IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT
WITHIN AND FOR THE COUNTY OF FREMONT, STATE OF WYOMING

MARY V. KIERNAN, Plaintiff, v. UPPER LITTLE WARM SPRINGS ASSOCIATION, a Wyoming non-profit corporation, ERIKS GOODWIN, an individual, JAMES W. PHILLIPS, an individual, Defendants.	)	Civil Action No. 43476

BRIEF IN SUPPORT OF MOTION TO DISMISS

Upper Little Warm Springs Association, a Wyoming non-profit corporation ("HOA"), by and through its undersigned counsel, Davis & Cannon, LLP, and pursuant to W.R.C.P. 12(b)(6), hereby files this *Brief in Support of Motion to Dismiss*.

STANDARD

In evaluating a motion to dismiss the facts in the complaint must be accepted as true. *Askvig v. Wells Fargo Bank Wyoming, N.A.*, 2005 WY 138, ¶11. However, a complaint that fails to demonstrate plaintiff is entitled to the relief requested is subject to dismissal pursuant to W.R.C.P. 12(b)(6). A motion to dismiss for failure to state a claim "is the proper method for testing the legal sufficiency of the allegations and will be sustained when the complaint shows on its face that the plaintiff is not entitled to relief." *Moses Inc. v. Moses*, 2022 WY 57, ¶8. Upon the filing of a motion to dismiss the answer deadline for that particular defendant is tolled until disposition. W.R.C.P. 12(a)(2); *Marquez v. Cable One, Inc.*, 463 F.3d 1118, 1120 (10th Cir. 2006); § 1346 Service of Responsive Pleadings—Time for Serving and Filing, 5B Fed. Prac. & Proc. Civ. § 1346 (3d ed.).

ANALYSIS

Plaintiff's *Complaint* contains five (5) causes of action against the HOA—negligence, breach of fiduciary duty, intentional inflict of emotion distress, breach of covenants, and permanent injunction. Each cause of action is based on the same basic facts. On or about August 11, 2022, there was a brush/grass fire on a neighboring lot owned by Defendant James W. Phillips. The fire never reached Plaintiff's property. In fact, the fire only came within 40 yards of Plaintiff's property. *Complaint* at ¶34.

Nonetheless, Plaintiff's claims she suffered "severe emotional distress" and now must live with "the fear of destruction and annihilation by fire." *Complaint* at ¶¶37, 38. Plaintiff also asserts the HOA failed to enforce the covenants by preventing her neighbor from camping on his property.[1] She argues camping does not constitute a residential use per the covenants. *Complaint* at ¶66. Given the plain language of the covenants, and the fact neither Plaintiff nor her property were damaged in any way, Plaintiff cannot sustain a claim for which relief can be granted. The case is frivolous and all causes of action should be dismissed.

I. Negligence

The elements of negligence are well known—"(1) The defendant owed the plaintiff a duty to conform to a specified standard of care, (2) the defendant breached the duty of care, (3) the defendant's breach of the duty of care proximately caused injury to the plaintiff, and (4) the injury sustained by the plaintiff is compensable by money damages." *Hatton v. Energy Elec. Co.*, 2006 WY 151, ¶10.

For this particular cause of action, the analysis can begin and end with the first element. The covenants specifically state enforcement is vested with "the owners of the lots and tracts therein."

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[1] On May 9, 1974, the HOA adopted Reservations and Restrictive Covenants to Upper Little Warm Spring Creek Subdivision (the "covenants"). Plaintiff attached the covenants to her *Complaint* as Exhibit A.

Exhibit A to *Complaint* at ¶2. Plaintiff even cites this provision to establish her standing. *Complaint* at ¶10. Nothing in the covenants puts the enforcement burden on the HOA. Without any obligation to enforce the covenants the HOA owed no duty to Plaintiff. It logically follows that without a duty there can be no breach.

As for damages, Plaintiff concedes neither she nor her property were damaged. The fire only came within 40 yards of her property at its closest point. *Complaint* at ¶34. Her claim for damages is thus limited to alleged "severe emotional distress" and "the fear of destruction and annihilation by fire." *Complaint* at ¶¶37, 38. The Wyoming Supreme Court has previously ruled emotional distress damages are not recoverable in property damage cases. *Blagrove v. JB Mech., Inc.*, 934 P.2d 1273, 1277 (Wyo. 1997) ("We therefore hold that emotional distress damages in connection with property damages are not compensable.).

In *Blagrove* the plaintiffs actually sustained significant property damage when a plumbing connection failed causing flooding and catastrophic damage to the structure, interior, and numerous personal mementos. *Id.* at 1275. Nonetheless, the Wyoming Supreme Court reasoned that "While we do not doubt that the Blagroves were justifiably and seriously distressed over the damage to the home they had built together with their families, adopting a rule allowing trial on the issue and recovery if proved would result in unacceptable burdens for both the judicial system and defendants." *Id.* at 1276-1277. The case further explains that generally "mere sorrow, anger, worry and fear are not compensable and recovery for more serious emotional distress is restricted because of the burden for the judicial system and defendants." *Id.* at 1276. Thus, even if Plaintiff's property had been damaged by the fire, she cannot recover damages for emotional distress. It is a rudimentary element of negligence that to recover for alleged negligent acts there must be damages. Absent a showing of damages, the claim must be dismissed.

