WISCONSIN COURT OF APPEALS
District IV

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

Appeal No. 2017AP001683 CR
Circuit Court Case No. 2015CF000121

SARA L. STEPPKE,

Defendant-Appellant.

On appeal from a Judgment of Conviction
in the Circuit Court for Dodge County,
the Honorable Brian A. Pfitzinger, Circuit Judge, presiding.

DEFENDANT-APPELLANT'S BRIEF and APPENDIX

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ISSUE PRESENTED

Whether the circuit court appropriately ordered defendant to make restitution for her crime victim's security system upgrade.

Answered by the circuit court: Yes.

STATEMENT ON ORAL ARGUMENT

Because the briefs should fully cover the issue in this case, oral argument is not recommended.

STATEMENT ON PUBLICATION

Because this case would clarify an existing rule of law, publication is recommended.

STATEMENT OF THE CASE

This case begins in March 2015 with the filing of a criminal complaint in *State v. Sara L. Steppke.* The state alleged that on November 14, 2014 Steppke stole $2,800 worth of flea and tick collars from her employer, V.V. (R3). Thereafter the state charged her with one count of theft of movable property, Stats., a Class I Felony. (R6).

Later the state amended the information to charge Steppke with three counts of misdemeanor theft instead. (R13). Steppke pled guilty to the three counts and in November 2015 the Dodge County Circuit Court withheld sentence and placed Steppke on three years' probation for each count. (R39:31).

At sentencing the parties stipulated that Steppke owed V.V. $3,000 in restitution for the flea and tick collars, so the court ordered restitution in this amount. (R59:4). However, the parties did not agree that Steppke owed V.V. $8,144 for a key fob system or $7,980 for a new security surveillance system – items that V.V. also was demanding. (R59:6). So the state and defense counsel proposed submitting letter briefs as to the propriety/impropriety of the court ordering Steppke to make restitution for these two security items. (R59:6). The court so ordered. (R59:32-33).

The parties submitted their briefs. The state argued that pursuant to *State v. Heyn*, *State v. Behnke*, and *State v. Johnson* the court could order Steppke to pay for security upgrades to the clinic. (R38). Steppke argued that *Heyn*, *Behnke*, and *Johnson* were distinguishable and besides, even if they were not, she did not have any ability to pay $16,000 in restitution. (R21).

The court found the *Heyn* case persuasive and while it believed the security system and the key fob system were not appropriate items of restitution, it believed that Steppke should pay the additional $16,000 as a condition of probation. (R24). Thus, it issued an order to that effect, stating that Steppke should pay the $16,000 as a condition of probation, not as restitution. (R24).

Steppke timely filed a motion for postconviction relief arguing that the circuit court lacked authority to order Steppke to pay the additional $16,000 as a condition of probation. (R34). The *Heyn* case, she argued, was based on an obsolete version of the restitution statute that had since been repealed and replaced by a comprehensive restitution statute. (R34:3-4). She argued that the court must follow the

restitution statute and cannot shoehorn the $16,000 obligation into a condition of probation. (R34:4).

The circuit court found Steppke's arguments convincing. (R65). It vacated its condition-of-probation order and set the matter for a restitution hearing. (R39).

In February 2017 a restitution hearing was held, at which time a representative from V.V. testified that the company needed the security system upgrades because of Steppke's theft. (R64:17). It no longer trusted its employees like it once did and, therefore, it felt a need to protect itself. (R64:24).

Steppke also testified at the restitution hearing. She said since being let go by V.V. she had applied for over 300 jobs, landing none. (R64:26). She had no ability to pay the $16,000 and asked the court to set restitution at $3,000 as it had done initially. (R64:37).

At the close of evidence the circuit court found that a causal nexus existed between Steppke's conduct and the need for the security system upgrade. (R64:40). It also found that Steppke's conduct was a substantial factor in causing the upgrade. (R64:41). Therefore, it ordered Steppke to pay $3,000 as restitution for the pet supplies, $8,144.40 as restitution for the key fob system, and $7,980 as restitution for the upgrades to the security camera system. (R64:37-41).

In March 2017 an amended judgment of conviction was entered adding the $8,144.40 and the $7,980 restitution amounts. (R45). It is from this judgment that Steppke appeals.

