

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Chris Gregerson,

Plaintiff,

v.

Morgan Smith, Boris Parker, and
Vladimir Kazaryan; Smith & Raver,
LLP, Saliterman & Siefferman, PC, and
Bassford Remele, PA, Minnesota Law
Firms,

Defendants.

Case Type: OTHER CIVIL
Court File No.: 27-CV-09-13489
Judge: John Q. McShane

**PLAINTIFF'S MEMORANDUM OF
LAW IN SUPPORT OF MOTION
TO AMEND THE COMPLAINT TO
CLAIM PUNITIVE DAMAGES AND
AN ALLOW DISCOVERY OF
DEFENDANT'S FINANCIAL
CONDITION**

Introduction

Plaintiff moves for leave to amend the Complaint to add a claim for punitive damages against defendants Morgan Smith and Boris Parker, and their respective law firms, under Minn. Stat. §§ 549.191 and 549.20. The statute requires a *prima facie* showing of clear and convincing evidence to support the allegation of willful indifference to the rights of others. The factors used to measure punitive damages include the financial condition of a defendant; if leave to amend is granted, Plaintiff request an order allowing discovery of defendant's financial condition.

Background

[OCP¹] used photos downloaded from Gregerson's photography website in advertisements without Gregerson's knowledge or consent. In 2005, Gregerson saw a skyline

1 “OCP” refers to the Original Corporate Plaintiff in the underlying litigation. That party's name has been redacted from this document related to a settlement agreement. The document is otherwise unchanged. “owner of OCP” refers to the individual who owns the corporation.

photo from his website in a [OCP] ad and demanded payment. The owner of [OCP], [owner of OCP], acknowledged the photo was Gregerson's but refused to pay for it. He claimed he already paid someone named Michael Zubitskiy and would not pay twice. [owner of OCP] refused to provide Zubitskiy's contact information, and made no attempts contact Zubitskiy or recover the \$850 he allegedly paid him. Gregerson brought a claim in conciliation court.

Defendant Morgan Smith represented [OCP] in that action. In a mandatory mediation session before the hearing, [owner of OCP] and Smith admitted the disputed photo was Gregerson's but objected to payment because the suit was not in federal court. [owner of OCP] and Smith still made no attempt to contact or involve "Michael Zubitskiy". The claim was dismissed without prejudice.

Gregerson publicized [OCP]'s copyright infringement in an essay on his website. Smith represented [OCP] in a defamation action against over the essay, alleging (for the first time) the photo was not Gregerson's but was, in fact, actually taken by Michael Zubitskiy. [owner of OCP] and Smith *still* made no attempt to locate or contact Zubitskiy. [owner of OCP] stated at his Feb. 13, 2006, deposition that he had no evidence Zubitskiy took the photo.

Gregerson served multiple subpoenas to locate Michael Zubitskiy, did a WestLaw PEOPLE-ALL search and used a skip-trace service. All showed no record of anyone by that name in the United States. Gregerson served [OCP] and Smith with a motion for sanctions alleging Zubitskiy did not exist, and they lacked any evidence to base their denial of Gregerson's copyright to the skyline photo. Gregerson produced a certificate of copyright registration, proof of prior publication, and out-takes from the photo shoot when he created the photo. Smith (and later, defendant Boris Parker) maintained Zubitskiy lawfully sold the skyline photo to [OCP].

Boris Parker took over representation of [OCP] after the defamation complaint was amended in April, 2006. He removed it to federal court where he represented additional counterclaims against Gregerson based on Gregerson's web page about [OCP] being false. Gregerson prevailed on all counts, with the court finding (1) There was no credible evidence to support the belief Zubitskiy existed or was the source of the photos, (2) There was no genuine dispute as to Gregerson's ownership of the photos, (3) [OCP] showed a flagrant disregard for Gregerson's rights as a copyright holder, and (4) Nothing authored by Gregerson was false.

