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 MOTION TO STRIKE

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Daniel A. Brown, WSBA #22028
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I. IDENTITY OF MOVING PARTY

Respondent Mark Von der Burg ("Respondent") respectfully moves for the relief specified in Part II of this Motion to Strike.

II. STATEMENT OF RELIEF SOUGHT

Respondent respectfully moves that the Court strike portions of Jill Lane's ("Appellant")[1] Petition for Review. Specifically, the following statements from Appellant's Statement of Case should be struck:

> 1. The defendant/respondent stipulated and admitted to the facts that Mr. von 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.

Respondent also moves that the Court strike Appendix Exhibit A-5 from the Appellant's Petition for Review, and any argument related to it.

III. FACTS RELEVANT TO MOTION

The underlying case in this matter was filed by Appellant in King County Superior Court on May 9, 2012. CP 5. The Appellant brought an

[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.

action for violating RCW 9.73.030 related to the alleged recording of a conversation between Appellant, Respondent, and at least three other individuals on or around June 7, 2010. CP 3.

On June 18, 2012, Respondent appeared in Kirkland Municipal Court as part of the parallel criminal proceedings pending against the Appellant. CP 265-269.[2] At that proceeding, Respondent invoked his Fifth Amendment rights against self-incrimination. On July 10, 2012, counsel for Respondent sent the Appellant's counsel a letter warning that, if the lawsuit proceeded, Respondent would request sanctions under CR 11 and RCW 4.84.185. CP 172-173. Meanwhile, on August 12, 2012, Respondent filed a CR 12(b)(6) Motion for Dismissal. CP 329-365. In none of these court appearances or filings, however, did Respondent judicially admit to making the recording.[3]

After the Appellant's case was dismissed on summary judgment, the Respondent filed a Motion for Sanctions under CR 11 and RCW 4.84.185. CP 151-190. The Motion for Sanctions alleged that sanctions were appropriate because the Appellant's case lacked legal and factual

[2] The cited Clerk's Papers are offered solely for the proposition that Respondent appeared in Kirkland Municipal Court on or around 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.

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

justification CP 157. After being awarded sanctions, the Appellant appealed to the Court of Appeals. After the Court of Appeals ruled against her, the Appellant subsequently moved for reconsideration and offered, for the first time, a copy of the Coldwell Banker Bain Bellevue ("CBBB") Privacy Policy. The CBBB Privacy Policy is similarly attached as Exhibit A-5 to the Appellant's Petition for Review.

IV. GROUNDS FOR RELIEF AND ARGUMENT

A. The Court Should Strike Appellant's Factual Assertions That Are Unsupported by the Record.

Appellant's Petition for Review includes at least two factual statements that are unsupported by the record. As a general rule, "matters referred to in the brief but not included in the record cannot be considered on appeal." *State v. Stockton*, 97 Wn.2d 528, 530, 647 P.2d 21 (1982); *See also State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)("Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record."); *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10 (1991) ("Our review is limited to matters included in the record."). Appellant's proposed "facts" listed in Part II were not argued before either the trial court or the Court of Appeals, and they should not be considered here. At no time did Respondent judicially stipulate or admit to recording the conversation, and

the assertion is certainly not supported by the citation offered by Appellant. Similarly, Appellant continues to misunderstand the nature of the sanctions against her and her counsel. It was not merely that she was "wrong" on the legal argument, but that she and her counsel failed to meet the CR 11 threshold to avoid sanctions.

B. The Court Should Strike Appendix Exhibit A-5 And Related Argument Because It Is Inadmissible and Irrelevant.

The Appellant offers a copy of the CBBB Privacy Policy as Appendix Exhibit A-5 to the Appellant's Petition for Review. Numerous rules, however, prevent the introduction of material that was not considered by the trial court. For example, RAP 10.3(a)(8) states that an appendix "may not include materials not contained in the record on review without permission from the appellate court, except as provided in rule 10.4(c)." Additionally, RAP 13.4(c)(9) limits the appendix attached to a Petition for Review to certain items, including the following:

> ...a copy of the Court of Appeals decision, any order granting or denying a motion for reconsideration of the decision, and copies of statutes and constitutional provisions relevant to the issues presented for review.

Finally, RAP 9.11 provides a vehicle for litigants to request the appellate courts to consider additional evidence on review.

Here, Appendix Exhibit A-5 falls outside the limited category of items permissible under RAP 13.4(c)(9). Additionally, the Appellant fails

to argue or articulate under RAP 9.11 why the Court should consider this material and argument. As a general rule, RAP 9.11 prohibits an appellate court from accepting additional evidence on appeal unless six conditions are met. *Mission Ins. Co. v. Guarantee Ins. Co.*, 37 Wn. App. 695, 683 P.2d 215 (1984)(examining previous version of RAP 9.11(a)). RAP 9.11(a) provides,

> The appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

Appellant devotes a substantial portion of her Petition for Review to an exploration of the CBBB Privacy Policy. *See* Appellant's Brief at 6-11. CBBB's Privacy Policy was first offered by Appellant in her Motion for Reconsideration to the Court of Appeals. Appellant did not, however, move to supplement the record in accordance with RAP 9.11, nor has she addressed the mandatory six factors for allowing supplemental evidence under that Rule. *See In re Recall Charges Against Feetham*, 149 Wn.2d

860, 872-73, 72 P.3d 741 (2003)(denying motion to supplement the record in part for failure to address mandatory factors under RAP 9.11); *Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 401, 314 P.3d 1093 (2013)(affirming grant of motion to strike under RAP 9.11). It should not be considered here and any argument related to it should be disregarded.

Even if the CBBB Privacy Policy were considered, however, it is irrelevant to the determination of this appeal. It implicates none of the considerations outlined in RAP 13.4(b). Moreover, CBBB's Privacy Policy is applicable by its terms only to "personal information" that, according to the policy, includes name, contact information, and financial/credit history information. Whatever else it may include, it does not extend to information obtained during a meeting at a financial institution with unknown persons engaged in an illegal occupation of private property.

V. CONCLUSION

For all the reasons identified above, the Respondent's Motion to Strike should be granted.

RESPECTFULLY SUBMITTED this 16th day of July, 2014.

WILLIAMS, KASTNER & GIBBS PLLC

By 
Hunter M. Abell, WSBA #37223
Daniel A. Brown, WSBA #22028
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, "Mark Von der Burg's Motion to Strike," to be delivered in the manner indicated below to the following counsel of record:

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DATED this 16th day of July, 2014, at Seattle, Washington.

Dena S. Levitin, Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Levitin, Dena
Cc: Abell, Hunter; Brown, Daniel; Bulis, Diane
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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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