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NO. 34995-7-II
(Kitsap Co. Superior Court Cause No.: 04-2-01561-0)

IN THE COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

HORSE HARBOR FOUNDATION, INC., ALLEN WARREN,
MICHAEL DALING and KATHERINE DALING

Appellants

v.

LINDA EASTWOOD, dba Double KK Ranch

Respondent

STATE OF WASHINGTON
SUPERIOR COURT
CLERK
JAN 10 2005
BY [Signature]

APPELLANTS' BRIEF

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ASSIGNMENT OF ERROR

The Trial Court erred in granting judgment against the individual Appellants, under an order entered on April 13, 2006.

ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Did the Trial Court err in finding the individual Appellants guilty of gross negligence, resulting in a judgment of \$79,181.41 against such Appellants individually, permitting judicial disregard of personal liability protection under the corporate entity sanctuary of Appellant Horse Harbor Foundation, Inc.?

STATEMENT OF THE CASE

Under a written lease, dated October 1, 2003, Horse Harbor Foundation, Inc. leased approximately 10 acres of property in Kitsap County from Respondent, Linda Eastwood, doing business as Double KK Farm (Ex 101). Horse Harbor is a nonprofit corporation, organized July 17, 1997, whose purposes are to save neglected and injured horses who face illness, abandonment or abuse, provide public education, and in the process, allow people to ride the horses under lessons for a fee which is used to support the Foundation. It depends upon a limited budget gathered from lesson fees, donations and volunteer work of interested and caring persons.

At the time the lease negotiations were ongoing, Appellant Allen Warren was employed by Horse Harbor and authorized to enter into a lease with Respondent (RP 26). Mr. Warren, who acted and served as the sole manager and paid employee of Horse Harbor, informed Respondent that the corporation he represented was limited in funds, could not afford a significant amount of rent or lease payments, but was able to pay \$20,000.00 per year, which comes out to \$1,667.00 each month (RP 41) (RP 502).

Respondent agreed to the rental rate, although she felt it was below the market rate, requesting that the property be maintained in good condition as a prerequisite to agreeing to the lower lease. This term was accepted by Mr. Warren and the lease was executed (Ex 101). Respondent admitted that when Mr. Warren called her about leasing her property, he informed her that Horse Harbor was storing horses in Central Valley, but they were in serious financial problems due to multiple loans and an inability to make payments. This was why they were looking for a new location, which was fully disclosed to Respondent (RP 501).

Respondent testified that she accepted the lease at the reduced lease rate because it was a way she could avoid incurring maintenance costs on that property, because she was aware it was very expensive to maintain that portion she was leasing to Horse Harbor (RP 882). However,

Respondent did admit that at the time she entered into the lease, she did expect Horse Harbor to keep it to standards below her own (RP 883).

Despite that admission, within a matter of just a few weeks, Respondent became concerned that the maintenance and upkeep of the horses and her premises were not up to her standards. She began sending notes to Mr. Warren, complaining of the problems and offering her suggestions on what should be done (Ex. 103). Friction between the two developed over critical remarks made by Respondent, which Mr. Warren believed were inappropriate and unnecessary (RP 49-51).

There were pre-lease problems on the property with electrical systems (RP 46), sprinkler systems (RP 46), mud after rain (RP 47), heating (RP 48) and other issues (RP 1247), which Horse Harbor believed should be taken care of by Respondent.

Of importance to Mr. Warren, Ms. Daling and Horse Harbor was that they had made it very clear to Respondent that they had very little money as a non-profit corporation, and could only afford the rent they requested to pay, and in agreeing to do the repairs, Respondent was aware of the time and money necessary to maintain the land as she wanted it (RP 502). Respondent had met with the Board of Directors of Horse Harbor, where discussions of the money problems were made clear to her (RP 1065, RP 1244, RP 1264, RP 1297).

In January 2004, Respondent contacted her attorney to have a notice of default sent to Horse Harbor, alleging that the upkeep of the property was not adequate (RP 509) (Ex 102). At the time the notification to Respondent's attorney was requested, Horse Harbor had only signed the lease and transferred horses to the property within the past three months.

Subsequently, a few complaints were filed by Respondent against the standards of upkeep and maintenance Horse Harbor adhered to with the property, which included an arena, barn, several stalls, pasture land, and wooden fences and gates (Ex 104, 105, 106). By February 2004, the relationship between Horse Harbor and Respondent was very bad (RP 57). Horse Harbor disagreed with the allegations against it by Respondent and continued to operate in an ever increasing hostile environment (RP 58).