Standard for punitive damages

In order to be entitled to amend a complaint to plead punitive damages, a plaintiff must make a *prima facie* showing of entitlement to such damages, which are recoverable "only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others." Minn. Stat. §§ 549.191 and § 549. 20 at Subd. 1(a). *Prima facie* evidence is evidence which, if unrebutted, would support judgment in the moving party's favor. *McKenzie v. Northern States Power Company*, 440 N.W.2d 183, 184 (Minn. App. 1989). In this context, the term *prima facie* "does not refer to a quantum of evidence, but to a procedure for screening out unmeritorious claims for punitive damages." *Thompson v. Hughart*, 664 N.W.2d 372, 377 (Minn. Ct. App. 2003) (citation omitted). It is the plaintiff's evidence that controls; a court should not consider evidence submitted in opposition to the motion. *Berczyk v. Emerson Tool Co.*, 291 F. Supp. 2d 1004, 1014 n.10 (D. Minn. 2003). In reviewing the evidence, a court "makes no credibility rulings, and does not consider any challenge, by cross-examination or otherwise, to the plaintiff's proof." *Berczyk* at 1008.

A defendant acts with deliberate disregard when he deliberately proceeds to act (1) in

conscious or intentional disregard of, or (2) with indifference to, the high probability of injury to the rights or safety of others. Minn. Stat. § 549.20(b)(1) and (2).

Rules for attorneys in representing a client's claims

During the August 26th, 2009, motion hearing in this case, the court asked the Plaintiff “What's to say they [the defendants] didn't simply believe their client?” The Plaintiff asked Smith and Parker this question in discovery. Neither responded that they did believe their client, but instead both contended they believed there was evidence to support their client's claims. Exhibit Q, R. This is a recitation of the language in Minn. R. Civ. P. 11.03 and Minn. Stat. § 549.211, regarding sanctions in civil actions. Both impose sanctions unless:

“...to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances...(2) the claims, defenses, and other legal contentions are warranted by existing law...(3) the allegations and other factual contentions have evidentiary support or...(4) the denials of factual contentions are warranted on the evidence...”

(underline added). The instant action is not a motion for sanctions under § 549.211, so this standard is not controlling. It prohibits an attorney from presenting factual claims (or denials) without knowledge, information, and belief they have evidentiary support.

However, if a lawyer knows a client's factual claims are false, it is prohibited under the Minnesota Rules of Professional Conduct (MRPC), whether it has evidentiary support or not. Rule 3.3 (a) states “A lawyer shall not knowingly: (1)make a false statement of fact or law to a tribunal...(3) offer evidence that the lawyer knows to be false.” Rule 4.1 requires “In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law.” The instant action is not a complaint under the Rules of Professional Conduct.

Criminal penalties for representing forged evidence at trial

There are at least three criminal penalties that would apply to an attorney who knowingly presents a forged sales agreement in court. Minn. Stat. §481.071 provides that any attorney “guilty of any deceit or collusion . . . shall be guilty of a misdemeanor.” Minn. Stat. §609.625 criminalizes falsely making documents “...whereby, when genuine, legal rights, privileges, or obligations are created...”. Subdivision 3 of that statute, Uttering or possessing, states:

Whoever, with intent to defraud, utters...any forged writing or object mentioned in subdivision 1...knowing it to have been so forged, may be sentenced as provided in subdivision 1.
[imprisonment for not more than ten years or to payment of a fine of not more than \$20,000, or both]

Minn. Stat. §609.63, forgery, states at Subdivision 2:

Subd. 2. Crime defined; forged document at trial.

Whoever, with knowledge that it is forged, offers in evidence in any trial, hearing or other proceedings authorized by law, as genuine, any forged writing or object may be sentenced as follows:...imprisonment for not more than three years or to payment of a fine of not more than \$5,000, or both.

