

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 11, 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. 98-3422-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

DANIEL GAGE,

PLAINTIFF-APPELLANT,

v.

JOHN HAGEN,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: THOMAS P. DONEGAN, Judge. *Reversed and cause remanded.*

SCHUDSON, J.¹ Daniel Gage appeals from the small claims court ruling granting John Hagen's motion for summary judgment and dismissing his action against Hagen. Gage argues that the court erred in concluding that his

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

claim for punitive damages was barred under *Tucker v. Marcus*, 142 Wis.2d 425, 418 N.W.2d 818 (1988). Gage is correct and, therefore, this court reverses.

The facts relevant to resolution of this appeal are undisputed. Gage filed a small claims complaint, alleging that on August 28, 1995, Hagen, an uninsured driver, drove “recklessly and wantonly . . . in an intoxicated state,” and caused a collision resulting in injury. Gage further alleged that, from the insurer of the vehicle he operated during the collision, he recovered \$35,923.19 in “compensatory damages only,” and that after receiving that payment, he “assigned his rights” to the insurer. Gage claimed that Hagen was liable to him “for nominal damages of \$1 and punitive damages of \$4,999.”

Hagen moved for summary judgment arguing that “the law in Wisconsin is that one cannot sue for punitive damages if only nominal compensatory damages are found” and, further, that because Gage “assigned all of his rights to recover any damages he incurred in the accident (up to \$35,923.19)” to the insurer following the settlement, “[h]e has no more claim to compensatory damages left, and cannot sue here for even the \$1.00 asked for in the complaint.” The small claims court granted Hagen’s motion for summary judgment, concluding that *Tucker* controlled, and that the exception to *Tucker* articulated in *Jacque v. Steenberg Homes, Inc.*, 209 Wis.2d 605, 563 N.W.2d 154 (1997), on which Gage relied, did not encompass his claim.

Summary judgment standards and methodology have been stated in countless cases and need not be repeated here. See *Caulfield v. Caulfield*, 183 Wis.2d 83, 91, 515 N.W.2d 278, 282 (Ct. App. 1994). Our review of a grant of summary judgment is *de novo*. See *Green Spring Farms v. Kersten*, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). In the instant case, at the summary

judgment stage, the circuit court's determination was purely a legal one, based on its reading of the case law.

In *Tucker*, the supreme court, in a four-to-three decision, stated:

We hold today that punitive damages are not available where there has been no "award" of actual damages.... An "award" represents a remedy recoverable in accordance with an order for judgment. It is not enough that actual damages may have been "suffered" or "sustained" in order for punitive damages to be awarded. This holding is firmly rooted in long-standing principles of Wisconsin law.

Tucker, 142 Wis.2d at 439, 418 N.W.2d at 823 (footnote omitted). Elsewhere in the opinion, however, the supreme court more specifically confined its conclusion, holding "that punitive damages may not be recovered where actual damages are unavailable due to the operation of section 895.045, Stats. [regarding recovery under the doctrine of contributory negligence]." *Id.* at 454, 418 N.W.2d at 829.

At least two distinguishing factors render considerable doubt that *Tucker* controls the instant case. First, unlike *Tucker*, the instant case does not involve any issue under § 895.045, STATS. Second, in *Tucker*, as the supreme court acknowledged, "there was neither voluntary payment by means of settlement nor a right to receive compensatory damages under section 895.045," *Tucker*, 142 Wis.2d at 449, 418 N.W.2d at 827; in the instant case, however, Gage did receive compensation by settlement, albeit from the insurer of the vehicle he was driving, not from Hagen.

Thus, although Gage provides sparse argument challenging the applicability of *Tucker*, this court concludes that *Tucker* does not control. Gage suggests that it is necessary to apply *Jacque* and, further, that *Jacque* supports his

action for nominal and punitive damages. Once again, however, this court gains less than certain guidance from the case law.

In *Jacque*, the supreme court considered, *inter alia*, “whether an award of nominal damages for intentional trespass to land may support a punitive damage award.” *Jacque*, 209 Wis.2d at 613, 563 N.W.2d at 158. The supreme court, first “consider[ing] the individual and societal interests implicated when an intentional trespass to land occurs,” *id.* at 614, 563 N.W.2d at 158, concluded that, under the egregious circumstances of that case, even an award of only \$1 nominal damages could support an award of \$100,000 punitive damages. *Id.* at 626, 563 N.W.2d at 163.

Gage argues that societal concerns just as strongly support the availability of punitive damages for intoxicated driving. The small claims court, however, correctly observed that the supreme court had not yet “carve[d] out some exception” for intoxicated driving, as it had for trespass to land. Indeed, while one might assume that, given the extreme dangers of intoxicated driving, the supreme court would do so, a careful reading of *Jacque* suggests otherwise.