STATEMENT OF FACTS

V.V., a veterinary clinic, employed Sara Steppke as a part-time, third-shift cleaning lady. (R3). In the early morning hours of November 14, 2014 an in-house security camera captured Steppke removing flea and tick collars from the basement of the clinic. (R3). One of the owners found out about the theft after the manufacturer of the collars called him to complain that the collars were being sold on Amazon. (R3). The owner confronted Steppke, terminated her, and then called the Dodge County Sheriff's Department to make a complaint. (R3). All totaled the clinic believed Steppke took $2,800 worth of product. (R3).

Steppke admitted to taking the product which led to the state charging her with misdemeanor theft in this case. (R3). Significantly, Steppke did no damage to the clinic's security system.

STANDARD OF REVIEW

Restitution awarded under Wis. Stats. § 973.20(5) is limited in two ways. First, before a trial court may order restitution there must be a showing that the defendant's criminal conduct was a substantial factor in causing the pecuniary injury to the victim. *State v. Longmire*, 2004 WI App 90, ¶13, 272 Wis.2d 759, 681 N.W.2d 534. Second, restitution is limited to "special damages" which could be recovered in a civil action. *Id.* ¶14. This second limitation restrains a sentencing court from ordering the payment of general damages. *Id.* Whether a circuit court has authority to order restitution in the first instance, given a particular set of facts, is a question of law this Court reviews *de novo*. *State v. Skotnicki*, 2000 WI App 214, ¶5, 238 Wis.2d 842, 618 N.W.2d 274.

ARGUMENT

Steppke's only complaint in this appeal is the circuit court's order of $16,000 in restitution for the security system upgrades. The order of $3,000 in restitution for the flea and tick product is not an issue.

Steppke's primary complaint is that, pursuant to statute, security system upgrades are not a proper item of restitution. At best, she argues, compensating theft victims so they feel less afraid in the future is an award of general damages and the restitution statute specifically prohibits general damage awards.

Even if this were not the case, she says, theft victims could not recover the cost of security system upgrades in a comparable civil action and, therefore, pursuant to the restitution statute, theft victims cannot recover them in criminal cases either.

To make her point, Steppke first discusses the difference between general and special damages and then shows how many recent cases actually rely on an incorrect definition of "special damages" to grant restitution particularly in security system cases. She then discusses these recent cases, pointing out that not only do most of them rely on this incorrect definition, but they also fail to consider whether the restitution award complies with the statute's second limitation – the one that limits awards to those recoverable in a comparable civil action.

Finally, she applies the correct definition of special damages to the facts of her own case to show that, while the circuit court addressed the statute's first limitation (nexus and substantial factor), it never bothered to address the second

(that the special damages are recoverable in a civil action). Consequently, the circuit court erred in ordering her to pay $16,000 in restitution to the victim in her case.

I. Under restitution law "special damages" are the victim's actual pecuniary loss due to the crime committed, nothing more, nothing less.

The restitution statute allows a court to order a defendant to:

> Pay all special damages, but not general damages, substantiated by evidence in the record, which could be recovered in a civil action against the defendant for his or her conduct in the commission of a crime considered at sentencing.

Wis. Stats. § 973.20(5)(a).

We define "special damages" as the natural, but not the necessary result of an alleged wrong. *Musa v. Jefferson County Bank*, 2001 WI 2, ¶30, 240 Wis.2d 327, 620 N.W.2d 797. In the restitution context, "special damages" represent the victim's actual pecuniary loss due to the crime committed. *Id.* Examples would include the victim's cost of medical care, his lost wages, or the impairment of his earning capacity. *Id*. Special damages include the loss resulting from property taken, destroyed, broken or otherwise harmed. *State v. Heyn*, 155 Wis.2d 621, 627, 456 N.W.2d 157 (1990). The value of a stolen stereo system, for example, would be special damages. *State v. Stowers*, 177 Wis.2d 798, 804, 503 N.W.2d 8 (Ct.App. 1993).

On the other hand, we define "general damages" as those losses which naturally, or necessarily, result from the defendant's wrongful conduct. *Musa*, 2001 WI 2, ¶29. They are the immediate, direct and proximate result of the crime.

