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NO. 90458-8

SUPREME COURT OF THE STATE OF WASHINGTON

JILL E. LANE *et al.*,

Appellant,

v.

MARK VON DER BURG *et al.*,

Respondent.

MARK VON DER BURG'S ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDING PARTY

Respondent Mark Von der Burg ("Respondent") respectfully asks this Court to deny the Petition for Review of Jill Lane ("Appellant").[1]

II. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1) Did the Court of Appeals err in determining that the trial court was within its discretion in awarding sanctions under CR 11 when the Appellant's claim was not supported by existing case law, and when there were no pretrial efforts to establish a factual and legal basis for the claim?

2) Is Respondent entitled to attorneys' fees for researching, drafting, and filing this Answer to Appellant's Petition for Review?

III. COUNTERSTATEMENT OF THE CASE

Respondent adopts the Statement of Facts set out in the Court of Appeals' decision, with the exception of the following sentence: "It appears undisputed that the [Kirkland Municipal] court granted the request based on evidence that [V]on der Burg had admitted to making the recording without Lane's knowledge or consent." Ct. of App. Op. at 3. The Kirkland Municipal Court granted Respondent's request to invoke the Fifth Amendment privilege in response to arguments from counsel for both sides, but Mr. Von der Burg did not then (or since) make a judicial

[1] Appellant's counsel, Andrew Magee, also identifies himself as a "Petitioner" in the Appellant's Petition for Review. *See* App's Pet. for Review at 1. To the extent Mr. Magee is a proper party in this matter, all references and arguments pertaining to "Appellant" are incorporated to include Mr. Magee.

admission that he recorded the meeting. Indeed, the request for Fifth Amendment protection was based on long-standing U.S. Supreme Court precedent permitting such a request on the basis of a "reasonable cause to apprehend danger from a direct answer." *State v. Levy*, 156 Wn.2d 709, 731-32, 132 P.3d 1076 (2006) (quoting *Hoffman v. U.S.* 341 U.S. 479, 486, 71 S. Ct. 814 (1951)).[2]

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

RAP 13.4(b) provides for review of a Court of Appeals' decision only when that decision conflicts with another Washington appellate decision, presents a significant question of law under the Constitution of the United States or the Constitution of the State of Washington, or involves an issue of substantial public interest. None of those conditions are met here and review should be denied.

The trial court and Court of Appeals correctly applied the requirements of CR 11 and the relevant case law to the facts in this matter. In doing so, the Court of Appeals appropriately determined that there was no due process violation. Indeed, this argument is apparently abandoned by Appellant in the Petition for Review, thus eliminating the need for analysis under RAP 13.4(b)(3). The Court of Appeals also correctly determined that the Appellant's action was not warranted under existing

[2] *See* CP 278-79 for argument from counsel regarding why Respondent invoked Fifth Amendment protections.

case law because the relevant conversation was not "private." Ct. of App. Op. at 9-11. Finally, the Court of Appeals appropriately determined that the Appellant failed to make a reasonable inquiry into the factual or legal basis for her claim. *Id.* at 11-13. As such, the lower decision does not conflict with prior holdings of this Court or the Court of Appeals as to warrant review under RAP 13.4(b)(1) or (2). Additionally, the decision of the Court of Appeals does not raise any issue of substantial public interest as to warrant review under RAP 13.4(b)(4). For all these reasons, review should be denied.

A. <u>Appellant Offers Statements That Are Unsupported by the Record And New Evidence That Is Irrelevant And Inadmissible.</u>

As an initial matter, the Appellant's Petition for Review includes factual statements that are unsupported by the record and new evidence that was not argued before the trial court. The factual statements include the following:

> 1. The defendant/respondent stipulated and admitted to the facts that Mr. [V]on der Burg had secretly recorded the conversation in question without Ms. Lane's consent (CP 333).
>
> 2. Defendant, as movant, initiated their CR 11 motion making the claim that CR 11 was violated because the trial court ultimately ruled that Ms. Lane's/Mr. Magee's view of the law that the conversation in question was private was "wrong," and that no reasonable person could have found the conversation at issue in this lawsuit to be private. (CP 13, lines 21-22).
>
> App.'s Pet. for Review at 4.

