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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 REPLY IN SUPPORT OF MOTION TO STRIKE APPELLANT'S UNTIMELY REPLY TO ANSWER AND RESPONSE TO MOTION TO STRIKE

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ORIGINAL

I. INTRODUCTION

Appellant Jill Lane ("Appellant") and her counsel assert that their combined brief complies with the requirements of RAP 13.4(d). Appellant is incorrect. An appellant may file a reply to an answer to petition for review under RAP 13.4(d), "only if the answering party seeks review of issues not raised in the petition for review." As Mr. Von der Burg ("Respondent") does not seek "review of issues not raised in the petition for review," the reply is impermissible under RAP 13.4(d). Moreover, although Appellant devotes significant attention to recounting counsel's efforts to file on the correct date, unsupported by any declaration, the Appellant identifies, at most, only a disparity between the letter from the Court Clerk of July 17, 2014 sent to both parties, and a verbal, *ex parte* continuance granted by the Court Clerk's office. This Court is best equipped to enforce its own rules, and Respondent respectfully requests that the date established by the written communication transmitted to both parties be adhered to. Finally, Appellant omits the operative section of RAP 18.9 pertaining to sanctions. For all these reasons, the Appellant's impermissible and untimely joint brief should be struck. In the alternative, continued participation in these proceedings should be contingent on paying the Respondent's reasonable attorneys' fees and expenses accrued in responding to Appellant's filing.

II. PROCEDURAL HISTORY

As noted in Mark Von der Burg's Reply in Support of Motion to Strike filed on August 13, 2014, the current procedural history merits review. There are currently two Motions to Strike pending before this Court. The first was filed by Respondent on July 16, 2014. This Motion to Strike (hereafter "First Motion to Strike") requested the Court to strike Appellant's Appendix Exhibit A-5 and two statements contained in the Statement of the Case in the Appellant's Petition for Review.

On July 17, 2014, the Court Clerk transmitted a letter to the parties stating that any response to the First Motion to Strike would be due on July 30, 2014. On July 31, 2014 - one day late - Appellant filed a brief entitled "Reply to Answer and Response to Motion to Strike." This appeared to be a joint brief comprising both a reply to the Respondent's Answer to the Petition for Review, and a response to the First Motion to Strike.

The following day, on August 1, 2014, Respondent filed a Motion to Strike Appellant's Untimely Reply to Answer and Response to Motion to Strike (hereafter "Second Motion to Strike"). The Second Motion to Strike sought to exclude the Appellant's reply brief filed on July 31, 2014, as it was both impermissible under RAP 13.4(d) and untimely. On August 15, 2014, Appellant filed a response brief. As such, this reply

brief is anticipated to be the final briefing addressing the Second Motion to Strike.

III. ARGUMENT

The Appellant's reply brief is both impermissible under RAP 13.4(d) and untimely. Moreover, *even if* the Appellant's response was appropriate under RAP 13.4(d), and *even if* it was timely, it should still be disregarded as it lacks any supporting declaration. Each issue is addressed in turn.

A. The Court Should Strike the Combined Brief As It Violates RAP 13.4(d) Because No New Issues Were Presented For Review.

RAP 13.4(d) outlines the requirements for an answer and reply brief to any petition for discretionary review filed with this Court. The requirements are simple: A party may file an answer within 30 days after service of the petition and the appealing party, in turn, may file a reply brief "only if the answering party seeks review of issues not raised in the petition for review." RAP 13.4(d).

In this case, Appellant filed a Petition for Discretionary Review on June 16, 2014. By its terms, the Petition for Review sought review of four issues. Three of the issues pertained to whether the Court of Appeals erred when it affirmed the trial court's order under CR 11. The fourth issue pertained to Coldwell Banker Bain Bellevue's Privacy Policy.

In response, Respondent filed an Answer on July 16, 2014. The Answer offered two counterstatements of the issues presented for review. The first was a consolidated counterstatement focusing on whether the Court of Appeals erred in determining the trial court was within its discretion. The second asked whether attorneys' fees should be awarded for filing the Answer. The Answer included a prefatory section explaining that certain exhibits and statements offered by the Appellant were inadmissible and should be struck in accordance with the reasoning outlined in the subjoined Motion to Strike. *See* Resp's. Answer to Petition for Review, 3-4. No new material issues were presented for the Court's review.[1]

RAP 13.4(d) is clear: A party may file a reply only if the answer to the petition for review "seeks review of issues not raised in the petition for review." By context and location in the Rules of Appellate Procedure, the term "review of issues" in RAP 13.4(d) pertains to issues presented for review in the petition for discretionary review and, by extension, the power of this Court to engage in appellate review of the lower court's

[1] Respondent concedes that the request for attorneys' fees could arguably be construed as a new issue, but Appellant solely identifies one contested factual statement as the additional issue introduced on review that merits a reply brief. *See* App's. Reply to Answer and Response to Motion to Strike, at 4-9. If the Court is inclined to consider Appellant's arguments on attorneys fees, Respondent moves that all other portions of the reply brief be struck. *See e.g. Chevron U.S.A., Inc. v. Hearings Bd.*, 156 Wn.2d 131, 140 n.6, 124 P.3d 640 (2005) (striking all portions of an appellate reply brief under RAP 13.4(d) that address anything other than a request for attorney fees).

decision. Indeed, Black's Law Dictionary defines "appellate review" as "[e]xamination of a lower court's decision by a higher court, which can affirm, reverse, or modify the decision." BLACK'S LAW DICTIONARY, 8th Ed., 1345 (2004).

