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 BERG'S REPLY IN SUPPORT OF MOTION TO STRIKE

Hunter M. Abell, WSBA #37223
Daniel A. Brown, WSBA #22028
WILLIAMS, KASTNER & GIBBS PLLC
Attorneys for Respondent Mark Von der Burg

Two Union Square
601 Union Street, Suite 4100
Seattle, WA 98101
(206) 628-6600

I. INTRODUCTION

Appellant Jill Lane ("Appellant") and her counsel fail to articulate a successful basis by which either of the contested statements from the Appellant's Statement of the Case should be considered. Indeed, for the second contested statement, Appellant and her counsel fail to make any argument *at all* regarding why it should be considered. Additionally, Appellant incorrectly relies on RPC 3.3 as an independent basis for admission of Appendix Exhibit A-5. As a result, both the statements and Appendix Exhibit A-5 should be struck.

II. PROCEDURAL HISTORY

A brief procedural history may assist review of the pertinent issues. On June 16, 2014, Appellant filed a Petition for Review with the Court of Appeals. On July 16, 2014, Mark Von der Burg ("Respondent") filed an Answer to Petition for Review and simultaneously filed a Motion to Strike Appendix Exhibit A-5 and two statements contained in the Appellant's Statement of the Case.

On July 31, 2014, Appellant filed a brief entitled "Reply to Answer and Response to Motion to Strike." This document was untimely according to the July 30, 2014 reply date established by the Supreme Court Clerk. It appeared to be a joint responsive pleading to the Respondent's July 16, 2014 Answer to Petition for Review and the 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, arguing that the July 31, 2014 filing by Appellant was untimely and impermissible in that Respondent's Answer did not seek review of issues not raised in the Appellant's Petition for Review.

There are now two motions to strike pending before this Court: the first pertains to the two contested statements of fact and Appendix Exhibit A-5, whereas the second pertains to the Appellant's untimely Reply brief filed on July 31, 2014. This Reply is anticipated to be the final briefing on the initial Motion to Strike addressing the contested statements of fact and Appendix Exhibit A-5. According to an August 4, 2014 letter from the Supreme Court Clerk, responsive briefing addressing the untimely July 31, 2014 "Reply to Answer and Response to Motion to Strike" is due on August 15, 2014, with any reply being served and filed not later than August 29, 2014. As such, this brief is devoted exclusively to addressing the contested statements of fact and Appendix Exhibit A-5 addressed in Respondent's initial Motion to Strike.

III. ARGUMENT

The Respondent asked this Court to strike two statements on the Appellant's Statement of the Case, and Appendix Exhibit A-5. As outlined in the Respondent's Motion to Strike, the statements are

unsupported by the record and Appendix Exhibit A-5 was not offered at the trial court level. Accordingly, the statement and Appendix Exhibit A-5 should not be considered by this Court.

A. The Court Should Strike Both Factual Assertions at Issue.

Tellingly, the Appellant offers little defense of the factual statements and Appendix Exhibit A-5. The first contested factual statement reads as follows:

> 1. At Page 4: 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).

To defend this statement's admissibility, Appellant mistakenly relies on the requirement at summary judgment that facts alleged in the complaint are considered true. *See* App's. Reply to Answer and Response to Mot. to Strike, at 9 (citing CP 333). In unclear reasoning, the Appellant argues the following:

> Those are the facts that upon their Motion for Summary Judgment, *et al.*, that Respondent states must be taken as true by the Trial Court, *i.e.* those are the facts that Respondent stipulates to the Court as being true, and those facts are that Mr. Von der Burg unlawfully recorded the conversation in question.

Id. This incorrectly conflates the standard on summary judgment with facts alleged in a statement of facts for purposes of appellate review. Simply because facts alleged in the complaint are assumed true for

purposes of summary judgment, that does not make them true for purposes of appellate review. It remains that Respondent did not judicially stipulate or admit to recording the conversation, and the Appellant's proposed statement of fact should be struck.

