

Judge Joanne Smith

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

Case Type: Contract

DR. BA LAM,)
)
) Plaintiff,)
)
v.)
)
) COUNTY OF RAMSEY, MINNESOTA,)
) DANIEL SCHACHT, OFFICE OF THE)
) RAMSEY COUNTY ATTORNEY, and)
) DAVID MACMILLAN,)
)
) Defendants.)

**PLAINTIFF’S MEMORANDUM OF
LAW IN SUPPORT OF MOTION FOR
LEAVE TO AMEND COMPLAINT**

Case No. 62-C8-05-012545

TO: HON. JOANNE SMITH, RAMSEY COUNTY DISTRICT COURT, 1530 COURTHOUSE,
15 W. KELLOGG BOULEVARD, ST. PAUL, MN 55102.

Pursuant to Minn. R. Civ. P. 15.01, Minn. Gen. R. Prac. 115.04, and Minn. Stat. § 549.19, plaintiff Dr. Ba Lam, through the undersigned attorney, submits this memorandum of law in support of his motion for an order granting leave to amend his Complaint to add a claim for punitive damages. A copy of the Complaint as it is sought to be amended is attached as Exhibit 1 to the Affidavit of Alfred Stanbury dated June 11, 2007 (hereinafter “Stanbury Aff. ¶ __ and/or Ex. __”). Added wording is underlined.

FACTS

Lam I

On October 14, 2002, after his motion for a temporary restraining order/temporary injunction was denied, Dr. Lam served a First Amended Complaint and Jury Demand against five defendants in *Dr. Ba Lam v. County of Ramsey, Minnesota, Kenneth Haider, Joseph Peroutka, Gary Clepper, and Scott Jahnke* (Ramsey County Case No. C2029271) (“*Lam I*”) and claimed for trespass, nuisance, mental anguish, taking of property without just compensation, and discrimination of the basis of race. The *Lam I* defendants served a Joint Answer and Counterclaim in which they asserted a defense of official immunity and counterclaimed for a prescriptive drainage easement and for permanent injunctive relief.

On August 15, 2003, the *Lam I* defendants’ motion for summary judgment was heard, and, in

an order filed on October 17, 2002, the trial court (Bastian, J.) *denied* the *Lam I* defendants' claim of official immunity as to plaintiff's trespass claim, *denied* their motion for summary judgment as to Dr. Lam's nuisance claim, *denied* their claim for a prescriptive easement, and *granted* their motion for summary judgment as to Dr. Lam's claims of discriminatory conduct and taking. On or about November 14, 2003, the *Lam I* defendants filed a notice of appeal of the denial of their official immunity defense and a petition for discretionary review of the denial of summary judgment as to Dr. Lam's nuisance claim. On December 1, 2003, Dr. Lam served a notice of review of the denials of his discrimination and taking claims. In an order filed on December 16, 2003, the Court of Appeals denied the *Lam I* defendants' petition for discretionary review, and, in an order filed on January 13, 2004, the Court of Appeals dismissed Dr. Lam's notice of review. Thereafter, on June 8, 2004, the Court of Appeals filed an unpublished opinion affirming the trial court's denial of the *Lam I* defendants' claim of official immunity as to Dr. Lam's trespass claim (Minn. Ct. App. No. A03-1753).

Following remand, *Lam I* was reassigned to Judge David Higgs because Judge Bastian had been reassigned to Family Court. The parties filed second informational statements, and, in theirs, the *Lam I* defendants, *inter alia*, indicated an intention to request leave of court to file a summary judgment motion on the issue of discretionary immunity as to Dr. Lam's nuisance claim, to which Dr. Lam objected. However, without waiting for the *Lam I* defendants to request such leave and without any apparent attention to Dr. Lam's objections, Judge Higgs issued an Amended Scheduling Order which, *inter alia*, granted such leave to the *Lam I* defendants. That motion for summary judgment as to Dr. Lam's nuisance claim was brought, briefed, and then denied in an order filed on February 1, 2005. The *Lam I* defendants did not appeal.

The Settlement

On March 30, 2005, the parties' attorneys reached an agreement to settle in the Judge Higgs' chambers with the judge participating in the negotiations, and the agreement was then put on the record in open court, *to wit*:

COURT: All right, this is the matter of Dr. Ba Lam versus County of Ramsey. We're here today for a pretrial settlement conference. I've had some discussions with counsel and it's my understanding that the parties have reached a settlement agreement in this matter. Counsel, do you just want to note your appearances for the record. And then, Mr. MacMillan, you're going to recite the settlement for

the record?

