IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CHARLES ROBERT GARNER, an individual,	)	
	)	NO. 67342-4-I
Appellant,	)	DIVISION ONE
v.	)	UNPUBLISHED OPINION
HOFFMAN CONSTRUCTION, INC.,	)	
Respondent.	)	FILED: November 5, 2012

Appelwick, J. — Garner filed a lawsuit against Hoffman alleging that Hoffman contaminated his property in demolishing a structure on it. The trial court entered summary judgment in favor of Hoffman, finding that Garner had provided no evidence upon which to support his claims. The trial court also awarded attorney fees to Hoffman under RCW 4.84.185 and CR 11. We reject Garner's argument that the trial court erred in failing to join other defendants to the lawsuit, in granting summary judgment, and in awarding fees. We affirm.

FACTS

Charles Garner purchased a house in 1976 (the Garner structure) that he later partially disassembled and moved to a parcel of property he owns located in what is now the City of Federal Way (City).[1] Due to significant neglect on Garner's part, the

[1] Over the past several years, Garner has initiated multiple lawsuits against the City involving this structure. See Garner v. City of Federal Way, et al., No. C06-1739-JCC (W.D. Wash Nov. 29, 2007) (lawsuit against the City and its code enforcement officer alleging §1983 violation related to code enforcement activities on the property); City of City of Federal Way v. Garner, No. 08-2-37690-7 KNT (King County Super. Ct., Wash., Sept. 28, 2009) (appeal of administrative order ordering demolition); Garner v. City of Federal Way et al., No. 09-2-09440-3 KNT (King County Super. Ct., Wash., May 18, 2010) (lawsuit against the City and its employees alleging a "de facto taking" of the property).

condition of the structure deteriorated to the point it was uninhabitable and unsafe. After years of issuing building code violations, the hearing examiner ordered the structure demolished in 2008. Garner refused to do so himself, and the City ultimately contracted with Hoffman Construction Inc. to perform the demolition.

The Puget Sound Clean Air Agency (Agency) is responsible under state and federal law for air quality regulation and management in King, Pierce, Snohomish, and Kitsap Counties. Agency regulations require that a certified inspector inspect any structure scheduled for demolition for asbestos-containing materials. The Agency must be notified prior to the demolition.

On November 30, 2009, a predemolition asbestos inspection of the Garner structure was conducted by Joseph Hade of NOW Environmental Services Inc. Samples of materials throughout the structure were analyzed. A copy of Hade's report, indicating no asbestos-containing materials were found, was mailed to the City's code enforcement officer. The City's code enforcement officer submitted the notification to the Agency as required, but mistakenly entered the wrong address for the site to be demolished. The demolition of the Garner structure took place on or about December 14, 2009. After becoming aware of the demolition, the Agency issued a notice of violation to the City and Garner for failing to provide notification and requested corrective action. The City's code enforcement officer responded in a letter explaining the mistake to the Agency. Garner received a copy of the City's response. The Agency responded that it considered the matter resolved and would take no further action. Garner also received a copy of the Agency's response.

On January 19, 2011, Garner filed a lawsuit in King County Superior Court, entitled "Charles Robert Garner v. Hoffman Construction Inc., et al." No. 11-2-03501-8 KNT (King county Super. Ct., filed Jan. 19, 2011). Garner claimed that Hoffman released "asbestos and other toxins" on his property and into the nearby Lakehaven wellhead protection zone as a result of the demolition. He alleged $995,000 in damages suffered by himself and the property, and requested unspecified punitive damages, attorney fees, and the establishment of a multi-million dollar trust fund for other unidentified members of the community exposed to the alleged toxins.

On March 10, 2011, Hoffman sent Garner a letter explaining that his lawsuit was frivolous, citing RCW 4.84.185 and CR 11, and informing him that it would seek costs and attorney fees if he proceeded with the lawsuit. On April 28, 2011, Hoffman sent another letter again reminding Garner of the possibility of fees or sanctions being ordered.

On May 10, 2011, Hoffman moved for summary judgment and for the order of attorney fees under CR 11 and RCW 4.84.185. On June 10, 2011, the trial court entered an order granting summary judgment in favor of Hoffman and awarding Hoffman attorney fees and costs totaling $16,826.87. Garner timely appeals.

ANALYSIS

I. Summary Judgment

When reviewing a grant of summary judgment, an appellate court undertakes the same inquiry as the trial court. Sheikh v. Choe, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). The court must consider the facts in the light most favorable to the nonmoving

party, and the motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. Yakima Fruit & Cold Storage Co. v. Cent. Heating & Plumbing Co., 81 Wn.2d 528, 530, 503 P.2d 108 (1972). The moving party bears the initial burden of showing an absence of any genuine dispute as to any material fact. Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 70, 170 P.3d 10 (2007). If the defendant is the moving party and alleges an absence of material facts in support of the plaintiff's case, then the burden shifts to the plaintiff to make a prima facie case concerning the essential elements of its claim. Young v. Key Pharms., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). In so doing, the plaintiff may not rely on conclusory statements, mere allegations, or argumentative assertions. CR 56(e); Vacova Co. v. Farrell, 62 Wn. App. 386, 395, 814 P.2d 255 (1991). Instead, the plaintiff must put forth evidence showing a triable issue exists. Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986). If the plaintiff fails to meet this burden on an element for which the plaintiff bears the burden of proof at trial, then summary judgment is warranted "'since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.'" Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Although the theory upon which his complaint is based is somewhat unclear, we assume that Garner claims that Hoffman was liable under a general theory of negligence. Negligence consists of the existence of a duty owed to the complaining party, a breach of that duty, and a resulting injury proximately caused by the breach.