The instant action is not a criminal prosecution for utterance of forgery, but these statutes would be relevant to measuring punitive damages against a lawyer who knowingly represents forged evidence; damages “...shall be measured by...factors...including...the severity of any criminal penalty to which the defendant may be subject.” Minn. Stat. § 549.20, Sub. 3, Factors.

Standard for malicious prosecution

A claim for malicious prosecution requires the underlying action be brought “without probable cause or reasonable belief that the Plaintiff will ultimately prevail on the merits.”

Complaint, ¶ 101. This appears consistent with the above rules, but is not identical language or an identical standard. The terms “reasonable belief” and “merit” are defined in the Minnesota Rules of Professional Conduct, focusing on the conduct of lawyers, as follows.

“Reasonable belief” or “reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

MRPC at 1.0 (j). There is no definition of “prevailing on the merits”, but Rule 3.1 describes Meritorious Claims and Contentions as having “...a basis in law and fact...”. Thus, to prevail on the merits requires a claim to have a basis in fact.

By this standard, a “reasonable belief that the Plaintiff will ultimately prevail on the merits” appears to require a lawyer believe the facts he is representing, and circumstances must be such that the belief is reasonable. The following circumstances would satisfy the malicious prosecution element of “lacking a reasonable belief the Plaintiff can prevail on the merits”:

1. A lawyer's knowledge that the client's evidence is forged, or factual contentions false;
2. Lacking “knowledge, information, and belief” that the “factual contentions have evidentiary support”;
3. Lacking belief in the facts the claim is based on;
4. Believing the facts, but without circumstances to make such belief reasonable.

Standard for actual knowledge

The Minnesota Rules of Professional Conduct prohibit an attorney from knowingly representing false evidence, with the definition of “know” or “knowing” as “...denot[ing] actual knowledge of the fact in question. A person's knowledge can be inferred from circumstance.” Id., rule 1.0, (g) (personal knowledge is not required). The phrase “Actual knowledge” is defined as:

(1) direct and clear awareness (as of a fact or condition) *actual knowledge* that the name and account number referred to different persons;

(2) awareness of such information as would cause a reasonable person to inquire further; specifically : such awareness considered as a timely and sufficient substitute for actual notice (as of a work-related injury or of a bankruptcy proceeding) actual knowledge within 90 days.

Source: *Merriam-Webster's Dictionary of Law*. Merriam-Webster, Inc.

Actual knowledge of a false claim can be inferred from circumstances.

...actual knowledge can be inferred from circumstantial evidence. Otherwise, it would be nearly impossible to establish actual knowledge in the context of a claim of fraudulent misrepresentation unless the affirming party admitted that it knew of the fraud.

Adams v. Adams, 131 P.3d 464 (Alaska, 2006). Proving actual knowledge does not require a confession, but may be proven by all the facts and circumstances surrounding a case, including awareness of evidence that an average person would consider to show a fact to exist.

actual knowledge--that is express cognition, or awareness implied from "knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry[thus, charging the individual] with notice of all facts which such an investigation would in all probability have disclosed if it had been properly pursued."

Poffenberger v. Risser, 431 A.2d 677, 681 (Md.1981)

Willful ignorance

Knowledge of highly suspicious circumstances, coupled with an unaccountable failure to investigate, allows an inference that a party had actual knowledge of the wrongdoing. "If a person with a lurking suspicion goes on as before and avoids further knowledge, this may

support an inference that he has deduced the truth and is simply trying to avoid giving the appearance (and incurring the consequences) of knowledge.” *United States v. Ramsey*, 785 F.2d 184, 189 (7th Cir.1986). The doctrine of willful ignorance or willful blindness makes one liable for the obvious truth one seeks to ignore by refusing to look. One may not deliberately close his or her eyes to what would otherwise be obvious to them. “[D]eliberate ignorance and positive knowledge are equally culpable.” See *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir. 1976). Thus, a statute requiring that an accused acted knowingly is satisfied by proof that the defendant acted “with an awareness of the high probability of the existence of the fact in question.” *Id.*

“In order for a defendant's ignorance to be deliberate or willful, the defendant must have been presented with facts that put him on notice that criminal activity is probably afoot, and then the defendant must have failed to investigate those facts, thereby deliberately declining to verify or discover the criminal activity.” *United States v. Barnhart*, 979 F.2d 647, 652 (8th Cir. 1992). “A willful blindness [jury] instruction is appropriate when the defendant asserts a lack of guilty knowledge, but the evidence supports an inference of deliberate ignorance.” *United States v. Long*, 977 F.2d 1264, 1271 (8th Cir. 1992).