Here, no new "issues not raised in the petition for review" are raised in the Respondent's Answer to Petition for Review. The prefatory section explaining that this Court should disregard Appendix Exhibit A-5 and the two contested statements, as outlined in the First Motion to Strike, does not constitute a request that this Court "affirm, reverse, or modify the decision" of a lower court. Nevertheless, the Appellant claims that "Appellant's Reply addresses that Respondent's Answer *does* raise new issues, and Appellant stands on those arguments as briefed." App's. Answer to Mark Von der Burg's Motion to Strike App's. Untimely Reply to Answer and Response to Motion to Strike, at 5 (emphasis original). The "new issues" identified by Appellant, however, are merely the statements of alleged fact that are subject to the First Motion to Strike filed by Respondent. *See* App's. Reply to Answer and Response to Motion to Strike, at 4-9. This is not the new appellate "issues" under "review" specified in RAP 13.4(d).

This situation is analogous to that faced by the Court in *State v. Miller*, 156 Wn.2d 23, 32 n.5, 123 P.3d 827 (2005). In *Miller*, a party

asked that the larger part of a supplemental appellate brief be struck under RAP 13.4(d) on the theory that it raised new issues. The Court denied the motion and observed the following: "[p]roperly read, the State has not raised new issues for review but has instead responded to arguments made in Miller's petition and reasonably developed issues and arguments raised below." *Id.* Here, the situation is similar. Respondent has not raised new issues for review, but merely responds to unsupported factual assertions contained in the Appellant's petition. As such, no reply brief is permissible under RAP 13.4(d). Put simply, Respondent does not seek "review" of the Appellant's improper statements of fact and appellate exhibits. Instead, Respondent requests they be struck. No lower court has addressed these issues and, consequently, they are not new "issues" presented for review that merit a reply brief under RAP 13.4(d).

B. The Court Should Strike the Combined Brief As It Is Unsupported and Untimely.

Appellant's counsel goes to great lengths to recount the efforts he took to ascertain the correct due date for the reply to Respondent's First Motion to Strike.[2] The Appellant's counsel's telephone calls, conversations with the Court Clerk, and understandings therefrom,

[2] Prudence suggests simply filing the reply on the earlier of the two potential due dates. Appellant provides no explanation or argument regarding why that option was not pursued.

however, are entirely unsupported by any declaration. Instead, Appellant's counsel provides only exhibits directly attached to the brief without any sworn testimony whatsoever. The exhibits and argument offered by Appellant should be disregarded for purposes of this analysis.

Even if Appellant's assertions are given credence, at most, it merely illustrates the discretionary power of the Court to enforce its own rules. As the July 30, 2014 deadline was provided in writing to both parties, it should take precedence over any alleged verbal *ex parte* request by Appellant for a continuance from the published deadline. Indeed, a one day delay in filing the reply brief is not, in and of itself, that significant. It takes on greater importance, however, when placed in context of this litigation. As noted in previous briefing, Appellant and Appellant's counsel have routinely ignored filing deadlines and requested serial continuances. *See e.g.* CP 145, CP 191, CP 429.

C. Terms Should Be Awarded Under RAP 10.2(i) And RAP 18.9.

Finally, the Appellant claims that sanctions are inappropriate as "RAP 18.9 describes that sanctions should only apply when the rules are used for the purposes of delay or filing a frivolous appeal, *et al.*" Appellant's Answer, at 5. Appellant omits, however, the operative text of the rule. While RAP 18.9 does authorize sanctions against parties that file frivolous appeals or use the rules for purposes of delay, it also applies to a

party who "fails to comply with these rules..." As recounted above, the Appellant filed an impermissible and untimely reply. The Respondent has been harmed by the necessity of responding to the inappropriate filing. This harm includes the time and expense incurred in researching the permissibility of reply briefs under RAP 13.4(d) under the circumstances presented here, as well as the time and expense incurred in drafting the necessary briefs. As such, the Appellant's combined brief should be struck, or, in the alternative, continued participation in the review should be made contingent on payment of reasonable attorneys' fees and costs.

IV. CONCLUSION

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

RESPECTFULLY SUBMITTED this 27th day of August, 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 27th day of August, 2014, I caused a true and correct copy of the foregoing document to be delivered in the manner indicated below to the following counsel of record:

Andrew Magee 1001 Fourth Avenue Plaza 44th Floor Seattle, WA 98154 Email: amagee@mageelegal.com *Attorney for Appellants*	SENT VIA: ☐ Fax ☐ ABC Legal Services ☐ Express Mail ☑ Regular U.S. Mail ☑ E-mail
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DATED this 27th day of August, 2014, at Seattle, Washington.

Dena S. Levitin, Legal Assistant

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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 Reply in Support of Motion to Strike Appellant's Untimely Reply to Answer and Response to Motion to Strike. We request that this document 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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