

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF LINN

JULIE MARIE GRIZZEL,

Plaintiff,

vs.

JAMES WILLIAM HICKEY, dba S & S FARMS,
RON LEE OMARA, and S. S. FARMS LINN
COUNTY, INC. and S & S FARMS LINN
COUNTY, INC.

Defendants.

Case No. 90-0722

MOTION FOR
SUMMARY JUDGMENT
(Oral Argument
Requested)

Defendants James William Hickey and S.S. Farms Linn County, Inc. respectfully move the Court for summary judgment in their favor herein. This Motion is supported by Exhibits A through B, attached hereto and by this reference made a part hereof. It is believed that defendant Omara has filed a petition in bankruptcy and that the case against him is thus stayed.

Defendants request oral argument, in person, and believe that approximately 30 minutes will be required.

Official court reporting services are not requested.

Points and Authorities: Rule 47C. of the Oregon Rules of Civil Procedure provides that summary judgment "...shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Defendants submit that the facts of the case outlined generally in

1 plaintiff's Amended Complaint, together with the affidavits and
2 transcripts, portions of which are Exhibits to this motion, make
3 out an overwhelming case for summary judgment herein in favor of
4 these defendants, as follows:

5 1. In May of 1988 plaintiff owned a cocker spaniel dog,
6 which she had bought in 1981 for \$250.

7 2. On May 16, 1988, two young men, Ron Omara and Curtis
8 Eubanks, stole the plaintiff's dog and also stole a
9 rottweiler dog belonging to a Joe Fick.

10 3. Eubanks and Omara brought the two dogs to defendant James
11 Hickey, who was then a federally licensed animal dealer,
12 buying and selling medical research animals. Eubanks and
13 Omara offered to sell the two dogs.

14 4. Mr. Hickey refused to buy the cocker spaniel but did buy
15 the rottweiler.

16 5. Omara and Eubanks left, but abandoned the cocker spaniel
17 there on the Hickey farm.

18 6. Defendant Hickey disposed of the cocker spaniel by
19 gunshot (a method approved by the U.S. Department of
20 Agriculture, the licensing agency) and buried the carcass
21 (required by the USDA).

22 7. The owner of the rottweiler reported the theft to the
23 authorities, and the designated officer, as part of the
24 investigation, came out to see James Hickey, who confirmed
25 that Omara and Eubanks had brought in two dogs and that he
26 had purchased one and disposed of the other. The rottweiler

1 was identified by and reunited with its owner.

2 8. Plaintiff's fiance' called Mr. Hickey the next day and
3 visited Hickey's kennels looking for the missing cocker
4 spaniel, but the description didn't match that of the
5 missing animal.

6 9. Plaintiff came out to the kennels a day later and
7 inquired further. At that time, apparently the description
8 mismatch was cleared up and Mr. Hicky confirmed to the
9 plaintiff that he probably had "put down" plaintiff's dog,
10 and had buried the carcass.

11 10. Two months later, plaintiff pressed criminal charges
12 against Eubanks and Omara. Eventually Omara was convicted
13 of Theft 2 for the theft of plaintiff's dog. As part of the
14 sentence, he was required to make restitution to the
15 plaintiff for \$250, which he did do. Eubanks was a
16 juvenile, and the disposition of his case is not known.

17 With the scene thus set, we must examine how that has been
18 translated into a set of allegations in the Amended Complaint and
19 claimed damages of \$400,000. Plaintiff does not allege that Mr.
20 Hickey and the corporate defendant, S. S. Farms, acting through
21 Mr. Hicky, knew the plaintiff, bore any grudges or malice toward
22 the plaintiff, had any knowledge about plaintiff's dog, the
23 dog's lineage, the "bond" between plaintiff and her dog, or the
24 circumstances of the theft. The key accusation against them is
25 that "Hicky knew or should have known by objective
6 characteristics of the circumstances alleged herein that My Girl

1 (the dog) was not a stray and could not reasonably have been
2 owned by Omara and/or Eubanks but was instead a pet which had
3 that day been wrongfully taken from its owner-companion." The
4 Amended Complaint further claims that Mr. Hickey "should have
5 known from objective observation that My Girl (the dog) was not a
6 homeless animal, but was instead someone's companion." The same
7 paragraph also alleges that Mr. Hickey "knew or should have known
8 that Omara and Eubanks had taken wrongfully My Girl from her
9 owner companion."