Relevant evidence

1. Defendants Smith and Parker had no evidence to support their representation of [OCP]'s denial of Gregerson's copyright ownership of the skyline photo. Gregerson's ownership

was corroborated by all available evidence, which included:

- a) Gregerson's work as a photographer and body of similar work;
- b) Gregerson's certificate of copyright registration (produced to Smith on January

25th, 2006), which established copyright ownership under federal law². Exhibit D.

2 “A certificate of registration of a copyright constitutes *prima facie* evidence of the validity of

- c) Possession of the high-resolution file for the photo (offered to [owner of OCP] in June, 2005, and February 13th, 2006. [owner of OCP] refused, but it was produced later);
- d) “out-takes”, similar photos taken at the same date and time as the disputed photo (produced on February 23rd, 2006). Exhibit O.
- e) prior publication by Gregerson, both on his website beginning Jan. 14th, 2004, and in Mpls/St. Paul magazine. Exhibit E, skyline photo license.
- f) Judge Montgomery ruled “There is no genuine dispute as to the ownership of the photos in question.” See Parker Defendant's memo. supporting dismissal at exhibit F, p. 6.
- g) [owner of OCP] admitted, at his Feb. 13, 2006, deposition, he had no evidence that Michael Zubitskiy took the photo. Exhibit C, page 34:19-21.

Q. Are you aware of any evidence that Michael Zubitskiy took the photo?

A. I'm not aware.

2. [owner of OCP] and Smith admitted Gregerson owned the skyline photo.

- a) On August 17th, 2005, in mandatory mediation before the small claims court hearing Gregerson brought against [OCP], [owner of OCP] and Smith agreed that the skyline photo was Gregerson's. Affidavit of Chris Gregerson at no. 10.
- b) At the following hearing, no challenge to Gregerson's copyright ownership was made, only the suggestion that [OCP]'s payment to Zubitskiy might be binding on Gregerson if it turned out Zubitskiy was Gregerson's employee. Id at no. 12, 13.

the copyright and facts stated in the certificate.” 17 U.S.C. § 410(c).

c) Neither Smith nor [owner of OCP] attempted to contact “Zubitskiy” to determine which party created the photo prior to representing to the court that Zubitskiy created it and owned the copyright. Exhibit A, [OCP]'s first discovery responses, Jan. 12th, 2006, interrogatory no. 13.

d) In comments he posted on Gregerson's web page under his own name, [owner of OCP] stated he was “...never even questioning his[Gregerson's] legal rights for the photo...”. Exhibit J, comments by [owner of OCP].

e) [owner of OCP] testified upon deposition he didn't challenge Gregerson's copyright.

Q. You haven't asked me to produce the high-resolution file for the photo or out-takes that show that I was at the time and location the photo was produced or a wider version of the same image....do you have any interest in that type of documentation or evidence?

A. No.

Q. Can you tell me why you're not interested in it?

A. Yes, I can.

Q. And why is that?

A. Because I'm not questioning your copyrights on the picture.

Exhibit C, transcript of deposition of [owner of OCP], page 22:12-23:1.

f) [owner of OCP] also testified he had no evidence “Zubitskiy” didn't simply take the photo from Gregerson's website.

Q. ...Do you have any way of knowing whether or not Michael Zubitskiy took the photo that he gave you from this web page?