MACMILLAN: Yes, Your Honor. David MacMillan, Assistant Ramsey County Attorney, appearing on behalf of the Defendant.

STANBURY: Alfred Stanbury, Stanbury Law Firm PA, for Dr. Ba Lam, Plaintiff.

COURT: All right. And the terms of the settlement?

MACMILLAN: Your Honor, it's my understanding that the terms of the agreement are as follows: This issue is essentially one of the drainage of surface water from the road so that it does not cross the plaintiff's property on Lake Johanna Boulevard. **What we have agreed -- the County has agreed is that we will undertake to extend the existing bituminous curb which abuts his property from where it stops now to the western border of his property, that would be on the southern side of Lake Johanna Boulevard. We will also agree to either use the existing culvert or establish a new culvert and catch basin and drainage system, which will drain water from the street and from the watershed area that collects on the street, pipe it under the street and across to the Tony Schmidt Park which is across -- or to the north of the plaintiff's property.** That will require -- probably we believe it might require obtaining some permits from the watershed district and the Department of Natural Resources. So the settlement -- we don't think there will be any problem with that but the settlement is conditioned on receiving those permits, we will obtain the permits, we will pull the permits.

The final issue is there will be a payment of \$2,100 dollars to the plaintiff for his costs of this matter. **We have agreed, since it now appears that the grating for the catch basin can be placed in the bike path that apparently they have come up with new gratings that are bike safe, so the grating will be in the bike path, the existing bike path will not be in Dr. Lam's landscaping.** And we've also agreed that to the extent that we have to disturb his landscaping to put the catch basin and the catch basin structure in, we will restore it to its current condition and it's at present unlikely we would ever have to disrupt or damage the arborvitae bushes that are planted but if we do we'll replace those as well. And we will accomplish that this year before November. In return, the plaintiff will dismiss his complaint, all of the remaining counts in his complaint.

COURT: It's my understanding that, Mr. MacMillan, you're going to draft a settlement agreement outlining all of this for signature by the parties and filing with the court?

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COURT: Dr. Lam, do you understand this agreement, sir?

PLAINTIFF: Yes, sir, I do.

COURT: All right. And you've had an opportunity to go over this with your attorney, I take it?

PLAINTIFF: Yes, I have.

COURT: And you are willing to accept this agreement as you've heard it described?

PLAINTIFF: Yes, I am. Your Honor.

COURT: **Who is here for the County?**

MACMILLAN: **Dan Schacht.**

SCHACHT: **Your Honor, my name is Dan Schacht, I'm with the Public Works Department.**

MACMILLAN: That's S-c-h-a-c-h-t.

COURT: **And I guess you must have the authority on behalf of the County then, together with Mr. MacMillan's designated authority?**

SCHACHT: **That's correct.**

Stanbury Aff. Ex. 2 (Tr., pp. 2-5) (emphasis added).

Over the next two weeks, the parties' attorneys worked on drafting a mutually acceptable settlement agreement. Following his receipt of the *Lam I* defendants' attorney's first draft, Lam's attorney responded as follows in a letter dated April 1, 2005:

As I see it, the draft of the settlement agreement omits any mention of a date by which the installation of the catch-basin *etc.* will be accomplished and the fact that the grate (or whatever it's called) will be located in the bike path. Dan Schacht said that the installation would be accomplished 'by November' to which I did not object although on reflection think it should be accomplished earlier in order to evaluate its effectiveness during summer rains. **In any event, the agreement should state a specific completion date and the fact that the catch-basin's grate will be located in the bike path.**

I object to the first sentence of ¶ 3. **The settlement, *inter alia*, represents an agreement by the county that, upon the installation of the catch-basin and curb, my client's existing landscaping by definition will be invulnerable to an allegation that it is interfering with or constitutes a hazard to the defendants' or the public's use of the right-of-way for public highway purposes. As worded, the first sentence of ¶ 3 leaves my client vulnerable to the arbitrary conduct and threats that prompted this action:** For those reasons, please change the first sentence of ¶ 3 to "Plaintiff will be permitted to maintain his existing landscaping within the public right-of-way ~~so long as his use of the right of way does not interfere with or constitute a hazard to the Defendants' or the public's use of the right of way for public highway purposes.~~"

I object to the the way in which ¶ 5 unnecessarily qualifies the dismissal of all counterclaims, **I want an unequivocal dismissal of the, counterclaims which could be worded as follows: 'Defendants will dismiss their counterclaims for a prescriptive drainage easement and for permanent injunctive relief against Plaintiff, with prejudice.'** The balance of the wording of ¶ 5 should be deleted inasmuch as there is no need to assure that the foregoing dismissals will not be misconstrued.

