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COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 JUL 29 AM 11:39

No. 66827-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

EAST EVERETT INVESTMENTS, Appellant

vs.

MURNA HUBER, Respondent

BRIEF OF APPELLANT

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Abbreviations

CP	Clerk's Papers
EEl	East Everett Investments, a Washington Limited Liability Company

I. ASSIGNMENT OF ERROR

This is an Appeal of the trial court's failure to award to the Appellant its reasonable attorney fees under RCW 4.84.185. As evidenced by CP 3-5, the trial court specifically denied Appellant its attorney fees under RCW 4.84.185 and it is that failure that the Appellant assigns error to.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether or not the trial court erred in failing to award the Appellant its reasonable attorney fees under RCW 4.84.185.
2. Whether or not, as required by RCW 4.84.185, Respondent's Complaint "was frivolous and advanced without reasonable cause."

III. STATEMENT OF THE CASE

The Litigants and the Pleadings

1. The Appellant (and the Defendant at the trial court) is East Everett Investments, a Washington Limited Liability Company ("EEI"), one of the developers of the Plat of East Everett. (CP 236-238)
2. The Respondent (and the Plaintiff at the trial court) is Murna Huber and the owner of an older rental house (built in 1947) located within the Plat of East Everett which she had purchased in 2004. (CP 236-238)
3. In her Complaint, the Respondent alleged that while the Appellant was in the process of developing the lots of the Plat of East Everett in the

vicinity of and adjacent to the Respondent's rental, the Appellant caused damage to her property. (CP 236-238) Specifically the Respondent alleged that the damages resulted from an alleged trespass by the Appellant onto her property (CP 237) and/or as a result of alleged negligent grading activities on or around her property (CP 238). The Appellant denied the allegations and affirmatively alleged that the Respondent's cause of action was against others not joined by the Respondent in that litigation. (CP 227-234) Specifically, it was alleged that Keith Lynn LLC, Dave Huber and Nelson & Sons were "necessary/indispensable parties." (CP 230)

4. From the Complaint and interrogatory discovery, the Appellant was unable to discern the specific factual basis for the Respondent's claims. (CP 83, lines 16-19). Therefore, in an effort to flush out the claims the Appellant filed a Motion for Summary Judgment seeking the dismissal with prejudice of Respondent's Complaint.¹ (CP 81-226)

5. Prior to filing a response to that Summary Judgment Motion, the trial court, on Respondent's motion, entered an Order Granting Voluntary Dismissal Pursuant to CR 41(a)(1)(B). (CP 67-68) Following the entry of

1

In fact, the scope of the facts set forth in the Motion included essentially the entire "kitchen sink" so that any response of the Respondent that alleged or raised specific facts that "might" give rise to liability would have been already addressed by the Motion.

that Order, the Appellant sought an award of reasonable attorney fees under RCW 4.84.185. (CP 56-66) In support of the Appellant's argument that Respondent's claims were frivolous, the Appellant attached/incorporated its original Motion for Summary Judgment. (CP 57)

6. In opposition to that Motion for fees, the Respondent submitted the Declaration of Dave Huber, her son. (CP 39-41) That Declaration provided some additional detail regarding the basis for the Respondent's claims but did not raise or attempt to raise an issue of fact regarding the material facts set out in Appellant's Motion in Support of an award of fees:

5. As part of its development, **defendant** graded a significant amount of land on the western edge of my mother's property in April 2008 to accommodate utilities and a wider road for egress and ingress to the development off east Hewitt Avenue. **Without authorization, defendant** took a larger portion of Plaintiff's land, and left a steeper slope on the western side than allowed under applicable development codes. Furthermore, **defendant** made no effort to stabilize this portion of the property after grading. Consequently, plaintiff's property eroded and shifted the foundation of the house in such a manner as to cause a significant crack in the foundation. (CP 40)

6. Later, **defendant's grading activities** cause my mother to lose access to the rental property, except through construction of a new gravel driveway on an adjacent lot owned by my company Keith Lynn LLC.² (CP 40)

2

As described below, Keith Lynn was a second entity that participated in the purchase and development of the Plat of East Everett and other properties in and around the Respondent's rental house. Keith Lynn was not a member of EEI.

