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No. 67342-4-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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SUPERIOR COURT
DIVISION I

CHARLES ROBERT GARNER,

Appellant,

vs.

HOFFMAN CONSTRUCTION, INC., ET AL.,

Respondents.

RESPONDENTS' ANSWERING BRIEF

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I. INTRODUCTION

This case is but the latest chapter in pro se Appellant Charles Garner's decades-long campaign to disrupt and resist the City of Federal Way's abatement of a dilapidated, unsanitary structure on Garner's property. Since at least 2006, he has repeatedly litigated claims against the City (not a party in this case) about the property in superior, federal and appellate courts—with no success.

With this case, Garner continues this frivolous campaign by suing a business—Appellee Hoffman Construction (“Hoffman”) that contracted with the City to demolish the structure after Garner ignored valid orders to do so. Garner alleges Hoffman contaminated the property during the demolition, largely relying on irregularities in the City's paperwork on a required pre-demolition asbestos inspection. Hoffman demonstrated to the trial court that a proper asbestos inspection was obtained by the City. Garner responded with multiple unsupported arguments and allegations—but without any admissible proof of wrongdoing by Hoffman. Furthermore, the company provided ample evidence that Garner knew he had no basis for his claims.

The trial judge properly granted summary judgment in favor of Hoffman, and awarded attorneys' fees to Hoffman under RCW 4.84.185 and CR 11. Now for the first time on appeal, Garner argues that Hoffman and/or the trial court should have joined the City in this lawsuit. His claims are without merit.

II. STATEMENT OF ISSUES

1. Does the record reflect that Garner provided sufficient evidence to support his claims for relief against Hoffman Construction?

2. Does a party's meritless claim that another party should have been joined in the litigation—a matter not argued in the trial court—require reversal of summary judgment?

3. Did the trial court abuse its discretion in awarding Hoffman's attorneys' fees in this case?

III. STATEMENT OF THE CASE

A. Underlying Facts.

The following statement of background facts is taken from briefing in an earlier lawsuit filed against the City of Federal Way ("Garner II," *see* section B. below). CP 103-105.

In 1976, Mr. Garner purchased a house, originally located south of SeaTac Airport, as part of a noise

abatement program. [citations to record omitted¹] The house was moved to property owned by Mr. Garner in what is now Federal Way, located at 31616 6th Avenue SW. He intended to rent the house out. The house was originally a two-story house and, in order to move it, the mover chain sawed off the bottom part of the house and moved the top part of the house to the Federal Way property. The bottom was not moved. The house was originally an "L" shape and the mover cut off one of the portions of the "L" to move it, as well. The mover did not align the two sections of the house properly when reassembling the house leaving a 12-foot gap. After the house was delivered to the property, the misalignment of the sections of the house precluded further work on the house for four years.

Although there was a 12-foot gap between the portions of the house, Mr. Garner never placed any material over the openings to prevent dust, wind, rain, and the elements from getting into the house and ruining it. Mr. Garner eventually pulled the two portions of the house together himself and reattached them. Mr. Garner then built a foundation and stub-walls so the house could be set down into place, which took him until 1983 or 1984. From 1980 through 1991, Mr. Garner had no permanent source of electrical power to his house. In fact to this day [briefing dated May 2009, CP 115], the power company has refused to send power to the house, although the house is hooked up to the power and ready for it, because the house has been red-tagged by the City code compliance officer as unsafe.

In 1991, Federal Way incorporated and the Garner property came into the City. Martin Nordby, the City's code compliance officer at the time, issued Mr. Garner a notice of building violation for failure to complete the

¹ Citations to the record supporting these facts came, almost exclusively, from Garner's deposition.

house and failure to apply for permits, as well as other issues. Mr. Garner never applied for permits from Federal Way to complete the construction on the house. Mr. Nordby placed a red tag stop work order on the house, because he determined the house was unsafe and he wanted access to the house so he could inspect to determine the extent of the problems and what steps needed to be taken to correct them. Mr. Garner did not allow access to the house for inspections, did not obtain permits, and did not appeal the red-tag. From 1991 to 2003, no work was done on the house. The house deteriorated and people broke the windows out of the house on several occasions. The exterior siding on the house warped.

