California Department of Forestry and Fire Protection ("CDF") v. Howell, et al., - CV09-00205 and Included Actions, CV 09-00306, CV09-00231, CV09-00245, CV10-00255, CV10-00264

RULING: Denied as to Issue One; granted as to Issue Two. The Defendants' motion for summary adjudication is denied as to the issue of duty and granted as to the issue of punitive damages.[1]

In their motion, the Defendants seek summary adjudication of Issue One, which states, "The Undisputed Material Facts Establish that No Defendant Owed any Plaintiff a Duty that Could Support Liability in case a Third Party Started the Moonlight Fire." In support, the Defendants proffer the material facts that none of them (1) "knowingly allowed" a third party to start the Moonlight Fire (Defendants' Statement of Undisputed Material Facts ("UMF") 1-4) or (2) had a "special relationship" with any of the Plaintiffs. UMF 5-8.

As a matter of law, the CDF, a public agency, cannot recover its fire suppression or related costs without establishing that the Defendants were ". . . responsible for setting or kindling the fire." *City of Los Angeles v. Shpegel-Dimsey, Inc.* (1988) 198 Cal.App.3d 1009, 1019-1020 ("*Shpegel-Dimsey*"); *People v. Southern Pacific Company* (1983) 139 Cal.App.3d 627, 637-638; *Health and Safety Code sections 13009, 13009.1*. A holding that the Defendants cannot be held liable to the CDF, if a third party started the fire, does not, however, fully dispose of the issue of duty, because the Defendants

[1] These actions were originally consolidated for purposes of discovery only. Order, March 25, 2010. They have since been consolidated for trial on the issue of liability, including liability for punitive damages. Referee's Report No. 11 and Order, filed September 28, 2012 ("Report and Order"), pp. 3:19, 4:4-7. The defendants' motion, filed in Case No. CV09-00205, seeks a ruling as to all plaintiffs in all actions, suggesting that the parties have agreed to consolidation for purposes of law and motion. Accordingly, the Court will treat the motion as if such consolidation has been ordered, subject to the objection by any plaintiff who did not file an opposition to the defendants' motion in reliance on the absence of such an order.

have not proffered undisputed material facts, or evidence in support, which establish that a third party started the fire. Accordingly the motion is denied as to the CDF. *See*, *Linden Partners v. Wilshire Linden Associates* (1998) 62 Cal.App.4th 508, 522 (summary adjudication must fully dispose of issue).[2]

On the other hand, liability for property damage sustained by the Plaintiffs in the Included Actions may arise under *Health and Safety Code section 13008*, even if a third party started the fire. *See, Shpegel-Dimsey, supra,* 198 Cal.App.3d at 1019 (Defendant may be liable for property damage arising from failure to exercise due diligence to prevent spread of fire); *People v. Southern Pacific Company, supra*, 139 Cal.App.3d at 637-638 (*Health and Safety Code sections 13007* and *13009*, unlike *section 13008*, require proof that Defendant started fire). Further, there is nothing in *Health and Safety Code section 13008* which limits liability for property damage to those fires about which the property owner was aware. *See, Shpegel-Dimsey, supra*, 198 Cal.App.3d at 1016 (fire at Defendant's plant started late in evening and spread due to Defendant's negligent storage of flammable materials). The Defendants proffer no material facts or evidence addressing potential liability under *Health and Safety Code section 13008* and thus fail to sustain their initial burden on the issue of duty as to the Plaintiffs in the Included Actions.

Issue Two states, "The Undisputed Material Facts Establish that Plaintiffs' Claims for Punitive Damages Have No Merit." The admissible evidence proffered by the parties

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[2] Although the Report and Order provided for stipulations under *Code of Civil Procedure section 437c(s)*, none appears to have been filed with the Court; nor do the defendants reference the subdivision in their motion.

relevant to the Defendants' liability for punitive damages establishes that, on September 3, 2007, the day the Moonlight Fire started:

1. Two employees of Howell's, J.W. Bush ("Bush") and Kelly Crismon ("Crismon"), used bulldozers to construct water bars in the Cooks Creek harvest plan area; Crismon also skidded some logs that need to be "yarded out." Second Amended Complaint of CDF, filed 2/10/2010 ("SAC"), paras. 77, 78; Answers of Howell's, Bush and Crismon to SAC, Exhibits 1-3 to Declaration of Tracy Winsor ("Winsor Decl."), paras. 77, 78.
2. Both Bush and Crismon shut down their equipment by 1:00 p.m. Deposition of Bush, taken 4/29/2010 ("Bush Depo."), Exhibit P to Declaration of William R. Warne ("Warne Decl."), pp. 294:23-295:3; Deposition of Crismon, taken 7/29/2012 ("Crismon Depo."), Exhibit O to Warne Decl., p. 259:14-17.
3. Howell's generally required that the trails be walked after the equipment was shut down. Deposition of Damon Baker, taken 4/27/2010 ("Baker Depo."), Exhibit 113 to Winsor Decl., pp. 101:9-104:14. On September 3, 2007, however, both Bush and Crismon walked their skid trails before shutting down their bulldozers; Bush walked all, and Crismon walked all but the last couple, of their respective trails. Bush Depo., Exhibit P to Warne Decl., pp.332:9-18, 333:12-16, 648:2-7; Crismon Depo., Exhibit 142 to Winsor Decl., pp. 294:10-16, 295:21-296:19.
4. As they left the worksite and returned to base camp in separate vehicles, both Bush and Crismon looked and smelled for smoke through open

windows. Bush Depo., Exhibit P to Warne Decl., pp.307:24-308:3, 309:14-15, 316:15-21, 318:6-19, 454:12-15, 456:23-457:1; Crismon Depo, Exhibit O to Warne Decl., pp. 294:17-19, 296:20-22.

5. The trip to base camp took about 20-25 minutes; when he arrived, Bush picked up his cell phone and a soda and then headed back to the site to clean out draws and to watch for fire. Bush Depo., Exhibit P to Warne Decl., pp. 307:24-308:3, 318:18-24; 332:9-18. When he encountered the fire on the way back, he tried to report it, but there was no cell phone service. *Id.*, pp. 365:18-20, 370:2-19; 374:10-20; Bush Depo., Exhibit 90 to Winsor Decl., p. 39:14-18.

6. Sierra Pacific, the Landowner Defendants and Beaty all contributed to pay for an air patrol to watch for fire in areas which included the Cooks Creek harvest plan area. Deposition of Mark Pustejovsky, taken 10/10/12, Exhibit R to Warne Decl., p.231:1-16; Deposition of Don Beaty, PMQ, taken 11/8/2012 ("Beaty Depo."), Exhibit S to Warne Decl., pp. 446:23-447:15; Declaration of Don Beaty, paras. 5-6; Deposition of John Moore, taken 8/9/2010 ("Moore Depo."), Exhibit 157 to Winsor Decl., p. 25:11-24.

7. There was no special request for an air patrol in the Cooks Creek area on September 3, 2007; instead, the patrol company routinely flew the area, looking for fires, on Labor Day. Moore Depo., Exhibit 164 to Winsor Decl., pp. 85:19-86:18.

8. During the flight, the pilot saw the smoke where the Moonlight Fire started a few minutes before he heard the USFS look-out call the fire in. The pilot

was too far away to be certain if the haze was smoke or dust, and he had turned his plane to investigate when he heard the USFS report, at which time he "turned back around." Deposition of Herschel Beail, taken 8/9/2010 ("Beail Depo."), Exhibit T to Warne Decl., p. 146:10-14; Beail Depo., Exhibit 78 to Winsor Decl., p. 48:8-15.

9. Howell's had been a licensed timber operator for over 30 years, and Sierra Pacific had used its services for 18 years. Deposition of Eunice Howell, taken 9/9-11/2010 ("Howell Depo."), Exhibit N to Warne Decl., p. 37:11-16, 45:15-19; Deposition of Mike Mitzel, taken 10/27/2010 ("Mitzel Depo."), Exhibit U to Warne Decl., p. 42:1-12.

10. Howell's license was not revoked either before or after the Moonlight Fire. Deposition of Ivan Houser, taken 4/19/2011 ("Houser Depo."), Exhibit W to Warne Decl., p. 560:8-11; Declaration of Eunice Howell, paras. 7-8.

The evidence also establishes that, prior to the day the Moonlight Fire started:

11. On June 21, 2007, the Greens Fire, which covered .25 acres, ignited in an area where employees of Howell's had been engaged in logging operations. Equipment use and logging were identified as causes of the fire. Wildland Fire Investigation Origin & Cause Report, prepared 6/22/07 and submitted 9/6/07, Exhibit II to Warne Decl. ("Greens Report").