These statements are unsupported by the record. For example, the first excerpt cites to CP 333 for the proposition that Respondent stipulated and admitted to the recording. That is nowhere found on CP 333. Meanwhile, the second excerpt cites to CP 13 for the partial proposition that Respondent initiated the CR 11 motion on the basis of the trial court finding the Appellant's legal theory to be "wrong." The Respondent did not seek CR 11 sanctions merely because the trial court ruled in his favor, however, but because the requirements of CR 11 were not met by the Appellant.

In addition to offering the above unsupported statements, Appellant devotes significant time to exploring co-Respondent Coldwell Banker Bain Bellevue's ("CBBB") Privacy Policy. App.'s Pet. of Review at 6-11. The Appellant did not, however, offer or argue the terms of the Privacy Policy before the trial court. Instead, Appellant argued this issue for the first time in her Motion for Reconsideration to the Court of Appeals. As a result, both the factual statements outlined above, and the exhibit and argument related to the Privacy Policy, are subject to a Motion to Strike filed contemporaneously with this Answer. Respondent requests that the Motion to Strike be granted and the subject statements, evidence, and related argument be disregarded for purposes of review.

B. Review Is Unnecessary Under RAP 13.4(b)(1) or (2) – The Court of Appeals' Decision Is Not In Conflict With This Court's Prior Decisions or Previous Decisions of the Court of Appeals.

Appellant does not explicitly argue that the requirements of RAP 13.4(b)(1) or (2) are met by the Court of Appeals' decision. Nevertheless, any argument that the underlying decision conflicts with precedent from this Court or the Courts of Appeals is mistaken.

Appellant incorrectly argues that she and her counsel were sanctioned merely for having the "wrong" view of the law as to what constitutes a "private conversation" under RCW 9.73.030. App.'s Pet. for Review at 16. Appellant accurately points out, however, that *Bryant v. Joseph Tree,* 57 Wn.App. 107, 115, 791 P.2d 537 (1990) (*aff'd* 119 Wn.2d 210 (1992) prohibits sanctions under CR 11 for merely failing to succeed on a legal argument. *Id.* at 15.

Appellant and her counsel were not simply wrong on the law – they also failed to comply with the requirements of CR 11. As the Court of Appeals correctly noted, the very purpose of CR 11 is to "deter baseless filings and to curb abuses of the justice system." Ct. of App. Op. at 8 (quoting *Bryant v. Joseph Tree*, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992) (emphasis original). As such, CR 11 sanctions are appropriate.

The trial court and the Court of Appeals both correctly found that Appellant's claim was not warranted by existing case law and that

Appellant did not make a reasonable inquiry into the factual or legal basis for the action. *See* Ct. of App. Op. at 9-13. Existing case law starkly illustrates the lack of support for the claim. Multiple cases observe that this Court adopts the dictionary definition of the word "private" when analyzing RCW 9.73.030: "belonging to one's self...secret...intended only for the persons involved (a conversation)...holding a confidential relationship to something...a secret message: a private communication...secretly: not open or in public." *State v. Townsend*, 147 Wn.2d 666, 673, 57 P.3d 255 (2002); *Kadoranian v. Bellingham Police Dept.*, 119 Wn.2d 178, 190, 829 P.2d 1061 (1992); *State v. Forrester*, 21 Wn.App. 855, 861, 587 P.2d 179 (1978) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1969)).[3]

These cases, and their application of the dictionary definition, reveal the extent to which the Appellant's claim is unsupported. In *Townsend*, for example, this Court found that email and computer messages between a criminal defendant and a fictitious teenage girl were clearly private communications as indicated by the criminal defendant's request that the fictitious girl not tell anyone about the communications, the subject matter of the communications, and the subjective intent of the