The lack of maintenance has resulted in the interior and exterior of the structure deteriorating. After over 30 years of abandonment and lack maintenance, the structure would need to be almost completely re-built and remodeled, if not razed, to become a habitable dwelling.

At the Improvement Officer hearing the Improvement Officer found that the City had properly brought forward an unfit building complaint. He found that the building on Mr. Garner's property is unfinished, unable to be occupied, and in a deteriorating state. The building is open to the elements, has no electricity, gas, or sewer, and lacks access to the current upper story front door. The building is unfit, unsafe, dangerous to the public, unsanitary, dilapidated and it would cost more than half the house's value to repair the building. Improvement Officer's Findings of Fact. The Appeals commission affirmed these findings.

CP 103-105.

B. Procedural History of Repetitious, Unsuccessful Lawsuits by Garner.

Garner's prior litigation about the property is described here as "Garner I", "Garner II," and so forth, as follows:

Garner I: *Garner v. City of Federal*, King Co. Sup. Ct. No. 06-2-26104-6-KNT. Garner filed suit seeking damages for §1983 federal due process violations and state constitutional violations for the 2003 code enforcement activities at the property. The case was removed to federal court (W.D. Wash. C06-1739-JCC) and resulted in a written opinion that no violations had occurred. The case was dismissed. CP 125-132.

Garner II: *City of Federal Way v. Garner*, King Co. Sup. Ct. No. 08-2-37690-7-KNT is an injunction action and trial de novo filed by Garner which followed the Federal Way Appeals Commission's decision upholding an Improvement Officer's ruling that the property was uninhabitable and should be demolished. King County Superior Court Judge McDermott adopted the findings of the Commission; found the City had followed proper procedures in abating the property; found the building was "unfit and more than fifty percent damaged or deteriorated;" concluded the building was "appropriate for demolition, that the order to demolish the building was proper;" and concluded that the "Petitioner

[had] not made any showing that a taking of property has occurred or will occur through the actions of the City of Federal Way.” CP 122-23. Garner appealed the trial court ruling to the Court of Appeals which eventually dismissed the appeal for lack of prosecution. *Garner v. Federal Way*, Ct.App. (Div. I) No. 64380-1-I. CP 150.

Garner III: *Garner v. City of Federal*, King Co. Sup. Ct. No. 09-2-09440-3 KNT. Mr. Garner initiated a second lawsuit against the City, repeating the same arguments made to Judge McDermott in the Appeals Commission trial de novo, including claims of alleged “de facto taking.” CP 134-36. Garner again urged RCW 19.27.180 as a basis for relief which Judge McDermott had previously rejected. Judge Hollis R. Hill agreed the lawsuit was barred by *res judicata* and dismissed the case with prejudice on May 18, 2010. CP 137-38. Garner subsequently appealed that ruling, and this Court affirmed the trial court’s decision in an unpublished opinion date July 25, 2011. *Garner v. Federal Way*, Ct. Apps. (Div. I) No. 65624-4-1. Garner’s motion for reconsideration was denied, and he has now petitioned the Supreme Court for review.

C. This Case.

1. *Garner’s Allegations Against Hoffman.* Garner filed this lawsuit on January 18, 2011, with a caption suggesting more than one

defendant, “Hoffman Construction, et al.” Complaint allegations, however, only identify Hoffman.² CP 1-3, 93-99. Based upon arguments in the opening brief, Garner evidently expected either the trial court or Hoffman to join Federal Way as a party. Garner alleges that his property was demolished by defendant under contract with the City. CP 4, 94. Hoffman allegedly “failed to perform due diligence of checking the postings” at the site “to insure that irreparable harm did not occur, by its actions, to Garner, their employees and health, safety, and welfare of the general public.” CP 6, 96. He claims that the demolition did not meet government standards for public safety relating to asbestos and that the asbestos report was “invalid.” CP 5-6, 95-96. Garner also alleges the property “is situate [sic] in a HIGH RISK designated Wellhead Protection Zone” of Lakehaven Utility District, and that failure to comply with requirements “did introduce toxins into the Wellhead Protection Zone.” CP 6-7, 96-97.

