

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

| | | |
|---------------------------|---|-----------------------------|
| KASHIYA NGWANGUMA, et al. |) | |
| |) | |
| Plaintiffs |) | |
| |) | |
| v. |) | CASE NO. 3:16cv-247-DJH |
| |) | |
| DONALD J. TRUMP, et al. |) | <i>Electronically filed</i> |
| |) | |
| Defendants |) | |
| _____ |) | |

MOTION TO DISMISS

Pursuant to Fed. R. Civ. P. 12(b)(6), the Defendant, Alvin Bamberger, moves to dismiss the complaint for failure to state a claim upon which relief can be granted. Defendant has filed his supporting memorandum and tendered his proposed order.

Respectfully submitted,

/s/ Stephen B. Pence
STEPHEN B. PENCE
PENCE & WHETZEL, PLLC
9300 Shelbyville Road, Suite 1205
Louisville, KY 40223
(502) 736-6200
steve@pencelegal.com

Counsel for Defendant

CERTIFICATE OF SERVICE

I certify that, on May 20, 2016, I electronically filed this document with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following:

Daniel J. Canon
David N. Ward
Gregory A. Belzley
Camille Bathurst
R. Kent Westberry

I further certify that, on May 20, 2016, I served this document upon the *pro se* defendant, by mailing a copy, first-class postage prepaid, to:

Matthew Warren Heimbach
222 Mable Street, Apt. 2
Paoli, IN 47454

/s/ Stephen B. Pence
STEPHEN B. PENCE
PENCE & WHETZEL, PLLC
9300 Shelbyville Road, Suite 1205
Louisville, KY 40223
(502) 736-6200
steve@pencelegal.com

Counsel for Defendant

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

| | | |
|--------------------------|---|-----------------------------|
| KASHIYA NWANGUMA, et al. |) | |
| |) | |
| Plaintiffs |) | |
| |) | |
| v. |) | CASE NO. 3:16cv-247-DJH |
| |) | |
| DONALD J. TRUMP, et al. |) | <i>Electronically filed</i> |
| |) | |
| Defendants |) | |
| _____ |) | |

**MEMORANDUM IN SUPPORT OF DEFENDANT
ALVIN BAMBERGER’S MOTION TO DISMISS**

The Defendant, Alvin Bamberger (Bamberger), seeks dismissal of Plaintiffs’ complaint, under Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief can be granted. Specifically, in their 125-paragraph complaint, two of the three Plaintiffs say nothing about Bamberger or his actions; the third says no more than that he pushed her — without causing physical injury — as she exited the scene. Because this is wholly inadequate to state a plausible claim against Bamberger, the Court should grant his motion to dismiss.

STATEMENT OF MATERIAL FACTS

Much of the complaint, while making for provocative reading, has nothing to do with Bamberger. It describes how: the three Plaintiffs, Kashiya Nwanguma (Nwanguma), Molly Shah (Shah), and Henry Brousseau (Brousseau), attended a Donald Trump (Trump) rally in Louisville for the purpose of protesting Trump’s presidential candidacy; protesters became vocal during Trump’s speech and began pushing and shoving their way towards the stage; Trump incited his supporters, and said of the

protesters, “Get them out of here”; and the Plaintiffs were shoved, struck, or intimidated as they exited the rally. [*See generally* R. 1-1: Complaint, ¶¶ 29-83.]

Only a handful of factual allegations have anything to do with Bamberger. Shah alleges nothing involving him, and does not claim to have interacted with him. [*See* R. 1-1: Complaint, ¶¶ 51-60 (Shah factual allegations).] Brousseau alleges nothing involving Bamberger, and does not claim to have interacted with him. [*See* R. 1-1: Complaint, ¶¶ 61-65 (Brousseau factual allegations).] Implicit in their non-interaction with Bamberger, neither Shah nor Brousseau allege to have suffered any injury from Bamberger’s conduct.

Nwanguma claims an interaction with Bamberger. She says that Bamberger is a 75-year old, Caucasian male, Trump supporter from Ohio, who wore KWVA (Korean War Veterans Association) apparel to the Trump rally. [R. 1-1: Complaint, ¶¶ 11-13. 74.] She says that numerous unnamed protesters “violently assaulted” her, and subjected her to physical force to remove her from the rally. [R. 1-1: Complaint, ¶¶ 46-47.] As for Bamberger specifically, Nwanguma says only that he: was one of the two “most aggressive” assaulters; repeatedly “shoved” her while she exited the rally; and later explained in a letter that he regretted pushing a young woman (presumably Nwanguma) down an aisle towards the exit (conduct that he attributed to his mental state after being knocked to the ground himself, and being caught between a group of white supremacists and Black Lives Matters protesters). [R. 1-1: Complaint, ¶¶ 48, 73, 75-79.]

Significantly, neither the Nwanguma nor Bamberger factual sections contain any allegation of physical or emotional injury. [*See* R. 1-1: Complaint, ¶¶ 36-50 (Nwanguma factual allegations, ¶¶ 73-79 (Bamberger factual allegations).] And, while the complaint’s “causes of action” section contains rote allegations of generic injury from

assault and battery, that section claims injury to all Plaintiffs caused by all Defendants. [See R. 1-1: Complaint, ¶¶ 98, 101.] In other words, it contains no allegation that Nwanguma suffered injury from Bamberger’s conduct. [*Id.*] Rather, it merely incorporates facts alleged elsewhere — and those facts allege no physical or emotional injury to Nwanguma, much less that Bamberger caused injury to Nwanguma. [See R. 1-1: Complaint, ¶¶ 99, 102.]

ARGUMENT

I. FED. R. CIV. P. 12(b)(6) STANDARDS.

To survive Rule 12(b)(6) dismissal, the Plaintiffs must allege facts that, accepted as true, are sufficient to “state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when a plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). For purposes of Bamberger’s motion, this Court must of course accept as true all well-pleaded facts alleged, *Gunasekera v. Irwin*, 551 F.3d 461, 467 (6th Cir. 2009), but the complaint’s “[f]actual allegations must be enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555. *See also Kreipke v. Wayne State Univ.*, 807 F.3d 768, 774 (6th Cir. 2015) (case should be dismissed if complaint fails to state sufficient facts to establish claim).

II. THE COMPLAINT FAILS TO ASSERT PLAUSIBLE CLAIMS AGAINST BAMBERGER.

The complaint asserts six causes of action: battery [R. 1-1: Complaint, ¶¶ 96-98]; assault [*id.*, ¶¶ 99-101]; incitement [*id.*, ¶¶ 102-06]; agency or vicarious liability [*id.*, ¶¶ 107-15]; negligence, gross negligence and recklessness [*id.*, ¶¶ 116-23]; and punitive

damages [*id.*, ¶¶ 124-25]. Three of the six — incitement, agency/vicarious liability, and negligence/gross negligence/recklessness — seek to impose liability against Trump for the acts of his supporters. [*See id.*, ¶¶102-23.] As such, they do not even purport to state claims against Bamberger. That leaves three claims against Bamberger: battery; assault; and punitive damages. For the following reasons, the complaint fails to assert plausible claims as to each.

A. “Punitive Damages” is Not a Cognizable Cause of Action.

The complaint asserts a free-standing claim for “punitive damages.” But punitive damages are not really a cause of action; they are an element of relief awarded to successful litigants in some tort cases. *See, e.g., Kroger Co. v. Willgruber*, 920 S.W.2d 61, 68 (Ky. 1996) (discussing when punitive damages are appropriate as an element of damages). Thus, while these Plaintiffs, like any others, might be entitled to an award of punitive damages if they prevail on certain tort claims, it is those tort claims — such as the assault and battery claims asserted here — that gives rise to any punitive damages award. *See, e.g., Shields Adm’rs v. Rowland*, 151 S.W. 408 (Ky. 1912). Punitive damages simply does not exist as an independent cause of action.¹

B. Shah and Brousseau Have Not Asserted Any Facts Sufficient to State a Claim Against Bamberger.

Neither Shah nor Brousseau allege anything involving Bamberger. They do not allege that he threatened them, nor touched them, or caused them any injury. [*See R. 1-1: Complaint*, ¶¶ 51-60 (Shah factual allegations); ¶¶ 61-65 (Brousseau factual allegations).] Without some allegation that Bamberger did something to them that caused harm, they

¹ Even then, an assault victim is entitled to punitive damages only by pleading and proving malice, an element missing from the factual allegations of the complaint. *See Hensley v. Paul Miller Ford, Inc.*, 508 S.W.2d 759 (Ky. 1974).

have not stated any plausible claim for relief. *Twombly*, 550 U.S. at 570 (2007); *Iqbal*, 556 U.S. at 678.

C. Because Nwanguma Has Not Alleged That Bamberger Caused Her Any Injury, and Does Not Seek Nominal Damages, She Has Not Asserted Plausible Claims for Assault or Battery.

