69928-8

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Court of Appeals Case No. 69928-8

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

Jill E. Lane, Plaintiff/Appellant
v.
Mark von der Burg/Coldwell Banker Bain Bellevue/Coldwell Banker Real Estate LLC,
and;
Dawn Gadwa/First Citizens Bank Washington/First Citizens Bancshares, Defendants/Respondents

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REPLY BRIEF OF APPELLANT

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I
INTRODUCTION

Pursuant to RAP 10.3(c), it is respectfully requested that the Introduction contained in the Brief of Appellant be incorporated by reference

II
ASSIGNMENTS OF ERROR

Pursuant to RAP 10.3(c), it is respectfully requested that the Assignments of Error contained in the Brief of Appellant be incorporated by reference

III
STATEMENT OF CASE

Pursuant to RAP 10.3(c), it is respectfully requested that the Statement of Case contained in the Brief of Appellant be incorporated by reference

IV
SUMMARY OF ARGUMENT

Pursuant to RAP 10.3(c), it is respectfully requested that the Summary of Argument contained in the Brief of Appellant be incorporated by reference

V
(REPLY) ARGUMENT

Introduction

The measure of whether a CR 11 violation has occurred is to first determine whether the Complaint contains a basis in law and fact to bring the lawsuit, and if not, then was a reasonable inquiry made before filing the lawsuit.

The measure of whether summary judgment should be granted is when there are no disputes as to material facts and that as a matter of law, one party would prevail.

These are separate and distinct standards and a party prevailing on summary judgment does not prevail on a CR 11 motion.

The Brief of Respondent devotes its factual basis in large part to those surrounding a criminal case involving Ms. Lane instead of those answering the question of whether CR 11 had been violated in this civil case.

Respondent goes so far to introduce and make in their statement of their case blatant factual misrepresentations.[1]

Respondent's legal arguments misrepresent the law referred to, and when routinely examined, support Ms. Lane's arguments that there was no CR 11 violation and that her due process rights were violated.

Respondent, furthermore, fails to refute Ms. Lane's correct arguments on appeal:

Analysis of Respondents (Failed) Argument

1. Review of Civil Rule 11 and RCW 4.84.185.

In response to Ms. Lane arguing that there was a basis in law and fact already admitted to by Respondent thereby ending discussion of a CR 11 violation, the Response merely restates the obvious about the standard of CR 11 (Response, pp. 16-17) to include that if there is any rational argument on the law and

[1] Respondent states in both their Introduction and Statement of the Case, (Statement of the Case, pursuant to RAP 10.3 is to be, "A fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement,") that, "After FCB evicted Ms. Lane from the Mansion by way of an unlawful detainer action . . . " (Response, p.1, 6) This is false - in fact, Ms. Lane was never evicted, nor did Respondent ever obtain a *writ* of restitution. (Appendix A, filed in *response* to Respondent's un-referenced to the record claim of eviction.)

the facts that then there could not be a CR 11 violation. (Response p. 17) In this case, it was rational to argue that the admitted to recording made without consent is a rational basis to bring a lawsuit when the Revised Code of Washington says that under those facts a person *shall* be subject to a civil action.

2. Review of the Washington Privacy Act.

Respondent argues that the definition of privacy under the facts of this case could only produce the conclusion that the conversation in question was, in their view of the law, not private and cite authority in support of that proposal. As was argued at the time before the trial court by Ms. Lane, however, the law also states:

> In considering that purpose, we note the phrase 'private conversation' is all-embracing and is broad enough to include a confidential or privileged conversation . . . To construe the words 'private conversation' narrowly and grudgingly would unnecessarily fail to give full effect to the legislative purpose to protect the freedom of people to hold conversations intended only for the ears of the participants.

State v. Grant, 9 Wn. App. 260, 265, 511 P.2d 1013 (1973)

All that Respondent points out is that the trial court's view of the law as to what was private is different than Ms. Lane's and that there was a basis in law and fact to argue that the conversation was private.