Black's Law Dictionary 391 (6th ed. 1990). In the restitution context, "general damages" are those that usually accompany the kind of wrongdoing alleged in the complaint. *Musa*, 2001 WI 2, ¶29. General damages are expected. *Univest Corp. v. General Split Corp.*, 148 Wis.2d 29, 42, 435 N.W.2d 234 (1989). Examples of general damages would include the pain, suffering, anguish or humiliation crime victims often experience. *State v. Holmgren*, 229 Wis.2d 358, 365, 599 N.W.2d 876 (Ct.App. 1999). Injury to one's reputation would be an example of general damages too. *Rouse*, 2002 WI App 107, ¶8. Unlike special damages, which are readily ascertainable, general damages are not readily susceptible to direct proof. *State v. Rouse*, 2002 WI App 107, ¶8, 254 Wis.2d 761, 647 N.W.2d 286. Pain and suffering, for example, is difficult to quantify. *Fenolio v. Smith*, 802 F.2d 256, 259 (7th Cir. 1986).

Overall, we distinguish general damages from special damages by defining "general damages" as those not easily estimable in monetary terms and "special damages" as denoting harm of a more material and pecuniary nature. *Lawrence v. Jewell Companies, Inc.*, 53 Wis.2d 656, 660, 193 N.W.2d 695 (1972).

Despite these time-honored definitions, our more modern restitution cases tend to define "special damages" as *any readily ascertainable pecuniary expenditure the victim pays out because of a crime*. *Holmgren*, 229 Wis.2d at 365. This definition is not only inaccurate, but leads to incorrect restitution awards.

The origin of this more modern definition can be traced back to the 1993 *Stowers* decision. The issue in *Stowers* was whether an order to pay the victim $5,000 for the wrong the defendant did was impermissible general damages. *Stowers*, 177 Wis.2d at 801-02. In defense of the circuit court's $5,000

award, the state cited to the *Boffer* case to argue that general damages were permissible. *Id.* In clarifying the *Boffer* decision this Court said:

> [T]he restitution ordered in [Boffer] was payment of the replacement costs of a stolen stereo system, the type of *readily ascertainable pecuniary loss* the law has always considered to constitute "special," rather than "general," damages.

Id. at 804 (emphasis added).

This is where the new definition began. This phrase shows up in no cases prior to *Stowers*. But the *Stowers* court was not defining "special damages" when it said the stolen stereo was a readily ascertainable pecuniary loss. It was merely commenting on the stolen stereo system as a typical example of "special damages."

It is important to note, too, that the *Stowers* court used the word "loss," not "expenditure." The word "expenditure" never appears in the *Stowers* decision. Nor did the *Stowers* court make any reference to *paid out because of the crime*. In fact, in *Boffer*, the victim of the stolen stereo system never paid out a dime because insurance proceeds covered the loss. *State v. Boffer*, 158 Wis.2d, 655, 662, 462 N.W.2d 906 (Ct. App. 1990).

Despite the innocence of the remark in the *Stowers* decision, a few years after *Stowers*, the *Behnke* court cited to *Stowers* to find that the victim's deadbolt lock in the *Behnke* case was *a readily ascertainable pecuniary loss* and thus a "special damage." *State v. Behnke*, 203 Wis.2d 43, 60, 553 N.W.2d 265 (Ct. App. 1996). It cited to *Stowers* accurately enough for this remark, even though the new lock in *Behnke* was never a loss. *Behnke* was an assault case. The victim bought the new lock after Behnke assaulted her because she

was afraid of him. *Id.* at 60. Behnke never stole or damaged the victim's lock. The victim suffered no pecuniary loss at all.

Be that as it may, the *Behnke* court went on to say that *any specific expenditure by the victim paid out because of the crime, a "special damage," is appropriate*. *Id.* at 61. Once again it cited to *Stowers* for this definition, but this new definition found in *Behnke* appeared nowhere in the *Stowers* decision. *Id.* In 1996, this definition was unique to *Behnke*.

A few years after *Behnke* came the 1999 *Holmgren* case where the court repackaged *Behnke's* definition so it reads as it does today: *any readily ascertainable pecuniary expenditure paid out because of the crime is appropriate as special damages*. *Holmgren*, 229 Wis.2d at 365. The *Holmgren* court cited to *Stowers* for this definition too, but of course this broad definition of "special damages" appears nowhere in *Stowers*. *Id.* Again, *Stowers* stands for the simple proposition that a stolen stereo system is the type of readily ascertainable pecuniary loss the law has always considered to constitute "special damages." *Stowers*, 177 Wis.2d at 804.