The check should be made payable to Dr. Ba Lam and mailed to me.

Stanbury Aff. Ex. 3 (strike-through in original, emphasis added).

While the length of time to install the drainage system was left at about six months, paragraph nos. 1, 2, 3, and 5 of the ultimately executed Agreement And Release incorporated the additions and deletions requested by Lam's attorney and inserted a deadline date of October 31, 2005, *to wit*:

1. The County of Ramsey will, either with its own forces or through contracts with third parties, and a: its sole cost and at no cost to Plaintiff, design and construct a catch basin and underground pipe which will drain surface water from Lake Johanna Boulevard and discharge it into park land owned by the County on the north side of Lake Johanna Boulevard, **no later than October 31, 2005. The catch basin will be constructed to lie within the paved portion of Lake Johanna Boulevard.** The purpose of this catch basin and drain pipe is to prevent surface water from ordinary rains and snow melt from draining off Lake Johanna Boulevard and across Plaintiffs property. To accomplish the construction of this drainage system, the County, or its contractors, may find it necessary to disturb the landscaping Plaintiff has placed adjacent to the road. The County shall restore all such disturbed landscaping to us original condition.

2. **The County, with its forces or independent contractors, shall extend the existing bituminous curb to the western edge of Plaintiffs property.**

3. Plaintiff will be permitted to maintain his existing landscaping within the public highway right-of-way. Nothing In this agreement shall operate as or be deemed a waiver or surrender by Defendants of any of its public highway easement interest.

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5. Defendants will dismiss all counterclaims it has made against Plaintiff in this matter, with prejudice, including their counterclaims for a prescriptive easement and injunctive relief.

Stanbury Aff. Ex. 4 (emphasis added).

That Agreement And Release and a Stipulation For Dismissal Order Dismissing All Claims were executed on April 14-15, 2005, and, along with a proposed Order for Dismissal and Entry of Judgment, were forwarded to Judge Higgs who signed and filed the Order for Dismissal and Entry of Judgment on April 22, 2005.

Lam II, The Instant Case

Dr. Lam commenced the instant case on December 13, 2005, claiming breach of contract and perpetuation of a nuisance after Ramsey County failed to install the drain grate on the paved portion of Lake Johanna Boulevard and failed to extend the bituminous curb to the western edge of Dr. Lam's property. Stanbury Aff. Ex. 1. Defendants have served one set of interrogatories¹ and taken two depositions of Dr. Lam. Dr. Lam has served two sets of document requests and interrogatories and taken six depositions (of defendants MacMillan and Schacht and non-party Ramsey County employees Jim Johnson, Kathy Jaschke, Doug Meyer, and Gary Clepper). Defendants' motion for summary judgment was heard on May 16, 2008, and taken under advisement.

ARGUMENT

Pleadings may be amended to assert an affirmative defense, even though an affirmative defense must be pleaded specifically and the failure to do so results in a waiver of the defense. *Rhee v. Golden Home Builders, Inc.*, 617 N.W.2d 618, 621 (Minn. App. 2000) (citing *Warrick v. Giron*, 290 N.W.2d 166, 169 (Minn. 1980)). "Ordinarily, amendments to pleadings should be freely granted except when prejudice would result to the other party." *Id.* (citing *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993)). "Minn. R. Civ. P. 15.01 authorizes the court to allow an amendment to the pleadings when justice so requires," and the rule gives no time limit for bringing

¹ Defendants have served two sets of document requests out of time and without asking the court for leave to do so. The first set was served on September 15, 2006, when the scheduling order in force at the time required all discovery to be completed by that date. The second set was served on March 29, 2007, and called for a response on May 1, 2007, whereas the scheduling order in force at the time required all discovery to be completed by April 22, 2007.

a motion to amend pleadings. *Id.* (quotation omitted). Thus some prejudice must be shown before the amendment can be refused. See, e.g., *Earlie v. Jacobs*, 745 F.2d 342 (5th Cir. 1984) (“Prejudice to the opposing party, not the diligence of the moving party, is the crucial factor in determining whether or not to grant leave to amend the complaint.”). The general standard which is to be employed by the district courts in deciding whether to grant or deny a motion for leave to amend was enunciated by the Supreme Court in *Foman v. Davis*, 371 U. S. 178, 182 (1962):

If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be ‘freely given.’