² However, the Complaints cites numerous alleged failings by the City, including: that city employees “failed to use due diligence” when ordering a pre-demolition asbestos survey on the property (§3.3), that the city hired an “unqualified” inspector to perform the asbestos inspection (§3.4), that the city “failed to use due diligence” when notifying the Puget Sound Clean Air Agency about the address of the asbestos inspection (§3.5), that the City provided defendant Hoffman “with the correct address and the invalid Asbestos Survey” (§3.6), and that the City posted “the invalid Asbestos Survey” at the site during demolition (§3.8). CP 5-7

As a result, Garner claims asbestos and toxins were released into the air and on the property, and alleges \$995,000 in damages suffered by Garner and the property. He also seeks establishment of a trust fund for other unnamed, unidentified members of the public exposed to “toxins.” CP 7-8, 97-98.

2. Background Facts. The City entered into a contract with Hoffman on December 11, 2009, to perform the demolition of the uninhabitable residence on Garner’s property after he had neglected for years to perform the ordered demolition himself. CP 44-61. The hearings examiner, Appeals Commission, and Superior Court (CP 123) had each previously ruled that the residence should be demolished, and Mr. Garner’s appeal of Judge McDermott’s order was dismissed for lack of prosecution. CP 150. The legal authority and procedural steps for declaring an unfit building, ordering demolition, and city authority to undertake the demolition of an unfit building is set forth in RCW 35.80.030 and Chapter 13.05 of the Federal Way City Code.

Before the contract was entered, the City requested quotes for the project, and Hoffman won the bid. CP 50-61. Bidders were notified that the City had already obtained the necessary asbestos inspection prior to

demolition, and that the inspection revealed “No asbestos found.” CP 63. See RCW 49.26.013(1) relating to asbestos testing.

After the demolition, Garner, defendant Hoffman, and the City received notification of a violation from Puget Sound Clean Air Agency stating that they had failed to notify the Agency prior to the demolition. The Agency ordered that corrective action be taken. CP 66-69. The City had taken the responsibility to provide the necessary notification and had attempted to do so, but it was discovered that the city code enforcement officer had mistakenly entered the wrong address on the notification to the Agency. CP 71. The Agency then notified Garner that it would take no further enforcement action. CP 75. Garner was well aware of the error and that the Agency considered the notification error “closed.” *Id.* Garner even forwarded an email he had received reporting that the address error had been administratively changed by the Agency. CP 176.

It is clear from the asbestos report that the *correct property was inspected* prior to demolition. CP 63. Thus, there is no reason whatever to believe that asbestos was released during the demolition. Garner’s Complaint allegation that the asbestos report was “invalid” (CP 95) presumably relates to the fact that the environmental inspector provided an outdated AHERN certification with his report to the City. CP 152-53.

Hoffman's counsel wrote to Garner in correspondence dated March 10, 2011, and provided the correct certificate for Mr. Hade, the inspector. CP 140, 143. Garner was invited to contact the environmental contractor himself to verify that Mr. Hade was indeed properly certified at the time he conducted the Garner property inspection. CP 141.

In addition, Garner was notified prior to the summary judgment motion that his allegations about claimed release of "toxins" into the wellhead protection zone administered by Lakehaven Utility District were not based on fact. CP 141-42. Rather, as counsel's letter states, according to the District's water quality/production engineer Stan French, the District is not involved in permitting or regulating building demolition projects. CP 76-78. Mr. French also explained that the property is not in a "high risk" zone, but rather, years before the demolition, Mr. Garner had parked large trucks on the property.³ CP 77, 80. For this reason, the *property* was assigned a "HIGH Hazardous Risk Level" due to the potential for leakage of oil, gasoline, and other vehicle-related substances which could seep into the ground and contaminate drinking water.

³ The *Second Declaration of Stan French* corrected his first declaration noting that Garner's property came to the attention of Lakehaven *in 2001*—not in 2010. CP 330-31, 77.

Correspondence signed by Mr. French addressed to Mr. Garner addressed this. CP 80.

