

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 17, 2008

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. 2008AP108-FT

Cir. Ct. No. 2005CV681

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

S. D. , BY HER GUARDIAN AD LITEM, J. DREW RYBERG,

PLAINTIFF-APPELLANT,

STEPHEN E. DOUD AND JAN L. DOUD,

PLAINTIFFS,

V.

JACOB A. EISOLD,

DEFENDANT-RESPONDENT,

MARK J. EISOLD AND KATHLEEN S. EISOLD,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Eau Claire County: LISA K. STARK, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM.¹ S.D. appeals a circuit court's award of punitive damages against Jacob Eisold. S.D. contends the court erred when concluding it could not consider Eisold's future earning capacity when awarding punitive damages. We agree and reverse the portion of the judgment awarding punitive damages and remand for the court to reconsider the issue in light of this decision.

BACKGROUND

¶2 This case involved sexual misconduct by Eisold against S.D. At the time, Eisold was fifteen years old, and S.D. was ten. S.D. sued Eisold and his parents, and a court trial was held in June 2007. The court found that Eisold had committed twenty acts of sexual misconduct against S.D. and awarded compensatory damages totaling \$45,643.97 and punitive damages of \$5,000.

¶3 When determining the amount of punitive damages, the court considered the relevant factors, including Eisold's ability to pay. Regarding Eisold's ability to pay, the court stated:

[Eisold] is not in a position to pay much, if any funds at this time given his limited income and the fact that he is a student. The plaintiffs argue that he will have a significant earning capacity given his past success at athletics and his current academic success. However, there is no real evidence of that in the record. What [Eisold] might earn in the future is not a factor to be contemplated under the jury instructions and is speculative based on the court record. The Court is directed to look at his current ability to pay, not an unknown future ability to pay.

For that reason, the Court has awarded \$5,000.

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

DISCUSSION

¶4 Determining the amount of punitive damages to award is an exercise of discretion. *See White v. Ruditys*, 117 Wis. 2d 130, 142, 343 N.W.2d 421 (Ct. App. 1983). Discretionary determinations are upheld if the court examined the relevant facts, applied a proper standard of law, and used a demonstrated rational process to reach a reasonable conclusion. *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789.

¶5 The purpose of punitive damages is to punish and deter, not to compensate the plaintiff. *See Reyes v. Greatway Ins. Co.*, 220 Wis. 2d 285, 303, 582 N.W.2d 480 (Ct. App. 1998), *aff'd*, 227 Wis. 2d 357, 597 N.W.2d 687. When awarding punitive damages, courts must consider: the grievousness of the defendant's acts; the degree of malicious intent; the actual and potential damage that might have been caused by the defendant's acts; and the defendant's ability to pay. *Gianoli v. Pfleiderer*, 209 Wis. 2d 509, 528, 563 N.W.2d 562 (Ct. App. 1996).

¶6 Here, the sole issue is whether the court erred by concluding it could not consider Eisold's future earning capacity when evaluating his ability to pay.² While on one hand it appears the court considered Eisold's future earning capacity and concluded it was too speculative based on the evidence to warrant a greater award, the court's unequivocal statement that what Eisold "might earn is not a

² S.D. also argues that WIS. STAT. § 895.043, the punitive damages statute, "does not require proof of ability to pay as a prerequisite to an award of punitive damages." We do not address this issue because Eisold concedes such proof is not required. However, we note that a court can only consider evidence before it, so a party failing to present evidence on a defendant's ability to pay cannot complain when the court relies on evidence presented by the opposition. *See Gianoli v. Pfleiderer*, 209 Wis. 2d 509, 532, 563 N.W.2d 562 (Ct. App. 1996).

factor to be considered” demonstrates that the court believed it could not consider his future earning capacity. The court’s decision also suggests it relied upon that belief.

¶7 However, future earning capacity can be considered when weighing a defendant’s ability to pay punitive damages. In *Reyes*, 220 Wis. 2d 285, an incarcerated defendant challenged a punitive damages award because of his inability to earn income and his lack of wealth. *Id.* at 306. We rejected the defendant’s argument, stating that “although [the defendant] is incarcerated and currently does not have any assets to satisfy the punitive damages award, this does not necessarily mean he forever lacks an ability to satisfy the judgment.” *Id.* Similarly, in *Anello v. Savignac*, 116 Wis. 2d 246, 253, 342 N.W.2d 440 (Ct. App. 1983), we noted that a defendant’s present wealth is not the only factor to consider, and to conclude otherwise would mean “punitive damages could never be awarded against an indigent.” *Id.* at 253.

¶8 Thus, when weighing Eisold’s ability to pay, the court was not prohibited from considering Eisold’s future earning capacity. The court’s decision indicates it believed otherwise. By not applying a proper standard of law, the court erroneously exercised its discretion. See *LeMere*, 262 Wis. 2d 426, ¶13. Therefore, we reverse the portion of the judgment awarding punitive damages and remand for the court to reconsider the issue in light of this decision.³

³ The court’s ultimate decision is still one of discretion, and we express no opinion on how the court should weigh Eisold’s earning capacity when it reconsiders the amount of the punitive damages award.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