Horse Harbor had very little money and operated its charitable and humanitarian work on a small budget, mostly being able to attract young people who liked horses to assist in helping to maintain the facility. Several adults were also volunteers and assisted in maintaining the grounds and animals. Respondent called as witnesses three such volunteers: 1) Julie Rothwell, an eighteen year old volunteer who gave riding lessons and worked for Horse Harbor from October to December, 2004 (RP 234); 2) Mike Blake, a father of one of the youngsters who volunteered from October 1, 2004 through the end of the year (RP 256-7);

and 3) Kathleen Watkins, who volunteered for two months in October and November 2004 (RP 305-6).

The disagreements between Respondent and Horse Harbor continued throughout the year 2004, resulting in a Notice of Eviction, the filing of the Complaint before the court, and Horse Harbor leaving on June 8, 2005.

Appellant Michael Daling and Appellant Katherine Daling are husband and wife, and on the Board of Directors and serve as officers of Horse Harbor (RP 134 and RP 175). They were previous volunteers who joined the Board in 2003, and served with other members. After Horse Harbor vacated the premises, Respondent filed a Second Amended Complaint on July 5, 2005, alleging that not only Horse Harbor, but Mr. Warren, Mr. Daling, and Mrs. Daling were in individual default and liability under the written lease for a wide variety of issues, primarily related to care and upkeep of the premises (CP 85).

The Amended Complaint alleged a breach of the lease, claiming Mrs. Daling and Mr. Warren intentionally used the corporation form to violate or evade duties of due care and to refrain from the omission of waste, thereby permitting judicial disregard of the corporate entity (CP 85).

Additionally, Respondent alleged negligence against all Appellants, claiming they had a duty not to cause physical damage to the property of Plaintiff (CP 85).

All Appellants denied the allegations of individual liability, as well as the allegations of liability against Horse Harbor (CP 88).

In addition to the three volunteers of Horse Harbor called by Respondent, she also relied upon the testimony of a real estate agent, Jim Vajda, who had knowledge of the condition of the property before the lease to Horse Harbor; Christa Cook, Respondent's employee two years before Horse Harbor arrived, who returned in February 2005 to work for Respondent; Gary Shuck, a real estate agent who had listed the property three years before Horse Harbor leased the property and who viewed the property in or around the spring of 2005, just before Horse Harbor left; and Mike Nelson, a real estate agent who had formally tried to sell Respondent's land.

The last two witnesses for Respondent was Respondent's cousin Tracy Heeter and Respondent herself. The actual testimony was divided into two groups: the first being the three Horse Harbor volunteers who worked the first three months of the lease, and people who either saw the property before, during or after the lease, but did not work for Horse Harbor.

Horse Harbor and the individual Appellants called Mr. Warren, Mr. Daling, and Mrs. Daling to testify. In addition, Appellants called Martha Whightman, a member of the Board of Directors, who testified that she met with Respondent and it was made clear in that meeting that Horse

Harbor was a non-profit corporation, that it would have students who would be doing daily maintenance as volunteer work parties, and that Horse Harbor was an educational facility, not a show facility (RP 1244). Ms. Wightman testified that Respondent understood the kind of operation Horse Harbor was (RP 1245).

Horse Harbor also called Jerry Meeks, a licensed general contractor who was retained by Horse Harbor to repair a backed-up toilet on the premises in January, 2004 (RP 1153). Mr. Meeks also testified he was requested to review a list of complaints filed by Respondent in her Notice of Default. He filed a report in response to the notice given by Respondent (Ex. 152).

Mr. Meeks testified that he found the premises operated by Horse Harbor to be in overall good condition. He stated that the stalls and lean-tos on Respondent's property were in good shape, the driveway, pathway and exits to all buildings were in good to adequate shape, that there was no evidence of infestation, no electrical problems, that the floor in the arena was in good shape, and the barn grounds well-maintained. He did find two fluorescent bulbs, which needed replacing and a backed-up toilet (RP 1154).

Mr. Meeks also found that the doors closed fine, only one gate was slightly bent, all the other gates were adequate, and the wash racks and pipes were working fine. The inspection disclosed the water system in the

arena was working fine, as well as the septic system, but that there was one bad downspout. He testified there were no garbage or refuse in the area, dried manure was disposed of, the paddocks were clean and in good shape (RP 1155).