Although the decision to permit amendment is within the court’s discretion, the trial court commits reversible error in not allowing amendment unless there is a good reason for denial. *Id.* Prejudice does not arise merely because a defendant will be exposed, for example, to an additional theory. The fact that the pleader seeking to amend may have previously overlooked the additional theory is no reason for denial of leave to amend, because, whereas Minn. R. Civ. P. 13.06 and 60.02 require “oversight, inadvertence, excusable neglect, mistake or surprise,” no such language appears in Minn. R. Civ. P. 15.01.

In order to amend a complaint to add a claim for punitive damages, Minn. Stat. § 549.191 requires a party, through one or more affidavits, to establish "prima facie evidence" for the claim. The party is not required to show entitlement to punitive damages *per se* but only an entitlement to allege punitive damages. See *Olson v. Snap Products, Inc.* 29 F.2d 1027 (Minn. D. 1998), *Ulrich v. City of Crosby*, 848 F.Supp. 861 (D. Minn. 1994); *Swanlund v. Shimano Indus. Corp.*, 459 N.W.2d 151 (Minn. Ct. App. 1990). The determination by the court is made as if the court would review a motion for a directed verdict. **In reaching its determination it makes no credibility findings, and does not consider any challenge by cross-examination of plaintiff’s proof.** *Hern v. Bankers Life Cas. Co.*, 133 F.Supp.2d 1130 (D. Minn. 2001) (emphasis added). Plaintiff’s complaint presently states two causes of action: Breach of contract and intentional perpetuation of a nuisance. Stanbury Aff. Ex. 1 (Complaint ¶¶ 18-21). A motion to amend to add a

claim for punitive damages is governed by Minn. Stat. § 549.191, which provides in pertinent part:

549.191 CLAIM FOR PUNITIVE DAMAGES.

Upon commencement of a civil action, the complaint must not seek punitive damages. After filing the suit a party may make a motion to amend the pleadings to claim punitive damages. The motion must allege the applicable legal basis under section or other law for awarding punitive damages in the action and must be accompanied by one or more affidavits showing the factual basis for the claim. At the hearing on the motion, if the court finds *prima facie* evidence in support of the motion, the court shall grant the moving party permission to amend the pleadings to claim punitive damages. For purposes of tolling the statute of limitations, pleadings amended under this section relate back to the time the action was commenced.

An award of punitive damages is governed by Minn. Stat. § 549.20, which provides in pertinent part:

549.20 PUNITIVE DAMAGES.

Subdivision 1. Standard. (a) Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.

(b) A defendant has acted with deliberate disregard for the rights or safety of others if the defendant has knowledge of facts **or** intentionally disregards facts that create a high probability of injury to the rights or safety of others **and**: (1) deliberately proceeds to act in conscious **or** intentional disregard of the high degree of probability of injury to the rights or safety of others; **or** (2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

(Emphasis added.)

The punitive claim sought to be added here would not change or vary the facts alleged in the Complaint but, on the contrary, would merely expand and amplify them and in reality do not amount to the addition of a new theory. The amendment will not prejudice defendants, will not delay the proceedings, do not constitute harassment, and will not put defendants to any additional expense. Consonant with Minn. Stat. § 549.20, an award of punitive damages will be allowed in this case because, upon clear and convincing evidence that the Agreement and Release was breached even though defendants had *actual knowledge* of facts that would create a high probability of injury to the rights of plaintiff and the safety of others and deliberately proceeded to act in *conscious* disregard of that high probability of injury to the rights of plaintiff and the safety of others; **OR** even though defendants had *actual knowledge* of facts that would create a high probability of injury