A. I do not.

Q. Have you attempted to contact Michael Zubitskiy to ask him about whether he took the picture from this web page?

A. I haven't.

Id, page 18:14-24.

g) Boris Parker, representing [OCP], stated “Defendants [OCP] have not inquired as to the copyright ownership of the Dex photo.” Exhibit F, interrogatory no. 7.

3. [OCP]'s claims against Gregerson over his web page relied upon their factual denial of Gregerson's copyright ownership

a) In discovery requests for admissions, Morgan Smith represented [OCP]'s denial Gregerson owned the copyright to the photo, claiming Zubitskiy took it and owned it. Exhibit A, request for admissions 3, p. 14.

b) In discovery interrogatory no. 4, [OCP] and Smith stated their publication of the skyline photo was lawful based on having purchased it from Zubitskiy, the true creator and copyright holder. Id., p. 4.

c) In a discovery interrogatory asking what statements on the web page are false, [OCP] and Smith cited Gregerson's statement “[OCP] and copyright violation...They published a photo from this website.” Exhibit B, p.8.

d) At his deposition, [owner of OCP] claimed Zubitskiy took the photo, not

Gregerson:

Q. You believe that this photo was taken by Michael Zubitskiy?

A. Yes.

Exhibit C, deposition of [owner of OCP], page 19:16-18.

Q. Who do you believe owns the copyright to that photo?

A. Michael Zubitskiy

Exhibit C, deposition of [owner of OCP], page 9:2-4

e) On April 10th, 2006, Judge Mark Wernick ruled [OCP] could not proceed in their

defamation lawsuit unless they specified direct challenges to Gregerson's statements about [OCP]'s copyright infringement (instead of merely alleging the title was defamatory). On April 14th, Smith served an amended complaint on behalf of [OCP] which explicitly cited Gregerson's statements alleged to be false and defamatory. They were Gregerson's claim of ownership of the skyline photo, and claim that [OCP] infringed his copyright. Complaint at ¶ 62.

- f) The federal Answer and counterclaims (e.g. deceptive trade practices, interference with prospective contractual relations, etc.) also denied Gregerson's copyright ownership and alleged the web page was false. Complaint at exhibit L, ¶¶ 22, 39, 58(b), 73, 74, 75. It alleged, at ¶ 46, Gregerson accused [OCP] of being “thieves engaged in fraudulent business conduct.” In a renewed discovery request by Gregerson, he asked [OCP] to quote the exact text that was the basis for this allegation. Boris Parker, representing [OCP], did not identify any comments, and never supplemented his response. Exhibit G, interrogatory 15.
- g) At trial, [OCP] did not identify any false statements authored by Gregerson. Complaint exhibit A, Order for Judgment, pp. 18.

4. There was an inexplicable failure of Smith or Parker to make any effort to locate Zubitskiy, despite direction from the court and duty to their client to obtain his testimony.

- a) In answering a discovery interrogatory on January 12th, 2006, Smith represented [OCP] (and their agents) made no effort to contact Michael Zubitskiy since purchases the photos on March 19th, 2004. Exhibit A, interrogatory 13, page 8.
- b) [owner of OCP] also stated at his February 14, 2006, deposition he made no

efforts to locate Zubitskiy. Exhibit C, page 18:21-24.