In 2002 came *Rouse*, citing *Holmgren* for the proposition that *any readily ascertainable pecuniary expenditure paid out because of the crime is appropriate as special damages*. *Rouse*, 2002 WI App 107, ¶10.

In 2004 came *Longmire,* also citing *Holmgren* for the definition. *State v. Longmire*, 2004 WI App 90, ¶14, 272 Wis.2d 759, 681 N.W.2d 759 (2004).

In 2005 came *Johnson*, citing *Longmire*. *State v. Johnson*, 2005 WI App 201, ¶12, 287 Wis.2d 381, 704 N.W.2d 625.

In 2012 we have *Fries* citing *Longmire* . *State v. Fries*, No. 2011AP517, unpublished slip. op., ¶7 (WI App Dec. 27, 2012).

Finally, in 2017, we have *Ezrow*, citing *Johnson. State v. Ezrow*, No. 2016AP1611, unpublished slip op., ¶7, (WI App May 25, 2017).

Thus, the *Behnke/Holmgren* definition has proven to be a durable one. But "special damages" never were and can never be *any readily ascertainable pecuniary expenditure paid out because of the crime.* Even setting aside its dubious origin, such a broad definition has no place in restitution law for several reasons.

First, this broad definition has nothing to do with the victim's losses. Its only focus is on the victim's expenditures; that is, what the victim buys or wants to buy after being victimized. Yet prior to *Behnke* "special damages" have always been defined by the victim's losses. *Musa*, 2001 WI 2, ¶30. The whole idea of restitution is to compensate the victim for his or her loss, to make him whole, and to put him in the position he was in before the defendant injured him. *State v. Ziegler*, 2005 WI App 69, ¶18, 280 Wis.2d 860, 695 N.W.2d 895; *Johnson*, 2005 WI App 201, ¶14. Thus, defining "special damages" by what the victim buys after being victimized tells us nothing about the victim's losses. This is particularly true in the security system cases. As discussed more fully below, in each of the security system cases the victims did not suffer the loss of their security systems or even suffer any damage to them. Yet, because of the broad *Behnke/Holmgren* definition of "special damages" the courts awarded the victims restitution for new systems as if they had.

Second, such a broad definition has no logical stopping point. In other words, there is no end to the amount of

restitution victims can demand under such an open-ended definition. This is particularly true in the security system cases where the victim can demand a state-of-the-art security system because, after being robbed, only a state-of-the-art system will restore secure feelings. To simply say any readily ascertainable expenditure qualifies as a proper measure of the victim's damages, no matter its cost, risks turning restitution into retribution for defendants; into windfall for victims.

Finally, and as also covered more fully below, defining special damages as any readily ascertainable pecuniary expenditure paid out is a round-about way of awarding the victim general damages. This is especially so in the security system cases, where the cost of new security systems and system upgrades are assessed against defendants because these systems help the victims feel more secure. But feeling afraid or less secure after being robbed is the natural or necessary result of being burglarized. In other words feelings of fear are general damages. Thus, awarding victims a sum of money to help the victim feel less afraid is doing nothing more than compensating them for their general damages, which the restitution statute specifically disallows.

In summary, there is no place in restitution law for a definition that says "special damages" are *any readily ascertainable pecuniary expenditure paid out because of a crime*. This is not the definition of special damages. This new definition is nothing more than a distortion of innocent dicta found in the *Stowers* decision – a distortion that departs radically from the theory of restitution, runs contrary to statute insofar as it allows for general damage awards, and more often than not unfairly punishes defendants. This definition needs to be purged from our restitution law once and for all.

Again, "special damages" are the victim's actual pecuniary loss due to the crime committed, nothing more; nothing less.