7. Finally, **defendant's grading activities** caused such a problem with the septic system that plaintiff was forced to terminate the existing rental agreement for the property in which the tenant was paying her \$1275 per month. (Emphasis provided.) (CP 40)

7. In that same Declaration, Mr. Huber also admitted to being the Respondent's agent "for all purposes related to the development and rental" as well as the owner of an entity that itself held a 50% member ownership interest in the Defendant EEI:

2. At all times material to this suit, I was the rental manager for Plaintiff Murna Huber-Willot, who is also my mother. Until 2010, I was also a member of East Everett Investments, LLC through my company Dang Investments, LLC³; (CP 39)

3. East Everett Investments was formed in 2005 for the purpose of developing a 100-lot plat in East Everett. Plaintiff owned a rental house in the center of the East Everett development and I was her agent **for all purposes related to development and rental**. (Emphasis supplied.) (CP 39)

8. The Declaration of Dave Huber (CP 39-41), made it clear that the Respondent's claims against the Appellant were factually based upon the Appellant itself having performed the offending grading activities. (CP 40) Yet the undisputed facts as set forth in Appellant's Motion for Summary Judgment⁴ and incorporated into Appellant's motion for fees were that (1) an

³ Dang actually owned a 50% interest in EEI while the other 50% was owned by another LLC owned by two other individuals. (CP 118-127)

⁴ CP 81-226.

independent contractor (Nelson & Sons), who was under contract to the Appellant and Keith Lynn, LLC (Dave Huber's LLC), performed all grading on the site;⁵ and, in any event, grading activity on or around the Respondent's rental was performed at the direction or with the permission of Dave Huber,⁶ the Respondent's acknowledged agent "for all purposes relating to the development and rental." (CP 39, lines 23-25)

9. The trial court denied Appellant's request for fees under RCW 4.84.185 for the following reason:

Defendant's motion for attorney's fees under RCW 4.84.185: Denied. The Court does not find that the Defendant has met the standard that the action was frivolous in its entirety.⁷

The Development History of Plat of East Everett

10. The Defendant EEI was formed for the sole purpose of purchasing and developing the Plat of Everett. (CP 85) Upon its formation, Dave Huber, through his ownership of Dang Investment, LLC, was a 50% owner of EEI while a second limited liability company owned by others was the owner of the other 50%. (CP 85)

11. The Plat of East Everett was created of record in 1891. (CP 40)

⁵ CP 90, lines 12-15; CP 156-180.

⁶ CP 87-94.

⁷ CP 9.

In 2004/2005 no infrastructure (i.e roads, sidewalks, drainage) had been built to serve the platted lots; therefore, the plat and the lots within the plat existed only “on paper.” (CP 40) In order to meet minimum lot size requirements for residential building permits, the 1891 lots needed to be reconfigured through the Snohomish County Boundary Line Adjustment. (CP 85-86) Once the lots were reconfigured, a grading permit could be applied for which, when approved, would allow for the construction of the infrastructure.⁸ (CP 86)

12. During the negotiations leading up to the execution of the EEI Agreement, Dave Huber advised the other members of EEI that his mother, the Respondent, wanted her rental property to be included in the project. (CP 87) Huber advised that the Respondent’s rental house was to be torn down so that, in the end, the Respondent would be left with six reconfigured lots that she could sell for her own account.⁹ (CP 87)

⁸

Attached to Appellant’s Motion for Summary Judgment as Exhibit 9 (CP 140) is an aerial photograph of the property included within the Plat of East Everett showing how the area looked prior to the commencement of the construction activities described below. (Some of the lots located within the Plat of East Everett as originally laid out are shown as an overlay on Exhibit 9 attached to the Motion for Summary Judgment or CP 140.)

⁹

The rental house actually sat on one or more of the six lots that she acquired in 2004. (CP 142-143)

13. As a result of those negotiations, the following language was included in the parties' operating agreement.

12. Late Comer Agreement/Additional Payments by DI (Dang Investments):

* * * *

- b. Murna Huber will be contributing to the construction cost of the project in proportion to the number of lots that she develops including a proportionate share of the loan costs and the interest carrying costs.¹⁰

14. Through a series of acquisitions, EEI then acquired title to most all of the other lots within the Plat of East Everett together with certain vacant and unplatted land located adjacent to but west of the existing plat, said unplatted land hereinafter referred to as "the Field." (CP 88; CP 137-140)