- c) Inexplicably, Smith and Parker never contacted or subpoenaed the gym where [owner of OCP] claims he met Zubitskiy. Gregerson subpoenaed LifeTime Fitness for membership records for anyone named Zubitskiy, [owner of OCP]'s cell phone company for call records from Zubitskiy, Qwest for any unlisted phone numbers for Zubitskiy, and others. Smith and Parker served no subpoenas.
- d) Boris Parker moved to quash Gregerson's subpoenas designed to locate information on Zubitskiy. Specifically, the subpoena to Qwest seeking any unlisted phone numbers for Michael Zubitskiy, and Hennepin County for any public assistance records. The motion was denied.
- e) At the small claims court hearing, Gregerson sought recovery from [OCP] for his photo, with [OCP] claiming they paid Zubitskiy \$850. Inexplicably, Smith failed to assert a cross-complaint on behalf of [OCP] against Zubitskiy. This would allow them to recover the \$850 they paid Zubitskiy, while still having Gregerson's claim dismissed for lack of jurisdiction. If the jurisdiction argument failed, they could defray damages owed to Gregerson by recovering them from Zubitskiy.
- f) Once Gregerson informed [OCP] he owned the skyline photo, [OCP] and [OCP]'s attorneys had an urgent duty to contact the person they bought the photo from and demand proof of ownership (or their money back). According to sworn discovery responses, neither Morgan Smith, [owner of OCP] , Parker, or Kazaryan ever opened a phone book, did a web search, or took any other steps to locate or contact Zubitskiy. This is inexplicable, considering their claims were based on

him.

g) The factual assertions Morgan Smith and Boris Parker represented – that [OCP] bought all rights to the skyline photo from Zubitskiy – they had a valid claim for copyright infringement against Gregerson for Gregerson's use of the skyline photo. Inexplicably, they neither brought such a claim or even asked Gregerson to stop using the photo. Nor did they ask Gregerson to turn over the money he earned from licensing the photo.

h) In attempting to settle the dispute, it is inexplicable that [owner of OCP]'s maximum offer would be \$500 (and Smith's offer zero) while representing they paid Zubitskiy \$850, since they could recover their \$850 from Zubitskiy and offer Gregerson at least that much (and break even). Judge Wernick stated the obvious when he wrote, in his April 10, 2006, order:

If [owner of OCP] had been acting in good faith...
[owner of OCP] would have offered to fairly compensate
Gregerson and then seek reimbursement from
"Zubitskiy"...[owner of OCP]'s bad faith...is the
moral equivalent of "theft"...

Complaint at exhibit H, p. 10. The fact [owner of OCP] and Smith would not offer Gregerson the \$850 that was paid to Zubitskiy suggests they somehow already *knew* that Zubitskiy did not exist, before any attempts to locate him were made.

i) Following Gregerson's Feb. 21st, 2006, motion alleging Zubitskiy was fabricated, [owner of OCP] and Smith contact investigator Michael Grostyan for the purpose of discrediting Gregerson's skip-trace report. Grostyan confirmed he also could not find any trace of Michael Zubitskiy. Exhibit P. [owner of OCP] and Smith proceeded with their claims nonetheless – despite the unavailability of the only

witness who could possibly corroborate their version of events.

5. [OCP]'s litigation relied upon the claim it “lawfully” purchased stolen property, and had as it's goal to harm Gregerson, with no cogent legal argument.

a) [OCP] stole Gregerson's photos, but claimed to have “lawfully” purchased them from Michael Zubitskiy, regardless of where Zubitskiy got the photo or

Zubitskiy's availability to testify. [owner of OCP] stated upon deposition:

Q. Do you believe it's fair to use that property if you paid someone and got permission even if it wasn't from the owner?

A. Yes. Yes, I purchased – because this – when I was buying it I thought I was buying from the owner.

Exhibit C, page 12:15-20.

b) [owner of OCP] stated in comments he posted on Gregerson's web page (Exhibit J) and in negotiations with Gregerson (Affidavit of Gregerson at no. 7) that his bottom line was “I don't want to pay twice for the same photo.” In truth he didn't pay once, but assuming his claim was true, it's a claim that the purchase of stolen goods satisfies any obligation to the rightful owner of the property.

c) In his October 22nd, 2007, statement of the case, Boris Parker summarized the dispute by still arguing [OCP] “lawfully” purchased stolen photos, despite the court's ruling the photos were Gregerson's and [OCP] infringed:

Having lawfully procured a number of photographs for website development use from a third party in March 2004, including the photograph allegedly owned by Gregerson, [OCP] responded to Gregerson that it had paid for and acquired the photo lawfully and questioned Gregerson's motive given his exorbitant demands...Notwithstanding the fact that [OCP] had already paid for the photo, [OCP] Financial

offered to pay Gregerson the amount of \$500.00 to resolve the matter...Gregerson refused the offer.

