659, 318 N.W.2d 141, 152 (1982). Instead, in defamation cases, damages usually take on a more nebulous form.

> [T]he more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

Id. (quoting ***Gertz v. Robert Welch, Inc.***, 418 U.S. 323, 350 (1974)).

Schauer testified that she was more than "emotionally distraught" upon learning of Thornton's defamatory comments. Although she additionally testified that she did not suffer any out-of-pocket damages or loss of relationships due to Thornton's defamatory comments, she nevertheless indicated that Thornton's comments adversely affected her. As we have previously noted, Van Hollen testified that her estimation of Schauer was lowered when she first learned of Thornton's statements. It was reasonable for the jury to conclude that others who heard Thornton's remarks would react similarly.

We also observe that Thornton himself is partially responsible for the state of the record on Schauer's damages. When Schauer was asked by her attorney to estimate the damage to her reputation due to Thornton's comments, Thornton's counsel objected, stating: "The assessment of damages is the jury's prerogative." Judge Kieffer agreed and sustained the objection.[5] Now, on appeal, Thornton complains that the evidence is insufficient to sustain the damage award.

[5] The correctness of the trial court's ruling is not before us.

Finally, we take note that because Judge Kieffer upheld the jury's damage award, we are required to give the jury's determination special weight. *See* ***Johnson v. Heintz***, 73 Wis.2d 286, 311, 243 N.W.2d 815, 830 (1976). We conclude that there is credible evidence to support the jury's finding as to damages and we uphold the awards. *See* ***Weiss***, 197 Wis.2d at 390, 541 N.W.2d at 762.

D. Evidentiary Issue/Perverse Verdict

Thornton contends that he is entitled to a new trial in the interest of justice due to the introduction of prejudicial evidence at trial. Specifically, he argues that Judge Kieffer "allowed and encouraged" Schauer to introduce evidence of sexual harassment and a hostile work environment contrary to Judge Snyder's pretrial order limiting testimony to Thornton's two alleged defamatory statements. Thornton contends that as a result the jury's verdict is perverse.

The admissibility of evidence rests within the sound discretion of the trial court. *See* ***State v. Bellows***, 218 Wis.2d 614, 627, 582 N.W.2d 53, 59 (Ct. App. 1998). A verdict is perverse when it reflects highly emotional, inflammatory or immaterial considerations or an obvious prejudgment with no attempt to be fair. *See* ***Redepenning v. Dore***, 56 Wis.2d 129, 134, 201 N.W.2d 580, 583 (1972). When reviewing a trial court ruling that a verdict is not perverse, this court defers to the trial court's decision because it is in a better position to determine whether perversity permeated the verdict. *See* ***id***. This court must sustain the jury's verdict if it is supported by any credible evidence. *See* ***Nieuwendorp v. American Family Ins. Co.***, 191 Wis.2d 462, 472, 529 N.W.2d 594, 598 (1995).

Thornton argues that improper evidence outraged the jury and prompted a verdict which sought to punish him. We agree that there were moments during the trial when Schauer's counsel attempted to introduce matters

beyond the limits of Judge Snyder's in limine order. However, Judge Kieffer consistently sustained Thornton's objections and adhered to the spirit of Judge Snyder's order.[6] In a few isolated instances, Judge Kieffer did allow evidence beyond the strict limitations of Judge Snyder's order, but this evidence was limited to giving the jury the flavor and background of the atmosphere and chemistry of the district attorney's office during Thornton's tenure. Moreover, Thornton himself brought out some of this evidence in his cross-examination of certain of Schauer's witnesses after Judge Kieffer had sustained objections to the same line of questioning on direct examination of the witnesses.

We have read the record of this trial in its entirety. We are not persuaded that Judge Kieffer misused his discretion in controlling the evidence on this point and we are convinced that the verdict is not perverse.

E. Indemnification

Alternatively, Thornton argues that pursuant to § 893.82(6), STATS., Schauer is not entitled to punitive damages and her compensatory damages are capped at $250,000. Thornton additionally argues pursuant to § 895.46(1), STATS., that the State must indemnify him in this amount because he was acting within the scope of his employment when the alleged statements were made. We reject Thornton's argument. We conclude that Thornton has waived this issue.

[6] For example, when questioning Thornton adversely, Schauer's counsel asked him, "Now, do you commonly refer to women as bitches?"; "Did you ever engage in any illegal conduct when you were in office?" and "[D]id you engage in any conduct while Attorney Schauer was Assistant District Attorney that would have created a hostile work environment that affected her ability to perform her job as Assistant District Attorney?" Judge Kieffer sustained objections to all of these questions.

Section 893.82(6), STATS., caps the amount recoverable by any person against a state officer, employee or agent at $250,000. In addition, § 895.46(1), STATS., provides in relevant part:

> If the defendant in any action … is a public officer or employe and is proceeded against in an official capacity or … as an individual because of acts committed while carrying out duties as an officer or employe and the jury or the court finds that the defendant was acting within the scope of employment, the judgment as to damages and costs entered against the officer or employe in excess of any insurance applicable … shall be paid by the state or political subdivision of which the defendant is an officer or employe.

The statute additionally provides:

> If the employing state agency or the attorney general denies that the state officer, employe or agent was doing any act growing out of or committed in the course of the discharge of his or her duties, the attorney general may appear on behalf of the state to contest that issue without waiving the state's sovereign immunity to suit.

Id.

