

66827-7

66827-7

NO. 66827-7-I

COURT OF APPEALS, DIVISION I

OF THE STATE OF WASHINGTON

EAST EVERETT INVESTMENTS, Appellant,

v.

MURNA HUBER, Respondent.

RESPONDENT'S BRIEF

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 SEP 12 AM 11:33

Mark G. Olson, WSBA #17846
Attorney for Respondent

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ORIGINAL

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APPENDIX

- A. Complaint for Damages for Trespass, Negligence and Breach of Contract, Summons, and Declaration of Service Huber-Willott v. East Everett Investments, L.LC. Snohomish County Cause No. 11-2-04651-4

TABLE OF AUTHORITIES

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I. INTRODUCTION

Murna Huber is the Respondent and was the plaintiff in the matter brought before the Snohomish County Superior Court. She is represented by her attorney Mark G. Olson.

II. ISSUES PRESENTED

1. Whether the Snohomish County Superior Court Abused its Discretion in Denying Defendant's Motion for An Award of Attorneys Fees and Costs When Plaintiff Presented Sufficient Factual Basis for Her Claims?
2. Whether this Court Should Award Respondent Her Attorneys Fees and Costs in this Appeal pursuant to RAP 18.9 Where Appellant Has Filed This Appeal Without Reasonable Legal Basis?

III. STATEMENT OF THE CASE

Murna Huber owns a house at 7111 20th St. SE, Everett, Snohomish County, Washington in the middle of property a tract of land being developed by EAST EVERETT INVESTMENTS, L.L.C. ("EEI"), a Washington for-profit corporation whose members include appellants' counsel Dennis Jordan.¹

In the course of developing residential property in east Everett in 2008, defendant EEI graded land around Ms. Huber's rental home. EEI's grading activities intentionally encroached upon Ms. Huber's property without permission, causing damage to her property and rental home,

¹ Pursuant to RPC 3.7, Plaintiff moved to disqualify Mr. Jordan from acting as defendant's primary legal counsel due to the fact that he was and is a material witness. However, the motion was denied.

including loss of rental income. Ms. Huber also alleged that EEI acted negligently in causing damage to her property, by grading adjacent properties in a manner that was careless and disregard of the effects on her property. These actions diminished the value of her property. CP 236-238.

Subsequently, EEI moved for summary judgment on various sundry grounds alleging among other arguments that others were to blame, and that in any event, EEI could not be held accountable for the grading activities of the company EEI itself had hired to conduct the grading. CP 81-226. Although the motion itself was not terribly complicated and easily defensible, Ms. Huber exercised her prerogative under CR 41(a)(1)(B) and voluntarily dismissed her suit without prejudice prior to responding to the summary judgment motion.²

Approximately thirty days later, EEI filed a motion pursuant to RCW 4.84.185 for attorney fees and costs alleging that Ms. Huber's complaint was frivolous and without merit. CP 67-68. Plaintiff responded with a detailed declaration of David Huber setting forth the specific factual basis supporting her claims. CP 39-41. After hearing oral argument, the Snohomish County Superior Court, Hon David Kurtz, denied the motion on the basis that EEI had not met the standard of showing that the action was frivolous. CP 9.

² Ms. Huber's suit was re-filed on April 21, 2011 and served on appellant's counsel Dennis Jordan on May 19, 2011. A true and correct copy of the Summons, Complaint and Declaration of Service are attached hereto as Appendix A.

IV. ARGUMENT

1. Trial Court's Decision Regarding an Award of Fees and Costs Pursuant to RCW 4.84.185 is Reviewed on an Abuse of Discretion Standard.

The decision to award attorney fees on this basis is left to the trial court's discretion and will not be disturbed in the absence of a clear showing of abuse. *Fluke Capital & Mgt. Servs. Co. v. Richmond*, 106 Wn.2d 614, 625, 724 P.2d 356 (1986); *Clarke v. Equinox Holdings, Ltd.*, 56 Wn. App. 125, 132, 783 P.2d 82, *review denied*, 113 Wn.2d 1001, 777 P.2d 1050 (1989). Therefore, the question is whether the court's conclusion was the product of an exercise of discretion that was manifestly unreasonable or based on untenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

RCW 4.84.185 allows for recovery of attorney fees and costs for the prevailing party where the lawsuit is found to be "frivolous." A lawsuit is frivolous when it cannot be supported by any rational argument on the law or facts. *Daubner v. Mills*, 61 Wn. App. 678, 684, 811 P.2d 981 (1991); *Bill of Rights Legal Found. v. Evergreen State College*, 44 Wn. App. 690, 696-97, 723 P.2d 483 (1986). The statute requires that the action be frivolous in its entirety. *Biggs v. Vail*, 119 Wn.2d 129, 133, 830 P.2d 350 (1992). Thus, if any one of the claims asserted was not frivolous, then

the action is not frivolous. *Biggs*, 119 Wn.2d at 137. *See also Tiger Oil Corp. v. Department of Licensing*, 88 Wn. App. 925, 937 -8, 946 P.2d 1235 (Div. II 1997).

2. The Trial Court Correctly Found Sufficient Factual Basis for Plaintiff's Complaint and Denied Defendant EEI's Motion.

In this case, Plaintiff submitted the declaration of David Huber. CP 39-41 in response to EEI's motion for attorney fees and costs. Mr. Huber's sworn testimony, which EEI did not challenge in the court below, established that EEI graded a significant amount of land on the western edge of my Plaintiff's property in 2008 to accommodate utilities and a wider road for egress and ingress to the development; that without authorization, EEI took a larger portion of Plaintiff's land, and left a steeper slope on the western side than allowed under applicable development codes; that EEI made no effort to stabilize this portion of the property after grading thus causing Ms. Huber's property to erode and shifting the foundation of the house in such a manner as to cause a significant crack in the foundation; and finally, caused Ms. Huber to lose direct access to the rental property. In addition, the grading activities caused significant problems for the septic system that Ms. Huber was forced to terminate an existing rental agreement, losing monthly income of \$1275. *Id.* The trial court determined that this constituted sufficient basis for the Complaint.

Ignoring well-established case law interpreting the frivolous claims statute, EEI essentially contends that Ms. Huber must prove that her complaint was not frivolous, and can only do so by providing a complete response to his Motion for Summary Judgment, which was never heard due to plaintiff's CR 41 dismissal. EEI even admitted in its motion that the record did not support its arguments: "Whether or not the Plaintiff's causes of action were grounded in fact or warranted by existing law will only be determined through the Plaintiff's responses to the facts and arguments as set forth in Defendant's Motion for Summary Judgment." CP 59. Defendant however has the burden of proof in a claim for attorneys fees and costs under RCW 4.84.185, not the plaintiff. Washington case law is quite clear that attorney fees can be awarded under RCW 4.84.185 – the only basis for defendant's motion – only if plaintiff's claim is frivolous *in its entirety*. See *Tiger Oil Corp. v. Department of Licensing*, 88 Wn.App. 925, 946 P.2d 1235 (1997) (denial of attorneys fees affirmed). Such cannot be said here. Plaintiff's decision to voluntarily withdraw her complaint without prejudice pursuant to CR 41 does not diminish the fact that Defendant's grading activities caused significant damage to plaintiff's rental property in east Everett, entitling her to seek compensation. A trial court should impose sanctions for frivolous suit only when it is patently clear that the claim had no chance for success. *In re Cooke*, 93 Wn.App. 526, 969 P.2d 127 (1999).

For these reasons, the decision of the Snohomish County Superior Court should be affirmed.

3. Ms. Huber Should Be Awarded Her Attorneys Fees and Costs for EEI's Frivolous Appeal Pursuant to RAP 18.9.

Furthermore, as EEI's appeal of the denial of attorney fees and costs is itself without any factual or legal foundation, plaintiff seeks sanctions pursuant to RAP 18.9. An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal. *Green River Community college Dist., No. 10 v. Higher Education Personnel Board*, 107 Wn.2d 427, 730 P.2d 653 (1986). Such is the case with EEI's appeal. It was completely without merit, and apparently done for the primary purpose of running up Ms. Huber's legal bills.

RESPECTFULLY SUBMITTED this 9th day of September, 2011.



Mark G. Olson, WSBA # 17846
Attorney for Respondent Murna Huber

DECLARATION OF SERVICE

I, the undersigned, certify under penalty of perjury under the laws of the State of Washington that on this day I caused to be delivered via legal messenger service the foregoing **RESPONDENT'S BRIEF** to the following parties:

Court of Appeals, Division I
600 University Street
One Union Square
Seattle, WA 98101-1194

Dennis Jordan, WSBA #4904
4218 Rucker Avenue
Everett, WA 98203
Attorney for Appellant

DATED this 9th day of September, 2011.

LAW OFFICES OF MARK G. OLSON



Dianne Marlow
Paralegal

FILED

APR 21 2011

SONYA KRASKI
SNOHOMISH COUNTY CLERK
EX-OFFICIO CLERK OF COURT

SUPERIOR COURT OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY

MURNA HUBER-WILLOTT,

Plaintiff,

v.

EAST EVERETT INVESTMENTS, L.L.C.,

Defendant.

No. **11 2 04651 4**

COMPLAINT FOR DAMAGES FOR
TRESPASS, NEGLIGENCE
And BREACH OF CONTRACT

COMES NOW Plaintiff MURNA HUBER, by and through her attorney of record, and complains and alleges against the defendants as follows:

I. PARTIES

1.1 Plaintiff MURNA HUBER is now and has been during the relevant times herein a resident of Snohomish County, Washington. Plaintiff owns and possesses the following property which is the subject of this action: 7111 20th St. SE, Everett, Snohomish County, Washington 98205.

1.2 Defendant EAST EVERETT INVESTMENTS, L.L.C. is now and has been at all times relevant herein a Washington for-profit corporation engaged in real property development based in Everett, Washington. East Everett Investments, LLC was formed in 2005 for the purpose of developing a 100-lot plat in East Everett.

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1 1.3 At all times relevant to this suit, David Huber was the agent and rental manager
2 for Plaintiff Murna Huber-Willott. Until 2010, David Huber was also a member of East Everett
3 Investments, LLC through his company Dang Investments, LLC; the other partner of defendant
4 East Everett Investments LLC was JDA LLC, which was owned by Dennis Jordan and David
5 Allegre.

6 **II. JURISDICTION AND VENUE—SUPERIOR COURT**

7 2.1 All acts alleged in this complaint occurred within Snohomish County.

8 2.2 The real property on which this action is based is located in Snohomish County.

9 2.3 The amount in controversy is greater than \$300.

10 2.4 The Superior Court has jurisdiction under RCW 2.08.010, granting original
11 jurisdiction over all cases and proceedings for which jurisdiction has not been vested exclusively
12 in some other court.

13 2.5 Snohomish County is the appropriate venue under RCW 4.12.010, as it is the
14 county in which the real property is situated.

15 **III. FACTS**

16 3.1 In the course of developing residential properties in east Everett in 2008-2009,
17 defendant East Everett Investments LLC graded land around plaintiff's rental home.

18 3.2. In particular, defendant graded a significant amount of land on the western edge
19 of my mother's property to accommodate utilities and a wider road for egress and ingress to the
20 development off east Hewitt Avenue.

21 3.3 Without authorization, defendant took a larger portion of Plaintiff's land, and left
22 a steeper slope on the western side than allowed under applicable development codes.
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1 3.4 Furthermore, defendant made no effort to stabilize this portion of the property
2 after grading. Consequently, plaintiff's property eroded and shifted the foundation of the house
3 in such a manner as to cause a significant crack in the foundation.

4 3.5 Later, defendant's grading activities caused plaintiff to lose access to the rental
5 property, except through construction of a new gravel driveway on an adjacent lot owned by
6 David Huber's company Keith Lynn LLC.

7 3.6 Finally, defendant's grading activities caused such a problem with the septic
8 system that plaintiff was forced to terminate the existing rental agreement for the property in
9 which the tenant was paying her \$1275 per month.

10 3.7 Attorney Dennis Jordan, as Co-Manager of East Everett Investments, as well as
11 DDR, LLC, prepared partnership agreements related to East Everett and DDR, LLC. Initially,
12 these partnership agreements contemplated how Plaintiff would reimburse the partnership for
13 development related expenses around her property which consisted of the rental house at issue in
14 this case plus five lots. Subsequently, Keith Lynn LLC purchased five of the lots and the
15 responsibility for these pre-development related expenses was transferred to Keith Lynn LLC
16 from Plaintiff.

17 3.8. Initially defendant East Everett Investments accepted responsibility for the
18 damages caused to plaintiff's property and agreed to compensate Plaintiff her lost rent due to the
19 eviction of tenants which itself was due to the construction of her septic system by East Everett
20 contractors. Defendant did compensate plaintiff for several months, and then abruptly and
21 inexplicably stopped making these compensation payments.

22 3.9 As a direct and proximate consequence of defendant's grading activities,
23 defendant encroached upon plaintiff's land causing damages in an amount to be proven at trial.
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IV. FIRST CAUSE OF ACTION - TRESPASS

4.1 The plaintiff incorporates each and every paragraph above, as though the same were set forth in full hereafter.

4.2 Defendant's grading activities intentionally encroached upon plaintiff's property without permission, causing damage to her property and rental home, including loss of rental income.