to the rights of plaintiff and the safety of others and deliberately proceeded to act in *intentional* disregard of the high probability of injury to the rights of plaintiff and the safety of others; **OR** even though defendants had *actual knowledge* of facts that would create a high probability of injury to the rights of plaintiff and the safety of others and deliberately proceeded to act *with indifference* to the high probability of injury to the rights of plaintiff and the safety of others; **OR** even though defendants *intentionally disregarded* facts that would create a high probability of injury to the rights of plaintiff and the safety of others and deliberately proceeded to act in *conscious* disregard of the high probability of injury to the rights of plaintiff and the safety of others; **OR** even though defendants *intentionally disregarded* facts that would create a high probability of injury to the rights of plaintiff and the safety of others and deliberately proceeded to act in *intentional* disregard of the high probability of injury to the rights of plaintiff and the safety of others; **OR** even though defendants *intentionally disregarded* facts that would create a high probability of injury to the rights of plaintiff and the safety of others and deliberately proceeded to act *with indifference* to the high probability of injury to the rights of plaintiff and the safety of others. The purpose of punitive damages is not to compensate a party but is to both punish and deter according to the gravity of the act. *Melina v. Chaplin*, 327 N.W.2d 19, 20 n.1 (Minn. 1982). The purpose of punitive damages is to deter future wrongful conduct. *Jensen v. Walsh*, 623 N.W.2d 247, 251 (Minn. 2001) (stating that the purpose of punitive damages is "to punish the perpetrator, to deter repeat behavior and to deter others from engaging in similar behavior"). "Punitive damages, in essence, represent a civil fine, and as such, should be imposed on an individual basis." *Shetka v. Kueppers, Kueppers, Von Feldt & Salmen*, 454 N.W.2d 916, 920 (Minn. 1990) (quotation omitted).

In agreeing to settle *Lam I*, plaintiff came into a right to have a nuisance abated by locating the drain grate in a particular place and by extending the bituminous curb in a particular way. Paragraph No. 2 of Affidavit of Dr. Ba Lam dated June 11, 2007 (hereinafter "Lam Aff. ¶ __"). And he reasonably expected the defendants would do what their attorney and representative swore to the court they would do. Lam Aff. ¶ 3. When the agreement to settle *Lam I* was reached, defendants had actual knowledge of the the fact that there was a high probability that the nuisance which had been litigated for the previous 2-1/2 years would not be abated if they did not install the drain grate on the paved portion of Lake Johanna Boulevard and extend the bituminous curb to the western edge of plaintiff's property. Defendants nevertheless proceeded to act in conscious or

intentional disregard for or with indifference to the high probability of injury to plaintiff's rights. In short, nuisance damages naturally and obviously flowed from the breach, *i.e.*, if defendants had not breached the Agreement and Release, the nuisance in the form of water running off Lake Johanna Boulevard and across plaintiff's land would have been abated in early November 2005. *See Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854), which holds that damages recoverable in contract actions are those which arise naturally from the breach **or** those which can be supposed to have been contemplated by the parties when the contract was formed--a rule that is followed in Minnesota. *Lesmeister v. Dilly*, 330 N.W.2d 95, 103 (Minn. 1983) (emphasis added). One commentator has explained the rule as follows:

Under the first rule of *Hadley v. Baxendale*, certain damages will so naturally and obviously flow from the breach that every one is deemed to contemplate them. Frequently, such damages are known as 'general' damages. Under the second rule, less obvious kinds of damages are deemed to be contemplated if the promisor knows **or has reason to know** the special circumstances which will give rise to such damages. Such damages are frequently known as 'special' or 'consequential' damages.

J. D. Calamari and J. M. Perillo, *CONTRACTS*, § 14-5 (West 1977) (emphasis added).

A plaintiff who presents evidence that a defendant intentionally maintained a condition that is injurious to health or offensive to the senses or which obstructs the free use of property states an actionable claim for nuisance. *Wendinger v. Forst Farms, Inc.*, 662 N.W.2d 546, 552 (Minn. Ct. App. 2003). In *Wendinger*, the plaintiffs supported their nuisance claim with evidence that the Forsts were aware of their operation's alleged impact on the Wendingers' use and enjoyment of their land as early as 1996. *Id.* The Court of Appeals considered that evidence sufficient to demonstrate intentional conduct, citing Dan B. Dobbs, *THE LAW OF TORTS* § 464 at 1325 (2000) (explaining that a defendant intentionally causes nuisance harm when he maintains the condition causing the harm after having been apprised of its effect upon the plaintiff's use and enjoyment of his land). *Id.* That is exactly what defendants did in this case. Defendants' disregard for or indifference to a high probability of injury is evident in the deposition testimony of defendants MacMillan and Schacht. *E.g.*, defendant MacMillan admitted a palpable indifference when he testified in pertinent part as follows at his deposition on September 6, 2006:

STANBURY: Between the time that you put the Settlement Agreement on the record before Judge Higgs and the execution of the Settlement Agreement by yourself and actually me, to whom did you speak with regard to the terms of the

Settlement Agreement?