Mr. Meeks also noticed that the drainage on the property by the upper barn and lean-tos was installed incorrectly, with land leaning toward the buildings, rather than away from the buildings, which caused water to build up. He discovered the curtain drains were installed backwards, that the fencing had normal wear and tear due to age and weather, and the electric fence worked fine (RP 1155).

Mr. Meeks testified as a licensed and certified contractor that the riding and facility areas were completely checked, and that the allegations of waste and disrepair by Horse Harbor was basically untrue and ludicrous (RP 1155).

The photographs taken by Respondent or by those who testified for Respondent were of the property before the lease was entered into, at times during the lease, and primarily after six months from the time Horse Harbor left. Two video tapes were taken of the property when Horse Harbor left. One by Mr. Warren which covered the property on June 8, 2005, the day Horse Harbor left (RP 1173). The other video was taken by Mr. Heeter, who claimed the video was shot on June 11, 2005, but had been destroyed when he reused it for other video recordings (RP 912).

Despite the absence of any other photographs of the property immediately after Horse Harbor left, Respondent was able to introduce 16 still pictures that Mr. Heeter testified he had taken from the video before he destroyed the video (RP 913-17; RP 1007).

Respondent and Appellants disagreed over the condition of the property at the time the lease ended. Respondent alleged that her claimed damages should include personal liability because the breach of contract terms for the upkeep and repair of the premises included intentional acts and gross negligence. On the other hand, the individual Appellants argued that they should be exempt from personal liability because it was improper under the law, given the factual evidence to disregard the corporate entity and assess personal liability to Mr. Warren, Mr. Daling and Mrs. Daling.

The trial court, at the conclusion of the case, determined that Horse Harbor had violated the terms of the lease agreement and that some of the problems which were the subject of the lawsuit not only included a breach of contract, but constituted negligence with damages. Those damages were divided into two categories (RP 1398).

In the first category, the trial court found damages which resulted exclusively from a lack of ordinary care should be assessed only against Horse Harbor. Second, the court determined that damages which resulted

from gross negligence should also be assessed against the individual Appellants.

Finally, the court assessed attorney's fees under section XVIII of the Real Estate Lease (RP 1400). In the judgment awarded by the court, the court assessed \$32,850.00 in damages against the individual defendants and Horse Harbor, together with \$44,762.75 in attorney fees and \$1,568.00 in costs, for a total of \$79,181.41 (CP 143-4). A second judgment was awarded only against Horse Harbor foundation for \$10,950.22 (CP 144).

The court found Warren was hired as paid manager, and therefore as an employee of a nonprofit corporation may be held liable with other agents for misconduct which causes damage to persons or property. Because of what the court termed substantial evidence of neglect by Horse Harbor, the court decided that the actions of Warren, because of his unique and direct responsibilities, were grossly negligent.

Appellants Mr. and Mrs. Daling, as two of the directors and officers of Horse Harbor, were found by the court to have committed actions which were tantamount to inaction, therefore gross negligence was assessed against these Appellants.

SUMMARY OF ARGUMENT

The trial court determined under the testimony and exhibits in evidence that there had been a breach of the lease, using as a guide the objective manifestation of a written lease analysis, as opposed to the unexpressed subjective intent of the parties. The court determined that the lease, which had been presented to Respondent by Horse Harbor, contained provisions which clearly set out an acceptance of the property in good condition and repair, with additional provisions that the property would be maintained during tenancy.

There were significant disagreements during the course of the trial over the actual condition of the property during the tenancy. Horse Harbor argued that it maintained the property the best it could under the circumstances of what had been given to it, with incorrectly installed drains, water flow control, and cosmetic appearances which hid defects resulting in an unknown potential problem for Horse Harbor during its tenancy, and which significantly led to much of the problems it experienced during that tenancy.

Respondent referred to her property as in pristine condition throughout her ownership and up to the time she leased the property to Horse Harbor. She denied many of the problems Horse Harbor complained of, maintaining that the poor upkeep she complained of was

solely the fault of Horse Harbor, and by gross negligence, the fault of the individual Appellants.

One of the most telling problems for Respondent on her theory of gross negligence was the lack of evidence from sources who were actually working on the property. Respondent called three witnesses who actually contradicted her claims of gross negligence, all of whom worked during the three months from the original date of the lease until Respondent requested the Notice of Default in January, 2004.