12. The Howell's employees had quit logging operations at 12:30 p.m. and left the area around 1:00 p.m. on that day; they did not conduct a fire patrol on foot, but "they had an air patrol that fly's [*sic*] during the afternoon to look

for fires." Greens Report, pp. 1, 3. The fire was spotted around 4:00 p.m. and estimated to have ignited around 3:00 p.m. *Id.*, p. 1.

13. Both Beaty and Sierra Pacific learned of the Greens Fire within two weeks after it occurred. Beaty Depo., Exhibit 3 to Cloyd Decl., p. 97:4-20; Deposition of John Forno, PMQ, taken 1/25/13 ("Forno Depo."), Exhibit 8 to Cloyd Decl., pp. 15:24-16:7.

14. Eunice Howell knew it was possible that Howell's employees could have caused the Greens Fire. California-Engels Mining Company ("Cal-Engels") Undisputed Material Fact ("C-E UMF"), 262.[3]

15. Neither Beaty nor Sierra Pacific did anything to investigate the cause of the Greens Fire. Deposition of John Van Duyn, taken 9/17/10 ("Van Duyn Depo."), Exhibit 11 to Cloyd Decl., p.77:17-25; Forno Depo., Exhibit 8 to Cloyd Decl., p. 20:10-25.

16. No one at Beaty was a fire investigator, and Sierra Pacific was not qualified to conduct such an investigation. Van Duyn Depo., Exhibit 11 to Cloyd Decl., pp. 77:25-78:1; Forno Depo., taken 9/1/10, Exhibit D to Declaration of Annie S. Amaral ("Amaral Decl."), p. 83:19-25.

17. Sierra Pacific did nothing to check for fire safety at Howell's after the Greens fire. Deposition of Tom Downing, taken 7/28/10, Exhibit 12 to Cloyd Decl., p. 275:11-20.

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[3] The defendants' hearsay objection to the deposition taken of Ms. Howell in the related federal action, portions of which were cited in support of C-E UMF 262, has been sustained; however, the defendants do not dispute this material fact.

18. Bush, one of the Howell's employees who had been working at the site where the Greens Fire started, did not receive any special training, and no other measures were taken, by Howell's after that fire. Bush Depo., Exhibit 6 to Cloyd Decl., p.165:3-13.

19. On August 17, 2007, the Lyman Fire, which covered 3 acres, ignited in an area where a Howell's employee had been ripping the ground. Equipment use was identified as a cause of the fire. Wildland Fire Investigation Origin & Cause, prepared and submitted 9/18/07 ("Lyman Report"), p. 1 of 4; Investigation Report, Case No. 07TGU005877, dated 8/17/07 ("Investigation Report"), Exhibit HH to Warne Decl.

20. The Howell's employee had worked in the landing area where the fire ignited until 9:00 a.m., then moved to another area, where he worked until sometime between 12:45 and 1:00 p.m., at which time he returned to the first landing. Lyman Report, p. 3 of 4; Investigation Report, p. 2 of 2. He stayed for anywhere between 15 minutes (Lyman Report, p. 3 of 4) and 30-45 minutes (Investigation Report, p. 2 of 2), to watch the area for fire. Deposition of Robert Brown, taken 5/24/2010, Exhibit G to Amaral Decl., pp.188:10-190.6.

21. The Lyman Fire was reported at 1:39 p.m. and was estimated to have started around 12:45 p.m. Lyman Report, p. 1 of 4.

22. Howell's and Sierra Pacific learned of the Lyman Fire on the day it was detected. Howell Depo., Exhibit 19 to Cloyd Decl., p. 276:3-15; Mitzel Depo., taken 1/25/13, Exhibit 13 to Cloyd Decl., pp. 13:24-14:9.

23. Sierra Pacific had no evidence suggesting that the Howell's employee caused the Lyman Fire, and did not know, until after it obtained the Moonlight Fire Report, that the USFS was attributing the cause to Howell's. Mitzel Depo., Exhibit H to Amaral Decl., pp. 54:15-21, 66:12-21; Forno, Depo., taken 1/25/13, Exhibit C to Amaral Decl., pp.19:7-20:12.

24. Sierra Pacific did not consider whether Howell's needed to tighten up its fire safety; Howell's did not receive any violations from the CDF for the Lyman Fire, which would "demonstrate the need." Mitzel Depo., Exhibit 13 to Cloyd Decl., p. 52:16-23.