II. The *Benhke* definition has led to incorrect results in a long line of security system restitution cases.

Several courts have looked at security systems in terms of court-ordered restitution. The first was the *Heyn* court in 1990. In this case Heyn had burglarized a home and the burglary was such a traumatic event for the victim that she was under doctor's care. *State v. Heyn*, 155 Wis.2d 621, 625, 456 N.W.2d 157 (1990). The victim stated that she had installed a burglar alarm as a direct result of Heyn's break-in. *Id.*

As a condition of probation the trial court ordered Heyn to reimburse the victim $4,000 for this burglar alarm. *Id.* at 625. Heyn argued on appeal that the circuit court could not order this payment under the restitution statute, then § 973.09(1)(b), Stats. *Id.* at 626. In response, the state maintained that the order was nevertheless proper under § 973.09(1)(a), Stats., the provision that then allowed the circuit court to impose conditions of probation. *Id.* at 629.

In deciding the case the supreme court leaned on subsection (1)(a), the condition-of-probation provision, and upheld the lower court's order. *Id.* at 629-30. In doing so, however, the court said:

> [E]ven if requiring Heyn to pay $4,000 to the [victim] for the cost of the installation of the burglar alarm … is not victim restitution under sec. 973.09(1)(b), the requirement may nevertheless be upheld if it is a reasonable and appropriate condition of probation under sec. 973.09(1)(a).

Id. at 629.

Heyn was decided under a completely different statute than the one that governs Steppke's case. *Heyn* was based on the 1985-86 version of § 973.09. In 1987 the legislature enacted the current, comprehensive restitution statute, § 973.20. 1987 Wis. Act. 398. In doing so, it also removed the section (1)(a) language the *Heyn* court relied on to sustain the $4,000 order. *Id.*

But the importance of *Heyn* is that the supreme court found a burglar alarm an inappropriate item of restitution. Unfortunately the majority never said why. The dissent said the $4,000 had all the attributes of restitution, which they plainly saw as unauthorized under the statute at the time. *Id.* at 631. Further, the dissenters said the ordinary meaning of "restitution" is to make a restoration of something to its rightful owner, reminding us that if the defendant in *Heyn* did not take or destroy the victim's burglary alarm then logically the defendant should not be made to restore it, *i.e.,* make restitution. *Id.*

Heyn is an important security system restitution case insofar as it is the only one decided by the supreme court. The others that have come after *Heyn* are all court of appeals decisions. Unfortunately, but for two of them, none of them even mention the *Heyn* decision which determined that security systems were not proper items of restitution.

The next case that dealt with this issue is the *Behnke* case decided in 1996. The issue in *Behnke* was whether a dead bolt lock constituted "special damages" under the new comprehensive restitution statute. *State v. Behnke*, 203 Wis.2d 43, 60, 553 N.W.2d 265 (Ct. App. 1996). The victim testified that she bought the lock after Behnke assaulted her because she was "afraid." *Id.*

In deciding the issue this Court first acknowledged that the "special damage" limitation within the restitution statute restrained it from assessing damages intended to generally compensate a victim for pain and suffering or anguish, injuries frequently experienced by crime victims. *Id.* Of course, making the defendant pay for a lock because the victim felt "afraid" would be compensating the victim for her general damages, nothing more; nothing less.

Nevertheless, the *Behnke* court used its new, broad definition to convert the lock to special damages.

> While the trial court may not assess these "general damages" as part of a restitution award, any specific expenditure by the victim paid out because of the crime, a "special damage," is appropriate. Since there was proof of causation for assessing this "special damage" we uphold it.

Id. at 61.

In 2002 we have the *Johnson* case. In this case, 17-year old Johnson forced two younger girls into a car and for several hours harassed and mistreated them before releasing them. *State v. Johnson*, 2002 WI App 166, ¶2, 256 Wis.2d 871, 649 N.W.2d 284. Ultimately, Johnson was convicted and ordered to pay restitution to one of the girls for a $1,005 security system for her house. *Id.* ¶3. At the restitution hearing the victim testified that she feared Johnson, continued to be afraid of him, and that she had lost her sense of security. *Id.* ¶21. Her stepfather testified that he installed the home security system to help her feel more secure. *Id.* Ultimately, the trial court ordered Johnson to make restitution for the security system in the amount claimed. *Id.* ¶6.

Johnson appealed the restitution determination, but this Court, citing the broad definition from *Behnke*, upheld the order. *Id.* ¶21.