15. Following those acquisitions, EEI reconfigured the platted lots, including the six lots owned by the Respondent.

16. CP 144-146 depicts Respondent's lots following their reconfiguration with CP 146 being overlaid with a copy of the grading plan that was approved in May, 2007. (CP 88) To conform to the elevation of the engineered infrastructure, the approved grading plan (which assumed Respondent's rental house was to be removed) actually lowered the elevation of the Respondent's lots below the elevation that they were at when she

¹⁰

CP 87; CP 126, paragraph 12(b).

acquired the lots in 2004. (CP 88)

17. The Boundary Line Adjustment process also allowed “unused” or “extra” lots located within the Plat of East Everett to be “relocated” through the areas that were previously unplatted - i.e., into the Field. Therefore, in the process of obtaining the BLAs for the Plat of East Everett lots, approved BLAs for and within the Field were also obtained. (CP 88-89)

18. However, notwithstanding the fact that EEI took title in its name to all land acquired (both platted and unplatted), under the terms and conditions of the parties’ operating agreement, EEI was not participating in or benefitting by the development of the Field. (CP 89)

19. Specifically, the agreement with Dave Huber as set forth in their operating agreement was that EEI would only participate in the development and subsequent sale of 82 of the reconfigured building lots and that all remaining property (i.e., the field located adjacent to and west of the Respondent’s property) would ultimately be transferred from EEI to Dang for development in its own name:

3. **Purpose of EEI:**

* * * *

- c. Except as otherwise provided herein, it is not the intent of EEI to develop or to participate in the development of any of the other real property described by Exhibit A attached hereto. Once the development of the 82 lots is complete and JDA has been compensated for its share of the profits as described below, the balance of the property owned

by EEI shall be distributed to DI.

* * * *

5. **Miscellaneous Member Representations and Obligations:**

a. DI's representations to JDA and EEI:

- i. That the real property being acquired will yield at least 82 buildable lots for the benefit of EEI for purposes of resale.¹¹

Property Transfers and Project Construction/Grading

20. In accordance with the terms and conditions of EEI's operating agreement (CP 118-127), EEI conveyed the Field to Dang on February 28, 2007. (CP 148-150)

21. On that same day, Dang transferred the Field to Keith Lynn. (CP 152-154)

22. EEI and Keith Lynn then obtained their own individual construction loans to pay for the development construction costs associated with their respective ownership. EEI obtained its financing through Frontier Bank and Keith Lynn obtained its through United Commercial Bank¹². (CP 91)

¹¹

CP 89, CP 118-120.

¹²

Deed of Trust from Keith Lynn to United Commercial Bank in the face amount of \$7,467,000 recorded under Snohomish County Auditor's File Number 200711210885. (CP 91)

23. The two entities (EEI and Keith Lynn) agreed to share the cost of construction based upon a pro-rata share of the entire cost allocated between the number of lots that each owned. (CP 182)

24. EEI and Keith Lynn then entered into a single construction contract with Nelson & Sons to grade the property to construct the infrastructure for the plat, the Field and for the Respondent's lots. (CP 156-180)¹³

Respondent's Lots

25. After construction started, Dave Huber advised the other members of EEI that Keith Lynn was going to acquire the Respondent's vacant lots which it did on November 21, 2007. (CP 184-186) At that point Keith Lynn's pro-rata share of the construction costs rose to reflect the additional lots it owned.¹⁴ (CP 91)

26. In addition, Dave Huber advised the other members of EEI that the Respondent had decided to keep her rental house that remained under her ownership rather than demolish it. As a result, the construction contract that

¹³

See CP 166 which has a line item providing as follows: "DEMO EXISTING STRUCTURES." This line item describes the demolition of the Respondent's rental house.

¹⁴

In addition, Keith Lynn brought current the construction costs that had been deferred for later payment by the Respondent. (CP 91)

had previously been entered with the contractor Nelson & Sons by the Appellant and Keith Lynn was amended to delete the “demo and removal of the house” and to delete all grading of the lot and all brush removal. The September 14, 2007 change order/credit against the construction contract was in the amount of \$6,800.00. (CP 91-92; CP 188)

Note: Therefore, as of September 14, 2007, EEI was not under contract to perform any work on Respondent’s rental lot.