25. Greg Gutierrez, the Fire Captain who investigated the cause of the Lyman Fire and prepared the Investigation Report, did not determine an official cause. Deposition of Greg Gutierrez, taken 10/19/2011 ("Guitierrez Depo") Exhibit B to Amaral Decl., pp.199:23-201:17; Investigation Report, Exhibit HH to Warne Decl.

26. Howell's never disciplined any of its employees after the fires in 2007; however, Eunice Howell told the employee operating equipment at the site of the Lyman Fire to walk all trails after finishing operations. Howell Depo., Exhibit J to Amaral Decl., pp. 241:9-242:3, 482:19-483:2; C-E UMF 266.[4]

27. The Timber Sales Agreement between the Landowner Defendants and Sierra Pacific, the Management Contract between the

[4] See footnote 3, above; the defendants do not dispute C-E UMF 266.

Landowner Defendants and Beaty, and the Logging Agreement between Howell's and Sierra Pacific contained various provisions regarding fire prevention and plans. Timer Sales Agreement, Exhibit 11 to Winsor Decl.; Management Contract, Exhibit 16 to Cloyd Decl.; Logging Agreement, Exhibit 17 to Winsor Decl.

Additionally, the evidence establishes that, on at least one occasion after the Moonlight Fire, when CDF employees bulldozed a trail and created "rolling water bars," they did not walk the trails afterwards but, instead, watched for fire from their equipment. Deposition of Bernard F. Paul, PMQ, taken 12/18/2012, Exhibit AA to Warne Decl., pp. 91:24 -99:4. The CDF PMQ witness testified that this practice was acceptable. *Id.*, pp. 92:4-18, 98:4-99:4.[5] It appears that those operations caused a fire. *Id.*, pp. 83:5-25.

Likening the facts in the instant action to those in *Nolin v. National Convenience Stores, Inc*. (1979) 95 Cal.App.3d 279, Cal-Engels argues that the evidence raises a triable issue as to malice, *i.e.*, whether the Defendants, by failing to investigate into the Greens and Lyman Fires and continuing to use Howell's services, intentionally acted in conscious disregard of the probable dangerous consequences of their conduct. The evidence before the Court, however, does not approach that in *Nolin, supra*, where the "[d]efendant's established inattention to the danger showed a complete lack of concern regarding the harmful potential-the probability and likelihood of injury." *Id.*, at 288.

[5] The CDF's practices are relevant to whether the conduct of the Howell's employees was so shocking or severe as to support a claim for punitive damages.

While Cal-Engels is not required to prove its case for punitive damages in these summary proceedings, the Court must view the evidence through the prism of Cal-Engels' ultimate substantive burden of proof, *i.e.*, by clear and convincing evidence. *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1049. Evidence merely consistent with the hypothesis of malice is insufficient. "'Rather some evidence should be required that is inconsistent with the hypothesis that the tortious conduct was the result of a mistake of law or fact, honest error of judgment, over-zealousness, mere negligence or other such noniniquitous human failing.'" *Food Pro International, Inc. v. Farmers Insurance Exchange* (2008) 169 Cal.App.4th 976, 994. (Citation omitted.)

This Court finds that no reasonable jury could find from the evidence herein that the Defendants' conduct, taken as a whole, was despicable, *i.e.*, was "'. . . so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people.'" *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton, supra,* 96 Cal.App.4th at 1050.[6]

Evidentiary Rulings:

Cal-Engels: Objections numbers 3 and 14-23, as directed against evidence proffered in support of Issue Two, are over-ruled.

[6] The Court has reviewed all evidence proffered by all parties, including the CDF (notwithstanding its failure to comply with *Rule 3.1110(f)* of the *California Rules of Court*), in support of, and opposition to, the defendants' motion; the Court found no evidence that is " '. . . inconsistent with the hypothesis that the tortious conduct was the result of . . . [anything other than] noniniquitous human failing.'" *Food Pro International, Inc. v. Farmers Insurance Exchange, supra*, 169 Cal.App.4th at 994.

CDF: Over-ruled: Objections numbers 9-17, 20-22.

Sustained: Objections numbers 18-19.

Defendants: Over-ruled: Objections numbers 1, 2, 3 (as to pp.235:12-16, 236:19-21, 241:3-6) 5, 6, 11, 12.

Sustained: Objections numbers 3 (as to remainder), 4, 7-10.

All parties' objections to evidence relating to Issue One are moot. The Defendants' request for judicial notice is granted in full; the CDF's request is granted as to all matters but for request number 17, Exhibit 10.