II. Breach of Fiduciary Duty

Plaintiff claims an entity (the HOA) breached its fiduciary duties by exposing her to an unreasonable fire hazard and failing to prevent tent camping on the neighboring property. Defendants have yet to locate a single Wyoming case where an HOA had a fiduciary duty to lot owners. Perhaps this is because fiduciary duties are usually reserved for individuals, such as officers, directors and trustees. Nonetheless, this claim suffers from other more obvious flaws.

To prove breach of a fiduciary duty Plaintiff must establish "(1) that the defendant was acting as a fiduciary of the plaintiff; (2) that the defendant breached a fiduciary duty to the plaintiff; (3) that the plaintiff incurred damages; and (4) that the defendant's breach of fiduciary duty was a cause of the plaintiff's damages." *Sewell v. Great N. Ins. Co.*, 535 F.3d 1166, 1172 (10th Cir. 2008). A fiduciary duty is considered extraordinary and not easily created. *Birt v. Wells Fargo Home Mortg., Inc.*, 2003 WY 102, ¶62. There must be a "special relationship of trust and confidence" where a party "reposes confidence in the integrity of the purported fiduciary [and] the purported fiduciary voluntarily assumes and accepts the confidence in advising the other party." *Erdelyi v. Lott*, 2014 WY 48, ¶23.

Even assuming the allegations in the *Complaint* are true, there is no evidence the HOA acted as a fiduciary. As noted above, the lot owners, not the HOA, have the responsibility to enforce the covenants. Without any obligation on the part of the HOA to enforce the covenants a special relationship could never be created. The HOA responded to Plaintiff's correspondences, but at no point accepted responsibility to act on Plaintiff's behalf. As with negligence, without a duty (fiduciary duty in this case) there is not and cannot be a breach.

The damages analysis is virtually the same for each cause of action. As neither Plaintiff nor her property sustained any damages she cannot fulfill this element of any claim. If Plaintiff claims emotional distress damages the case of *Skane v. Star Valley Ranch Ass's* is helpful. Skane sued

officers and directors of the owner's association after he lost a bid for re-election. 826 P.2d 266, 267 (Wyo. 1992). His breach of fiduciary duty claim focused on alleged misconduct by the officers and directors in the voting process. In finding that Skane had not established any damages the Wyoming Supreme Court said "Skane, like all members of society, must cope with life's indignities and failures . . . in an already overly litigious society, this Court cannot fashion remedies for all life's disappointments." *Id.* at 270. Like Skane, Plaintiff has not suffered any cognizable damages and this Court cannot fashion a remedy just to deal with her irrational fears.

III. Intentional Infliction of Emotional Distress

A brief excerpt from the Wyoming Civil Pattern Jury Instructions explains the burden Plaintiff faces in proving intentional infliction of emotional distress:

> To recover under the claim of intentional infliction of emotional distress, the plaintiff must prove that the defendant acted in an extreme and outrageous manner and that the defendant intentionally or recklessly caused the plaintiff severe emotional harm. It is not enough that the defendant has acted with intent that is wrongful or even criminal, or that defendant has intended to inflict emotional distress, or even that defendant's conduct has been characterized by "malice," or a degree of aggravation that would entitle the plaintiff to punitive damages. There must be more than mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities to constitute intentional infliction of emotional distress. The conduct must be so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.
>
> The Court must make an initial determination as to whether the facts of a given case may reasonably be regarded as so extreme and outrageous as to permit recovery.

§21.01; see also Restatement (Second) of Torts § 46 (1965) (adopted in Wyoming by *Leithead v. Am. Colloid Co.*, 721 P.2d 1059, 1066 (Wyo. 1986)). Additionally, the emotional distress "must be reasonable and justified under the circumstances, and there is no liability where the plaintiff has

suffered exaggerated and unreasonable emotional distress..." *Leithead*, 721 P2d at 1067. For example, evidence of "crying, being upset and uncomfortable is insufficient to demonstrate severe emotional distress that attains a level no reasonable person could be expected to endure. *Hatch v. State Farm Fire & Cas. Co.*, 930 P.2d 382, 397 (Wyo. 1997).

This Court should have no difficulty making a threshold determination as to whether the facts of this case may be regarded as so extreme and outrageous to permit recovery. In Wyoming, as with most of the west, the threat of fire is usually present. This is something all reasonable westerners endure. This reality, along with the fact the fire in question never reached Plaintiff's property, should easily allow this Court to determine the facts are not so extreme and outrageous to permit recovery.

Another way to analyze Plaintiff's claims are to compare them with cases where the conduct was extreme and outrageous. In *Bevan v. Fix*, two minors watched their mother get beat, kicked, punched, drug by the hair, and choked by a boyfriend who was screaming he wanted to kill her. 2002 WY 43, ¶25. The Wyoming Supreme Court felt this "could be construed as outrageous, atrocious, and utterly intolerable in a civilized community." *Id.*

In *Worley v. Wyoming Bottling CO., Inc.* plaintiff's employer constantly toyed with, harassed, and threatened him. 1 P.3d 615, 629 (Wyo. 2000). This included demanding impossibly large sale increases, withholding pay, humiliating him for minor infractions, and promising to keep up these activities until plaintiff quit. *Id.* The Wyoming Supreme Court ruled the cumulative effect of these actions over a prolonged period of time were enough to at least make it to the jury. When compared with the above cited cases, Plaintiff's allegations cannot reasonably be considered as extreme and outrageous, let alone atrocious and utterly intolerable in a civilized community.

IV. Breach of Covenants

Plaintiff claims the HOA breached the covenants by allowing the neighbor to camp on his

property in a tent or car, and by failing to take steps to prevent the fire. Plaintiff asserts the covenants are specific, plain, and unambiguous on these topics. *Complaint* at ¶66. In support she cites a clause in the covenants requiring each lot to be used for a private residential purpose. *Complaint* at ¶67.

There is not a single clause in the covenants preventing a lot owner from camping on his property. Moreover, it is impossible for Plaintiff to say so matter of fact that camping is not permitted. Anyone that has ever driven through a subdivision has likely seen a tent thrown up in the backyard, whether for a child's sleepover or simply for fun. Plaintiff is attempting to impose restrictions on lot owners not established in the covenants by creating her own definition of residential purpose. It would be inconsistent to interpret the covenants to restrict camping when they allow storage of campers, camp trailers, and even horses. **Exhibit A** to *Complaint* at ¶4.

As for the risk of fire, the covenants do not prohibit camp fires or the burning of grass/brush. More importantly, and as explained further above, Plaintiff is foisting upon the HOA obligations it never had. The lot owners, not the HOA, must enforce the covenants.

Yet again, Plaintiff has not and cannot adequately plead damages. "To establish a prima facie case for breach of contract, a plaintiff must show: (1) a lawfully enforceable contract, (2) an unjustified failure to timely perform all or any part of what is promised there, and (3) entitlement of the injured party to damages." *Kappes v. Rhodes*, 2022 WY 82, ¶17. An award of damages for breach of contract is limited to "those reasonably foreseeable damages that directly resulted from the breach." Wyoming Civil Pattern Jury Instructions §15.20 (Measure of Damages – Contract). Of course, Plaintiff did not sustain any physical or property damage as a result of the fire or the neighbors camping, and emotional distress damages are not available for contract claims. *Long-Russell v. Hampe*, 2002 WY 16, ¶11.

V. Permanent Injunction

Plaintiff makes an unusual argument, asking this Court to force the HOA to act by virtue of an injunction. She specifically asks that the HOA be enjoined from not enforcing the covenants, assuming the HOA even has this obligation. The peculiarities of this cause of action aside, Plaintiff cannot establish the necessary elements.

For a party to obtain a permanent injunction it must prove: "(1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 822 (10th Cir. 2007). This is a higher burden than a preliminary injunction where a plaintiff must only establish substantial likelihood of success on the merits as opposed to actual success on the merits. *Id.* As the Wyoming Supreme Court has noted, "The extraordinary remedy of an injunction is a far-reaching force and must not be indulged in under hastily contrived conditions. It is a delicate judicial power and a court must proceed with caution and deliberation before exercising the remedy." *Simpson v. Petroleum, Inc., Wyo.*, 548 P.2d 1, 3 (1976).

As explained in each section above, Plaintiff cannot succeed on any of her claims. Moreover, it is not sufficient for Plaintiff to make conclusory statements about irreparable injury and no adequate remedy at law. *Rialto Theatre, Inc. v. Commonwealth Theatres, Inc.,* 714 P.2d 328, 333 (Wyo. 1986). "The complaint must allege a set of facts which, if proven, would provide a proper basis for the intervention of a court of equity." *Id.* Plaintiff's complaint fails to state why monetary damages, assuming she had any damages at all, would not be sufficient. Proof of these matters "must be capable of being established based on the facts pled in the complaint." *Id.* Absent these facts being established in the *Complaint* Plaintiff cannot sustain a cause of action for permanent injunction.

CONCLUSION

Plaintiff has failed to establish the requisite elements for each cause of action, even when accepting the facts in the *Complaint* as true. In fact, for most of the causes of action Plaintiff cannot establish a single element. The case is frivolous and all causes of action should be dismissed.

DATED this 4th day of October, 2022.

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CERTIFICATE OF SERVICE

I do hereby certify that on the 4th day of October, 2022, I caused a true and correct copy of the foregoing *Motion to Dismiss Complaint* to be served as follows:

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Note: Plaintiff has consented to service by email only.