Judge Joanne Smith

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF RAMSEY — SECOND JUDICIAL DISTRICT

Case Type: Contract

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DR. BA LAM, Plaintiff, *v.* COUNTY OF RAMSEY, MINNESOTA, DANIEL SCHACHT, OFFICE OF THE RAMSEY COUNTY ATTORNEY, and DAVID MACMILLAN, Defendants.	**PLAINTIFF'S REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO AMEND COMPLAINT** Case No. 62-C8-05-012545

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

Plaintiff Dr. Ba Lam, through the undersigned attorney, submits this reply memorandum of law in support of his motion for leave to amend his Complaint by adding a claim for punitive damages.[1]

While Minn. Stat. § 466.04, subd. 1(b), exempts Ramsey County from an award of punitive damages, that does not stand as a reason to deny plaintiff's motion to amend. Two of the other three defendants--MacMillan and Schacht--would not be immune from a punitive damages claim, and, pursuant to Minn. Stat. § 466.07, Ramsey County would be required to indemnify MacMillan, Schacht, or both for any damages, including punitive damages, levied against them, provided that either of them was acting in the performance of the duties of his position and was not guilty of willful neglect of duty or bad faith.

It is curious to say the least for defendants to argue that a claim for punitive damages arising from a breach of contract should be denied where defendants learned of the court's dismissal of plaintiff's breach of contract claim before serving and filing their response memorandum and where

[1] Defendants served an unsigned response memorandum by fax at 4:58 P.M. on June 18, 2007, after previously contending that plaintiff's attorney's faxing of motion papers after 4:30 P.M. was inconsiderate if not sneaky. Reportedly, their response memorandum was not filed until June 19, 2007, and, as usual, plaintiff's attorney did not receive a copy of whatever correspondence may have accompanied the filed response memorandum and the judge's courtesy copy. Government attorneys do appear to enjoy a pass when it comes to observing procedural rules.

plaintiff has not sought to add a claim for punitive damages for breach of contract.

Defendants contend that they did not intentionally or deliberately disregard facts which create a high probability of injury to the rights or safety of plaintiff because the evidence shows only that defendants MacMillan and Schacht were merely forgetful and merely failed to communicate. In other words, defendants have revealed an intention to conduct an airhead defense[2], *i.e.,* experienced lawyer MacMillan and experienced professional engineer Schacht will testify to being airheads, which will present credibility questions which only a jury can answer and do not support a denial of plaintiff's motion to amend. *See Wilson v. City of Eagan,* 292 N.W.2d 146, 150 (Minn. 1980) ("The weight and force to be given evidence relating to punitive damages is exclusively a jury question."). The deposition testimony set out by plaintiff speaks loudly and clearly for itself.

Plaintiff has already shown what evidence has been considered by the Minnesota Court of Appeals to sufficiently demonstrate intentional conduct, *to wit:*

> In *Wendinger v. Forst Farms, Inc.,* 662 N.W.2d 546, 552 (Minn. Ct. App. 2003), 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.

Pltf. Mem. at 10.

Defendants are denying the undeniable when they assert in conclusory fashion that "there is no indication in the record that defendants had 'knowledge of facts' that would create a high probability of injury to the rights or safety of the plaintiff." For that to be true, defendants MacMillan and Schacht would have had to have slept through the 2-1/2 years of litigation that preceded the signing of the Agreement and Release.

Nor would it be reasonable for the court to conclude that defendants' failure to remember or communicate was mere negligence rather than willful failures to act. In *Muehlstedt v. City of Lino Lakes,* 473 N.W.2d 892 (Minn. Ct. App. 1991), why the city engineer's failure to act was properly found to be willful was explained by the Minnesota Court of Appeals as follows:

> Here, prior the tree burial, [the city engineer] knew that the proposed burial

[2] Similar to the boo-boo criminal defense ("The man admits it, Your Honor. He made a boo-boo.").

> site was private property and that the contracts prohibited trespass or entry onto private property without permission. He also knew that he had not contacted respondent regarding use of the property for tree burial. On those facts, our deference to the jury does not allow us to conclude that it erred in finding a willful failure to act.

Defendants really should get their facts straight or at least phrase them intelligibly. What does it mean, *e.g.*, to say "[a]t no point does plaintiff highlight evidence that the defendants knew that the drain grate would cause an alleged nuisance to plaintiff's property"? The drain grate itself did not and could not cause anything. That's axiomatic. It was the *location* of the drain grate *and the failure to extend the curb* that perpetuated the nuisance, and defendants knew or can be easily held to have known that if the drain grate were to be located on plaintiff's property **and** if the curb were not to be extended, the nuisance which had been litigated for 2-1/2 years would be perpetuated and not abated. Yet nowhere in defendants' response memorandum is any mention of the need to extend the curb and their failure to extend the curb in November 2005.

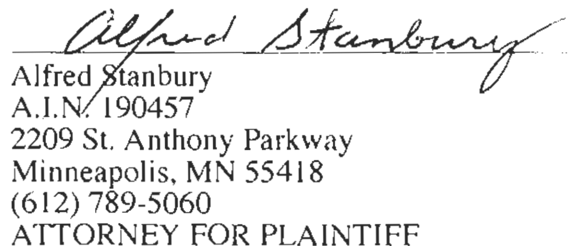
CONCLUSION

Plaintiff has shown a *prima facie* entitlement to allege punitive damages and demonstrated that at trial he will be able to produce clear and convincing evidence that the defendants acted in deliberate disregard of the his rights or safety. For the foregoing and previously stated 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.

Dated: June 22, 2007.



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