

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

EMANDA HARTZOG, Individually and as Next of Friend of JAHMIL PEREZ, a Minor,	)	CASE NO. SX-04-CV-095
	)	
	)	
Plaintiffs,	)	ACTION FOR DAMAGES
	)	
v.	)	<u>JURY TRIAL DEMANDED</u>
	)	
UNITED CORPORATION D/B/A PLAZA EXTRA,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM

BEFORE THE COURT is the Defendant United Corporation's Motion for Summary Judgment. Defendant moves for summary judgment, *inter alia*, on the question of punitive damages. For the reasons stated below, Defendant's motion will be denied.¹

I. BACKGROUND

Plaintiff Emanda Hartzog commenced this action individually and on behalf of her minor son, Jahmil Perez, for injuries her son sustained in accidentally ingesting the sap of a *dieffenbachia* houseplant she purchased from a supermarket operated by Defendant United Corporation, doing business as Plaza Extra, in Christiansted, St. Croix, U.S. Virgin Islands. *Dieffenbachia*, or dumbcane by another name, is poisonous if ingested. Hartzog alleges negligence, product liability for failure to warn of the plant's poisonous properties, and negligent infliction of emotional distress. (*See generally* Mem., entered Sept. 6, 2011.) Plaza Extra denies liability, asserts affirmative defenses, and objects to punitive damages.

¹ At the final pretrial conference, the Court informed the parties, *inter alia*, that Defendant's motion for summary judgment on the issue of punitive damages would be denied. Verbal orders are enforceable pending reduction to writing. Super. Ct. R. 5. In ruling on Defendant's summary judgment motions, however, the Court inadvertently did not address punitive damages. (*See generally* Mem. Op., entered Sept. 6, 2011.)

Hartzog purchased four *Dieffenbachia* plants from Plaza Extra in late 2003. (Compl. ¶ 4, filed Mar. 1, 2004.) Plaza Extra began offering plants for sale in 2003 in its supermarket. (Pl Opp'n to Def. Summ. J. Mot., Ex. 1 (Hamed Dep. 17:5-9, Oct. 8, 2009), filed Mar. 18, 2010.) Gloria Johnson² had approached Wally Hamed, a representative of Plaza Extra,³ about selling plants. (Hamed Dep. 18:1-9.) Hamed knew Johnson as "a small individual local vendor." *Id.* at 17:15-17. He entered into an oral agreement with her whereby she delivered, displayed, priced, and took care of the plants and in exchange, Plaza Extra received twenty-five percent of the profits. *Id.* at 18:5-6. Johnson selected the varieties of plants sold in the supermarket. *Id.* at 22:4-9. "She had complete discretion on what she [brought] in." *Id.* at 26:21-22. Plaza Extra never inquired whether any of Johnson's plants were edible. *Id.* at 27:2-6, 46: 3-6. Hamed did not verify whether Johnson had a business license or sold plants elsewhere. 18:20-22, 19: 1-9. He also never inquired into Johnson's experience with plants. *Id.* at 27:11-18. He, himself, was unfamiliar with plants and was not experienced in horticulture. *Id.* at 22:21-24.

Neither Johnson nor Plaza Extra displayed any signs in the area where plants were sold. *Id.* at 32:18-21. (Accord Pl. Opp'n to Def. Summ. J. Mot., Ex. 4 (Hartzog Dep. 76:21-24, Oct. 2, 2009).) Hartzog did not speak with anyone at Plaza Extra regarding the plants. (Hartzog Dep. 77:16-18.) The plants were not identified by name. (Hamed Dep. 24:1-3; Hartzog Dep. 71:18-20.) Instructions on plant care or maintenance were not supplied. (Hamed Dep. 33:11-25.) No cautionary information regarding potential toxicity was provided. (Hamed Dep. 34:10-17, 45:1-4; Hartzog Dep. 71:13-17.) A few months after Hartzog purchased the

² Gloria Johnson passed away in 2004 or 2005. (Hamed Dep. 12:24-25.) Hamed's role within Plaza Extra was not identified in his Complaint.