Respondent argues that under *State v. Slemmer,* 48 Wn. App. 48, 53, 738 P.2d 281 (1997) that there is no expectation of privacy when one who attended a meeting could reveal what transpired to others. In interpreting RCW 9.73.030, that is not what *Slemmer* says at all - to the contrary - *Slemmer* specifically points out that an expectation of privacy is preserved unless:

(a) The content/summary of the meeting would be available to anyone within or outside the entities involved (*e.g.,* Ms. Lane, *et al.,*/Respondent, and;

(b) That all of the participants (Ms. Lane/Respondent) knew, and were informed of that (and, under RCW 9.73, would have had to have conceded that - along with the fact that the recording was being made with Ms. Lane's consent made - on

the recording). *See State v. Slemmer,* 48 Wn. App. 48 at 52-3, 738 P.2d 281 (1987)

Ms. Lane was never told that the content of the meeting would be discussed with anyone *outside* of the parties, and she never knew that would be the case, nor did she ever give her consent to doing so, much less to the recording at all, on the recording as required by law.

3. No Reasonable Person Could Possibly Conclude The Conversation At Issue Was Private.

Although Respondent cites *State v. Slemmer,* 48 Wn. App. 48, 53, 738 P.2d 281 (1987) for the proposition that there is no expectation of privacy when you are at a meeting where "one who attended could reveal what transpired at the meeting to others." (Response, p.19); What Respondent does not point out, however, is that what *Slemmer,* in interpreting RCW 9.73.030 (*e.g., supra*) does not do so and say that to claim an expectation of privacy under the circumstances does not mean you have violated CR 11.

In other words, it is Ms. Lane's reasonable view of the law, (and by her affidavit submitted in response to the CR 11 motion) that because she was not made aware of the recording being made, nor that its contents could be discussed or disseminated outside of those present, that she had a reasonable expectation of privacy and that that point, at the very least, is made rationally. That the trial court on summary judgment viewed the law differently is not the equivalent of saying that Ms. Lane's argument was not arguable, *i.e.,* it had a basis in law and fact, and for having lost on summary judgment is by no means sufficient to find a violation of CR 11.

In making the argument that the Complaint, upon being served, could in no-way make sense, Respondent overlooks what the Supreme Court in *Bryant* points out is Respondent's remedy, namely:

> We affirm the Court of Appeals reversal of the CR 11 sanctions against the respondents. If the respondents violated a court rule, they violated CR 12(e), not CR 11. CR 12(e) requires attorneys to comply with a court's order for a more definite statement. Judge Huggins imposed the proper sanction under

this rule when she dismissed the amended complaint without prejudice. *See* CR 12(e). CR 11 sanctions are not appropriate where other court rules more properly apply.

Bryant v. Joseph Tree, Inc., 119 Wn.2d at 223 (emphasis added)

If Ms. Lane's factual complaint of privacy was so vague and ambiguous, (*i.e.,* "impossible" to comprehend) then Respondent's appropriate remedy upon receiving the Complaint is to move pursuant to CR 12(e) for a more definite statement.

4. Ms. Lane's Privacy Act Claims Are Barred By Statute Because Ms. Lane Tried to Extort FCB During The Conversation At Issue.

Respondent states that "Ms. Lane's illegal conduct during the conversation at issue . . . serves as a complete bar to Ms. Lane's Privacy Act claims." (Response, p. 21)

At absolutely no time whatsoever, before-during-after the filing of this lawsuit has Ms. Lane been subjected to any known investigation regarding making any threats of extortion or other unlawful requests arising from the conversation in question.

When Ms. Lane brought her lawsuit, she had not been investigated for, arrested for, nor prosecuted and found guilty of extortion or making unlawful requests or demands, and so there would be no bar to her bringing the lawsuit. At no time whatsoever had what took place and what was said at the meeting in question ever been proferred as part of, or evidence of any criminal activity.

