COURT OF APPEALS
DECISION
DATED AND RELEASED

OCTOBER 4, 1995

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

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 94-1615
94-1616

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

CITY OF TWO RIVERS,

Plaintiff-Respondent,

v.

THOMAS J. LAVEY, d/b/a
LAKELAND OUTDOOR ADVERTISING,

Defendant-Appellant.

APPEALS from a judgment of the circuit court for Manitowoc County: ALLAN J. DEEHR, Judge. *Reversed.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

ANDERSON, P.J. Thomas J. Lavey appeals from a judgment of the trial court wherein the court denied Lavey's motions after verdict. Because we conclude that there was insufficient evidence to support the jury's verdict, we reverse.

Lavey was cited for violating the City of Two Rivers' sign ordinance. The ordinance regulates all billboards within 100 feet of a federal aid primary highway and 300 feet of residential property. A sign within these boundaries can only be "on-premise" advertising, defined by the ordinance as "[a]ny sign identifying or advertising a business, person, activity, goods, products or services located on a premises where the sign is installed and maintained." TWO RIVERS, WIS., MUNICIPAL ORDINANCE ch. 3, § 10-3-2(a)(20) (1990). The ordinance's purpose is stated in the preamble as to promote traffic safety and the aesthetics of the community. ***Id.,*** § 10-3-1(a).

Lavey's company, Lakeland Outdoor Advertising, maintains a billboard in an area the ordinance restricts to "on-premise" advertising. Lakeland Outdoor Advertising posted a billboard with the words "Outdoor. It's Not a Medium, It's a Large" superimposed over a blown-up color photo of an orange, with the Sunkist logo visible. Lavey testified that the sign was part of an Outdoor Advertising Association of America campaign to promote the medium of outdoor advertising. When he ordered the billboard for his company, he saw a draft poster with black and white copy of the words, but without the picture of the orange or the Sunkist logo. The sign was posted without Lavey's knowledge of the background picture of the orange.

The advertising copy was not preapproved by the City. The zoning administrator testified that the words and pictures on outdoor signs change frequently and a permit or approval is not required to change the advertising copy of outdoor signs. The zoning administrator cited Lavey for

illegally advertising an off-premise commercial item—Sunkist oranges.

While the ordinance makes a distinction between "on-premise" and "off-premise" signs, the zoning administrator testified that "on-premise" signs could contain "generic, noncommercial messages" even if the advertising copy referred to "off-premise" activities. The ordinance does not define noncommercial messages.

At trial, the jury found that the billboard was "off-premise" commercial advertising of oranges and not "on-premise" noncommercial advertising of outdoor advertising as Lavey contended. The court imposed a $750 forfeiture for each count, plus costs. Lavey appeals.[1]

Lavey raised the sufficiency of the evidence argument before the trial court in a motion after verdict. On appeal, he does not frame the issues to include the issue of sufficiency of the evidence, although the City addresses it in

[1] We certified this case to the Wisconsin Supreme Court, which declined to accept jurisdiction of the appeal. The court, however, stated:

> Although it is not the normal practice of this court to furnish reasons for certification refusals, we deem it advisable in the interest of clarity and judicial economy to do so in this case. Assuming certified issues are theoretically suitable for disposition by this court, certification is nonetheless not appropriate if those issues are not presented by the facts of the case at hand. In this instance, the certified issues might be moot if the jury verdict, essentially finding that the subject sign was promoting oranges rather than outdoor advertising, is not supported by the credible evidence. That threshold issue is presented by the parties' court of appeals briefs and is properly an issue for disposition by that court.

its appellate brief. We, however, are not bound by the issues as framed by the parties. *See* ***Saenz v. Murphy***, 162 Wis.2d 54, 57 n.2, 469 N.W.2d 611, 612 (1991). Moreover, the issue of sufficiency of the evidence was discussed extensively below.

When reviewing whether there is sufficient evidence to sustain a jury verdict, we must review the evidence in a light most favorable to the verdict. ***Nieuwendorp v. American Family Ins. Co.***, 191 Wis.2d 463, 473, 529 N.W.2d 594, 598 (1995). We will sustain a jury's award if there is any credible evidence that supports the verdict, sufficient to remove the question from the realm of conjecture. *See* ***id.*** When more than one inference may be drawn from the evidence presented at trial, we are bound to accept the inference drawn by the jury. ***Id.*** This standard is even more appropriate when the jury's verdict has the approval of the circuit court. ***Id.***

The City contends that "[t]he jury's determination that a billboard displaying a huge Sunkist orange constituted an advertisement for Sunkist oranges was an entirely reasonable inference." The City further states that it is undisputed that no oranges were sold on the premises on which the billboard was situated and the jury's verdict that the sign constituted an off-premise sign was reasonable and based upon credible evidence.