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MACMILLAN: To be honest, between the time -- between March 30 which I believe was the date of the hearing or the settlement conference in front of Judge Higgs and the time I signed off on the Settlement Agreement, I did not talk to anybody in the County that I recall. My memory may be flawed. But I do not recall speaking to anyone in the County. I think the terms of it were pretty well laid out, and I didn't feel it necessary to do so. But I may have. I just don't remember that I talked to anyone.

STANBURY: **When the Settlement Agreement was executed, did you convey the terms of that Settlement Agreement to anyone?**

MACMILLAN: **I can't recall whether or not I did, other than the court and to you.**

STANBURY: At some point did someone learn what the terms of the Settlement Agreement were and what the County had to do?

MACMILLAN: Dan Schacht learned about it at the hearing -- at the settlement conference, and when we put it on the record. He was there when I read it into the record.

STANBURY: **But the formal executed Settlement Agreement was not conveyed to anyone in particular?**

MACMILLAN: **I honestly don't recall whether or not I did or not.**

STANBURY: Would you have any record of whether it was or not?

MACMILLAN: Probably somewhere, yes.

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STANBURY: If you did not communicate the terms of the executed Settlement Agreement to anyone, on what basis was the County proceeding to comply?

MACMILLAN: . . . With respect to the issue of what would be done as far as putting the drain and all of that, the issues I think were pretty clear. Dan had been sitting in the courtroom, and it was my understanding that it was pretty straightforward that he understood what we needed to do.
...

STANBURY: **Between the time that you signed -- executed the**

Settlement -- we executed the Settlement Agreement, did you speak with anyone at all with regard to what was being done, what was to be done?

MACMILLAN: **No. Not to my recollection, I didn't.**

Stanbury Aff. Ex. 9 (MacMillan Dep. Tr., p. 5, ll. 15-16; pp. 6-7, ll. 12-4; p. 7, ll. 9-22; p. 8-9, ll. 8-3; p. 9, ll. 12-17) (emphasis added).

And defendant Schacht admitted a palpable indifference when he testified in pertinent part as follows at his deposition on September 7, 2006:

STANBURY: After [the settlement agreement] was put on the record in court did you thereafter, if not immediately, at some point thereafter, convey what you had agreed would be done to someone else?

SCHACHT: Yes, I did.

STANBURY: To whom?

SCHACHT: I conveyed that to Kathy Jaschke.

STANBURY: Why her?

SCHACHT: She is the assistant maintenance engineer.

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STANBURY: To the best of your recollection, what did you tell her had to be done?

SCHACHT: I asked her to begin preparing a design for a catch basin on Lake Johanna Boulevard.

STANBURY: **Did you make a point to tell her that the catch basin was to be on the paved portion of the roadway?**

SCHACHT: **No, I did not.**

STANBURY: **You understood that it was to be on the paved portion of the roadway, is that right?**

SCHACHT: **I understood that initially, but later on through the year I forgot about that detail.**

STANBURY: You mean four to six weeks [after reaching the settlement agreement in court]?

SCHACHT: Yes.

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STANBURY: Between the time of the court hearing that you attended and the day on which you learned that the system had been installed, had you had any occasion to speak with Mr. MacMillan about this project?

SCHACHT: I don't recall having spoken to Mr. MacMillan during that time.

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STANBURY: **Back when you initially conveyed what needed to be done to Kathy Jaschke, did you tell her about the need to install a bituminous curb?**

SCHACHT: **I don't recall telling her that, no.**

Stanbury Aff. Ex. 10 (Schacht Dep. Tr., p. 4, ll. 16-24; p. 5, ll. 12-25; p. 8, ll. 4-10; pp. 9-10, ll. 23-1) (emphasis added).