The second contested factual statement reads as follows:

> 2. At Page 4: 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)

The Appellant's "Reply to Answer and Response to Motion to Strike" does not defend the admissibility of this statement. Instead, it focuses exclusively on the first contested factual statement addressed above, and the admissibility of Appendix Exhibit A-5. *See* App's. Reply to Answer and Response to Mot. To Strike, at 10-12. Consequently, it is unnecessary to further examine this issue, except to reiterate that the Appellant's position is unsupported by the record and should be struck.

B. The Court Should Strike Appendix Exhibit A-5.

Finally, Appellant argues that Exhibit A-5, the Coldwell Banker Bain Bellevue ("CBBB") Privacy Policy, should be admitted under the auspices of RPC 3.3. As an initial matter, Respondent explicitly denies

that RPC 3.3 is implicated in any way by the existence of the CBBB Privacy Policy.[1] RPC 3.3 applies to a "false statement of fact or law." Appellant identifies no such purported "false statement of fact or law," other than to argue, without support, that the mere existence of the CBBB Privacy Policy somehow implicates counsel's obligations under RPC 3.3. This is an incorrect reading of the facts and requirements of RPC 3.3, as well as an incorrect reading of the CBBB Privacy Policy itself.

Additionally, by its terms, RPC 3.3 is not an independent basis for admission of evidence, as intimated by Appellant ("...and it is respectfully submitted that it not be stricken, but be considered under RPC 3.3..."). App's. Reply to Answer and Response to Mot. To Strike, at 10. Indeed, even if RPC 3.3 were somehow violated, the Preamble and Scope to the Washington Rules of Professional Conduct notes that any violation of a Rule "does not necessarily warrant any other nondisciplinary remedy..." RPC Preamble and Scope at [20]. This would presumably include admission of otherwise inadmissible evidence. Appellant has offered no authority for the proposition that RPC 3.3 permits the consideration of Appendix Exhibit A-5. That is for the simple reasons that RPC 3.3 is

[1] This unfounded allegation of a professional violation under RPC 3.3 is regrettably illustrative of Appellant's and Appellant's counsel's behavior throughout this litigation. The responsibility to provide "conscientious and ardent" representation (RPC Preamble and Scope [2], [8]-[9]) does not excuse such behavior.

insufficient for that purpose.

Finally, as noted in Respondent's Motion to Strike, the CBBB Privacy Policy applies on its terms only to "personal information" including name, contact information, and financial/credit history information. Moreover, it implicates none of the considerations outlined in RAP 13.4(b). As such, even if it were considered, it is irrelevant for purposes of this review. As it was not offered at the trial court, and as Appellant fails to address how it may be considered despite the provisions of RAP 9.11 and RAP 13.4(c)(9), it should be struck.

IV. CONCLUSION

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

RESPECTFULLY SUBMITTED this 13th 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 13th day of August, 2014, I caused a true and correct copy of the foregoing document, "Mark Von der Burg's Reply in Support of Motion to Strike," 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
Alexander S. Kleinberg Chad E. Arceneaux EISENHOWER CARLSON, PLLC 1201 Pacific Avenue, Suite 1200 Tacoma, WA 98402 Email: AKleinberg@Eisenhowerlaw.com Carceneaux@Eisenhowerlaw.com *Attorneys for Respondent First-Citizens Bank & Trust Company*	SENT VIA: ☐ Fax ☐ ABC Legal Services ☐ Express Mail ☑ Regular U.S. Mail ☑ E-mail

DATED this 13th day of August, 2014, at Seattle, Washington.

Dena S. Levitin, Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Levitin, Dena
Subject: RE: LANE, et al. v. VON der BURG, et al. - WA Supreme Court Case No. 90458-8

Received 8-13-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Levitin, Dena [mailto:DLevitin@williamskastner.com]
Sent: Wednesday, August 13, 2014 4:18 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Abell, Hunter; Brown, Daniel; Bulis, Diane
Subject: LANE, et al. v. VON der BURG, et al. - WA Supreme Court Case No. 90458-8

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. 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,

Dena S. Levitin
Legal Assistant to Randy J. Aliment, Shawn B. Rediger and Hunter M. Abell
Williams Kastner
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Main: 206.628.6600
Direct: 206.233.2996
Fax: 206.628.6611
dlevitin@williamskastner.com
www.williamskastner.com

WILLIAMS KASTNER™