If at a later time, the trial court has a different point of view of the law than Ms. Lane regarding a statutory exception to RCW 9.73 that resulted in summary judgment being granted, that is not a basis for CR 11 sanctions. (*See Bryant v. Joseph Tree, Inc.,* 57 Wn. App. 107, 115 (1990), wherein it states, "[T]he mere fact that a court ultimately determines that a lawyer's view of the law is 'wrong', is insufficient to warrant sanctions under any aspect of Rule 11." (internal citations omitted)) *See* Opening Brief, p. 13

Respondents argument that under the facts and applicable statutory law that there is a pre-existing defense/bar by-way-of

a statutory exception necessarily first acknowledges the basis in law and fact for applicability of the statute which provides for the basis in law of bringing this suit. Respondent acknowledges, therefore, that there was a rational basis in law and fact to file the lawsuit whereby the suit was filed before the trial court ruled on the statutory exception.

5. Ms. Lane's Due Process Rights Have Not Been Violated.

Respondent, without citing any language thereof, cites *Buechler v. Wenatchee Valley College,* 298 P.3d 110, 119, 291 Ed. Law Rep. 468 (2013) for the proposition of what process was due to Ms. Lane when she was alleged to have violated CR 11.

In *Buechler* - a case wherein a nursing student admitted to a violation of school policy which resulted in her expulsion without being given a hearing/oral argument – the Supreme Court, (citing *Goss v. Lopez,* 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975)) states:

> *Goss* states that it is only if 'he [Ms. Lane] denies the [charges]' that the student is due 'an explanation of the evidence the authorities have and an opportunity to present his side of the story.
>
> *Buechler v. Wenatchee Valley College,* 174 Wn. App. 141, 157, 298 P.3d 110, 118, 291 Ed. Law Rep. 468 (2013)

Here, Ms. Lane was alleged to have violated CR 11 by motion of Respondent made without Respondent requesting oral argument as required by court rule (KCLR 7.) Ms. Lane denied the allegation and objected/asked/moved the trial court for oral argument so that the matter was in compliance with the court rule embodying her due process right to a hearing.

In other words, *Buechler/Goss* stands for the proposition that if one admits to charges against them, they are not due a hearing, and if one denies charges against them, they are due a hearing, *i.e.,* according to Respondent's argument, Ms. Lane is due a hearing.

Respondent also refers to *Watson v. Maier,* 64 Wn. App. 889, 827 P.2d 311 (1992) for the proposition that there is no

due process right to a full evidentiary hearing (Brief of Respondent, p. 5[2]) which *Watson* describes as one where the attorney in question was, (after three-hearings had been held already,) demanding that at his hearings he should have been allowed to make discovery, present testimony and cross-examine witnesses, and even suggests that he had a right to a jury trial. *See Watson* at 899

When correctly read, however, what *Watson* actually says is:

> While it is fundamental that due process requires notice and an opportunity to be heard, this does not necessarily mean that an attorney is entitled to a full evidentiary hearing on CR 11 sanctions.
>
> *Watson v. Maier,* 64 Wn. App. at 900 (emphasis added)

In fact, in *Watson,* the Court points out that "Whether and to what extent an additional hearing is required will vary depending upon the nature of the case." *Watson,* 64 Wn. App. at 900 (emphasis added) In other words, in *Watson,* the attorney subject to the CR 11 motion was given at least one-

[2] Refers to Brief of Respondent Mark von der Burg

hearing - fundamental to due process – to plead his case and present evidence. In fact, (according to *Watson,*) "He [attorney] had not one, not two, but three opportunities to be heard." *Id.* at 900 The attorney in question in *Watson* was given three hearings to do what Ms. Lane was entitled to by court rule to do once, and was denied.

When *Watson* is returned to its feet, it stands for the proposition that at the very least Ms. Lane was/is entitled to a hearing on CR 11 sanctions.