Garner's complaint allegations are false and misleading. There is no basis for believing the demolition caused asbestos contamination at the site when an asbestos inspection found no asbestos. Mr. Garner knew the report's findings before he originally filed this case, and he obstinately insisted on proceeding. Garner had to know that his claims against Hoffman for "release of toxins" based on the Lakehaven Utility District letter had nothing whatever to do with Hoffman—but rather related to his own activities on the property years before.

Hoffman attempted to persuade Garner to dismiss this lawsuit in correspondence dated March 10, 2011, and follow up correspondence dated April 28, 2011. CP 140-48. Both letters pointed to the lack of factual support for Garner's claims. Garner was provided copies of CR 11 and RCW 4.84.185 and advised of the potential for an award of terms and fees for pursuing frivolous litigation and alleging claims with no factual basis. CP 145-46. In response, Garner sent a 21-page reply, choosing to ignore the fact that no evidence of contamination or legitimate recoverable damages existed. CP 152-72. Garner's history of repetitious litigation

and refusal to acknowledge the lack of factual basis for his claims demonstrate that appeals to reason are useless.

Accordingly, Hoffman moved for dismissal and for an award of fees and terms under CR 11 and RCW 4.84.185. As Honorable Monica Benton noted, Garner's opposition to the summary judgment did not contain evidence sufficient under CR 56(e) to create a genuine issue of material fact. CP 25-26. The trial court dismissed Garner's lawsuit, and awarded \$16,826.87 for Hoffman's reasonable costs and attorneys' fees in obtaining the dismissal. CP 335-338.

IV. ARGUMENT

A. **The Legality of the Property Demolition Has Been Conclusively Litigated.**

The elements of actionable negligence are (1) a duty of care, (2) breach of the duty, and (3) damages proximately caused thereby. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). The fully-litigated Garner II case conclusively established the legality of the ordered demolition of the residence on plaintiff's property.

B. The Trial Court Correctly Ruled That Garner Failed to Establish a Genuine Issue of Material Fact in His Opposition to Summary Judgment.

Hoffman reasonably relied upon the City to obtain a proper asbestos inspection, and was in no way responsible for shortcomings in the paperwork. *But even if it was*, Hoffman's submittals to the trial court demonstrated that an asbestos inspection conducted by a properly-certified individual *had taken place* on the property. Technical irregularities in the notification to Puget Sound Clean Air Agency do not change that fact. Garner argues, without proof, that Hoffman's failure to detect irregularities constitutes proof that asbestos contamination occurred. The evidence was to the contrary: no asbestos was found. Quibbles over the qualifications of an asbestos inspector or speculation about possible contamination by some other means are not sufficient. A factual dispute that would not affect the outcome of the case is irrelevant in a summary judgment motion.

Garner's speculation and argumentative assertions that asbestos was released does not raise a genuine issue of material fact.

Mere allegations or conclusory statements of facts unsupported by evidence do not sufficiently establish such a genuine issue. *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989). In addition, the nonmoving party "may not rely on

speculation, argumentative assertions that unresolved factual issues remain, or on having its affidavits considered at face value.” *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). After the moving party submits adequate affidavits, the nonmoving party must set forth specific facts rebutting the moving party's contentions and disclose that a genuine issue of material fact exists. *Seven Gables*, 106 Wn.2d at 13, 721 P.2d 1.

Discover Bank v. Bridges, 154 Wn.App. 722, 727, 226 P.3d 191 (2010).

“The mere existence of a scintilla of evidence in support of the non-moving party’s position is not sufficient.” *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995). “[S]ummary judgment should be granted where the nonmoving party fails to offer evidence from which a reasonable [fact finder] could return a [decision] in its favor.” *Id.* at 1220.

