

FUDGE v. BIANUCCI

22CV46477

DEFENSE MOTION TO STRIKE PRAYER FOR PUNITIVE DAMAGES

This is a personal injury action between neighbors involving an alleged dog bite. Before the Court is a defense motion to strike from the operative Complaint the prayer for punitive damages (Judicial Council form complaint, Paragraph 14.a.(2)). No opposition is noted.

Today's motion is procedurally defective. Pursuant to Calaveras County Superior Court Local Rule 3.3.7, "all matters noticed for the Law & Motion calendar shall include" specified language in the Notice of Motion pertaining to the Court's tentative ruling procedure, and "failure to include this language in the notice may be a basis for the Court to deny the motion." The pending motion fails to include the required language, subjecting it to summary denial. However, since the issue will no doubt resurface, and again noting plaintiff did not oppose the motion, the Court elects to reach the merits.

Pursuant to CCP §§ 435 and 436, a party may move for an order striking from a pleading "any irrelevant, false or improper matter" or "any part of any pleading not drawn in conformity" with laws, rules or orders. (See *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1683.) According to defendants, the prayer for punitive damages is not drawn in conformity with the laws due to a lack of sufficient averments.

There is no heightened pleading requirement for a punitive damage prayer based on malice or oppression. However, in light of the future evidentiary burden facing plaintiff, it is reasonable to consider that the averments should at least permit a factfinder to have "no substantial doubt" that defendants acted with malice. (*Amerigraphics, Inc. v. Mercury Cas. Co.* (2010) 182 Cal.App.4th 1538, 1559.) To adequately plead a claim for punitive damages under the malice rubric, one must plead with specificity facts demonstrating (1) defendant's conduct was "despicable" and that (2) defendant acted with a willful and conscious disregard for the safety of another in the commission of said conduct. Despicable conduct is conduct that is "so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people [and] having the character of outrage frequently associated with crime." (*Scott v. Phoenix Schools, Inc.* (2009) 175 Cal.App.4th 702, 716.) Stated another way, "punitive damages are appropriate if the defendant's acts are reprehensible ... [and which] could be described as evil, criminal, recklessly indifferent to the rights of the [plaintiff], or with a vexatious intention to injure." (*Food Pro International, Inc. v. Farmers Ins. Exchange* (2008) 169 Cal.App.4th 976, 994-995.)

There are not many cases finding conduct despicable in the context of non-intentional wrongdoing. (See, e.g., *Sumpter v. Matteson* (2008) 158 Cal.App.4th 928, 936 [driving recklessly, while impaired, was despicable]; *Lackner v. North* (2006) 135 Cal.App.4th 1188, 1210 [skiing recklessly, but not impaired, not despicable]; *Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1300-1301 [failure to warn of product's carcinogenic properties was despicable]; *Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1221-1222 [sexually abusing a minor was despicable].) Defendants have not cited, and this Court has not located, any California precedent on point. However, the Court of Appeals of North Carolina has addressed this precise issue, and formulated the following rule:

“Permitting a dog that is known to have twice attempted without provocation to bite a human being to run loose in an area habitated or occupied by other people is evidence of a reckless or wanton indifference to or disregard for the safety of others, sufficient to support an award of punitive damages.”
Hunt v Hunt, 357 S.E.2d 444, 447 (N.C. 1987).

This Court finds the reasoning therein persuasive.

In the case at bar, plaintiff alleges that defendants allowed their dog to roam off-leash in the past, that their dog entered plaintiff's property in the past, and that their dog growled at plaintiff in the past. There are no averments that the dog had been adjudicated to have dangerous propensities or that defendants were consciously disregarding a known risk that their dog would bite someone if allowed to escape the property. Defendants are presumably liable for plaintiff's injuries based on strict liability, but going further into “fault” determinations – especially those required for punitive damages – requires more averments regarding defendants' wrongdoing (*actus res*), defendants' mindset (*mens rea*), and the dog's disposition. (See, e.g., *Thomas v. Stenberg* (2012) 206 Cal.App.4th 654, 666-667; *Salinas v. Martin* (2008) 166 Cal.App.4th 404, 413-414; *Chee v. Amanda Goldt Property Management* (2006) 143 Cal.App.4th 1360, 1369-1370; *Donchin v. Guerrero* (1995) 34 Cal.App.4th 1832, 1838; *Drake v. Dean* (1993) 15 Cal.App.4th 915, 922.)

Motion to strike Paragraph 14.a.(2) is GRANTED, with 30 days leave to amend.

The Clerk shall provide notice of this ruling to the parties forthwith. Defendant to prepare a formal Order in conformity with this Ruling in conformity with CRC 3.1312.