UNITED STATES BANKRUPTCY COURT

Eastern District of California

In re Kari Ann Peck, Debtor.	Case No. 01-11815
Adrian Maaskant, Plaintiff, v. Kari Ann Peck, Defendant.	Adv. No. 01-1125-D

FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM OF DECISION UPON REMAND

Upon remand of this matter by the Bankruptcy Appellate Panel of the Ninth Circuit ("the BAP"), this court finds that the defendant, Kari Ann Peck, slandered the plaintiff, Adrian Maaskant, with respect to statements accusing the plaintiff of molesting the defendant's minor daughter Kamria made to neighbors Stephanie Corey and Bill Corey. The court concludes that the damages sustained by the plaintiff as a result of these statements are not discharged by the discharge in bankruptcy obtained by the defendant in her bankruptcy proceeding.

This matter was tried at a point where the defendant's original attorney had obtained permission to withdraw based on the failure of his client to participate in the ongoing litigation. At the trial, only the plaintiff and his attorney and the plaintiff's witnesses were present. There was no appearance by or on behalf of the defendant. The plaintiff fully presented his case, and at the close of the case the plaintiff's attorney made a closing argument. The plaintiff did not request that a single exhibit be admitted into evidence. Upon the record presented, this court found for the defendant. The BAP

determined that the plaintiff had been slandered by the defendant and reversed, remanding the matter for an award of damages.

Acting as his own attorney on the appeal, the plaintiff designated the following items to be included in the record on appeal: (1) the trial transcript, (2) transcripts of seven status conferences, (3) the plaintiff's pre-trial statement, (4) the transcript of a state court proceeding in which the names of neither of the litigants in this adversary proceeding appear in the title of that action, (5) an affidavit from plaintiff's former attorney clarifying the identity of a person mentioned in the state court proceeding, (6) selected portions of a deposition of the defendant (taken in an unnamed proceeding), (7) the depositions of deputy sheriffs Richard Wood and Brian Armendariz, and (8) this court's findings and conclusions as stated on the record. Nine days later the plaintiff filed an amendment to the items to be included in the appellate record which specified: (9) the summons and complaint in a state court action involving the defendant, (10) the summons and complaint in this adversary proceeding, and (11) a hand-written letter the defendant wrote to the court on February 25, 2002.

How many of the documents specified actually reached the BAP is unknown, but apparently some, along with other documents not part of the record, were reviewed by the BAP. The need for making the complaint in this adversary proceeding a part of the record is unknown, but so long as it was not cited for the purpose of establishing any evidence, its inclusion would appear harmless. And clearly it was proper to include the findings and conclusions announced by the court at the conclusion of the trial. But as to every other document noted, it is clear that none of those documents were ever part of the trial record.

The BAP opinion does in footnote 14 note that the plaintiff attached the deposition of a deputy sheriff to his reply brief, then describes content of the cited testimony but then goes on to note that the evidence cannot be considered because it wasn't part of the trial record. While the extent to which the bell can be unrung is unclear, it is noted that the body of the opinion nevertheless does contain references to

matters not part of the trial record.

On page 358 of the opinion it is noted that, " . . . Debtor filed a crime report with the Kern county Sheriff's Department, charging Maaskant for his lewd and lascivious acts." *Maaskant v. Peck (In re Peck)*, 295 B.R. 353 (B.A.P. 9th Cir. 2003). The term "lewd and lascivious" nowhere appears in the trial transcript, but it does appear in the sheriff's report,which is not a part of the record. This strongly suggests–though doesn't in and of itself confirm–that the BAP reviewed and considered the sheriff's report. (It is noted that the report lists the defendant only as an attending parent, not as a witness.) Also, it is clear that the defendant did not herself file or initiate the report but that she appeared with her daughter at the sheriff's office at the request of the sheriff and that the alleged facts of the molestation were obtained directly from Kamria.

The BAP opinion at page 358 also makes reference to the amount of the plaintiff`s claim set forth in the defendant's bankruptcy schedules. The schedules were not part of the trial record, nor was the court asked to judicially notice them, nor was there any oral testimony at trial as to the listing of plaintiff's claim in the schedules. Also on page 358 and in footnotes 7 and 8, the BAP discusses a state court complaint against the defendant, no references to which were in any manner a part of the trial record. Clearly the BAP went beyond the trial record to outside sources, but this court has no way of knowing the extent of such forays or how such efforts affected the tenor and result of the BAP's decision.

Throughout this proceeding the plaintiff has remained apparently oblivious to the fact that the issue of child molestation arose only after the plaintiff, in blatant disregard of California law, and without obtaining a writ of possession, removed the defendant's personal belongings from her residence and dumped them on the driveway. This act alone on the part of the plaintiff is what appears to have set the defendant's course of action into play. Had the plaintiff followed the requirements of California Code of Civil Procedure sections 1161 *et seq.,* and notably section 1174, it is unlikely that the statements regarding child molestation would have ever arisen.