[3] Although it post-dates the filing of this lawsuit, this Court also cited Webster's dictionary definition in its recent decision analyzing RCW 9.73.030 in *State v. Roden*, 179 Wn.2d 893, 899, 321 P.3d 1183 (2014).

criminal defendant. *Townsend*, Wn.2d at 673-74. Indeed, the *Townsend* defendant specifically asked the fictitious girl to not "tell anyone about us." *Id.* at 674. Conversely, in *Kadoranian*, this Court determined that communications were not "private" when the comments were made to a stranger and there was no indication the speaker intended for the conversation to be private. *Kadoranian*, Wn.2d at 190-91.

Here, other than a self-serving declaration, Appellant cites no evidence in the record that indicates the conversation on June 7, 2010 was intended to be private.[4] Unlike *Townsend*, there was no request or intimation that the conversation be kept private. Indeed, the meeting in question involved at least five different people, including one person who was unidentified at the time. Moreover, it was held in a business location during normal operating hours and the conversation was one that would necessarily need to be communicated to outside individuals.[5] CP 153. (citing ¶¶7-8 of Decl. of Respondent in Support of CR 12(b)(6) Motion).

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[4] Appellant's declaration claims that she presumed "this was a private meeting to discuss what is normally a private matter, the negotiation and purchase price and offer on a house." CP at 238. As the Court of Appeals observed, however, "Lane's presumption is insufficient to establish the claim because 'any [interested party] will contend that his or her conversation was intended to be private.'" Ct. of App. Op. at 11 (quoting *State v. Clark*, 129 Wn.2d 211, 225, 916 P.2d 384 (1996)).

[5] Indeed, as argued in prior briefing, that was the point of the meeting. *See* CP 158. The meeting was to convince First Citizens Bank ("Bank") management that Appellant had acquired an ownership interest in the house, not merely to convince Respondent. Obviously, neither Respondent nor the Bank's representative at the meeting had individual authority to authorize such a transaction and, consequently, would be required to communicate the substance of the conversation to third parties.

In short, nothing about the conversation suggests it was "private" within the meaning of RCW 9.73.030 and related case law.

Not only was Appellant's position unsupported by existing case law, Appellant and her counsel failed to conduct a reasonable inquiry into the factual or legal basis for the action. Appellant provided no evidence at the trial court that she or her counsel engaged in any pre-filing inquiry regarding the facts of the conversation in question, or how the facts correlated with RCW 9.73.030. Instead, Appellant and her counsel offered courtroom transcripts from the Kirkland Municipal Court that post-dated filing of the underlying lawsuit in this matter. CP 224-34. As noted by the Court of Appeals, not only did these conversations take place after filing of the underlying lawsuit,[6] the conversations between the judge, City Attorney, and counsel for Respondent did not even address whether the conversation was "private." Ct. of App. Op. at 12. Additionally, the Kirkland Municipal Court transcripts appear to have been selectively transcribed and were apparently not transcribed by a licensed court reporter. CP 957. This is insufficient evidence to

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[6] This lawsuit was initiated on May 31, 2012 whereas the conversations in question took place in open court on June 18, 2012. *See* CP 265-69. The cited Clerk's Papers are offered for the limited proposition that the conversation in question took place on June 18, 2012. As noted by the trial court, the transcribed materials offered by Appellant do not appear to have been prepared by a certified transcriptionist and appear selectively transcribed. CP 963. Consequently, Respondent cites them only for the limited purpose identified here.

demonstrate a "reasonable inquiry" into the facts and law underlying the lawsuit.

Finally, Appellant argues that the trial court's order she provide evidence of a pre-filing reasonable inquiry created a new and *sua sponte* standard. Apps. Pet. for Rev. at 11. This is incorrect. The text of CR 11 states that an attorney's signature constitutes the following:

> ...a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed *after an inquiry reasonable under the circumstances*: (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law...