In 2010 we had *Piotter*. In this case Piotter pled guilty to unlawful entry into a locked building, a condominium. *State v. Piotter*, No. 2009AP2005, unpublished slip op., ¶1 (WI App Jan. 26, 2010). The circuit court ordered him to make restitution to the condominium for a $1,800 upgrade to its locking system. *Id.* ¶2. On appeal, Piotter argued that he had done nothing to break the condominium's old system and, thus, should not be required to pay for a new upgrade. *Id.* Citing *Johnson* and the broad definition, however, this Court affirmed the restitution order.

In 2012 we had the *Fries* case. In *Fries*, the defendant, while armed, robbed a convenience store. *State v. Fries*, 2011AP517, unpublished slip op., ¶1 (WI App Dec. 27, 2012). Conviction followed. *Id.* As part of his sentence, the circuit court ordered Fries to pay restitution to the convenience store owner for an $8,700 upgrade to the store's security system. *Id.* Fries appealed this determination contending that the security system upgrade was not "special damages." *Id.* ¶4.

Insofar as this Court acknowledged that the store owner installed the upgrade for no reason other than to reduce employee anxiety and to make his employees feel safe, *id.* ¶9, it nonetheless affirmed the lower court's restitution award. In doing so it relied on the broad definition from *Behnke* and *Johnson*. *Id.*

Finally, this year, we get the *Ezrow* case which mirrors the decisions in the other security system cases. In the case, Ezrow was convicted of stealing from his employer. *State v. Ezrow*, No. 2016AP1611, unpublished slip op., ¶1 (WI App

May 25, 2017). The trial court ordered him to pay his employer $2,150 in restitution to cover the employer's cost of moving and installing new security cameras. *Id.* ¶3. Ezrow appealed this decision arguing that he did no damage to the employer's security system and, therefore, these costs were not "special damages." *Id.* ¶4. But following a familiar pattern, this Court, relying on *Behnke* and *Johnson* and the broad definition, once again affirmed the trial court's award. *Id.* ¶¶7 & 10.

What this survey of cases illustrates is that, but for the *Heyn* case, which was decided before *Behnke*, the rest of the security system cases rely solely on the flawed *Behnke* definition of "special damages" to order defendants to make restitution for security systems and system upgrades. None of the cases discuss *Heyn* in any meaningful way, even though *Heyn*, the leading security system case, held that security systems are not a proper item of restitution.

Nor should they be. In none of these cases did the defendant do any damage to the victim's security system. In none of the cases did any of the victims suffer a pecuniary loss of their systems. At best, the victims lost their sense of security which left them feeling anguished, distressed and less safe than before the robbery, break-in, or whatever the case may be. But these feelings are general damages, not special damages. In each case, ordering defendants to pay the victims so that the victims feel safe is paying them general damages contrary to statute.

III. The restitution court not only must find "special damages," but must determine that the victim could recover these same damages in a comparable civil action.

The restitution statute not only limits awards to "special damages," but limits them further to those that could be recovered in a civil action against the defendant for his or her conduct in the commission of a crime considered at sentencing. Wis. Stats. § 973.20(5)(a). This important limitation has been wholesalely overlooked in the security system cases.

Take the *Ezrow* case for example. There the criminal charge arose from Ezrow's theft of money from his employer's safe. *State v. Ezrow*, No. 2016AP 1611, unpublished slip op., ¶2 (WI App May 25, 2017. A comparable civil claim would be an action for conversion. Comment, WIS JI-CIVIL 2200 – Conversion (*every theft is a conversion*). However, in an action for conversion the plaintiff may only recover the value of the property at the time of the conversion, plus interest to the date of trial. *Traeger v. Sperberg*, 256 Wis.2d 330, 333, 41 N.W2d 214 (1950). He cannot recover general damages to compensate him for his lost sense of security. The rule prohibits such an award. *Id.*

In *Ezrow*, although the court correctly quoted the statute, including the provision that limits restitution to what can be recovered in a civil action, the court's opinion contains no discussion of this other statutory limitation. *Ezrow* ¶6. Consequently, the *Ezrow* court sustained a restitution order that awarded the victim $2,150 for the cost of installing new security cameras, or costs a plaintiff in a civil action would never be able to recover.