The first of those three witnesses was Julie Rothwell, who stated that she worked on the property as a volunteer during the first few months of the lease (RP 234). Although she did not think the property was being properly cared for, she admitted that the volunteers were mucking the stalls and taking care of the property (RP 235). Ms. Rothwell, under cross-examination, admitted that her concerns primarily involved the fact that the volunteers did not have a place to put certain things like manure (RP 236).

Ms. Rothwell had never been to the property before (RP 246), but in her two months, she testified that she would arrive at 4:00 o'clock in the afternoon, and leave about 6:00 o'clock (RP 247-8). She was a volunteer riding teacher. Her testimony on direct was that the horses were not fed in the morning, their teeth were not floated (filed down), and they never saw a veterinarian (RP 238-40). However, on cross-examination, she admitted

that she was not involved in the feeding of horses, that she did not have any personal knowledge as to what time they were fed, that she was only there between 4:00 pm and 6:00 pm because she was in school (RP 249). She also admitted she had no idea if there was a veterinarian hired by Horse Harbor (RP 249).

Ms. Rothwell's testimony primarily consisted of an 18 year old who volunteered to teach for two months and was speculating on conditions which she did not personally observe, while at the same time admitting that she did see volunteers working on the property for Horse Harbor conducting care and maintenance of the facility.

The second witness, Mike Blake, volunteered to work for Horse Harbor and testified he participated in the maintenance programs. He testified he would arrive in the afternoons and clean stalls before riding (RP 259). He did disagree with some of the policies of Horse Harbor, but he admitted work was done by Horse Harbor volunteers, and himself as a volunteer for Horse Harbor, including putting up fences which had been knocked askew, lowering mangers, building saddle racks, replacing lights, taking wheelbarrows full of waste out (RP 261), and he testified that while he was present at Respondent's property as a volunteer, he maintained the curtain drains and made sure they were clean and operable (RP 264).

Mr. Blake testified that he did not take any issue with Horse Harbor over the maintenance programs while he volunteered (RP 268). In

fact, Mr. Blake testified that he even went over and above what Mr. Warren, as the manager for Horse Harbor, requested he do to maintain the facility. Specifically, he stated that whenever Respondent would ask him to do something on the premises that was being leased by Horse Harbor, he would do it (RP 268).

Mr. Blake also contradicted Ms. Rothwell's testimony about the horses not being fed in the morning. Mr. Blake testified that Mr. Warren fed the horses in the morning (RP 272).

Mr. Blake testified he took care of the fences; however, he only had to take care of the areas in the pasture that did not have hot wire, which shocked horses that came too close to the fences. Since the other fences had hot wire, he only had to replace a fence rail in the area that did not. He testified that was the only thing that had to be fixed and other than that, everything with the fences was fine (RP 287).

Mr. Blake also testified that there was no dry rot on the fences, that he knew this because he sat on the fences and they supported him just fine (RP 287-8). Mr. Blake further testified that the drains were working, that the ground in the paddock and walkway was firm and solid, and there was very little mud during that time period of three months he was there (RP 288).

Mr. Blake's testimony was consistent with the testimony of contractor Jerry Meek, who came out shortly after Mr. Blake left and

made his investigation of the complaints Respondent made in her Notice of Default only a short time after Mr. Blake left.

Mr. Blake testified that if the curtain drains were kept clean, the drains would work, and that when he was there, these curtain drains worked (RP 289). In addition, Mr. Blake testified that Mr. Warren had a work schedule for mucking (cleaning the stalls) and for turning the horses out (RP 290) (Ex. 154). He testified the list was posted (RP 291). Mr. Blake also testified that the arena was sprinkled while he was there and that he never saw any horses falling or slipping after the sprinkler system was turned off.

Mr. Blake testified that he saw no erosion of the paddocks and that he supervised the volunteers responsible for cleaning and mucking the stalls (RP 297).

Mr. Blake's testimony, as a witness for Respondent contained a broader knowledge of the manner in which the property was maintained during the first three months of the lease than Ms. Rothwell, who was only a teacher two hours a day, and was not involved in maintenance or supervision of the volunteers.

The third witness for Respondent was Kathleen Watkins, who volunteered for two months at the same time Mr. Blake was there (RP 306). Ms. Watkins testified that she saw the volunteers taking care of the

horses, but she contradicted Mr. Blake by claiming that the volunteers were not supervised (RP 309). Mr. Blake had testified he did supervise.

Ms. Watkins testified that seven of the horses came to Horse Harbor with thrush (foot fungus), and that she was treating them (RP 317). She had originally intended to give lessons, but ended up treating the horses that were ill. She testified Mr. Blake assisted her (RP 318). She also confirmed that during that winter, there was no standing water in the barn.

All three of these witnesses were singularly important to Appellants' argument that work was being conducted in the care and maintenance of the facility. Each of these individuals was personally present. They may have disagreed with some policies, they may have had some concerns over certain areas of upkeep, but none substantiated the grossly negligent conditions attached by Respondent to the individual Appellants in the performance of their obligations for the care and upkeep of the Respondent's premises.

Mr. Warren had prepared a daily checklist for the volunteers, which had been reviewed and assisted by Respondent (RP 51, RP 1229) (Ex. 154). Mr. Warren testified that Respondent cooperated on working with him to prepare this list, which was then used to remind the volunteers about the daily mucking and care responsibilities (RP 51).

With eight to ten volunteers working each day, at any one time on a regular basis during the week and more over the weekend, Horse Harbor had people to help do the work (RP 1238). In addition, members of the Board of Directors came out and did work on the premises. Martha Wightman testified that she participated in clean up and mucking, according to the schedules prepared by Mr. Warren, which were regularly used and returned to Mr. Warren (RP 1250). She also testified that she personally painted fence rails, swept and wipe down walls in the office and tack room, cleaned the office, bathroom and counters, as well as the barn, before Horse Harbor left (RP 1257).

Ms. Wightman also testified that she attended two official work parties on the property well before the move-out, which was an addition to the work she did while on site.

Mr. Daling testified that he worked on maintenance two or three times a month, usually on weekends (RP 1281), and was responsible for replacing wire and fixing electrical problems (RP 1283). Mr. Daling also testified he worked on the drains four to five times during the leased period and again before Horse Harbor vacated (RP 1293).

Mrs. Daling testified that she personally cleaned stalls with pressure washers, scrub brushes, and rags (RP 1083), that they had a handyman come in to repair wood that was damaged (RP 1090), and that she personally cleaned the double stalls and filled the area with required

dirt (RP 1090). Mrs. Daling recounted that many times she cleaned the mats with pressure washers and raked rocks about the premises (RP 1091), and that prior to Horse Harbor vacating she personally worked on the barn floor to bring in clay and place layers in any holes on the ground (RP 1097-98).

Mrs. Daling also testified that she was present when the students were mucking and cleaning stalls, she verified that Mr. Warren had a white board which set out a grid of the property outlining the work that had to be done at each grid or station (RP 1117), and that she and other adult volunteers would supervise with the muck work done by the young volunteers in the afternoon after school (RP 1118). She also testified that she worked on drains, built a berm, and was at Horse Harbor each week for at least one day for three and one-half hours and two weekends every month anywhere from five to 12 hours (RP 1119).

ARGUMENT

The trial court found there was poor horse care, maintenance and manure programs, that Horse Harbor's floor cover and bedding materials in mucking programs were inadequate and inconsistent. It also found that the teenage volunteers were not adequately trained or supervised for tasks, and they came only after school. The court found the volunteers did not

use checklists that were provided and there were only occasional adult volunteers.

There was a significant amount of testimony about problems on the property by witnesses who saw the property at different times before and after the lease, and a few employees and relatives of Respondent who alleged problems they saw on the premises. However, there was direct testimony from three workers for Horse Harbor and a general contractor who made a personal review of all of the items complained of by Respondent in her Notice of Default, none of which ever testified or indicated that the care, upkeep or supervision ever reached the level of gross negligence.

Washington Pattern Instruction 10.01 defines negligence as the failure to exercise ordinary care. It is the doing of some act that a reasonable careful person would not do under the same or similar circumstances or the failure to do some act, that a reasonable careful person would have done under the same or similar circumstances.

Washington Pattern Instruction 10.02 defines ordinary care to mean the care a reasonably careful person would exercise under the same or similar circumstances.

The standard of negligence requires a review of ordinary negligence in the circumstances brought before the court in testimony and exhibits. The court might rightfully conclude that despite the efforts of a

group of volunteers embarked upon a noble purpose in helping distressed horses, because there was not enough money to pay for manpower, materials, and extraordinary maintenance, that this might constitute not ordinary care under the same or similar circumstances.