While Respondent cites/notes *Bryant v. Joseph Tree, Inc.,* 119 Wn.2d 210 (1992) and acknowledges that "CR 11 procedures 'obviously must comport with due process requirements.'" (Response, p. 23), what Respondent fails to reveal, however, is that the Supreme Court in *Bryant* points out just what due process is due to a person facing a CR 11 violation allegation, stating, "At oral argument, Bolin had the opportunity to be heard on this issue. Bolin's due process rights were therefore not violated." *Bryant,* 119 Wn.2d at 224

(emphasis added) The Supreme Court states plainly that oral argument for a CR 11 motion is the process that is due to Ms. Lane and that it was denied in violation of her due process rights.

Respondent makes the blanket assertion that in *Rivers v. Wash. State Conf. of Mason Contractors,* 145 Wn.2d 674, 697, 41 P.3d 1175 (2002) the Supreme Court "noted that oral argument is not prescribed for motions for sanctions . . . " (Response, p. 23)

That is not what *Rivers* says at all. What *Rivers* says is that, "oral argument is not prescribed for motions under CR 37 for sanctions for discovery abuse or under KCLR 4 for violation of a court's scheduling order." *Rivers,* 145 Wn. 2d at 697

This matter concerns a motion for violation of CR 11, not CR 37, and KCLR 7, not KCLR 4.

A CR 11 violation motion is a dispositive motion, and under KCLR 7, dispositive motions are prescribed to be heard

by-way-of oral argument, *i.e.,* by rule, the due process due in a CR 11 motion is oral argument. The trial court, therefore, committed legal error in not granting oral argument when so moved by Ms. Lane.

VI
CONCLUSION

Ms. Lane filed a lawsuit against Respondent because:

A. Ms. Lane had been given documented facts admitted to by Respondent that a recording of a meeting between her (and her representative) and Respondent had been made without her consent in violation of the law, and;

B. RCW 9.73.030/9.73.060 provide that under those facts, as a matter of law, Respondent shall be subject to a civil action.

C. The fact of the matter is that a similarly situated attorney(s) documented that Respondent had violated RCW 9.73 (and would be subject to a civil suit,) a sitting judge agreed that there was a rational question as to whether Respondent violated 9.73 and could incriminate himself if he answered questions about

making the recording, and counsel for Respondent acknowledged the same when he sought (and was granted) Vth Amendment protections from discussing/answering questions regarding the making of the recording without Ms. Lane's consent.

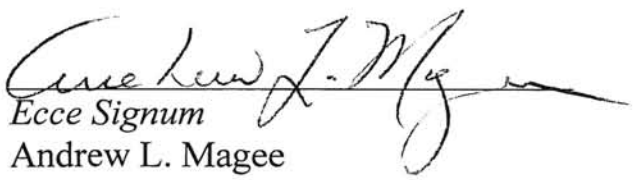
D. On summary judgment, the trial court viewed the law differently than Ms. Lane, and found in favor of Respondent.

E. The trial court, however, committed legal error when it found that Ms. Lane had violated CR 11 because it is manifestly untenable to say that there was not a basis in law or fact (or that a reasonable inquiry was not made) to bring this lawsuit when the facts as admitted to by Respondent provide a rational basis to invoke RCW 9.73's provision that Respondent shall be subject to a civil action.

Ms. Lane, therefore, respectfully requests, and so moves, that her appeal be granted, and the finding of the trial court be reversed and that she be awarded all costs/fees allowable by law.

DATED this 29th day of July, 2013

Respectfully Submitted



Ecce Signum
Andrew L. Magee
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APPENDIX A

FILED

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KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

FIRST-CITIZENS BANK & TRUST COMPANY, a North Carolina banking association, Plaintiff, vs. JILL E. LANE, in her separate capacity, and the marital community comprised of JILL E. LANE and "JOHN DOE" LANE, wife and husband; PRIORITY ROSE CHILDREN'S OUTREACH; and JOHN DOES 1-15, OCCUPANTS OF 435 8TH AVENUE WEST, KIRKLAND, WASHINGTON 98033, Defendants.	NO. 10-2-21078-4SEA FINAL JUDGMENT AND ORDER

JUDGMENT SUMMARY

1.	Judgment Creditor:	First-Citizens Bank & Trust Company
2.	Judgment Debtors:	Jill E. Lane, in her separate capacity, and the marital community comprised of Jill E. Lane and "John Doe" Lane, wife and husband; and Priority Rose Children's Outreach
3.	Principal Judgment Amount:	$0
4.	Statutory Attorney's Fees:	$200.00
5.	Costs:	$239.00
6.	Other Recovery Amounts:	$100.00

FINAL JUDGMENT AND ORDER - 1

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ORIGINAL

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7. Total Judgment Amount: $550.00

8. Post-Judgment Interest Rate: 12.00% Per Annum

9. Attorney for Judgment Creditor: Alexander S. Kleinberg
Eisenhower & Carlson, PLLC
1201 Pacific Avenue, Suite 1200
Tacoma, WA 98402

ORDER

THIS MATTER having come on for hearing on June 24, 2010 before this Court, upon an Order to Show Cause obtained by Plaintiff requiring Defendants to appear and show cause, if any they have, why a Writ of Restitution should not be issued restoring to Plaintiff the property described in the Complaint herein as follows: 435 8th Avenue West, Kirkland, Washington 98033 (the "**Property**"). The Plaintiff, First-Citizens Bank & Trust Company appearing by and through its attorneys, Eisenhower & Carlson, PLLC and Alexander S. Kleinberg, and Defendants not appearing; and the Court having examined the records and pleadings on file herein, which include but are not limited to Plaintiff's verified Complaint for Unlawful Detainer and the exhibits attached thereto, and having found that Defendants have been properly served with Plaintiff's Complaint for Unlawful Detainer and show cause pleadings, and having heard the argument of Plaintiff's counsel, and the Court finding that Plaintiff has proven it owns the Property at issue, that none of the Defendants are tenants or licensees of the Property, that none of the Defendants have any ownership or other legally or equitably cognizable interest in the Property, nor permission to occupy or use any portion thereof, and further finding that the Defendants are squatters in the Property, as they have settled in the Property without any legal claim of license, and that Plaintiff has the right to be restored to possession of the Property and that there is no substantial issue of material fact as to the right of Plaintiff to be granted such

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relief as prayed for in its Complaint for Unlawful Detainer, and the Court having made its findings of fact and conclusions of law, now therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that the Defendants have no legally or equitably cognizable interest in the Property, nor the right to be in possession thereof, and possession of the Property shall hereby be restored to Plaintiff, and a Writ of Restitution shall be issued forthwith to the Sheriff of King County, Washington, directing the Sheriff to deliver possession of said Property to Plaintiff. It is further

ORDERED, ADJUDGED AND DECREED that final judgment is hereby entered in favor of Plaintiff and against Defendants on Plaintiff's claims for unlawful detainer. Plaintiff shall have a final judgment against Defendants Jill E. Lane and the Priority Rose Children's Outreach for: (a) Plaintiff's costs and disbursements in the amount of $250.00 (which consist of the filing fee of $157.00 and service and posting fees fee of $93.00); (b) Statutory attorney's fees in the amount of $200.00; and (c) other recovery amounts of $100.00 (which consist of the Clerk's fee of $20.00 to issue the Writ of Restitution and the Sheriff's fee of $80.00 to execute the Writ of Restitution). Interest shall accrue on the total judgment amount of $550.00 from this date forward at the rate of twelve percent (12.00%) per annum.

DONE IN OPEN COURT this 24th day of June, 2010.

COURT COMMISSIONER

Presented by:

EISENHOWER & CARLSON, PLLC

By: _____
Alexander S. Kleinberg, WSBA # 34449
Attorneys for Plaintiff First-Citizens Bank & Trust Company 6/24/10

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CERTIFICATE OF SERVICE

I certify that on the 29th day of July, 2013, I caused a true and correct copy of this Reply Brief of Appellant to be served electronically and by U.S. Mail on the following:

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