³ Wally Hamed's role within Plaza Extra was not identified in his deposition.

houseplant, her son became violently ill. Hartzog had placed one of the *dieffenbachia* plants on an outside balcony. (Hartzog Dep. 24:18-23.) Part of a leaf on the plant had broken off. Hartzog's son "tried to see if he could put it back together" (Pl. Opp'n to Def. Summ. J. Mot., Ex. 5 (Perez Dep. 11:7-8, Sept. 30, 2009). Hartzog's older son said that his younger brother got sap on his hand and ingested the poison after sucking his fingers. (Perez Dep. 11:8-11.) At the time Hartzog's son took ill, Hartzog was on the property but not in the home. (Hartzog Dep. 20:8-19.) The boy was alone with his older brother for about ninety minutes while Hartzog waited outside for a construction worker to arrive. *Id.* at 19:25-20:2. Soon after ingesting the sap, Hartzog's son became unresponsive. (Hartzog Dep. 34:1-13.) He had difficulty breathing and his tongue swelled up. *Id.* at 34:15-25. The family took him to the emergency room. *Id.* at 37:17-21. On the way there, Perez went unconscious. *Id.* at 37:24-38:5. Once the family returned home to retrieve the plant, the doctor diagnosed the boy with *dieffenbachia* poisoning. He remained hospitalized for two days. As a result, Hartzog claims she "suffered extreme emotional distress, physical injuries, mental anguish, pain and suffering and loss of enjoyment of life" (Compl. ¶ 14.) She seeks damages, including punitive damages, along with costs and fees.

II. SUMMARY JUDGMENT

Summary judgment is appropriate where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine dispute as to any material fact" Fed. R. Civ. P. 56(c)(2) (applicable via Super. Ct. R. 7.)⁴ "A court reviewing a summary

⁴ In 2010, Congress substantially revamped Federal Rule of Civil Procedure 56. *See generally* Fed. R. Civ. P. 56 (2011 rev. ed.). The rule was "revised to improve the procedures for presenting and deciding summary-judgment motions The standard for granting summary judgment remain[ed] unchanged." *Id.* at adv. comm. notes: 2010 Amend. As Plaza Extra filed its motion for summary judgment prior to the amendment, the Court employs here the version of the rule in effect at the time of filing.

judgment motion must evaluate the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor.” *EBC, Inc. v. Clark Bldg. Sys., Inc.*, 618 F.3d 253, 262 (3d Cir. 2010). “Facts that could alter the outcome are ‘material facts’ and disputes are ‘genuine’ if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct.” *Clark v. Modern Group, Ltd.*, 9 F.3d 321, 326 (3d Cir. 1993) (citations omitted). “A defendant meets this standard when there is an absence of evidence that rationally supports the plaintiff’s case. A plaintiff, on the other hand, must point to admissible evidence that would be sufficient to show all elements of a *prima facie* case under applicable substantive law.” *Id.* (citations omitted). The court may grant summary judgment as to the entire action. “If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue.” Fed. R. Civ. P. 56(d)(1).

III. PUNITIVE DAMAGES

“Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and other like him from similar conduct in the future.” Restatement (Second) of Torts § 908(1) (1979). “Punitive damages may be awarded for conduct that is outrageous, because of the defendant’s . . . reckless indifference to the rights of others.” *Id.* § 902(2). “[T]he trier of fact can properly consider the character of the defendant’s act [and] the nature and extent of the harm” *Id.* “A jury’s assessment of the extent of a plaintiff’s injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation.” *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). The Supreme Court of the United States “has long made clear that ‘[p]unitive damages may properly be

imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition.” *Philip Morris USA v. Williams*, 549 U.S. 346, 352 (2007) (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996)). The plaintiff must show punitive damages by clear and convincing evidence. *Acosta v. Honda Motor Co., Ltd.*, 717 F.2d 828, 839 (3d Cir. 1983). That burden is “an extremely high burden of proof . . . [which the] existence of negligence alone is not sufficient . . .” *David v. Pueblo Supermarkets of St. Thomas, Inc.*, 740 F.2d 230, 237 (3d Cir. 1984).