We find the same result in the *Fries* case. In this case Fries was convicted of armed robbery of a gas station. *State v. Fries*, No. 2011AP517, unpublished slip op., ¶2 (WI App Dec. 27, 2012). Like the crime of theft in the *Ezrow* case, a civil action for robbery would be conversion. *State v. Johnson*, 207

Wis.2d 239, 247, 558 N.W.2d 375 (1997) (*robbery is distinguished from theft only in that robbery contains the element of violence*). The same recovery rule would apply meaning the victim of a robbery could only recover the value of the property taken plus interest.

But like the *Ezrow* court, the *Fries* court never analyzed the restitution award for compliance with this second statutory limitation either. Consequently, it upheld the circuit court's award of restitution for a new security system just like it did in the *Ezrow* case. *Fries*, ¶1.

We see the same result in the *Piotter* case. Piotter was convicted of unlawful entry into a locked building. *State v. Piotter*, No. 2009AP2005, unpublished slip op., ¶1 (WI App Jan. 26, 2010). A comparable civil action would be an action for trespass. *State v. Mitchell*, 169 Wis.2d 153, 167 n.11, 485 N.W.2d 807 (1992) *rev'd on other grounds*, *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (*breaking in is simply breaking and entering or trespass*). In an action for trespass the plaintiff can recover nominal, compensatory and consequential damages, but can recover nothing to install locks and a burglar alarm. *Gavcus v. Potter*, 808 F.2d 596, 598 (1986) (*The installation of locks and a burglar alarm … was not recoverable*).

Insofar as this seems to be the rule governing permissible recoveries in actions for trespass, the *Piotter* court, like the *Fries* and the *Ezrow* courts, never discussed this limitation either.

The *Johnson* case is a bit different. In this case the defendant was convicted of the crime of false imprisonment. *State v. Johnson*, 2002 WI App 166, ¶2, 256 Wis.2d 871, 649 N.W.2d 284. A comparable civil action would be identical to the criminal action. *Herbst v. Wuennenberg*, 83 Wis.2d 768, 774,

266 N.W.2d 391 (1978) (*the tort of false imprisonment protects the personal interest in freedom from restraint of movement*). In a civil action for false imprisonment the plaintiff could recover actual and compensatory damages, including general damages for mental suffering, fright, and distress. Jay E. Grenig, 14 Wis. Prac., Elements of an Action § 6:4 (2017-17). Thus, unlike the *Fries, Ezrow* and *Piotter* courts, the *Johnson* court at least had some grounds to award the victim in the *Johnson* case $1,000 for a security system so the victim would feel safe. *Johnson*, 2002 WI App 166, ¶3. But of course, the restitution statute specifically prohibits awarding general damages, so awarding general damages to restore the victim's lost sense of security still would be prohibited. *Id.* ¶21.

Finally we have the *Behnke* case. In *Behnke* the defendant was convicted of false imprisonment, battery and sexual assault. *State v. Behnke*, 203 Wis.2d 43, 48, 553 N.W.2d 265 (Ct.App. 1996). Suffice it to say that the victim would have been entitled to recover the same type of damages as the victim in the *Johnson* case – actual, compensatory and general damages, suggesting too that awarding the victim $20.98 to buy a new deadbolt lock so she would feel less afraid was appropriate. *Id.* at 57. But again, these would be general damages specifically prohibited by the restitution statute.

The feature that ties all of these security system cases together is the fact that none of them contain a discussion or an analysis of the second limitation on restitution, namely the provision that limits recoveries to what a victim could recover in a comparable civil action. This important provision has just been overlooked resulting in restitution awards for security systems that the victims could not recover in a comparable civil action.

IV. Applying the proper law to the facts of Steppke's case shows the circuit court erred in ordering restitution.

As stated above, the circuit court initially ruled that Steppke should pay $19,000 in restitution as a condition of probation -- $3,000 for product and $16,000 for the security system upgrades. The court relied on the *Heyn* case for authority to make such an order. When Steppke called to the court's attention that *Heyn* was no longer good authority, in light of the comprehensive restitution statute adopted after *Heyn*, the court agreed, reversed its decision, and granted Steppke a hearing on the issue of restitution.

