

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 4, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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.

No. 98-2920

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

KEVIN GILMORE,

PLAINTIFF-APPELLANT,

V.

BRUCE FISCHER,

DEFENDANT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Affirmed.*

ROGGENSACK, J.¹ Kevin Gilmore appeals from an order of the circuit court dismissing his assault claim against Bruce Fischer because Gilmore failed to establish that Fischer intended to cause injury to Gilmore when he drove his fully loaded truck into the oncoming lane of traffic, forcing Gilmore's vehicle

¹ This appeal is decided by one judge pursuant to § 752.31(2)(a), STATS.

off the highway. Gilmore also appeals the amount of punitive damages awarded for intentional infliction of emotional distress, the claim upon which he prevailed at trial. We conclude that the circuit court properly dismissed Gilmore's assault claim when the evidence proved only that Fischer may have intended to scare Gilmore, but it did not prove he intended to harm him. We also affirm the circuit court's punitive damage award for intentional infliction of emotional distress because Fischer did not cross-appeal.

BACKGROUND

On July 12, 1997, Gilmore and Christopher Beamon were traveling southbound on Highway 61 between Boscobel and Fennimore. Gilmore was driving and Beamon was his passenger. Fischer, who recently had been fired by Gilmore, was traveling northbound on the same highway in a fully loaded log truck. As Gilmore's vehicle approached, Fischer swerved into the oncoming lane of traffic, forcing Gilmore off the road. Although there was no contact between the vehicles, Gilmore and Beamon were afraid that the truck would either collide with them or cause other vehicles to collide.

On June 5, 1998, Gilmore filed a complaint in small claims court alleging that as a result of Fischer's actions, he was placed "in great fear and at serious risk of injury and even death." On June 29, 1998, the court consolidated Gilmore's case with a similar case that Beamon had filed, suggested that the plaintiffs consult a lawyer, and set a trial date. On August 24, 1998, one day before the trial was scheduled to begin, the plaintiffs filed a memorandum in support of claims for assault.

On August 25, 1998, a trial to the court was held. After the plaintiffs presented their case, Fischer made a motion to dismiss for failure to prove a cause

of action for intentional infliction of emotional distress. The plaintiffs responded that they were not claiming intentional infliction of emotional distress, rather they were asserting assault claims. The court dismissed the plaintiffs' assault claims, but concluded that it would rule on causes of action for intentional infliction of emotional distress.

The court awarded Beamon compensatory damages of \$99 and Gilmore no compensatory damages. It also awarded Beamon and Gilmore punitive damages of \$200 each. Beamon did not pursue a joint appeal. However, Gilmore appealed the court's dismissal of his assault claim; its failure to award punitive damages for that claim, and the amount of punitive damages awarded for the intentional infliction of emotional distress claim. Fischer did not cross-appeal.

DISCUSSION

Standard of Review.

The determination that a claim should be dismissed based upon insufficient proof is a question of law. *Seraphine v. Hardiman*, 44 Wis.2d 60, 65, 170 N.W.2d 739, 742 (1969). However, the circuit court's award of the amount of damages is a discretionary determination which we will uphold unless the court erroneously exercised its discretion. See *Brain v. Mann*, 129 Wis.2d 447, 455, 385 N.W.2d 227, 231 (1986). When we review a discretionary decision, we examine the record to determine if the circuit court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. *State v. Keith*, 216 Wis.2d 61, 69, 573 N.W.2d 888, 892-93 (Ct. App. 1997).

Assault.

An assault is an intentional attempt, by force or violence, to physically harm another. *Degenhardt v. Heller*, 93 Wis. 662, 664, 68 N.W. 411, 412 (1896). “[W]here an assault is carried out to completion and a battery committed, a plaintiff is not required to prove hostile intent or desire to do harm.” *McCluskey v. Steinhorst*, 45 Wis.2d 350, 357, 173 N.W.2d 148, 152 (1970). In cases of assault where no battery has occurred, one of the elements of the claim which a plaintiff must prove is the present intent to cause harm. *Degenhardt*, 93 Wis. at 664, 68 N.W. at 412; *see also McCluskey*, 45 Wis.2d at 357, 173 N.W.2d at 152; *Brabazon v. Joannes Bros. Co.*, 231 Wis. 426, 436, 286 N.W. 21, 26 (1939); *Raefeldt v. Koenig*, 152 Wis. 459, 461-62, 140 N.W. 56, 57 (1913); *Donner v. Graap*, 134 Wis. 523, 527, 115 N.W. 125, 127 (1908). Evidence of threats, or of an intent to frighten, do not establish the element of intent to harm for the purpose of proving assault. *Degenhardt*, 93 Wis. at 664, 68 N.W. at 412; *see also Meyer v. Briggs*, 18 Wis.2d 628, 630-31, 119 N.W.2d 354, 355-56 (1963).

For example, in *Degenhardt*, the defendant discharged a gun in proximity to the plaintiff, but without aiming the gun at him. The supreme court concluded that the plaintiff’s assault claim was not supported by sufficient evidence because the defendant did not intend to cause bodily harm to the plaintiff, he merely intended to frighten him by threats and discharging the gun. *Degenhardt*, 93 Wis. at 663-64, 68 N.W. at 412.

Here, the circuit court found, as a fact, that Fischer, like the defendant in *Degenhardt*, merely intended to frighten Gilmore and Beamon, not to

cause them bodily harm.² We will not overturn a circuit court's finding of fact unless it is clearly erroneous. Section 805.17(2), STATS.; *Noll v. Dimiceli's, Inc.*, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983). There is evidence in the record which supports the circuit court's finding. Because Gilmore failed to establish that Fischer intended to cause injury, a necessary element of assault, the circuit court properly dismissed Gilmore's cause of action for assault.³

Punitive Damages.

Gilmore argues that the circuit court erred by not awarding a greater amount of punitive damages for his claim of intentional infliction of emotional distress. In Wisconsin, punitive damages cannot be awarded in the absence of an award of compensatory damages. *Weiss v. United Fire & Cas. Co.*, 197 Wis.2d 365, 393, 541 N.W.2d 753, 763 (1995). Gilmore was awarded no compensatory damages. However, because Fischer did not cross-appeal the award of punitive damages to Gilmore, we do not disturb the circuit court's decision in that regard. Therefore, we conclude that given the absence of an award of compensatory damages to Gilmore, his claim of error asserting the circuit court did not award enough punitive damages has no merit. *Id.*

² Gilmore argues that intent to cause bodily harm can be inferred, as a matter of law, because Fischer's conduct was substantially certain to cause injury. *Gouger v. Hardtke*, 167 Wis.2d 504, 512-14, 482 N.W.2d 84, 88-89 (1992). This argument does not apply here because we have concluded that the circuit court's factual finding that Fischer merely intended to frighten Gilmore and Beamon was not clearly erroneous. See § 805.17(2), STATS.

³ Because we conclude that the plaintiff did not establish a cause of action for assault, we do not reach the question of damages for that claim.

CONCLUSION

The circuit court properly dismissed the assault claim because Gilmore did not provide proof sufficient for the circuit court to find that Fischer intended to cause injury when he swerved into Gilmore's lane of traffic, forcing Gilmore off the highway. Further, we do not disturb the circuit court's punitive damage award for intentional infliction of emotional distress.

By the Court.—Judgment and order affirmed.

This opinion will not be published in the official reports. *See* RULE 809.23(1)(b)4., STATS.