4.3 The defendant committed the tort of trespass against the plaintiff's property.

V. SECOND CAUSE OF ACTION - NEGLIGENCE

5.1 The defendant owed a duty of reasonable care to Plaintiff, to avoid unreasonably causing harm to her property.

5.2 The defendant acted unreasonably in causing damage to Plaintiff's property, by grading adjacent properties in a manner that was careless and disregard of the effects on plaintiff's property. This action breached his duty of reasonable care.

5.3 The defendant's actions damaged Plaintiff, by diminishing the value of her property.

5.4 The defendant's actions were the proximate and legal cause of the damages.

5.5 The defendant is liable to Plaintiff for their negligent acts.

VI. THIRD CAUSE OF ACTION - BREACH OF CONTRACT

6.1 The defendant entered into an agreement with plaintiff to compensate her for the loss of rental income caused by defendant's grading activities.

6.2 Defendant did make these compensatory payments for several months in 2008, and then abruptly stopped doing so, without notice and without cause, even though the loss of rental income caused by defendant's action continue to the present day.

FILED

APR 21 2011

SONYA KRASNI
SNOHOMISH COUNTY CLERK
EX-OFFICIO CLERK OF COURT

SUPERIOR COURT OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY

MURNA HUBER-WILLOTT,

Plaintiff,

v.

EAST EVERETT INVESTMENTS, L.L.C.,

Defendant.

No. **11 2 04651 4**

SUMMONS

TO: Defendant EAST EVERETT INVESTMENTS, L.L.C.

A lawsuit has been started against you in the above entitled court by plaintiff. Plaintiff's claim is stated in the written complaint, a copy of which is served upon you with this summons. In order to defend against this lawsuit, you must respond to the complaint by stating your defense in writing, and serve a copy upon the undersigned attorney for the plaintiffs within twenty (20) days after the service of this summons upon you, excluding the day of service, or a default judgment may be entered against you without notice. A default judgment is one where plaintiff is entitled to what s/he asks for because you have not responded. If you serve a notice of appearance on the undersigned attorney you are entitled to notice before a default judgment may be entered. If you wish to seek the advice of an attorney in this matter, you should do so promptly so that your written response, if any, may be served on time. This summons is issued pursuant to Rule 4 of the Civil Rules for Superior Court.

DATED this 21st day of April, 2011.

LAW OFFICES OF MARK G. OLSON



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Attorney for Plaintiff

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TELEPHONE: (425) 388-5516
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SUPERIOR COURT, IN AND FOR THE COUNTY OF SNOHOMISH, STATE OF WASHINGTON

MURNA HUBER-WILLOTT

Plaintiff/Petitioner

Cause #: **11 2 04651 4**

VS.
EAST EVERETT INVESTMENTS, L.L.C.,

Defendant/Respondent

Declaration of Service of:

**SUMMONS AND COMPLAINT FOR DAMAGES FOR TRESPASS,
NEGLIGENCE AND BREACH OF CONTRACT,**

Hearing Date:

Declaration:

The undersigned hereby declares: That s(he) is now and at all times herein mentioned, a citizen of the United States and a resident of the State of Washington, over the age of eighteen, not an officer of a plaintiff corporation, not a party to nor interested in the above entitled action, and is competent to be a witness therein.

On the date and time of **May 19 2011 10:23AM**
at the address of **4218 RUCKER EVERETT**
within the County of **SNOHOMISH** State of **WASHINGTON**

the declarant duly served the above described documents upon

EAST EVERETT INVESTMENTS, L.L.C.,

by then and there personally delivering **1** true and correct copy(ies) thereof, by then presenting to and leaving the same with
BARBARA OLSON PERSONAL SECRETARY

No information was provided that indicates that the subjects served are members of the U.S. military.

I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
Dated: May 19, 2011 at Everett, WA

by *B. Anderson*
B. Anderson

**Original Sent For Filing
MAY 19 2011**

The documents listed above were served in accordance with RCW 4.28.080 and/or client instructions. If service was substituted on another person or left with a person that refused to identify themselves, it is incumbent upon the client to notify ABC Legal Services, Inc. immediately in writing if further attempts to serve, serve by mail, or investigate are required. If service was substituted on another person, pursuant to RCW 4.28.080 (16), service shall be complete on the tenth day after a copy of the documents are mailed to the subject at the address where service was made. Documents were not mailed by ABC Legal Services, Inc.

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Summons Copy:	3.50	Wait / Stake Out Time:	0.00
Other:		Total:	72.50
		Pre-Paid Retainer:	0.00
		AMOUNT DUE	72.50

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PROOF OF SERVICE**



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