27. Other than through Dave Huber, her son and agent, none of the other members of EEI ever communicated with the Respondent regarding this project or her participation in the project. (CP 88) All communications, if any, regarding the Respondent’s rental house and the grading in, around or adjacent thereto, were through Dave Huber. (CP 88)

IV. ARGUMENT

RCW 4.84.185 provides as follows:

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense **was frivolous and advanced without reasonable cause**, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the

order.

* * * *

An action is frivolous if it “cannot be supported by any rational argument on the law or facts.” *Clarke v. Equinox Holdings, Ltd.*, 56 Wash.App. 125, 132, 783 P.2d 82, *review denied*, 113 Wash.2d 1001, 777 P.2d 1050 (1989).¹⁵

Under the authority of *Escude v King County Public Hospital*, 117 Wash. App. 183, 192-194 (2004), despite the Plaintiff’s voluntary dismissal of this case under CR 41, the trial court retains jurisdiction to determine whether attorney fees under RCW 4.84.185 are appropriate.

We review a trial court’s denial of a motion for attorney fees for abuse of discretion. We use the same standard to review its refusal to award sanctions under either CR 11 or RCW 4.84.185. “ ‘A trial court abuses its discretion when it bases its denial on untenable grounds or reasons.’ ”¹⁶

Under the facts of this case, it is undisputed that if there was a trespass or if there was any negligent grading, it was physically performed by Nelson & Sons, not by the Appellant EEI. Subject to limited exceptions, Washington law is clear that EEI (the principal) is not liable for the torts of its independent contractor Nelson & Sons:

¹⁵ *Eller v. East Sprague Motors & R.V.'s, Inc.* 159 Wash.App. 180, 191-192, 244 P.3d 447, 453 (Wash.App. Div. 3,2010)

¹⁶ *Housing Authority of City of Everett v. Kirby* 154 Wash.App. 842, 849-850, 226 P.3d 222, 225 - 226 (Wash.App. Div. 1,2010)

As a general rule, a principal is not liable for the torts of an independent contractor. But the general rule is subject to exceptions. See *Epperly v. City of Seattle*, 65 Wash.2d 777, 781, 399 P.2d 591 (1965). The employer of an independent contractor is not insulated from liability if the work is inherently dangerous; if the employer causes or knows of and sanctions illegal conduct; or if the employer owes a nondelegable duty of care to persons injured by the work of the independent contractor. *Epperly*, 65 Wash.2d at 781, 399 P.2d 591; *Shaffer*, 524 S.E.2d at 701; cf. *Tauscher v. Puget Sound Power & Light Co.*, 96 Wash.2d 274, 287, 635 P.2d 426 (1981). We discuss each exception in order.¹⁷

Although in some early cases it was thought that the doctrine of respondeat superior applied to the relation between an employer and an independent contractor, the authority of these few cases was soon overwhelmed by many decisions promulgating the general rule *that an employer is not liable for the torts of an independent contractor or the latter's servants*. This rule of the nonliability of an employer is based upon the theory that the characteristic incident of the relation created by an independent contract is that the employer does not possess the power of controlling the person employed *as to the details of the stipulated work*, and it is, therefore, a necessary judicial consequence that the employer shall not be answerable for an injury resulting from the manner in which the details of the work are carried out by the independent contractor. 27 Am.Jur. 504, § 27.¹⁸

See also the timber trespass case of *Ventoza v Anderson*, 14 Wash App. 819, 837-838 (1976) wherein the court stated as follows:

The defendant objected to an instruction given by the court which stated:

One who engages an independent contractor to perform

¹⁷ *Hickle v. Whitney Farms, Inc.* 107 Wash.App. 934, 940, 29 P.3d 50, 53 (2001).

¹⁸ *Bill v. Gattavara* 24 Wash.2d 819, 837-838, 167 P.2d 434, 443 - 444 (1946)

logging operations is not liable to landowners for the trespasses of the independent contractor or those employed by the independent contractor, whether as agents or independent contractors themselves, unless the trespass is the result of the advice or direction of the principal, or unless the principal has notice of the trespass and fails to interfere.

The argument is made that the use of the words 'unless the principal has notice of the trespass and fails to interfere' was improper as there was no evidence that Anderson had notice of any trespass by Clark or anyone else. The defendant Anderson also argues that such an instruction would unjustly punish an innocent employer if the engaged independent contractor willfully trespassed.