A restitution hearing was held at which time the victim testified as to his losses and the reasons why he felt he needed an enhanced security system and a key fob system. In his words, all of his security improvements were a direct result of being victimized. (R64:17). At the close of evidence the court issued an oral ruling. It found that a nexus existed between Steppke's crime and the clinic's need to upgrade its security. (R64:40). It found that Steppke's action was a substantial factor in causing the clinic to upgrade its system. (R64:41). And for these two reasons it ordered Steppke to pay the clinic $16,000 in restitution to cover the cost of the camera system upgrade and the key fob system. (R64:41).

Significantly, in issuing its decision the court did not once mention the word "special damages," nor did it mention that, by statute, its restitution award was limited to the damages the clinic could recover in a civil action. Insofar as "nexus" and "substantial factor" are necessary components of a restitution analysis, they are only components of the first statutory limitation. *State v. Fries*, No. 2011AP517, unpublished slip op., ¶7 (WI App Dec. 27, 2012)(*the statute....limits a court's authority to order restitution in two ways*).

The first limitation looks to whether the defendant caused the victim's damages (a sufficient nexus) and whether defendant's conduct brought about the injury (substantial factor). *Id.*

But the second limitation, the one the circuit court overlooked in Steppke's case, asks whether the victim's damages are "special damages" and whether the victim could recover them in a civil action. *Id.* Under the facts of Steppke's case, of course, the only special damage the clinic suffered was the loss of the pet collars, which Steppke readily agreed to pay for. Steppke did not do any damage to the clinic's security system and for this reason the clinic did not suffer any pecuniary loss of its system. In other words, the clinic suffered no "special damages" in this regard.

Similarly, and as discussed above, the civil counterpart to criminal theft is a cause of action for conversion, whereby damages are limited to the value of the property at the time of the conversion plus interest to the date of trial. *Traeger v. Sperberg*, 256 Wis.2d 330, 333, 41 N.W.2d 214 (1950). Given that Steppke did not convert the clinic's security system to her own use, meaning the clinic suffered no loss, legally the clinic could recover nothing in the way of a new system.

In summary, we can say this about Steppke's case. First, the circuit court's restitution analysis was incomplete. Insofar as it found a sufficient nexus between Steppke's conduct and the victim's need for a security upgrade, and insofar as it found Steppke's conduct to be a substantial factor in the victim's need, it stopped there. It did not go on to analyze whether the victim's key fob system or its camera upgrade were "special damages," and if so, whether V.V. could recover the cost of both in a comparable civil action.

Had it completed its analysis the answer to the first inquiry would be "no," because V.V. never suffered the pecuniary loss of its security system because of Steppke's conduct. Steppke did not damage the clinic's security system. In fact, the clinic's security system worked just fine as evidenced by the fact that it caught Steppke on film committing the theft. (R3:2). Because V.V. never suffered the loss of its security system it suffered no special damages in this regard.

As to the second inquiry – whether V.V. could legally recover the cost of an upgraded security system in an ordinary civil action – the answer also is "no." A comparable civil action would be an action for conversion where the injured party could recover only the value of the property converted, plus interest. Because Steppke never converted the clinic's security system to her own use, V.V. could recover nothing in a similar civil action.

Nor would it do to simply say that the clinic's security system upgrades were readily ascertainable pecuniary expenditures the clinic paid out because of Steppke's crime and, therefore, under *Behnke* and its progeny the systems are "special damages." As Steppke has demonstrated, the *Behnke* definition is incorrect. Restitution law is designed to compensate the victim for the victim's losses and make the victim whole, not net the victim a windfall.

In short, the circuit court's restitution analysis was incomplete and for this reason it issued the restitution award in error. The award cannot stand.

CONCLUSION

In summary, the restitution statute permits the circuit courts to order restitution only for "special damages." Special damages are not any readily ascertainable pecuniary expenditure paid out because of the crime. To the contrary, special damages are the victim's actual pecuniary loss due to the crime committed. In Steppke's case the victim, V.V., did not suffer any actual financial loss of its security system because of Steppke's conduct. Therefore, pursuant to the restitution statute the circuit court erred in ordering her to pay $16,000 in restitution for those systems. For these reasons the circuit court's $16,000 restitution order must be reversed.

Dated this _____ day of September 2017.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 6,070 words.

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Dated this _____ day of September 2017.

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