- d) Morgan Smith described the intent of the litigation as being to “chase Mr. Gregerson away” (exhibit H).
- e) Boris Parker stated the case was not about the truth of Gregerson's statements, but damage of the statements to [OCP]. Affidavit of Gregerson at no. 30.

6. All independent evidence showed Zubitskiy did not exist.

- a) There is no listing for any Zubitskiy in the Twin Cities phone book, and a web search turned up nothing for that name, despite Zubitskiy's alleged career as a photographer and web developer. Complaint at exhibit C.
- b) A background check by Gregerson and [OCP] showed no record or anyone named “Michael Zubitskiy”. Exhibit M, P.
- c) [OCP] asserted Zubitskiy provided government-issued ID for his signature to be notarized, but there were no driver's license records for him. He was met attending a sauna at a suburban gym, and was a photographer and web developer, but there was no credit record for him, or mention on the World Wide Web.
- d) Gregerson subpoenaed LifeTime Fitness, the gym where [owner of OCP] allegedly met Zubitskiy, requesting records for any member named “Zubitskiy”. There were no such members. Exhibit N.
- e) Gregerson Subpoenaed Qwest to find any unlisted numbers for any spelling of Zubitskiy. Qwest responded there were no records. Exhibit L.
- f) A WestLaw “PEOPLE-ALL” search done by Gregerson turned up nothing for Zubitskiy.

g) In a Feb. 14th, 2006, letter from Smith to [owner of OCP], he stated “I appreciate that there are certain Boris and other Zubitskiy's in existence, but would appreciate the discovery of at least one Michael.” Exhibit K.

h) Zubitskiy allegedly provided a CD-ROM with photos he took in March of 2004, but one photo showed a summertime scene of a Kenwood mansion, contributing towards the incredible nature of the story. Complaint at exhibit A, p. 6.

i) Judge Ann D. Montgomery ruled “There is no credible evidence to support the belief that Zubitskiy exists or was the source of the controverted photos.”

7. The [OCP] employees who notarized Zubitskiy's signature lost his commission for it.

a) The notarization of Zubitskiy's signature was by [OCP] employee Vladimir Kazaryan, a defendant in this action on a claim of aiding and abetting.

b) While the underlying litigation was still ongoing, he faced proceedings by the Minnesota Department of Commerce for fraudulently notarizing Zubitskiy's signature. In response, he surrendered his notarial commission to avoid further proceedings. Complaint exhibit E.

c) His deposition testimony was filled with contradictions, as was his trial testimony, which was deemed not credible by Judge Montgomery. Complaint exhibit A.

8. [OCP] employee Michael Walker testified the Zubitskiy photo agreement was fabricated.

Former [OCP] employee Michael Walker testified upon deposition (and later at trial) he saw the Zubitskiy photo agreement in June of 2005 on [OCP]'s printer/copier. He was suspicious because the document was dated 2004, but lacked any signatures yet. Complaint exhibit A.

9. Smith and Parker were aware of [owner of OCP]'s reputation for dishonesty.

- a) Both knew [owner of OCP] told Gregerson he used the skyline photo only once, but it was soon established [owner of OCP] used it on multiple web sites and newspaper ads.
- b) Dozens of comments were posted on Gregerson's web page by people claiming they, too, had been victimized by [owner of OCP].
- c) Smith was having continued trouble with non-payment by [owner of OCP] (and ultimately sued [owner of OCP] himself).

10. At trial, Boris Parker did not introduce any evidence Gregerson's statements on his web page were factually untrue. This was the basis of the litigation against Gregerson.

