

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals**For the Seventh Circuit****Chicago, Illinois 60604**

Submitted March 28, 2023*

Decided April 3, 2023

BeforeDIANE S. SYKES, *Chief Judge*ILANA DIAMOND ROVNER, *Circuit Judge*MICHAEL B. BRENNAN, *Circuit Judge*

No. 22-2113

PRIEST D. BUTLER,
*Plaintiff-Appellant,**v.*GOOGLE, LLC, et al.,
*Defendants-Appellees.*Appeal from the
United States District Court for the
Eastern District of Wisconsin.

No. 20-CV-1834-JPS

J.P. Stadtmueller,
*Judge.***ORDER**

Priest Butler sued YouTube and its parent companies for allegedly preventing his videos from earning money. He sought \$25 million in punitive damages but no compensatory damages. Because he raised only state-law claims, his suit had to satisfy the criteria for invoking the district court's diversity jurisdiction. The judge concluded

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

that it was legally certain that Butler could not meet the jurisdictional threshold of \$75,000. We affirm. Butler has waived any claim for compensatory damages, and under the applicable law, this waiver makes punitive damages unavailable.

Because we are reviewing a dismissal for lack of jurisdiction, we take as true the allegations from the complaint. *See A.F. Moore & Assocs. v. Pappas*, 948 F.3d 889, 891 (7th Cir. 2020). Butler posts videos to his YouTube channel. He agreed with YouTube that any advertising revenue generated by those videos would be split between him and the company. YouTube flagged his videos (wrongly, he asserts) as violent, inappropriate for minors, or otherwise “[n]ot suitable for most advertisers.” As a result, he says, his channel earned less money.

Butler sued YouTube and its parent companies in federal court, bringing state-law claims for breach of contract and defamation. The complaint sought \$25 million in punitive damages but said nothing about compensatory damages. Raising the jurisdictional issue on his own, the judge noted that because Butler did not allege any federal claims, he had to rely on diversity jurisdiction and meet the jurisdictional threshold of \$75,000. The parties are diverse, so the inquiry focused on the latter requirement. After briefing the judge concluded that under Wisconsin law Butler could not recover any punitive damages because (1) they are not available for contract actions and (2) Butler had not pleaded facts suggesting “express malice,” which is required for punitive damages in a defamation suit. The judge then ordered limited discovery to determine if compensatory damages could clear the jurisdictional threshold. The parties submitted documents showing how much ad revenue Butler had received from his channel. They disagreed on the exact number, but the evidence showed that it was not more than \$600.

The judge dismissed the case for lack of jurisdiction. He reasoned that the documents showed that any possible amount in controversy for compensatory damages was no more than \$600, far below the jurisdictional threshold. And because punitive damages were unavailable, he concluded, it was legally certain that Butler could not recover \$75,000. Butler appealed.

We note two flaws in the judge’s analysis. First, the judge wrongly concluded that compensatory damages necessarily fall somewhere “between \$400.00 and \$600.00.” The judge relied on the accounting statements that the parties submitted, showing that over the relevant timeframe, Butler earned around \$400 to \$600. But this information does not support the judge’s conclusion about compensatory damages. In a breach-of-contract case, damages are not what a party earned but what the party would have

earned had the defendant not breached the contract. *United Concrete & Constr., Inc. v. Red-D-Mix Concrete, Inc.*, 836 N.W.2d 807, 824 (Wis. 2013). And for a defamation claim, damages compensate the harm to the plaintiff's reputation, not however much money the plaintiff made despite the defamatory conduct. *See Laughland v. Beckett*, 870 N.W.2d 466, 476 (Wis. Ct. App. 2015).

Second, the judge's ruling that no punitive damages were available in the defamation claim because Butler did not allege malice is based on a pleading defect that Butler might have cured by amending his complaint. The judge ruled that further amendment was "futile," but his rationale depended on the error described above. Having concluded that compensatory damages could not exceed \$600, the judge reasoned that even if Butler could allege malice, punitive damages would need to exceed actual damages by a ratio of over 100:1 to meet the jurisdictional threshold of \$75,000. Because such a ratio would likely offend due process, the judge continued, Butler could not meet the threshold. *See generally Rainey v. Taylor*, 941 F.3d 243, 255 (7th Cir. 2019) (discussing permissible punitive-damages ratios). But the judge's analysis about punitive damages hinges on the faulty assumption that compensatory damages were maxed out at \$600, and so it too was flawed.

Nevertheless, these errors are harmless. In his opening appellate brief, Butler argues that the potential for punitive damages alone puts the amount in controversy above the jurisdictional threshold of \$75,000. *See* 28 U.S.C. § 1332(a). He expressly disavows any other damage relief: "[I] did not sue the defendants for loss, injury or actual damages but for punitive damages to penalize the defendants for the particularly egregious, wrongful conduct against [me] The calculation of actual damages is not applicable ... [because I am] solely suing the defendants for punitive damages" He has therefore waived any claim for compensatory damages. *See Accident Fund Ins. Co. of Am. v. Custom Mech. Constr., Inc.*, 49 F.4th 1100, 1108 (7th Cir. 2022). (Butler mentions compensatory damages for the first time in his reply brief, too late to avoid waiver. *Id.*)

Butler's waiver of compensatory damages dooms his argument that he can meet the monetary threshold for diversity jurisdiction. When a party relies on punitive damages to satisfy the amount-in-controversy requirement, the first question is whether punitive damages are available under state law. *LM Ins. Corp. v. Spaulding Enters. Inc.*, 533 F.3d 542, 551 (7th Cir. 2008). Under Wisconsin law punitive damages are available only if compensatory damages are possible. *Groshek v. Trewin*, 784 N.W.2d 163, 173 (Wis. 2010); *Country Visions Coop. v. Archer-Daniels-Midland Co.*, 946 N.W.2d 169, 187 (Wis. Ct. App. 2020), *aff'd*, 958 N.W.2d 511 (Wis. 2021). Because Butler has waived

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compensatory damages, it is “legally certain” that he will not recover *any* punitive damages, let alone enough to meet the \$75,000 threshold. *LM Ins.*, 533 F.3d at 551.

Butler also argues that when the judge raised the jurisdictional issue on his own—without the defendants contesting jurisdiction—the judge both legally erred and demonstrated bias against Butler. But the court has “an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it,” and must dismiss a case if federal subject-matter jurisdiction is absent. *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010); FED. R. CIV. P. 12(h)(3). It was thus proper, in fact required, for the judge to inquire about the jurisdictional defect. Finally, the order of dismissal, by itself, is not evidence that the judge was biased against Butler. *See Liteky v. United States*, 510 U.S. 540, 555 (1994).

AFFIRMED