Had the plaintiff not taken it upon himself to contact authorities, he never would have had to incur the costs of the resulting sheriff's investigation. While the defendant did relate to authorities after they contacted her what her daughter had told her of the incident, the only persons to whom the defendant actually asserted that molestation had occurred were her neighbors, the Coreys.[1] In reporting her statements to the plaintiff, it is clear that the Coreys did not believe that the allegations were true. As to the grandmother of one of the other girls on the boat trip, there was no charge of child molestation but rather a request that the other girl join in the accusation.

It is apparent from the record that to the extent that knowledge of the molestation claims became public knowledge, the defendant's older daughter Briona was far more active in discussing the molestations than the statements by the defendant, so it is likely that those who heard of the charges heard them from the plaintiff and his wife and from the defendant's older daughter.

As to the damages to be awarded, the court can only look to the record in making such an award. In his closing argument at the conclusion of the trial, the plaintiff's attorney did not argue for the awarding of any specific amount of damages. The plaintiff argues post-appeal for a large award as a warning to others that they should not engage in slander. That, however, is not the function of this court nor of this proceeding. The plaintiff has also urged, post-trial, that punitive damages should be awarded against this defendant–a single parent with five minor children who was unable to pay her rent.

The purpose of punitive damages is to punish the defendant's wrongdoing. *Adams v. Murakami*, 813 P.2d 1348, 1350 (Cal. 1991). The essential question in every case therefore, is whether the amount of punitive damages awarded serves this interest. *Id.* This court must look to the wealth of the defendant when awarding punitive damages, as

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[1]A declaration filed by the defendant in the early stages of this adversary proceeding noted that it was her understanding that the Coreys, the principal witnesses in this case on the issue of slander, had moved into the defendant's former residence. Whether or not this is true, and whether or not the Coreys were tenants of the plaintiff at the time of trial is unknown, but in any event, as none of this information is part of the trial record, it is in no way affecting this court's decision with respect to damages.

the function of punishment or deterrence will not be served if the defendant's wealth allows him to absorb the award with little or no discomfort. *Id.* "By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and gravity of the particular act, exceeds the level necessary to properly punish and deter." *Id.*

In *Murakami*, the California Supreme Court addressed the issue of whether evidence of a defendant's financial condition is a prerequisite to an award of punitive damages and, if so, whether the burden of introducing evidence of the defendant's wealth is on the plaintiff or defendant. In holding that evidence of a defendant's wealth is a prerequisite to an award of punitive damages, and that the burden of introducing evidence of the defendant's wealth is on the plaintiff, the court noted that because a punitive damage award could not be sustained on appeal absent evidence of the defendant's financial condition, "such evidence is essential to the claim for relief." *Id.* at 1357.

Here, the plaintiff was given the full opportunity at trial to introduce evidence of the defendant's wealth. The plaintiff, however, did not introduce any relevant evidence regarding the defendant's wealth. In fact, the only evidence of the defendant's wealth is that during the defendant's four-year tenancy she had financial difficulties paying the rent and other obligations. Not long after the defendant first moved into the plaintiff's rental property, the parties agreed that the defendant could pay the last month's rent and security deposit over time. Moreover, the defendant could not meet her obligations throughout the term of her tenancy, so the plaintiff occasionally reduced the rent and forgave portions of the rent. Additionally, one of the plaintiff's reasons for evicting the defendant was that the she was "far behind on rent."

Under *Murakami*, the plaintiff is required to introduce evidence of the defendant's wealth as a prerequisite to an award of punitive damages. As indicated above, the plaintiff failed to meet this burden. Therefore, this court will not award the plaintiff punitive damages.

As noted above, the plaintiff's case was fully presented and argued at trial.

Following remand, the court offered the plaintiff the opportunity to set forth those portions of the evidence presented at trial which were relevant to the issue of damages. The court cautioned the plaintiff that the record was not being reopened for further evidence on the issue of damages as the plaintiff was obligated and permitted at trial to present such evidence. The plaintiff nevertheless has gone on to submit voluminous copies of receipts and schedules and to argue for substantial dollar amounts to which he feels entitled based on testimony given during the trial. The court will not at this point accept further evidence but will look only to the evidence in the record.

At trial the plaintiff testified to having spent some $10,000 in dealing with the criminal investigation. While the plaintiff is not entitled to recover for any costs with respect to any civil litigation he commenced other than such costs as might be recoverable by the filing of a cost bill in this adversary proceeding as a prevailing litigant, the court will assume that the $10,000 figure testified to was with regard to the criminal investigation.

As charges of molestation were also made publicly by the defendant's daughter Briona, the extent to which any adverse community reaction to the charges is traceable to the defendant as opposed to Briona is difficult to assess, but the court will award to the plaintiff an additional $10,000 as compensatory damages.

A separate judgment will issue.

Dated: September 30, 2005

/s/

Brett Dorian
United States Bankruptcy Judge