- a) Judge Ann D. Montgomery wrote the only statements by Gregerson challenged at trial were a referral of anyone victimized by [OCP] to the Minnesota Department of Commerce, which she ruled "...was so clearly a statement of Plaintiff's opinion...", and a statement by Gregerson [OCP] was "...suspected of fraud and forgery was a true statement of fact reflecting defendant's belief...." Complaint at exhibit A, p.17.
- b) There was no challenge to Gregerson's statement that the Zubitskiy photo agreement was forged, Zubitskiy doesn't exist, and [OCP] committed copyright infringement – the focus of the claims against Gregerson for the past two years.

11. Morgan Smith and Boris Parker have not indicated they believed their client's claims.

- a) In discovery in the instant action, Smith has indicated he did not believe his client's contentions. Exhibit Q, interrogatory no. 1.

- b) Parker objected that his belief is not relevant. Exhibit R, interrogatory 1.
- c) Both responded they believed [owner of OCP]'s claims had evidentiary support, language from Minn. R. Civ. P. 11.03 regarding sanctions.

12. Bassford Remele, PA, and Saliterman & Siefferman, PC, employed Boris Parker in a managerial capacity with supervisory authority. He was a partner and/or shareholder at both firms, according to the firm's web sites. Exhibit I. Likewise, Morgan Smith is a partner/owner at Smith & Raver, LLP.

Argument

Malicious prosecution plaintiffs are entitled to punitive damages if the defendants showed a deliberate disregard for the rights of others. *Allen v. Osco Drug, Inc.*, 265 N.W.2d 639, 644 n.6 (Minn. 1978). The attorney defendants in this case represented factual contentions they knew were false, or lacked evidentiary support. They brought a cause of action without a reasonable belief they could prevail on the merits, with no evidence to support their denial of Gregerson's copyright ownership. They had actual knowledge that [owner of OCP]'s claims regarding Michael Zubitskiy were false (an average person, exposed to the same evidence, would know Michael Zubitskiy did not exist; further, Smith and Parker further engaged in an inexplicable failure to attempt to locate Zubitskiy, despite the overwhelming necessity of finding him if they had any hope of prevailing in their client's claims).

This conduct qualifies as a reckless disregard for the rights of others. The evidence produced amounts to a *prima facie* showing the defendants attempted to use the courts, on behalf of their client, to deprive Gregerson of his free-speech rights without a reasonable basis to believe the Plaintiff could prevail on the merits.

The Law Firms

The defendant law firms are liable for punitive damages under Minn. Stat. §549.211, Sub. 2. Master and Principle, (c), stating a principle is liable if “the agent was employed in a managerial capacity...”. Boris Parker and Morgan Smith were partners at their firms with supervisory authority. Exhibit I. The Minnesota Rules of Professional Conduct (at 5.1(c)(2) describe a partner as someone with “...managerial authority in the law firm...”.

Conclusion

The representation of forged evidence in court, against a defendant whom had already been victimized once by theft of his property, is extremely serious. If done knowingly, it is criminal conduct and a serious violation of the rules of procedure and the rules of professional conduct. The defendant attorneys had a duty to their client to locate Zubitskiy; their failure to attempt to do so is inexplicable – not even opening the phone book or doing a simple web search. Judge Wernick advised them explicitly “to locate the elusive Mr. Zubitskiy” if they wished to pursue their claim (Complaint at exhibit H, p. 13). They chose not to try, despite Zubitskiy's liability to [OCP] for the copyright infringement damages [OCP] would eventually have to pay Gregerson (\$19,462 was awarded). This failure to look for Zubitskiy was willful ignorance.

Gregerson requests leave to amend his complaint to seek punitive damages against Morgan Smith and Boris Parker under Minn. Stat. §§ 549.191 and 549.20, and against their law firms (Bassford Remele, Saliterman & Siefferman, and Smith & Raver) who employed them in a managerial capacity under § 549.20, Sub. 2, (c) Master and Principle. He further requests an order allowing discovery of these defendant's financial condition.

Respectfully submitted,

Dated: _____

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