10 This language requires some serious reflection. First,
11 there is absolutely nothing in the allegations or the evidence to
12 indicate or even hint that plaintiff's dog was represented to Mr.
13 Hickey as a stray or a homeless animal, so those references in
14 the Complaint are quite meaningless. Second, if an observer sees
15 a man with a dog, what does an "objective observation" reveal?
16 It reveals a man with a dog, and nothing more. Some humorous
17 studies have been done to the effect that owners tend to look
18 like their dogs, or vice versa. Was this one of the fatal
19 "objective characteristics of the circumstances" that Mr. Hickey
20 overlooked or ignored? Is it so utterly extraordinary for a
21 young man to be seen with a cocker spaniel that investigation is
22 demanded? In actual fact, it is rare to see members of
23 motorcycle gangs with well trimmed poodles, or to see elderly
24 widows with large attack dogs, but beyond those extremes, how
25 unusual is it for a young man, or a member of his family, to own
26 a cocker spaniel? Are well groomed cocker spaniels extremely

1 rare? This general line of questioning was submitted to the
2 plaintiff and she was unable or unwilling to clarify much of
3 anything on this issue.

4 It is important to note that Mr. Hickey did not buy the dog
5 and he did not know it was stolen. He did know one of the young
6 men, and knew that he owned dogs. After he refused to buy the
7 cocker spaniel and it was left there nonetheless, he also then
8 knew the cocker spaniel was deliberately abandoned on his
9 property by the owner or at least the person who claimed he was
10 the owner.

11 The core of plaintiff's complaint is a the claim of
12 negligence. The First and Third Claims for Relief are directed
13 solely against the defendant Omara, the Second, Fourth, and Fifth
14 Claims include Mr. Hickey and the corporation.

15 Plaintiff's Second Claim, directed at Mr. Hickey and the
16 corporation is the claim of negligence. The definition of
17 negligence requires first that there must be a legal duty
18 existing on the defendant to perform some act and a failure to
19 perform that duty, which failure must be the proximate cause of
20 injury and damage. Aiken v. Shell Oil Co., 219 Or 523, 348 P2d
21 51 (1960). "It is elementary that where there is no duty, there
22 is no negligence." Booth v. Nirshel, 239 Or 634, 637, 399 P2d
23 364 (1965). There must be (1) a legal duty to use care, (2) a
24 breach thereof, and (3) damage to the plaintiff which (4) was
25 proximately caused by the breach. Stout v. Madden, 208 Or 294,
26 300 P2d 461 (1956). So, given these guidelines, the case at hand

1 boils down to the question of what "duty" if any the law imposes
2 where the owner (or the person believed to be the owner)
3 deliberately abandons an animal on ones property? The Court is
4 not required to guess, for the complaint must state the duty
5 imposed or facts from which the law will imply a duty. Kerk v.
6 Tektronix, Inc., 244 Or 10, 415 P2d 510 (1966), citing Hendricks
7 v. Sanford, 216 Or 149, 337 P2d 974 (1959). On both points
8 plaintiff's case fails, for the plaintiff has failed to state the
9 specific "duty" defendants owed to the plaintiff and failed to
10 set forth facts from which a duty can be implied by law.

11 Even if we darken up the facts of the case, and turn Omara
12 and Eubanks into total strangers to Mr. Hickey, what duty did the
13 law impose on Mr. Hickey? The USDA regulations under which he
14 operated required that he get the name of the seller. He did
15 that. Was he to assume that local boys known to him on sight,
16 whose names were entered in the books as the source of an animal
17 would be foolish enough to bring him a stolen animal? That's not
18 the duty the law imposes. "Ordinarily an individual is under no
19 duty to protect another from the criminal acts of a third party,
20 (cites omitted here) and may proceed on the assumption that
21 others will obey the criminal law." Torres v. U.S. National
22 Bank, 65 Or App 207, 670 P2d 230, 233 (1983), rev. denied, 296 Or
23 237, 678 P2d 491. And that's exactly what Mr. Hickey did. It
24 was not negligence.

25 Beyond this discussion, plaintiff's further claims require
6 some analysis. Plaintiff Fourth Claim refers back to the

1 negligence claim and seeks damages for mental distress and
2 punitive damages for the infliction of that mental distress.
3 However, for two reasons such are simply not recoverable in such
4 an action. Negligence alone is not sufficient to support
5 punitive damages. Mills v. Liquidators, 206 Or 212, 219, 288 P2d
6 1060 (1955). And, damages for mental distress are generally not
7 recoverable in an action alleging damage only to property. Meyer
8 v. 4-D Insulation Co., 60 Or App 70, 652 P2d 852 (1982).

9 Colorful language about some "extraordinary transgression of
10 the bounds of socially tolerable conduct" will not transmogrify
11 the underlying facts of the case into something they are not.
12 The remaining allegation directed against these two defendants is
13 one of conversion. As the market value of the dog was nominal,
14 the real issues are the mental distress claimed and the punitive
15 damages. The case of Fredeen v. Stride, 206 Or 369, 525 P2d 166
16 (1974) is directly on point and dispositive of both issues. In
17 that case action was brought by the owner of a dog against a
18 veterinarian who had given away the owner's dog, and against the
19 person who received the dog from the veterinarian. The court
20 noted that: "Ordinarily a conversion does not cause the property
21 owner sufficient mental anguish to merit an award of damages for
22 pain and suffering and the amount of damages is limited to the
23 value of the property converted." 269 Or at 372. But, it added
24 that "mental suffering is a proper element of damages where
25 evidence of genuine emotional damage is supplied by aggravated
6 conduct on the part of the defendant." 269 Or at 373 (Emphasis

1 added). So, in the case at hand, unless the plaintiff can show
2 some aggravated conduct on the part of these defendants, her
3 emotional response to the loss of her dog is irrelevant. The
4 result in Fredeen v. Stride was that the party who received the
5 dog from the veterinarian was held not liable for such damages.

6 "As a general rule, "punitive damages are not recoverable
7 merely because a conversion takes place. The plaintiff must
8 prove that a conversion occurred and also that defendant's
9 wrongful conduct was attended with aggravating circumstances."

10 Daly v. Wolfard Bros., Inc., 204 Or 241, 253, 282 P2d 627 (1955)

11 (Emphasis added). The plaintiff must show malice or guilty
12 intent on the part of the defendant or other circumstances of
13 aggravation to be entitled to punitive damages. J & J Lumber Co.

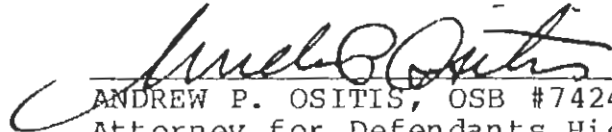
14 v. Oregon Fir Lumber Company, 203 Or 237, 240, 276 P2d 394

15 (1955). Beyond that, the plaintiff must do so by clear and
16 convincing evidence. ORS 41.315.

17 At the very least, if the mental distress and punitive
18 damages are removed, as well they should be, the only real
19 damages which plaintiff can legitimately seek (purely arguendo,
20 as these defendants deny liability) for the alleged "conversion"
21 are damages equal to the dog's value, which she admits she has
22 already received by means of the restitution made by the
23 defendant Omara as part of his criminal case.

24 Given the foregoing, summary judgment is appropriate.
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2 Respectfully submitted this 4th day of March, 1991.
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