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COURT OF APPEALS
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No. 65635-0

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

NEW HORSESHOE SALOON ASSOCIATES, LLC, a Washington
Limited Liability Company,

Appellant,

v.

COMMERCE BUILDING LIMITED PARTNERSHIP,

Respondent.

RESPONDENT'S REPLY BRIEF

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January 19, 2011

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I. REPLY ARGUMENT

A. Commerce should have been awarded its attorney's fees at the Trial Court.

New Horseshoe Saloon Associates (“NHSA”) argues that the award of reasonable attorney’s fees in a temporary injunction setting is discretionary. However, the case cited by both Commerce Building Limited Partnership (“Commerce”) and NHSA does not state that the award is within the Trial Court’s discretion, but rather “the **amount** of a reasonable attorney’s fee is within the Trial Court’s discretion.” *Ino Ino, Inc. vs. City of Bellevue*, 132 Wn. 2d 103, 143, 937 P. 2d 154 (1997)(emphasis added). CR 65(c) and RCW 7.40.080 define damages for an unwarranted injunction to include attorney’s fees. Commerce’s request for fees relating to the dismissal of the frivolous suit is fair and supported by precedent. The purpose for awarding attorney’s fees as damages when an injunction is unwarranted or a lawsuit is frivolous is to prevent parties from filing frivolous claims and damaging the other party. The Trial Court should have awarded Commerce its attorney’s fees as damages under CR 65(c) and RCW 7.40.080 for a wrongful temporary restraining order.

B. Commerce should be awarded its attorney's fees and costs on appeal.

NHSA's appeal is frivolous, as evidenced by the fact that it does not dispute in its Reply Brief any of the substantive responsive arguments submitted by Commerce relating to NHSA's claims. NHSA fails to recognize or completely ignores that the motion at issue in this case involved evidence outside the pleadings and therefore, was a summary judgment motion under CR 56. The Trial Court never indicated that dismissal was based on CR 12(b)(6) and in fact, held otherwise when it considered evidence outside the pleadings and entered its order. Further, NHSA's arguments that it was not allowed time for discovery in this matter and that its hypothetical facts need not be supported at all, are without merit, as discussed in Commerce's appellate brief. Therefore, Commerce should be awarded its attorney's fees and costs on appeal.

II. CONCLUSION

Commerce respectfully requests that this Court affirm the Trial Court's decision with respect to its dismissal of NHSA's claims against Commerce. Commerce also requests that the Court reverse the Trial Court's decision denying Commerce its attorney's fees and costs and grant Commerce its attorney's fees and costs from the lower court action and on appeal.

Dated this 19th day of January, 2011

Respectfully submitted,

ANDERSON HUNTER LAW FIRM, P.S.

Handwritten signature of Kristi Favard in cursive script.

Kristi Favard, WSBA #34419
Attorneys for Respondent

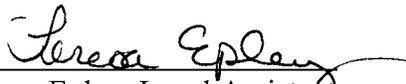
CERTIFICATE OF SERVICE

I hereby certify that on this day I caused to be served a copy of the foregoing document directed to the following individuals in the manner indicated below:

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DATED this 19th day of January, 2011.


Teresa Epley, Legal Assistant