Hoffman submitted the declaration of a knowledgeable witness at Lakehaven Water District: the district does not regulate demolitions. The district’s prior concern about the property was related to Garner’s activities—not the demolition. CP 76-78. Garner makes the outrageous claim that Hoffman Construction somehow contaminated ground water when plaintiff Garner’s own long-term storage of heavy equipment on the property had led to the “high hazard” designation by Lakehaven. Garner’s

storage of heavy equipment in a state of “disrepair” dating from 2001 led to the designation of the site as a high hazard. CP 330-31. Garner knows very well how he used the property, and why Lakehaven monitored the use. He even discussed the matter with the Lakehaven engineer. CP 331. The site is no longer deemed high hazard by Lakehaven *because the old equipment has been removed—by Garner. Id.* Garner’s attempts to confuse the Court with accusations about contamination by Hoffman by misrepresenting *his own prior uses* reveals the lengths to which Garner is willing to go. Garner’s actions have caused both the City and Hoffman to incur significant legal expenses.

Garner appears to suggest that “airborne contaminate[s],” “lead-based paint” or arsenic contaminated his property, presumably due to some action of Hoffman. *See Opening Brief* at 20, 22, 23. Again, Garner offers no proof. He cannot rely upon speculation and unsupported allegations of fact.

Garner cannot muster any admissible proof of “specific facts showing that there is a genuine issue for trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). “The mere existence of a scintilla of evidence in support of the non-moving party’s position is not sufficient.” *Triton Energy Corp., supra* at 1221.

C. **Garner’s Claim that the City Should Have Been Joined Was Not Raised in the Trial Court and, by No Means Merits Reversal.**

CR 19 addresses joinder of so-called “indispensable” parties. Garner’s brief argues it was Hoffman’s or the trial court’s obligation to join the City—after *he decided* not to include the City in the complaint (possibly fearing sanctions after the prior dismissal of his last case against the City on *res judicata* grounds). Garner never raised this issue before the trial judge, and this Court “may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a). The joinder issue is normally raised as a *defense* against liability, and the “burden is on the party raising the defense to show that the person who was not joined is needed for just adjudication.” *Gildon v. Simon Prop. Grp.*, 158 Wn.2d 483, 495, 145 P.3d 1196 (2006). Nothing in the situation *required* that the City be joined as a party; nor did the circumstances present the possibility of “inconsistent” obligations by Hoffman to the City, or anyone else. *Id.* at 503.

In any event, the substance of the summary judgment ruling establishes the Garner could not prove his case against Hoffman *or the City*. Joining the City would not have changed the result.

D. The Trial Court's Award to Hoffman Under RCW 4.84.185 and CR 11 Is Appropriate and Should be Upheld.

Civil Rule 11 requires pro se parties to sign and date their pleadings—which Garner did. CP 9, 99. His signature “constitutes a certificate” that he read the pleading and “that to the best of the party’s . . . knowledge, information, and belief, formed after an inquiry reasonable under the circumstances” the pleading “is well grounded in fact,” and “warranted by existing law or a good faith argument for” change of existing law.

Garner knew when he filed this case that an asbestos survey had been done. He knew, or could easily have confirmed, that the asbestos inspector was property certified. He alleged in the Complaint that asbestos contamination occurred on the property—when he knew no asbestos had been found. He willfully misrepresented the letter received from Lakehaven and concocted a frivolous theory about contamination of the water supply. He failed to respond to two separate letters from Hoffman’s counsel providing information refuting his claims and asking him to withdraw the case. Instead, he generated a 21-page mishmash of verbiage that failed to address the issues. His demonstrated history of repeated frivolous claims over this property cannot be ignored. His conduct has caused Hoffman, and the City, considerable expense and waste of resources defending groundless, repetitious lawsuits.

CR 11 is intended “to deter baseless filings and to curb abuses of the judicial system.” *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994). A pleading violates this rule if it is not warranted by existing law. *See* CR 11(a). The Court may impose “an appropriate sanction” on a party who signs a pleading in violation of the rule which may include an order to pay the other party “the amount of reasonable expenses incurred because of the filing of the pleading.”

A determination of whether a violation has occurred is “in the sound discretion of the court.” *Doe v. Spokane & Inland Empire Blood Bank*, 55 Wn.App. 106, 110, 780 P.2d 853 (1989). But, if a violation is found, “the rule makes the imposition of sanctions mandatory.” *Id.* The court has “broad discretion” regarding the sanctions to be imposed. *Id.* When imposing sanctions, the Court must make a finding, using an objective standard as to whether a reasonable party in similar circumstances could believe his actions were legally and factually justified. *Id.* at 110 *ff*; *cf. Cain v. Korum Ford*, 80 Wn.App. 877, 912 P.2d 1052 (1996) (case addressed what reasonable attorney would do).