Nwanguma is the only Plaintiff to allege any wrongdoing by Bamberger. But even her allegations are perfunctory, and entirely inadequate to state a plausible claim. The only *fact* she alleges is that Bamberger “shoved” and “struck” her, or “pushed” her up the aisle towards the exit.² [R. 1-1: Complaint, ¶¶ 73-76.] She does not allege that Bamberger threatened her in any; she does not allege that Bamberger’s conduct harmed her in any way.

“Assault is a tort which ... requires the threat of unwanted touching ...” *Banks v. Fritsch*, 39 S.W.3d 474, 480 (Ky App. 2001). Because Nwanguma has not pled any such threat — that is, because her complaint fails to allege facts sufficient to state a key element of the tort, — she has failed to make a plausible claim of assault. *Twombly*, 550 U.S. at 570 (2007); *Iqbal*, 556 U.S. at 678.

Nwanguma’s assault and battery claims suffer from another defect: her failure to allege any injury. The factual allegations of her complaint, after all, say nothing about any emotional or physical harm from any source, and certainly say nothing about emotional or physical harm that Bamberger caused. To be sure, an assault and battery victim who is unable to prove damages can recover nominal damages. *Vitale v. Henchey*, 24 S.W.3d 651, 659 (Ky. 2000). Here, because Nwanguma does not allege — and thus

² She also asserts, in conclusory language, that Bamberger “assaulted” her. [R. 1-1: Complaint, ¶ 48.] But a “pleading must go beyond ‘labels and conclusions’ or a mere ‘formulaic recitation of the elements of a cause of action.’” *SFS Check, LLC v. First Bank of Delaware*, 774 F.3d 351, 355 (6th Cir. 2014) (quoting *Twombly*, 550 U.S. at 555). Simply put, “‘naked assertions devoid of further *factual* enhancement’ contribute nothing to the sufficiency of the complaint.” *16630 Southfield Ltd. P’ship v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 506 (6th Cir. 2013) (quoting *Iqbal*, 556 U.S. at 678) (emphasis added).

cannot prove — actual damages, she is limited to an award of nominal damages. But she fails to seek nominal damages, the only relief to which she would be entitled if she prevailed. [*See* R. 1-1: Complaint, Demand for Relief A-E.] In other words, Nwanguma seeks relief that she cannot plausibly obtain given the facts alleged in her complaint, and fails to seek the only relief that her complaint might warrant.

CONCLUSION

For all these reasons, the Plaintiffs' complaint fails to plausibly assert claims against Bamberger. The Court should therefore grant Bamberger's motion to dismiss, under Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief can be granted.

Respectfully submitted,

/s/ Stephen B. Pence
STEPHEN B. PENCE
PENCE & WHETZEL, PLLC
9300 Shelbyville Road, Suite 1205
Louisville, KY 40223
(502) 736-6200
steve@pencelegal.com

Counsel for Defendant

CERTIFICATE OF SERVICE

I certify that, on May 20, 2016, I electronically filed this document with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following:

Daniel J. Canon
David N. Ward
Gregory A. Belzley
Camille Bathurst
R. Kent Westberry

I further certify that, on May 20, 2016, I served this document upon the *pro se* defendant, by mailing a copy, first-class postage prepaid, to:

Matthew Warren Heimbach
222 Mable Street, Apt. 2
Paoli, IN 47454

/s/ Stephen B. Pence
STEPHEN B. PENCE
PENCE & WHETZEL, PLLC
9300 Shelbyville Road, Suite 1205
Louisville, KY 40223
(502) 736-6200
steve@pencelegal.com

Counsel for Defendant

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

| | | |
|---------------------------|---|-----------------------------|
| KASHIYA NGWANGUMA, et al. |) | |
| |) | |
| Plaintiffs |) | |
| |) | |
| v. |) | CASE NO. 3:16cv-247-DJH |
| |) | |
| DONALD J. TRUMP, et al. |) | <i>Electronically filed</i> |
| |) | |
| Defendants |) | |
| _____ |) | |

ORDER

Motion having been made, and the Court having considered counsel's arguments and having been otherwise sufficiently advised,

IT IS ORDERED that Defendant Alvin Bamberger's motion to dismiss the complaint, pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief can be granted, be and hereby is, **GRANTED**.

The complaint against Alvin Bamberger hereby is **DISMISSED WITH PREJUDICE**. This is a final and appealable order and there is no just cause for delay.