CR 11 (emphasis added). Consequently, the trial court's order was in compliance with the requirements of CR 11 that any such inquiry occur prior to signing. Far from being a new standard, the trial court's order constituted yet another missed opportunity for Appellant to justify her and her counsel's behavior in this litigation.

C. <u>Review Is Not Warranted Under RAP 13.4(b)(3) or (4) – The Court of Appeals' Decision Does Not Raise Significant Issues of Public Policy or Constitutional Questions.</u>

As noted previously, Appellant apparently abandons her argument that the CR 11 sanctions were awarded through a due process violation. Consequently, no analysis is necessary under RAP 13.4(b)(3). The final

remaining issue for analysis under RAP 13.4 is whether the case raises significant issues of public policy that warrant review.

RAP 13.4(b)(4) permits review if the petition "involves an issue of substantial public interest that should be determined by the Supreme Court." Cases that affect broad numbers of other cases, invite unnecessary litigation, or create confusion are prime cases for review under RAP 13.4(b)(4). *See e.g. State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005)("This case presents a prime example of an issue of substantial public interest. The Court of Appeals holding...has the potential to affect every sentencing proceeding in Pierce County...invites unnecessary litigation on that point and creates confusion generally."). Here, the unique circumstances of this case, involving a party illegally occupying a private home and conversing at a financial institution in an attempt to justify the occupation, makes it unlikely this case will be replicated. Further reducing the likelihood of replication is the fact that the alleged recording was not made as a matter of any government or other institutional policy. Finally, far from inviting unnecessary litigation, the Court of Appeals' ruling affirmed a trial court decision that terminated an unsupported and frivolous lawsuit. This case does not merit review under RAP 13.4(b)(4).

D. Respondent Requests Attorneys' Fees Pursuant to RAP 18.1(j).

Finally, pursuant to RAP 18.1(j), Respondent moves for attorneys' fees and expenses incurred in researching, drafting, and filing an Answer to Appellant's Petition for Review. RAP 18.1(j) authorizes this Court to award reasonable attorneys' fees and expenses "[i]f attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied..." Moreover, RAP 18.1(j) requires that a party seeking attorneys' fees and expenses request them in the Answer to the Petition for Review.

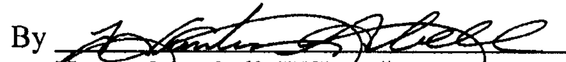
Here, the Court of Appeals awarded attorneys' fees in the amount of $5,927.62 and costs of $259.00 to Respondent. This is in addition to the sanctions imposed by the trial court in the amount of $16,000.00. Despite these financial penalties, however, Appellant and her counsel continue this wasteful and protracted litigation. It is as unfounded today as it was when initiated. Reasonable attorneys' fees and costs should be granted as a result of responding to the Petition for Review.

V. CONCLUSION

The trial court and Court of Appeals each applied the law correctly. Review is not warranted under RAP 13.4(b) and, as a result, the Appellant's Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 16th day of July, 2014.

WILLIAMS, KASTNER & GIBBS PLLC

By 

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Attorneys for Respondent Mark Von der Burg

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 16th day of July, 2014, I caused a true and correct copy of the foregoing document, "Answer to Petition for Review," to be delivered in the manner indicated below to the following counsel of record:

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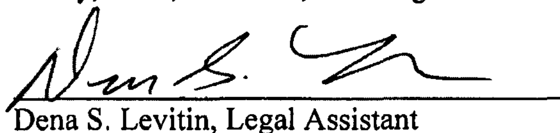

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Dear Clerk of the Court:

On behalf of Hunter M. Abell, attorney for Respondent Mark Von der Burg in *LANE, et al. v. VON der BURG, et al.*, Case No. 90458-8, please find attached our Answer to Petition for Review, as well as a Motion to Strike. We request that these documents be filed with the Supreme Court of the State of Washington. Please confirm upon filing. Additionally, please do not hesitate to contact us with any related concerns. Thank you in advance.

Sincerely,

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