We find that the record includes testimony from which the jury could conclude that Anderson was aware that the persons with whom he was dealing were taking timber from the plaintiffs' land. Evidence was present to support the instruction insofar as the challenge raised is concerned.

We disagree that the instruction would permit punishment of an innocent employer if the employed independent contractor trespassed. The two exceptions to nonliability that are specified by the instruction impose liability upon an employer for negligent direction of the independent contractor (Restatement (Second) of Torts 410 (1965)), or for failing to act upon becoming aware that the independent contractor is about to harm a third party in the performance of the employment. Restatement (Second) of Torts 414A (1965). See also *Cleveland, C. & St. L. Ry. Co. v. Simpson*, 182 Ind. 693, 104 N.E. 301, 108 N.E. 9 (1914); *Lamb v. South Unit Jehovah's Witnesses*, 232 Minn. 259, 45 N.W.2d 403, 33 A.L.R.2d 1 (1950); *Wright v. Tudor City Twelfth Unit, Inc.*, 276 N.Y. 303, 12 N.E.2d 307, 115 A.L.R. 962 (1938). The instruction was consistent with the general rule expressed in *Bill v. Gattavara*, 24 Wash.2d 819, 167 P.2d 434 (1946), which held that an employer is not liable for the torts of an independent contractor or his servants. See also Restatement (Second) of Torts 409 (1965). It was also consistent with the further holding expressed in *Bill v. Gattavara*, *supra*, that where a trespass is committed on the property of another by the advice or direction of a defendant, the relationship between the immediate agent of the wrong and the person sought to be charged is unimportant. Further, where

one hires another to do certain work as an independent contractor in an area where the employer has the right to be, that employer may not stand silently by if he observes the contractor trespassing into an adjacent area. An employer is not entitled to nonliability for the acts of an independent contractor in such circumstances. A trespass will have occurred because of the culpable misfeasance of the employer in the first instance, and because of culpable nonfeasance in the second instance. We find no error in the giving of the instruction.¹⁹

In summary, Respondent's Complaint (CP 236-238) alleges that her damages were caused by the tortuous conduct of the "Defendant" when in fact, if there was any tortuous conduct at all, it was performed by Nelson & Sons, the independent contractor of the Appellant and of Keith Lynn. The Appellant has no liability for such actions absent proof of an exception to the general rule; and no such proof has ever been provided by the Respondent.

V. CONCLUSION

The trial court denied Appellant's request for fees because, as the trial court stated, the Appellant did not establish that the Respondent's action was frivolous "in its entirety." (CP 9) Yet, contrary to the trial court's holding,

¹⁹

Ventoza v. Anderson 14 Wash.App. 882, 895-896, 545 P.2d 1219, 1228 - 1229 (Wash.App.,1976) See also *Gattavara, supra*, at 838 which stated as follows:

It should also be borne in mind that even though an employer has the right to stop work which is not properly done, that fact does not, in and of itself, operate to create the relation of master and servant between the owner and those engaged in the work. *Hubbard v. Department of Labor and Industries, supra*.

the claims of the Respondent are clearly and “entirely” frivolous under either the undisputed facts and/or under by the law related to the liability of a principal for the tortuous acts of its independent contractor.

Therefore, the Appellant seeks the entry of an Order reversing the trial court’s decision not to award attorney fees under RCW 4.84.185. Specifically, the Appellant seeks a remand to the trial court holding that the Respondent’s claims were frivolous in their entirety along with a direction to the trial court to enter an Order awarding the Appellant their reasonable attorney fees incurred at the trial court and on appeal under and pursuant to RCW 4.84.185 and RAP 18.1

VI. ATTORNEY FEES ON APPEAL

See the preceding paragraph.

Respectfully submitted,

DENNIS JORDAN & ASSOCIATES,
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By


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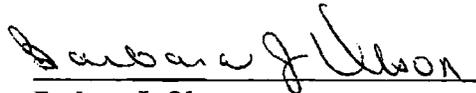
DECLARATION OF SERVICE

I declare under the penalty of perjury of the laws of the State of Washington that a copy of the foregoing Appellant's Brief was on this day transmitted via fax and also deposited in the U. S. mail by declarant in a properly stamped and addressed envelope addressed to:

Mark G. Olson
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Executed at Everett, Washington on this 29th day of July, 2011.


Barbara J. Olson