In *Jacque*, the supreme court concentrated very specifically and thoroughly on the special nature of the harm caused by trespass to land—harm quite distinguishable from that resulting from intoxicated driving. See *Jacque*, 209 Wis.2d at 615-22, 563 N.W.2d at 159-61. The supreme court also focused on the societal response to trespass to land, commenting that “[p]unitive damages have the effect of bringing to punishment types of conduct that, though oppressive and hurtful to the individual, *almost invariably go unpunished by the public prosecutor.*” *Id.* at 620, 563 N.W.2d at 161 (emphasis added). Thus, the supreme court clearly was influenced by the fact that despite the significant harm it causes,

trespass to land generally is not prosecuted and, when it is (as it was in that case), the penalty is modest. *See id.* By contrast, of course, intoxicated driving “almost invariably” is prosecuted and, sometimes, the penalties are substantial. Thus, whether measured by the nature of the harm or by the nature of society’s response, it is anything but clear that the supreme court would extend the *Jacque* exception to the instant case.

If *Jacque* is *inapplicable*, however, it is inapplicable only as an *exception* to *Tucker*. But *Tucker* does not seem to apply to the instant case at all, given that its holding is anchored in situations “where there has been no ‘award’ of actual damages,” *Tucker*, 142 Wis.2d at 439, 418 N.W.2d at 823, or “where actual damages are unavailable due to the operation of section 895.045, Stats.” *Id.* at 454, 418 N.W.2d at 829. Here, by contrast, Gage’s compensatory damages were both available and recovered. Thus, *Jacque* remains applicable to the instant case in clarifying that “in the proper case, a \$1 nominal damage award may properly support” a substantial punitive damage award even though “a much larger compensatory award might not.” *See Jacque*, 209 Wis.2d at 629, 563 N.W.2d at 164.

Hagen contends that even nominal damages are no longer available to Gage because he settled his compensatory claim and, therefore, if any additional damages are possible—nominal or punitive—they would be for the insurer to pursue.² Hagen, however, seems to be assuming that nominal damages are under

² In the “Release, Subrogation and Trust Agreement,” Gage and his wife agreed:

The undersigned acknowledge that Travelers Indemnity Company shall be entitled to the extent of the payments hereunder, and is hereby subrogated to all rights of recovery which the undersigned have, may have, or ought to have, to the proceeds of any settlement or judgment that may result from the

(continued)

the umbrella of compensatory damages. They are not. Nominal damages are distinct. “Nominal damages are to be distinguished from compensatory damages on the one hand and from punitive damages on the other, in that they are granted irrespective of harm to the complainant or of a bad state of mind on the part of the defendant.” RESTATEMENT (SECOND) OF TORTS § 907 cmt. a (1977).³

Gage could not have recovered punitive damages *from the insurer* under the uninsured motorist provision of the policy covering the vehicle he was driving. *See Burns v. Milwaukee Mut. Ins. Co.*, 121 Wis.2d 574, 580, 360 N.W.2d 61, 65 (Ct. App. 1984) (“[R]ecover of punitive damages on an uninsured motorist claim is contrary to public policy.”). While Hagen accurately points out that Gage subrogated rights to the insurer pursuant to the settlement, he fails to recognize that Gage did so only “to the extent of the payments” provided by the insurer in compensation “for the bodily injury.” Hagen simply offers nothing to

exercise of any rights of recovery of the undersigned against any person or organization legally responsible for the bodily injury because of which payment herein are made, up to \$35,923.19.

³ *See also* RESTATEMENT (SECOND) OF TORTS § 907 (1977) (“Nominal damages are a trivial sum of money awarded to a litigant who has established a cause of action but has not established that he is entitled to compensatory damages.”); RESTATEMENT (SECOND) OF TORTS § 907 cmt. b (1977) (“Nominal damages … can be awarded … when the plaintiff has not claimed compensatory damages but has sued only to establish a right or to obtain a ruling by a court that the defendant’s conduct was tortious.”); BLACK’S LAW DICTIONARY 392 (6th ed. 1990):

Nominal damages are a trifling sum awarded to a plaintiff in an action, where there is no substantial loss or injury to be compensated, but still the law recognizes a technical invasion of his rights or a breach of the defendant’s duty, or in cases where, although there has been a real injury, the plaintiff’s evidence entirely fails to show its amount.

See also Fletcher v. Eagle River Mem’l Hosp., 150 Wis.2d 145, 155, 441 N.W.2d 297, 302 (Ct. App. 1989) (“Compensatory damages are awarded to make whole an injured party suffering actual damage or loss. Where the only concern is with the vindication of legal rights, nominal damages are appropriate.”) (citation omitted), *rev’d on other grounds*, 156 Wis.2d 165, 456 N.W.2d 788 (1990).

refute Gage's contention that he "recovered only compensatory damages in his uninsured motorist claim," and that his compensatory "award did not cover punitive or nominal damages which remain his right to recover as unassigned." *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (unrefuted arguments deemed admitted).

Therefore, this court concludes that the small claims court erred in granting summary judgment to Hagen and dismissing Gage's action. Accordingly, the case is remanded for further proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded.

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