Hansen v. Wash. Natural Gas Co., 95 Wn.2d 773, 776, 632 P.2d 504 (1981). Garner presents no evidence that "toxins" of any kind were released onto his property or into the local area's groundwater. At the hearing on summary judgment, he admitted that he did not possess such evidence and likely would not be able to obtain it. His unfounded speculations about contamination and allegations of technical defects in the City's paperwork are insufficient to establish a genuine issue of material fact. Because Garner fails to establish a prima facie case of negligence, summary judgment was proper.

II. Joinder

Garner argues that the trial court erred in failing to join other parties as defendants in his lawsuit under CR 19, including the City, the Agency, Lakehaven Utility District, NOW Environmental Services, and Hoffman's prior attorney John

[2] Hoffman asserts that Garner did not make an argument regarding joinder below and has thus waived it on appeal under RAP 2.5(a). The record shows Garner somewhat obliquely raised this issue in his motion for reconsideration, stating "Garner asserts that NOW Environmental, Inc. is an indispensable party to be Joined in this proceeding so as to determine the material issue of facts surrounding the survey" and "Garner has briefed the [Agency] Board of Directors on these issues and they are fully aware that they are an indispensable party to this action and were subject to a Joinder." We will accept Garner's use of the term "indispensable" as an attempt to argue joinder under CR 19. However, Garner's arguments regarding CR 14(a), CR 21 and the equitable doctrine of "vouching-in" were not raised below and we will not consider them for the first time on appeal. RAP 2.5(a).

Garner also appears to argue that, because he captioned the complaint "Charles Robert Garner v. Hoffman Construction Inc., et al.," that all relevant entities were on notice that they were subject to joinder. Garner provides no evidence of notice or authority to support this argument. His claim is also called into question by his failure to comply with CR 10(a)(1) ("the title of the action shall include the names of all the parties") or CR 10(a)(2) ("[w]hen the plaintiff is ignorant of the name of the defendant, it shall be so stated in his pleading.").

We also reject Garner's argument that Hoffman effected a joinder of the City by inadvertently including the City in the title of the action when it filed a Notice of

Ahlers.[2] CR 19 requires joinder of a party with an interest relating to the subject of the action where disposition in the party's absence may impair the party's ability to protect its interest in the litigation. Eugster v. City of Spokane 139 Wn. App. 21, 30, 156 P.3d 912 (2007). But, Garner does not explain why any other party would have an interest in his lawsuit against Hoffman, and given that he does not provide any evidence of damages, his complaint would not have survived a motion for summary judgment against *any* defendant. As such, Garner's claim that error was committed by failure to join parties to his lawsuit is without merit.

III. RCW 4.84.185 and CR 11

RCW 4.84.185 allows for recovery of attorney fees and costs by the prevailing party where the lawsuit is found to be "frivolous."[3] "A lawsuit is frivolous when it cannot be supported by any rational argument on the law or facts." Tiger Oil Corp. v. Dep't of Licensing, 88 Wn. App. 925, 938, 946 P.2d 1235 (1997). CR 11 permits a court to

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Substitution of Counsel on March 4, 2011. We are unaware of any authority for the proposition that a defendant can join another defendant to a lawsuit by changing the title of the action alone.

[3] RCW 4.84.185 provides:

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

impose a sanction, including attorney fees, when an argument is (1) not well grounded in fact; (2) unwarranted by existing law; or (3) for any improper purpose, such as harassment or delay. Although Garner filed his lawsuit pro se, "pro se litigants are bound by the same rules of procedure and substantive law as attorneys." Westberg v. All-Purpose Structures, Inc., 86 Wn. App. 405, 411, 936 P.2d 1175 (1997).

We review a trial court's order to pay attorney fees under CR 11 and RCW 4.84.185, as well as the amount of any such fees, for an abuse of discretion. Tiger Oil, 88 Wn. App at 937-38. A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Absent such a showing, we will not disturb the trial court's decision. Clarke v. Equinox Holdings, Ltd., 56 Wn. App. 125, 132, 783 P.2d 82 (1989).

The trial court entered detailed findings of fact regarding Garner's sanctionable conduct. Specifically, the trial court found that:

> 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.
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> 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 difficulties 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.

Based upon these findings, the court ordered Garner pay Hoffman's attorney fees in the amount of $16,826.87, a figure supported by affidavits and invoices from Hoffman's attorneys.

Garner's claim against Hoffman was advanced without reasonable cause and was not well-grounded in fact. No reasonable jury could find that Garner had proven the elements of negligence. Contrary to Garner's characterization of the matter, there is no evidence that he or his property were harmed in any way, and Garner admitted to the trial court that he had no way of gathering any such evidence. Garner was notified twice by Hoffman that sanctions would be sought if he proceeded with the lawsuit. The trial court did not abuse its discretion in imposing sanctions nor in the amount awarded.[4]

Garner makes vague references in his brief to both state and federal due

[4] Garner claims that the trial court failed to follow the procedure outlined in RCW 4.84.185 because Hoffman filed its motion for attorney fees contemporaneously with its motion for summary judgment. Garner makes no argument how he was prejudiced in this regard. We are also unpersuaded by Garner's assertion that the contract between Hoffman and the City indemnified him from the payment of any attorney fees.

process violations. But, "'naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.'" In re Rosier, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) (quoting United States v. Phillips, 433 F.2d 1364, 1366 (8th Cir. 1970)). We decline to consider issues unsupported by cogent legal argument or citation to relevant authority.

The trial court did not abuse its discretion. We affirm.

WE CONCUR: