NO. 90458-8

SUPREME COURT OF THE STATE OF WASHINGTON

JILL E. LANE, *et al.*, Appellant,

v.

MARK VON DER BURG *et al.*, Respondent

REPLY TO ANSWER AND RESPONSE TO MOTION TO STRIKE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I
INTRODUCTION

Before the Court is a Petition for Review seeking reversal of the affirmation of the Trial Court's finding that Appellant violated Civil Rule (CR) 11 – nothing more. Under CR 11 - and beneath all that has been pled and briefed in this matter - we are instructed to look at the Complaint, signed by Appellant's attorney, and determine if therein, there was a basis in fact and law to support the claim made. Here, it has never been disputed that:

A. As a basis in fact contained in the Complaint, Appellant had delivered to them - and authenticated by a prosecuting authority - an e-mail exchange between themselves and Mr. von der Burg whereby he admitted that he;

(i) Secretly recorded a conversation between himself,

(ii) using his I-phone (an electronic device), and;

(iii) did so without obtaining Appellant's, or anyone else present, consent, and;

B. As a basis in law the Complaint provides that the Legislature made a part of the Revised Code of Washington (RCW), *i.e.*, the law, Title 9 –

Crimes and Punishment, and Chapter 9.73 – Privacy, Violating Right Of, which states clearly if that such a recording was made, a persons privacy would have been violated and that the person/entity that did so, shall be subject to a legal action for damages. (*See* RCW 9.73.030/060)

The RCW did, also, provide for it to be subject to interpretation as a matter of law (a) regarding what was considered a private conversation, and; (b) with exceptions, namely, but not limited to, whether the recording documented an otherwise particular criminal act.

Appellant, protected by, and directed to, and following the Legislature's/RCW's manifest commandment that directs to all Court's that such a Complaint as Appellant's shall subject the Respondent to the legal action brought by Appellant, has, nevertheless - be it as a matter of discretion, *de novo review*, logic, or merely common sense - been subjected to the manifestly untenable position, finding, and affirmation by Respondent, the Trial Court, and the Court of Appeals that what the Legislature states shall be done is instead, *frivolous*, and sanctionable.

The mechanism by which this was done and affirmed by the Court of Appeals is:

1. In direct conflict with the law set forth by this Court in *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210 (1992), affirming *Bryant v. Joseph Tree, Inc.*, 57 Wn. App. 107 (1990), and;

2. Raised a significant question of law, *i.e.*, whether the word *shall* as contained in the RCW may be re-defined by a trial court to mean *frivolous*, thereby eviscerating the RCW statute(s) embodying the Constitutional right to Privacy in the RCW and violating separation of powers, and;

3. Acted against a matter of public interest by wrongly applying CR 11 chilling the pursuit of factual and legal theories whereby wrongs against any person within the jurisdiction of the RCW/the State of Washington would go uncompensated and individuals seeking the protection of, or compensation for the violation of, their rights as otherwise directed to be pursued by the Legislature, (*See Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219 (1992) and;

4. By Respondents violation of the Rules of Professional Conduct (RPC) 3.3 where upon moving for CR 11 sanctions, they failed to disclose the material fact that Respondent/Coldwell Banker Bain Bellevue (CBBB) pronounced and published a Privacy Policy stating that itself considered and would want to have known to the Appellant to consider the personal sharing of information in the conversation that took place to be private and that any law regarding privacy would be fully adhered to, *e.g.*, that before the conversation was recorded, Mr. von der Burg would need to obtain the consent of any/all those present. (*See* RCW 9.73.030/060)

It is respectfully submitted that this exposed in Appellants Petition for Review and provides a sound basis for granting review. Respondents, however, have submitted an answer(s) which (i) fails to refute Appellant's Petition for Review and (ii) raises new issues not contained therein, and; (iii) has filed a motion to strike. Accordingly, and respectfully, Appellants Reply and Response, respectively, follows:

II
IDENTITY OF PARTY REPLYING TO ANSWER AND RESPONDING TO MOTION TO STRIKE

The Replying and Responding Party, respectively, to Respondent's Answer and Motion to Strike is Appellant, Jill E. Lane, and her Attorney, Andrew L. Magee.

III
ISSUES INTRODUCED BY RESPONDENT

Appellant's Petition confines itself to the facts surrounding this matter's Complaint and those alleged therein as only relevant to whether CR 11 had been violated. (Petition, pp. 2-7) Respondent, however, has made an issue of additional facts that upon analysis further expose and solidify the manifestly untenable reasoning of the affirmation of the Court of Appeals of the Trial Court; Namely, but not limited to, and while conceding nothing else argued in any Answer or Motion:

1. Respondent disputes, and would seem to be seeking either remand or relitigation of the Court of Appeals finding of fact that Mr. von der Burg admitted to making the recording in question without Appellant's knowledge or consent. (Respondent 1, Answer, p.1)[1] In doing so, Respondent raises three new issues;

(a) Is this dispute timely? – NO, *i.e.*, if Respondent wanted to dispute this, it could have filed a motion to reconsider with the Court of Appeals and did not, and;

(b) Do facts alleged in a Complaint have to be admitted to before a complaint is filed to not be a CR 11 violation? – NO, and;

(c) Respondent proceeds to argue thereby and concede, contrary to their position, that their arguing for and being granted Fifth Amendment privileges was an acknowledgment that there was a reasonable cause to apprehend danger, *i.e.*, there was a basis in law and fact to be prosecuted either criminally or civilly, from Mr. von der Burg answering questions about making the recording. (Respondent 1, Answer, p.2)

As to (a), the Rules of Appellate Procedure (RAP) 12.4 – Motions for Reconsideration of Decision Terminating Review, states, "Only One Motion Permitted. Each party may file only one motion for

[1] Inasmuch as there is an Answer from each Respondent, it is respectfully submitted and requested that the Answer from Respondent Mark von der Burg be referred to as Respondent 1, and Respondent First Citizens Bank & Trust Company's Answer as Respondent 2.

reconsideration. . . . " (RAP 12.4(h) Respondent did not file a motion to reconsider, and it could have. Appellant does not dispute the Court of Appeals finding of fact on that matter, but has always argued that this was the case and that this demonstrated compliance with CR 11.

As to (b), CR 11 states that to be in compliance with the rule "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 [a complaint be] well grounded in fact;" (CR 11(a)) In this matter, and as the Court of Appeals states as fact, that what the Complaint in this matter alleges as fact was in fact that case, confirming that Appellant's Complaint was/is well grounded in fact. (Court of Appeals Op., p.2) And, under those as acknowledged by all - including the Court of Appeals - well grounded facts, there was a basis in law, under the RCW, as stated in the Complaint, (*e.g.*, shall be subject to legal action/RCW 9.73.030/060) to pursue the underlying legal action. The Court of Appeals, furthermore, acknowledges specifically that:

> It appears undisputed that the court granted the request [to invoke Fifth Amendment privileges] based on evidence that von der Burg had admitted to making the recording without Lane's knowledge or consent. The Court appeared to acknowledge that the act was a possible criminal violation.
>
> (Court of Appeals Op., p.3)

Respondent does not dispute this statement of fact by the Court of Appeals, and by their words, *adopt* it as fact. (Respondent 1, Answer, p.1)

If *the act* was a possible criminal violation, and the Court of Appeals establishes - as a matter of fact – it was, then Respondent is now arguing, and the Court of Appeals has confirmed that Appellant/Appellant's attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances was, as a matter of fact, correct and that there was, therefore, a well grounded basis in fact, and that the Complaint in question was *in compliance* with CR 11; And, as well, and fully compliant with CR 11, that the Complaint was warranted by existing law, *i.e.*,

> Any person who, directly or by means of a detective agency or any other agent, violates the provisions of this chapter shall be subject to legal action for damages, . . .
>
> RCW 9.73.060 (*See* A-4, Petition for Review)

As to (c), on one hand, Respondent is re-affirming that making the recording subjected Mr. von der Burg to "'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))." (Respondent 1, Answer, p.2) Whereas, on the other hand, Respondent's argument before the Trial Court and the Court of Appeals

has been to maintain that the conversation in question was "in furtherance of their criminal endeavors;" (Respondent 2, Answer, p.1, citing CP 366)

The simple fact of the matter is that what took place on the recording was not viewed by the prosecutor that originally had communicated to them by Mr. von der Burg that he made the recording as evidence of any wrongdoing by the Appellant. To the contrary, as stated in Appellant's Petition for Review, the prosecuting authority stated that the recording, "will establish that VDB [Mark von der Burg] illegally tape recorded a meeting between himself and the Defendant [Appellant] on June 7, 2010." (Petition for Review, p.13, citing CP 203) The prosecuting authority in question, furthermore, stated, "The [city] is not intending on using the recording . . ." (Petition for Review, p.13, citing CP 229)

While Respondent before the Trial Court and Court of Appeals, and now, before this Court argues that what took place in the recording was some sort of unlawful activity of Ms. Lane, that is not what the prosecuting authority who first came into possession of knowledge of, and the content of, the recording concluded, and, Appellant/Ms. Lane has never been investigated, probable cause found, nor prosecuted for anything regarding the tape. The Trial Court, furthermore, if it did, as indicated by Respondent, did find that Appellants' activity on the recording was unlawful, it has, to the best of Appellant's knowledge,

never been acted on, nor reported by the Trial Court to any authority as such, but merely used as what we now know to be a manifestly untenable position to find Appellant in violation of CR 11.

IV
RESPONSE TO MOTION TO STRIKE

1. Whereas Respondent states that Appellants Petition for Review's citation to CP 333 (page 5 of Respondent's Motion for Summary Judgment, *et al.,*) that Mr. von der Burg did not stipulate to secretly recording the conversation in question, in fact, CP 333 states, concedes and argues that, "When considering the motion, the court must accept the facts alleged in the complaint as true." (CP 333) (emphasis added) The facts alleged in the complaint state:

> Ms. Lane asked for a private meeting between herself, her real estate agent, Mr. McClung, and Mr. von der Burg, and Ms. Dawn Gadwa representing First Citizens Bank on June 7, 2010.
>
> Unbeknownst to Ms. Lane and Mr. McClung, upon attending the private meeting at the offices of Mr. von der Burg/Coldwell Banker Real Estate LLC – along with Ms. Gadwa representing First Citizens Bank Washington/First Citizens BancShares – at Coldwell Banker Bain of Bellevue, Washington, the private conversation was unlawfully recorded using an electronic device
>
> CP 326

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. Both CP 326, and CP 333 are part of the record. Accordingly, they should not be stricken.

2. Respondent seeks to have the Court strike what under RPC 3.3 – Candor Toward the Tribunal - mandates that it must disclose to this Court (and all Courts before,) and it is respectfully submitted that it not be stricken, but be considered under RPC 3.3 and as such, is dispositive in this matter because Respondent itself explicitly acknowledges and attaches privacy to the recorded conversation in question which it has argued from the beginning could not be the case; and that RCW 9.73.030/060 applied to, and was to be fully adhered to by Respondent.

RPC 3.3 – Duration of Obligation, Comment [13] states:

> A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

RPC 3.3, Comment 13

RPC 3.3's mandate and time limit are that Respondent must disclose the nature and content, *i.e.*, the material fact(s) of the existence and acknowledgments of their Privacy Policy upon becoming the moving party of the CR 11 motion that argues that, and as the Court of Appeals

found, that, "No reasonable person could conclude that this conversation was private." (Court of Appeals Op., p.10) That is because Respondent's Privacy Policy states as a matter of material fact that itself, and any/all who come to Respondent to share information may expect that information to be treated as private and that the laws, namely, but not limited to, RCW 9.73.030/060 would be fully adhered to by Respondent. Respondent has always argued that RCW 9.73.030/060 just could not apply, *i.e.*, that CBBB just did not consider information shared with them to be private at all, nor did the law(s) of the State of Washington apply to them. While Respondent has argued from the outset that no one could possibly consider the conversation that took place at Respondent's place of business as private, they themselves – all along – broadcast and published a Privacy Policy stating otherwise without disclosing that material fact to the Trial Court, the Court of Appeals, nor this Court.

Inasmuch as the RAP's do include rules regarding the addition to the record on appeal, it has been acknowledged that the Privacy Policy was introduced not by Respondent as RPC 3.3 requires, but by Appellant upon their motion for reconsideration before the Court of Appeals pursuant to RAP 12.4, which states:

> (d) Answer and Reply. A party should not file an answer to a motion for reconsideration or a reply to an answer unless requested by the appellate court.

RAP 12.4(d)

Here, the record will reflect, that the Court of Appeals considered Appellant's Motion to Reconsider and remained silent as to the introduction of the Privacy Policy, and did not request that an answer be filed by Respondent there upon properly becoming the record on appeal/review and/or properly before this Court as an arbiter of the RPC's.

V
CONCLUSION

The basis in fact for the underlying case in this CR 11 matter originates from the simple fact that it was acknowledged by a prosecuting attorney to Appellant that Mark von der Burg made a recording of a private meeting at his private business, on private property, in a private office without Appellant's, or anyone else present, permission, and a basis in law under the Revised Code of Washington/RCW 9.73.030/060, *i.e.*, the law, which states that if such a recording is made, the person, *etc.*, that made the recording shall be subject to legal action for damages. In response, Respondent was able to convince the Trial Court of nothing more than that Appellant's view of the law was wrong, and then to take the manifestly untenable position that because Appellants view of the law was wrong, that Appellant violated CR 11. This was affirmed by the Court of Appeals. Both the Trial Court and the Court of Appeals

affirmation contradicts the law set forth in *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210 (1992) affirmation of *Bryant v. Joseph Tree, Inc.*, 57 Wn. App. 107 (1990). Additionally, the Trial Court's position and Court of Appeals affirmation, if allowed to stand, will violate the public interest and be bad public policy by chilling pursuit of a remedy orderly prescribed by the Revised Code of Washington, *i.e.*, the Trial Court and Court of Appeals will eviscerate a statute without authority to do so, and the rights and remedies assured to all residents and citizens of the State of Washington there under. It reduces the statutory mandate of the meaning of *shall* to - if the act to be done thereby – a frivolity under CR 11 and result in the person/lawyer following the law being punished for what the law says the *shall* do!

Respondent, furthermore, has – all along – argued that the central material fact is whether the conversation that was recorded without the consent of Appellant, or any/all others present was private and that it was not. Yet – all along – Respondent has known, and put at the forefront of corporate policy that it wanted the entire world to know that it considered all information shared with it by persons to be considered private by publishing a Privacy Policy stating so. Respondent has never attempted to correct the false statement of material fact that the conversation could not be considered private previously made throughout these proceedings, and

now seeks to *strike*, rather than correct the non-disclosure of the Privacy Policy in violation of RPC 3.3. It is respectfully submitted that RPC 3.3 does apply to the non-disclosure of the Privacy Policy and its acknowledgments and that the introduction of the Privacy Policy under RPC 3.3 by Appellant is both timely and proper for this Court to consider both as a matter for review and by itself to the Respondent/Respondent's counsel.

For the reasons stated in Appellant's Petition for Discretionary Review, and for the failure of Respondent's Answers to refute the Petition, and for this Reply and Response's eclipsing the argument's presented in Respondent's Answers and Motion to Strike, it is respectfully requested that Discretionary Review be granted.

Submitted this 31st day of July, 2014

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CERTIFICATE OF SERVICE

I certify that on the 31st day of July, 2014, I caused a true and correct copy of this Reply to Answer and Response to Motion to Strike to be served electronically and by U.S. Mail on the following:

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To the Clerk of the Court:

Please find attached Appellants Reply to Answer and Response to Motion to Strike and Certificate of Service to be filed with the Court today, July 31, 2014 under the following information:

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