Plaza Extra argues that summary judgment should be entered on the issue of punitive damages because “[t]he sale of houseplants without a warning as to their natural characteristics is not outrageous conduct which evidences an evil motive or a reckless indifference to the rights of Plaintiff.” (Summ. J. Mot. 7.) Neither can the “continued sale of the plants without any warnings” rise to the level of outrageous conduct. *Id.* Even if continuing to sell *dieffenbachia* without warnings were “considered outrageous, it is conduct arising *after* the harm alleged in Plaintiff’s complaint and therefore not conduct which caused or contributed to the plaintiffs’ harm.” *Id.* at 8 (emphasis in original). In opposition, Hartzog claims that punitive damages are warranted because of Plaza Extra’s “callousness in intentionally ignoring industry standards in providing warnings of the dangerous and toxic plants . . . and continuing to do so even after the near death of Jahmil Perez . . .” (Pl. Opp’n to Def. Summ. J. Mot. 11.) Plaza Extra highlights in reply that “punitive damages are reserved for near criminal behavior, that which involves ‘some element of outrage similar to that usually found in crime.’” (Def. Reply to Pl Opp’n to Def. Summ. J. Mot. 5, filed Apr. 6, 2010 (quoting Restatement (Second) of Torts § 908 cmt. b (1965)).

Summary judgment is proper where the movant shows that material facts are no longer disputed between the parties. Here, however, Plaza Extra has not pointed to any facts regarding question of punitive damages. (*See generally* Summ. J. Mot. 7-8.) Plaza Extra has not submitted any information regarding the industry practices of national or local supermarkets, nurseries, or gardens, for example. The Court has no material, in the form of depositions, affidavits, or otherwise, which support Plaza Extra's argument that the "sale of the houseplants without a warning as to their natural characteristic . . . does not support a punitive damage claim as a matter of law." *Id.* at 7. That conclusion is unsupported with any facts from the record or with any legal authority, whether mandatory or persuasive. "Legal memoranda . . . are not evidence and cannot by themselves create a factual dispute sufficient to defeat a summary judgment motion." *Jersey Cent. Power & Light Co. v. Lacey Twp.*, 772 F.2d 1103, 1109-10 (3d Cir. 1985). Contrariwise, legal memoranda alone also cannot deny a factual dispute either. "[T]he party moving for summary judgment . . . bears the burden of demonstrating the absence of any genuine issues of material fact." *Doebler*, 442 F.3d at 819-20 (emphasis added).

Hartzog requested punitive damages because she alleges that Plaza Extra acted with "such a reckless disregard for [her] rights and interests" (Compl. ¶ 16.) "Punitive damages may be awarded for conduct that is outrageous, because of the defendant's . . . reckless indifference to the rights of others." Restatement (Second) of Torts § 902(2) (1979). Plaza Extra has not shown how material facts are now undisputed on this point. Plaza Extra claims that "[t]here is no credible evidence or testimony as to any *evil motive or outrageous behavior* on the part of [Plaza Extra]." (Def. Reply 5 (emphasis in original).) Credibility determinations, however, "are inappropriate to the legal conclusions necessary to a ruling on

summary judgment. A [trial c]ourt should not weigh the evidence and determine the truth itself, but should instead determine whether there is a genuine issue for trial.” *Doebler*, 442 F.3d at 820. Plaza Extra disputes that its actions warrant the severity of punitive damages. It has not shown, however, where material facts as to the recklessness Hartzog alleges are no longer materially disputed between the parties. Accordingly, summary judgment on the question of punitive damages must be denied at this time.

IV. CONCLUSION

Accordingly, for the reasons stated above, Defendant’s Motion for Summary Judgment on the issue of punitive damages is denied. The Court finds that Plaza Extra has not carried its burden to show an absence of material fact on that issue. An appropriate order follows.

DONE AND SO ORDERED this 8th day of September, 2011.

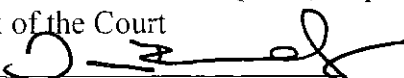


DARRYL DEAN DONOHUE, SR.
Presiding Judge of the Superior Court

ATTEST:

VENETIA H. VELAZQUEZ, Esq.

Clerk of the Court

By: 

Court Clerk Supervisor

Dated: 9/8/11