Here, principles of waiver and judicial estoppel come into play. Thornton did not raise any indemnification claim during the trial court proceedings. To the contrary, after the State filed an answer on Thornton's "official capacity" behalf to Schauer's second amended complaint, Thornton later stipulated that this aspect of Schauer's claims could be dismissed. As we have previously noted, this left only Schauer's claims pending against Thornton personally. Thereafter, Thornton did not seek to reinvolve the State in this action or give the State notice that he was seeking indemnification. Nor has Thornton involved the State on this appeal.

As a result, the State has not had the opportunity under the statute to be heard on the question of whether Thornton's defamatory comments were

"committed while [he] was carrying out duties as an officer or employe." Section 895.46(1), STATS. The statute clearly envisions the participation of the State in any proceeding which may result in indemnification. We daresay the State would be genuinely surprised and justifiably aggrieved were we to decide ex parte in this opinion that it is obligated to pay $250,000 on the judgment against Thornton. We deem the issue waived for purposes of this appeal. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980). From this it follows that we also reject Thornton's contention that Schauer's damages are capped at $250,000. *See supra* note 2.

2. Schauer's Cross-Appeal

On her cross-appeal, Schauer challenges Judge Kieffer's postverdict order for a new trial on her claim for invasion of privacy. The order was based on the judge's determination, as with the defamation claim, that a conditional privilege instruction should have been provided to the jury as to this claim. Schauer contends that a new trial is not warranted because (1) the instructions that were given were proper, (2) Thornton waived his objection to the instructions, and (3) the real controversy was fully tried and justice did not miscarry. We reject Schauer's arguments and affirm the trial court's ruling.

It is well settled that an order for a new trial rests in the discretion of the trial court and will not be set aside or reversed unless the trial court has proceeded upon an erroneous view of the law or erroneously exercised its discretion. *See* ***Genge v. City of Baraboo***, 72 Wis.2d 531, 534, 241 N.W.2d 183, 184 (1976).

Schauer first contends that the trial court's invasion of privacy instruction—which did not include an instruction on conditional privilege—was

proper. Judge Kieffer disagreed with Schauer on this point and so do we. The law in Wisconsin is clear: an invasion of privacy claim is subject to the common law defenses of absolute and conditional privilege. *See* ***Zinda***, 149 Wis.2d at 931, 440 N.W.2d at 556. When a defendant has a conditional privilege, the plaintiff is entitled to recover only upon a showing that the defendant abused that privilege. *See* ***id***. When the evidence does not support a finding, as a matter of law, that the defendant abused his or her conditional privilege, it is a question of fact to be determined by the jury. *See* ***id***. Thus, Judge Kieffer correctly determined that Thornton was entitled to a conditional privilege instruction as to this claim.

Schauer argues that even if the instruction should have been given, Thornton waived his right to a new trial by failing to object to the jury instructions. Again, we are unpersuaded. In the oral decision granting a new trial, Judge Kieffer detailed Thornton's arguments regarding the invasion of privacy claim. After agreeing to the jury instructions, Thornton argued the application of conditional privilege to the invasion of privacy claim in support of a directed verdict. Although he did not cite chapter and verse to Judge Kieffer, Thornton argued that he was aware of case law supporting the application of conditional privilege to an invasion of privacy claim. Schauer resisted this motion, arguing that the privilege applied only to the defamation claim. Following this argument, Judge Kieffer denied Thornton's motion for a directed verdict.

At the postverdict proceedings, Judge Kieffer held that Thornton's arguments were sufficient to bring the issue of conditional privilege to the court's attention regarding the jury instructions. We do not hold a party to waiver when the issue has been brought to the attention of the trial court with sufficient prominence such that the court understands it is asked to make a ruling. *See* ***State v. Salter***, 118 Wis.2d 67, 79, 346 N.W.2d 318, 324 (Ct. App. 1984). Judge Kieffer

determined that Thornton had sufficiently raised the issue and that the court had erred by failing to deliver a conditional privilege instruction as to the invasion of privacy claim. The judge is obviously in a better position than we to determine what he perceived as the issue before the court. We respect that better position and we affirm the judge's ruling.

Schauer's further argument that the invasion of privacy claim was nonetheless fully and fairly tried begs the question. Here, a critical jury instruction, necessary to the theory of the defense, was not delivered. That, in and of itself, establishes that the matter was not fully and fairly tried. Moreover, Judge Kieffer correctly noted that the invasion of privacy claim was "hotly and highly contested" and that the failure to instruct the jury as to conditional privilege warranted a new trial. Given the judge's assessment of the situation, we reject Schauer's contention that the real controversy has been tried and that justice has not miscarried with respect to the invasion of privacy claim. Judge Kieffer's decision clearly indicates his belief to the contrary.

We conclude that Judge Kieffer's decision to grant a new trial was based on a proper view of the law and does not reflect an erroneous exercise of discretion. *See* ***Genge***, 72 Wis.2d at 534, 241 N.W.2d at 184. We uphold the order granting a new trial on the issue of invasion of privacy.

CONCLUSION

Schauer's remedy was not under the WCA. Schauer's action was not governed by the notice of claim statute because the parties stipulated that the action against Thornton as an employee of the State should be dismissed. The evidence was sufficient to support the jury's liability findings and damage awards. The evidence was also sufficient to support the jury's finding that Thornton

abused his conditional privilege. The trial court did not err in its evidentiary rulings and the verdict is not perverse. Thornton is not entitled to indemnification because he did not provide the State with notice that he was seeking such relief. Schauer's damages are not presently capped at $250,000. Judge Kieffer did not err in awarding Thornton a new trial on Schauer's invasion of privacy claim. We remand for a full trial on all issues related to that claim.

No costs to either party.

By the Court.—Judgment and order affirmed and cause remanded.

Not recommended for publication in the official reports.