

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 16, 2007

David R. Schanker
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP2663

Cir. Ct. No. 2005SC459

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STEVEN C. SEIDL,

PLAINTIFF-APPELLANT,

V.

ERIC E. DAVIDSON AND NANCY J. DAVIDSON,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Calumet County:
DONALD A. POPPY, Judge. *Reversed.*

¶1 ANDERSON, J.¹ In this small claims appeal, Steven C. Seidl challenges the trial court's imposition of what it termed "punitive damages." The trial court imposed the damages as punishment for Seidl's behavior that violated an easement agreement that had been incorporated into a court order. Seidl claims that punitive damages were not an available remedy in this case. Seidl further maintains that the punitive damages award cannot stand as a contempt sanction for his violation of the court order. We agree and reverse the portion of the judgment pertaining to the punitive damages or contempt sanction.

¶2 Seidl and Eric E. and Nancy J. Davidson own adjoining properties in Menasha. The Davidsons' parcel is landlocked. They gain access to their property via an easement running across Seidl's property. The parties have a contentious history, which resulted in a 2002 court-approved stipulation and order. The order sets forth the specific terms of the easement and the consequences for violations of those terms. The order states that a violation of certain terms of the agreement

shall be a basis or grounds for disobedience with a Court Order, and shall be Contempt of Court as defined by *Chapter 785 of the Wisconsin Statutes*. This is subject to a Court hearing for determination. Both remedial and punitive sanctions may be imposed upon anyone who is found in Contempt of Court for violation of these paragraphs.

¶3 In 2005, Seidl filed a complaint against the Davidsons alleging that they failed to remit payment for their share of the yearly upkeep expenses. Seidl sought \$766.34 in compensatory damages plus interest and attorney fees. The

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Davidsons filed a counterclaim, alleging that Seidl had violated the terms of the easement and requesting that the court impose remedial and punitive contempt sanctions and award them costs, attorney fees and “such other relief as the Court deems just and equitable.” Following a hearing, the trial court awarded Seidl \$936.00 and the Davidsons \$271.82 in compensatory damages. The court then stated Seidl should pay what it called “punitive damages” in the amount of \$20,000. The court reduced the total amount of damages to the small claims jurisdictional limit of \$5000. Seidl appeals from the punitive portion of the award.

¶4 Whether the trial court intended to characterize the amount imposed as “punitive damages” or as a contempt sanction is open to debate. We, like the parties, address the amount imposed as both punitive damages and as a contempt sanction.² In either event, our review of the \$5000 punishment is de novo. *See Frisch v. Henrichs*, 2006 WI App 64, ¶22, 290 Wis. 2d 739, 713 N.W.2d 139, review granted, 2006 WI 108, 292 Wis. 2d 409, 718 N.W.2d 723 (whether law permits the use of contempt under facts and circumstances of case is a question of law because the procedures and penalties are prescribed by statute); *Loehrke v. Wanta Builders, Inc.*, 151 Wis. 2d 695, 701, 445 N.W.2d 717 (Ct. App. 1989) (whether punitive damages are available is a question of law).

¶5 We agree with Seidl that the trial court erred in awarding the challenged amount to the Davidsons. First, punitive damages were not an available remedy. Punitive damages cannot be awarded in the absence of an

² The Davidsons argue that Seidl waived his challenge to the punitive damages award. Even if Seidl arguably waived his objection, we will address the issue on its merits. *See Wirth v. Ehly*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), *superseded by statute on other grounds*, WIS. STAT. § 895.52 (waiver is a rule of judicial administration, not jurisdiction, and we have the discretion to make exceptions).

award of actual or compensatory damages based on the conduct at issue. *Kehl v. Economy Fire & Cas. Co.*, 147 Wis. 2d 531, 534, 537, 433 N.W.2d 279 (Ct. App. 1988); *Tucker v. Marcus*, 142 Wis. 2d 425, 439, 418 N.W.2d 818 (1988). The trial court premised its punitive damages award on its finding that Seidl placed large stones in the grassy portion of the easement around the time the Davidsons had rented a brush cutter to clean up the area. The court did not award any compensatory damages for this conduct. The trial court only awarded the Davidsons compensatory damages for their maintenance expenses related to grading the easement driveway, filling the potholes in the driveway with gravel and renting of brush cutters. Therefore, the court erred in imposing punitive damages for Seidl's placement of the stones in the grassy portion of the easement.

¶6 Second, the “punitive damages” award cannot be characterized as either a remedial or a punitive contempt sanction. A punitive, or criminal, sanction punishes a past contempt of court for the purpose of upholding the authority of the court. WIS. STAT. § 785.01(2); *Frisch*, 290 Wis. 2d 739, ¶26. A punitive sanction also requires that a district attorney, attorney general or special prosecutor formally prosecute the matter by filing a complaint and following procedures set out in the criminal code. WIS. STAT. § 785.03(1)(b); *Frisch*, 290 Wis. 2d 739, ¶26. It is obvious that this procedure was not followed in this case.

¶7 A remedial, or civil, sanction, by contrast, is imposed to ensure compliance with court orders for the purpose of terminating a continuing contempt of court. WIS. STAT. § 785.01(3); *Frisch*, 290 Wis. 2d 739, ¶27. A remedial contempt sanction *must be* purgeable through compliance with the original court order. *Frisch*, 290 Wis. 2d 739, ¶27; *Diane K.J. v. James L.J.*, 196 Wis. 2d 964, 969, 539 N.W.2d 703 (Ct. App. 1995). The contempt sanction imposed here lacked this indispensable feature of remedial contempt.

¶8 In sum, the trial court's imposition of the challenged amount as punitive damages or as a contempt sanction cannot stand. We reverse the portion of the judgment concerning this amount.

By the Court.—Judgment reversed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