The court might also rightfully conclude that despite knowing that a volunteer humanitarian agency, which could only afford one employee and \$20,000.00 annually to pay in rent to board 16 distressed and abused horses, and had to depend on children as volunteers, Respondent should not be aware of the limitations of that agency to perform the care and upkeep she expected on her property.

The trial court did determine that despite the purpose of Horse Harbor Foundation, and the financial limitations it had, the overall performance of Horse Harbor constituted negligence because the care it provided to the facility it leased and the care which it provided for the horses dipped below the standard of ordinary care.

However, Washington Pattern Instruction 10.07 defines gross negligence as the failure to exercise slight care. It is the negligence that is substantially greater than ordinary negligence. Failure to exercise slight care does not mean the total absence of care, but substantially less than ordinary care.

The trial court wrongly affixed gross negligence to the ordinary negligence of Horse Harbor, permitting the piercing of the corporate veil

which normally protects nonprofit corporations. Under RCW 4.24.264, a member of the Board of Directors or the Officer of any nonprofit corporation is not individually liable for any discretionary decision or failure to make a discretionary decision within his or her official capacity as Director or Officer unless the decision or failure to decide constitutes gross negligence.

The trial court concluded gross negligence under a theory of breach of contract because the upkeep required more involvement in the affairs of the corporation than the individuals who govern the Board, and Mr. Warren, as their employee, demonstrated. To the contrary, Respondent's own witnesses contradicted any theory of gross negligence by direct observation and admission of exercising care in the upkeep and maintenance of the property and animals. This included feeding, supervising, cleaning, fixing, repairing and maintaining the structures and ground.

All of the testimony of Respondent and her remaining witnesses painted a picture of absolute devastation for the property, commencing with difficulties within a few weeks of the commencement of the lease. However, Respondent's witnesses, who worked for Horse Harbor, all testified to some problems, but not the problems specified in such horrific detail as Respondent claimed in her list of defaults, which she saw her attorney about in January, 2004.

In addition, a licensed general contractor, Jerry Meeks, wrote a complete report after viewing the property, contemporaneous to the time Respondent made her complaints about the property (Ex. 153). That report, by this eyewitness, confirmed the testimony of the Horse Harbor employees who testified for Respondent.

The complaint filed by Respondent was filed as a result of the Notice of Default and lists of alleged wrongdoings on the property during the time Respondent's witnesses worked for Horse Harbor on Respondent's property. After that Notice of Default, the complaint and the relationship between Respondent and Appellants disintegrated. This led to a vacation of the property on June 8, 2005.

Video tape of the property by Mr. Warren on June 8, 2005 was provided to the trial court in evidence to substantiate the care and repair of the property at the time Appellants vacated. A similar video, alleged by Respondent's cousin, Tracy Heeter, taken on June 11, 2005, was apparently destroyed and pictures which he claimed were stills were introduced in evidence. Those 16 pictures were the only evidence presented to the trial court of the condition of the property from the time Appellants moved out until six months later, in December, 2005 (Ex 131-147). When asked why such evidence was lacking, Respondent testified that she simply did not have the time to take the pictures and document the condition of the property over that six month period (RP 641).

The video tape taken by Mr. Warren was introduced to contradict the claim which he anticipated that the property condition would be exaggerated once Horse Harbor left. The exhibit was a detailed video tape more in detail than the 16 still photographs allegedly taken from the destroyed video of Mr. Heeter. That video tape of Mr. Warren may have provided the trial court with some evidence of negligence by lack of ordinary care, but it did not substantiate the definition of gross negligence.

In Nist v. Tudor, 67 Wash.2d 322, 407 P.2d 798 (1965), the case involved an automobile collision with a truck, where the injured party was a passenger and friend of the driver. An automobile accident occurred, seriously injuring the passenger, who filed an action against the driver, alleging gross negligence. The trial court refused to find gross negligence, stating that gross negligence means the failure to exercise slight care, and interpreted that to mean that if the defendant driver exercised any care at all for the safety of her passenger, the passenger could not recover under that theory of law.

The injured passenger appealed. The Supreme Court considered the history of the judicial definition given to gross negligence, stating that the application of the term had not been consistent and its application was not uniform. The court stated that gross negligence may be more readily understood if anchored to or guided by other more understandable concepts, and ought to be directly related to the hazards of the occasion in

which it is involved. Nist v. Tudor, supra, 67 Wash.2d at 330 (quoting Palsgraf v. Long Island R. Co., 248 N.Y. 339, 162 N.E. 99, 59 A.L.R. 1253 (1928)).

Gross negligence, to have practical validity, should be related to and connected with ordinary negligence, with the circumstances surrounding the actors largely determining the quantum of care required in any rule referring to or prescribing standards of care. Nist v. Tudor, supra, 67 Wash.2d at 331. In other words, in the instant case, if ordinary care in a contract case is determined by whether a party adheres to a provision in the contract, then the quantum of care should be determined from those circumstances surrounding both Respondent and the individual Appellants. This is the reason why emphasis has been placed on the knowledge of Respondent to the condition and capability of Horse Harbor Foundation before it entered into the lease with Respondent.

In other words, it may be a breach of contract not to have exercised ordinary care in the upkeep of the property, as the trial court found, but based upon the totality of the circumstances, and the evidence which the trial court had, which included the testimony of Respondents' own witnesses who worked at Horse Harbor, gross negligence was not a viable claim.

The gross negligence must be substantially and appreciably greater than ordinary negligence. A care, not totally absent, but one substantially

or appreciably less than that quantum of care in inhering in ordinary negligence. Nist v. Tudor, supra, 67 Wash.2d at 331. By this definition, the Supreme Court said that in determining the degree of negligence, the law must necessarily look to the hazards of the situation confronting the actor. Although in a tort case, where negligence is normally defined and reviewed, the trial court concluded that negligence and gross negligence belonged in the damage claim of Respondent under a breach of contract. That being the case, then the trial court should have applied the same standard to the actors involved in the instant case.

The burden of proof rests with Respondent in the instant matter, proving gross negligence as the approximate cause of her injuries by a preponderance of the evidence.

In Meisel v. M&N Modern Hydraulic Press Co., 97 Wash.2d 403, 645 P.2d 689 (1982), the Supreme Court considered a case of a products liability suit for a severe injury caused in the course of employment. The defendants were alleged to be successors of a corporation and any liability should be assessed also against the successors, including individual shareholders. The court confirmed the doctrine of corporate disregard as follows: "*The corporate entity is disregarded and the liability assessed against shareholders in the corporation when the corporation had been intentionally used to violate or evade a duty owed to another.*"

In the instant case, the Second Amended Complaint alleged breach of contract against the individual Appellants with the allegation that the conduct of Horse Harbor Foundation against Respondent was intentional. No evidence was produced at trial to substantiate that claim. The court in M&N stated that the doctrine has two essential factors: first, the corporate form must be intentionally used to violate or evade a duty; and second, the disregard must be "*necessary and required to prevent unjustified loss to the injured party.*" Meisel v. M&N Modern Hydraulic Press Co., supra, 97 Wash.2d at 410.

In other words, not only must there be intentional harm or misconduct, but that intentional act must harm the party seeking relief. In the instant matter, there was no evidence, by testimony or exhibit, that Horse Harbor Foundation ever directed intentional misconduct toward Respondent, or that intentional misconduct was the cause of the harm that is being avoided by corporate disregard.

Disregarding corporate entities and assessing liability against shareholders may occur when the corporate entity has been intentionally used to violate or evade a duty owed to another. Morgan v. Burks, 93 Wash.2d 580, 611 P.2d 751 (1980). As in M&N, the Supreme Court was faced with a claim of individual liability against its shareholders. In this case, the president of the corporation shot the Plaintiff, paralyzing him permanently. When the suit reached trial, damages were awarded against

the shooter individually; however, the two shareholders were not acting in a joint effort or venture with the shooter, so they were not held individually liable. The appeal that followed concerned a question of whether wrongdoing by the shareholders on other issues could create liability against the shareholders in the tort sued upon.

The Morgan court considered several issues, but the one relevant to the instant case was whether there should be an assessment of individual liability to the shareholders. As in M&N, the question was whether there should be a corporate disregard under the facts in the case. The court concluded that the doctrine of disregard of the corporate entity will not apply, even though the intent necessary to disregard the corporate entity may exist, unless it is necessary and required to prevent unjustified loss to the injured party. Morgan v. Burks, supra, 93 Wash.2d at 587.

In Morgan, the issue was whether the corporate entity would be disregarded, but only if it was to prevent a violation of a duty. In some cases, the court may expand the duty owed by the corporation, but it must do so for an adequate reason, such as public advantage, requirements of justice, alter-ego, fraud, bad faith, or other wrong. In other words, the violation of duty will result if the entity is not disregarded. Morgan v. Burks, supra, 93 Wash.2d at 587.

The Morgan court quoted J. I. Case Credit Corp. v. Stark, 64 Wash.2d 470, 475-76, 392 P.2d 215 (1964). “*While the facts of each case*

in which the doctrine of disregarding the corporate entity is applied vary, there is one situation common to all: a right owned and it's corresponding duty owed to the person demanding recognition of his right and the performance of its corresponding duty. For example, the obligee of a contract has a right to receive performance of its obligations. The obligor, on the other hand, is under a corresponding duty to perform those obligations. When the doctrine of disregard is applied, it is applied because of the necessity of enforcing this right-duty...When expressed, it has usually been expressed in a restricted form, namely, by a holding that before a corporate entity is disregarded, some specie of fraud, bad faith or other wrong must exist to be obviated...But, such cases often mean nothing more than that violation of duty (denoted as fraud) will result if the entity be not disregarded...The enforcement of the duty owed requiring it, the courts disregarded the corporate entity by refusing to give effect to the claimed incident of corporate status."

In the instant case, there was no such allegation of wrongdoing by fraud or wrongful conduct tantamount to the level of fraud which the court was referring to. The trial judge disregarded the corporate entity not by finding fraud, misrepresentation or other intentional act, but by lowering the degree of negligence it found in the performance of the obligation under the contract to reach gross negligence, from which the trial court

then was able to attach individual liability by piercing the corporate veil which normally protects such nonprofit corporations.

In announcing the decision of the trial court, the trial judge relied upon Graffell v. Honeysuckle, 30 Wash.2d 390, 191 P.2d 858 (1948). This case involved a written lease in which the plaintiff landlords sought damages against the individual defendants, who were tenants in plaintiff's building. The case did not involve a corporate entity. What plaintiffs wanted was treble damages to compensate plaintiffs for the damage.

The only question on appeal was whether the trial court erred in refusing to award the plaintiffs their treble damages. The Supreme Court reviewed the legislative intent relating to waste and trespass under the applicable statutes of that time. In defining waste, as the unreasonable or improper use, abuse, mismanagement, or omission of duty touching real estate by one rightfully in possession which results in a substantial injury, the court stated that the interested landlord has the right to expect that the estate should revert back to the condition it was in undeteriorated by any willful or negligent act. Graffell v. Honeysuckle, supra 30 Wash.2d at 398.

Even if the trial court felt Horse Harbor Foundation committed waste and was obligated for that waste, to permit Respondent to recover for damages and to make her whole again, the trial court did not obtain authority for individual liability under Graffell.

CONCLUSION

This Court is respectfully requested to find that the trial court erred in finding the individual Appellants guilty of gross negligence and thereby assessing judgment damages against each individual Appellant and judicially disregarding personal liability protection provided to officers and agents of nonprofit corporations.

DATED this 30th day of March, 2007.

LAW OFFICES OF LESLIE CLAY TERRY, III



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Attorney for Appellants

COURT OF APPEALS DIVISION II OF THE STATE OF
WASHINGTON

HORSE HARBOR
FOUNDATION, INC., a
Washington nonprofit corporation;
ALLEN WARREN, a single man;
MICHAEL DALING and
KATHERINE DALING, husband
and wife, and their marital
community,

Appellants,

v.

LINDA EASTWOOD, dba Double
KK Ranch,

Respondent.

Kitsap Co. Superior Court Cause
No.: 04-2-01561-0
Washington State Court of Appeals
Cause No.: 34995-7-II

DECLARATION OF SERVICE

07 MAR 30 PM 3:55
COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY _____ DEPUTY

I, Joseph Duvey, declare and say as follows:

1. I am a citizen of the United States and resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and am competent to be a witness herein. My address is 19330 Winesap Road Unit 57, Bothell, WA 98012.

2. On March 30, 2007, I served the following document on the individuals named below, in the specific manner indicated:

Appellants' Brief

David Horton
Attorney at law
3212 NW Byron Street, Suite 104
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U.S. Mail, Postage Prepaid
 Facsimile
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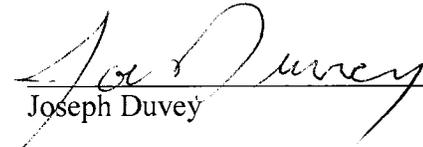
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U.S. Mail, Postage Prepaid
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 Other

I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

EXECUTED this 30th day of March, 2007, at Seattle, Washington.


Joseph Duvey