The trial court’s order on summary judgment states:

1. Plaintiff’s Complaint is not well-grounded in fact formed after a reasonable inquiry under the circumstances because plaintiff (1) knew or should have known the demolition of his property did not release asbestos into the environment or on the property, and (2) knew or should have known that a notification from Lakehaven Utility District plaintiff received after the

demolition had nothing to do with the demolition, and instead was related to plaintiff's own prior activity of parking trucks on the property. For these reasons, plaintiff knew or should have known that no contamination of plaintiff's property was caused by Hoffman Construction.

2. Plaintiff knew or should have known that his Complaint was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law.

3. Plaintiff knew or should have known defendant was not responsible for technical deficiencies in permitting associated with the demolition, including inclusion of the wrong address when the Puget Sound Clean Air Agency was notified, and that such deficiencies did not suggest that any contamination at the site occurred. Further, plaintiff was informed that an asbestos survey had been conducted of his property before the demolition, and the survey failed to find evidence of asbestos on his property. Plaintiff knew of these matters before this case was filed, and knew or should have known no contamination occurred for these reasons. Therefore, plaintiff's apparent motive was to harass and/or to cause defendant Hoffman Construction to incur needless expense in defending the action that plaintiff knew was not based upon accurate allegations of fact.

4. The Court finds that plaintiff signed the Complaint in violation of CR 11(a), and an appropriate sanction is requiring him to pay the reasonable and necessary attorneys' fees and costs incurred defendant to date, in defending this case.

5. For the reasons set forth above, the Court further finds that defendant Hoffman Construction is entitled to an award of fees and costs under RCW 4.84.185 as well. Plaintiff's Complaint is frivolous and cannot be

supported by any rational argument on the law or facts and was advanced without reasonable cause.

6. Plaintiff's history of litigation related to this property demonstrates a continuing refusal to accept the rulings of prior tribunals relating to the property, and disregard for the rights of other parties to be free from harassing litigation. Plaintiff's pattern of prior conduct indicates that deterrence is needed to prevent future repetitious litigation by plaintiff and to curb abuses of the judicial system.

7. The Court has reviewed declarations of defendant's counsel related to fees and costs incurred to date, and finds the amounts set forth therein to be reasonable.

CP 336-37.

The *Doe* court stated, *supra* at 114: "For a plaintiff's negligence claim to be well grounded in fact, the plaintiff must be able, at an absolute minimum, to identify some injury suffered by the plaintiff that was proximately caused by the named defendant; in other words, the plaintiff must have standing to bring the action." Garner cannot meet this minimal standard.

In addition, RCW 4.84.185 provides that "upon written findings by the judge that the action . . . was frivolous and advanced without reasonable cause" the offending party may be required to pay the prevailing party's reasonable expenses, including attorneys' fees "incurred

in “opposing such action.” Determination of expenses is made on motion by the prevailing party after voluntary or involuntary order of dismissal or summary judgment.

“An action is frivolous if it ‘cannot be supported by any rational argument on the law or facts.’” *Eller v. E. Sprague Motors*, 159 Wn.App. 180, 191-192 (Div. III 2010). As the *Eller* Court noted, it is not necessary that the court find “bad faith.” Rather, it is “enough that the action is not supported by any rational argument and is advanced without reasonable cause.” *Id.* This case surely meets the standard set forth in the law for recovery under RCW 4.84.185. For the reasons stated, the trial court properly exercised its discretion in awarding Hoffman its reasonable fees and costs in this case. Hoffman submitted declarations relating to incurred attorneys’ fees and expenses. CP 332-33, 81-86. The trial court awarded a total of \$16,826.87 (CP 338), which is a reasonable amount in view of the work necessary to obtain the summary judgment dismissal.

V. CONCLUSION

For the reasons stated herein, Hoffman Construction requests that this Court affirm the judgment of the trial court in this case.

DATED this 5th day of December, 2011.

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