We disagree. This court has held, "[t]o advertise a product or service which is for sale to the public, it is necessary to draw the potential consumer's attention to it by presenting its good qualities and benefits, creating

a desire to possess it." ***CUNA Mutual Ins. Soc'y v. DOR,*** 120 Wis.2d 445, 450, 355 N.W.2d 541, 544 (Ct. App. 1984). To apply this definition the billboard must be viewed and read in context. It was not just a blown-up color photograph of an orange with the Sunkist logo. Conspicuously superimposed over the photograph of the orange was the advertising copy: "Outdoor. It's Not a Medium, It's a Large." We find no credible evidence in the record to support the verdict that Lavey's billboard contained off-premise advertising of Sunkist oranges. There is no credible evidence that the billboard presented the good qualities and benefits of Sunkist oranges; a jury could not reasonably conclude that Lavey's billboard created a desire in the consuming public to purchase Sunkist oranges.

Marvin Now, a building and zoning administrator responsible for the enforcement of sign ordinances, was the City's only witness at trial. He testified that he was confused as to the sign's intent and determined that the sign must be advertising oranges. Mr. Now ascertained that there were no oranges available for sale to the public on the premises.

Lavey, however, testified that he did not intend to advertise on behalf of Sunkist oranges:

Q And in your own mind what was the poster advertising?
A What you had indicated on one of your exhibits, Outdoor, It's Not a Medium, It's a Large.
Q Did it have anything to do with Sunkist oranges in your opinion?
A No, it did not.
Q Were there other backgrounds that you later became aware of on this advertising poster?

A We became aware later that there were backgrounds on these posters, actually I did when I traveled to a different market and I saw a Eskima [sic] Pie for one of those backgrounds. I did not even see the one that we had.
Q When you had your bill poster put this poster panel up, did you think that you were advertising Sunkist oranges?
A No, I new [sic] they weren't advertising Sunkist oranges.

Additionally, Lavey testified that he was not sure whether the national group, Outdoor Advertising Association of America, received compensation from Sunkist:

Q Do you know when the billboard was put up that says Outdoor, It's Not a Medium, It's a Large, with the Sunkist orange in the background, did your national group get remuneration for that orange?
A No.
Q Are you sure of that?
A I have no idea -- my national group gets remuneration? In other words were they paid to use that orange?
Q Yes.
A I have no idea, honestly have no idea.

The City presented insufficient evidence for the jury to find that Lavey was in fact advertising oranges. The court instructed the jury as follows:

> In order to find that Mr. Lavey violated the ordinance, the city of Two Rivers must prove … the sign contained off-premises advertising of Sunkist oranges.
> The term off-premises sign is defined by the ordinance. An off-premises sign is a sign which advertises goods, products or facilities or services not necessarily on

> the premises where the sign is located or directs persons to a different location from where the sign is located.

The court further stated that the jury must be satisfied or convinced to a reasonable certainty by evidence that is clear, satisfactory and convincing that Lavey is guilty. We conclude that the City did not present clear, satisfactory and convincing evidence to prove that the sign contained off-premise advertising of Sunkist oranges.

Because we conclude that there is insufficient evidence to support the jury's verdict, we do not reach Lavey's appellate issues.

By the Court.—Judgment reversed.

Not recommended for publication in the official reports.

Nos. 94-1615(D)
94-1616(D)

NETTESHEIM, J. (*dissenting*). I contend that the evidence supports the jury's determination that Lavey's sign was not permissible "on-premise" advertising. Therefore, I dissent.

The ordinance requires that on-premise advertising may only promote the business or activity conducted on the site of the advertising. The sign in question prominently displayed a large orange with the Sunkist logo in conjunction with the words "Outdoor. It's Not a Medium, It's a Large." No activity regarding Sunkist oranges is conducted on the site of this advertising. Lavey's business activity is outdoor advertising. He is not engaged in any business activity involving the production or sale of Sunkist oranges.

One clear and unmistakable message conveyed by Lavey's sign is that it advertises for Sunkist oranges. This is precisely what the ordinance prohibits. The majority seems to conclude that any further, and arguably more subtle, message that the sign conveys in support of outdoor advertising constitutes a defense to the ordinance and thus the evidence is insufficient. The majority is wrong. The ordinance bars off-site advertising. Thus, a sign which promotes both on-site and off-site activity is still a violation of the ordinance. At a minimum, a jury question existed.

We are to uphold a jury determination if there is any credible evidence which supports the verdict. ***Nieuwendorp v. American Family Ins. Co.***, 191 Wis.2d 463, 473, 529 N.W.2d 594, 598 (1995). The evidence clearly shows that Lavey's sign promoted the off-site activities of Sunkist oranges.

I respectfully dissent. I would uphold the jury's verdict and move to the further appellate issues raised by Lavey.