MacMillan assumed Schacht knew what had to be done when he left the March 30, 2005 hearing and did not bother to communicate with Schacht at all during the next seven months. But a settlement agreement meant so little to Schacht that he almost immediately proceeded to forget what defendants had agreed to do in return for plaintiff's agreement to dismiss his case and, with palpable indifference, never exercised any oversight in connection with the drain system he asked Kathy Jaschke to design. He obviously told her little to almost nothing, as is evident from the April 5, 2007 deposition testimony of engineering technician three Meyer, to whom Jaschke delegated the job of designing the drain system:

STANBURY: Is this the final drawing of the drain system one?

MEYER: Yes.

STANBURY: So there were drawings prior to that. Is that right, or not?

MEYER: Yes. I began working on this project May 2d 2005. That is the earliest date that I found. And over the next several months I developed it into this final drawing. . . .

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STANBURY: We're not going to be talking with regard to drain system number two, the one that was the most recent installation. You had nothing to do with that, is that right?

MEYER: I have no knowledge of it. I had no knowledge that it was necessary.

STANBURY: So we'll concentrate on drain -- we'll call it drain system number one, the one that was designed and installed in 2005.

MEYER: Okay.

STANBURY: At some point someone asked you to design this, is that correct?

MEYER: That's correct.

STANBURY: Who did that?

MEYER: Kathy Jaschke.

STANBURY: Do you remember what she told you had to be done, and if you do remember, what did she tell you?

MEYER: I don't recall the exact wording. It's almost three years ago -- two years ago. I'm sorry, I don't recall the exact wording. But in effect, Kathy came to me and asked if I could put these together and design some way to relieve the water problem that was occurring there. That's, in effect, what our conversation was.

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STANBURY: Did Ms. Jaschke give you any documents to look at with respect to what you were to do?

MEYER: No, I don't believe so.

STANBURY: Let me rephrase it a little bit. With respect to what you were to design?

MEYER: No.

STANBURY: **So you received no documents as to, for example, where to install the drain grate?**

MEYER: **No. She did not instruct me that it was to be located at one point or another. I based the location on the evidence that I saw in the field, as we say. The discoloration of the pavement and the area around where the catch basin or surface drain, as we call it, which is standard nomenclature, the evidence of water collecting there, the staining on the pavement indicated that it was even**

corroborated when I ran elevational contour lines, that that was the low point or the collecting point of the water.

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STANBURY: You've indicated both in testimony today and in an answer to an interrogatory that you began the drawings around May 2d, according to your CAD documents?

MEYER: That's correct.

STANBURY: May 2d, 2005. When you began that had you had any discussions with anybody besides Ms. Jaschke concerning what you were to do?

MEYER: No, sir.

STANBURY: And as you proceeded through the drawings starting on May 2d, 2005, and I believe it's indicated or you said takes it all the way up to about October 17th, 2005?

MEYER: That's correct. That's the date on this drawing.

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STANBURY: **Did you just proceed to design this yourself, or were you involved with anyone else in putting these drawings together?**

MEYER: **I worked independently, as I do much of my time. . . . I indicated that putting [the two catch basins] out here on the edge of the road eliminated having to open cut through the road. Any time -- we see this often. We go out and build a beautiful road and not long afterwards utility companies come and then they have to jackhammer in and cut out a section of the road and they have to do all these thing, and the patching becomes just a perpetual problem, because there's unequal settling. It becomes a bump. It becomes a dip. It becomes a pothole. So any time we can minimize open cutting the road, meaning cut through the pavement with saws and jackhammers and dig holes, any time we can minimize that we get a much smoother ride.**

By putting the structures on the outside (indicating) out of the road -- out of the driver's travel path eliminates that bump in the road that is just perpetual and never goes away. And it's also -- it was the most prudent, because we only needed one length of pipe here. We are in a business to try

and save money as much as spend money.

Stanbury Aff. Ex. 15 (Meyer Dep. pp. 9-10, ll. 24-22, pp. 11-12, ll. 13-6, p. 14, ll. 8-16, pp. 14-16, ll. 23-8) (emphasis added).

Because Jaschke adopted Schacht's palpable indifference, Meyer was not aware of the existence of the settlement agreement itself or what it required the *Lam I* defendants to do and not do and was left to conclude and did conclude that he was to design just another drain system in a way that would minimize or avoid the open cutting of the pavement.


CONCLUSION

For the foregoing reasons, plaintiff asks the court to grant him leave to amend his Complaint by adding a claim for punitive damages.

Respectfully submitted,

STANBURY LAW FIRM P.A.

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