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Washington State Supreme Court

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No. 90458-8

SUPREME COURT
OF THE STATE OF WASHINGTON

JILL E. LANE, *et al.*,

Appellants,

v.

MARK VON DER BURG, COLDWELL BANKER BAIN,
FIRST-CITIZENS BANK & TRUST COMPANY, DAWN
GADWA, AND FIRST-CITIZENS BANK
WASHINGTON/FIRST-CITIZENS BANCSHARES,

Respondents.

FIRST-CITIZENS BANK & TRUST COMPANY'S ANSWER
TO PETITION FOR REVIEW

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ORIGINAL

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I. RESTATEMENT OF THE ISSUES

1. Whether the Court should deny Appellants' petition for review when the Appellants have failed to articulate how review could properly be granted under the Rules of Appellate Procedure. Answer:

Yes.

2. Whether substantial evidence supports the trial court's findings of fact that led to its award of sanctions against Jill Lane and her attorney. Answer: Yes.

3. Whether the sanctions awards and awards of attorneys' fees that the trial court and the Court of Appeals imposed against Ms. Lane and her attorney should be upheld. Answer: Yes.

II. RESTATEMENT OF THE CASE

This case arises from invasion of privacy claims that Appellant Jill E. Lane brought against Respondent First-Citizens Bank & Trust Company ("FCB"), FCB employee Dawn Gadwa, and FCB's realtors, Mark Von der Burg and Colwell Banker Bain, regarding Ms. Lane's unlawful occupancy of a multi-million dollar Kirkland mansion that was previously foreclosed upon and owned by FCB (the "**Mansion**"). CP 366. This case also concerns Ms. Lane's attempts to defraud FCB and various governmental entities in order to obtain ownership of said property. CP 366; *see also Police Squelch Squatters' Brazen Move Into Mansion*,

Danny Westneat, The Seattle Times, June 15, 2010, available at http://seattletimes.nwsourc.com/html/dannywestneat/2012126896_danny16.html (last visited August 21, 2012).

After FCB evicted Ms. Lane from the Mansion by way of an unlawful detainer action, Ms. Lane was convicted of criminal trespass in Kirkland Municipal Court for her unlawful occupancy of this property. CP 368, 532; *see also Bellevue Squatter Found Guilty of Trespassing in Kirkland Luxury Home, Kirkland Reporter.com, available at <http://www.kirklandreporter.com/news/159942515.html> (last visited August 21, 2012).* CP 368, 532.

However, prior to her eviction from the Mansion and her conviction for criminal trespass, and shortly after she unlawfully took possession of the Mansion, Ms. Lane and her associate, James McClung, met with FCB employee Dawn Gadwa, the realtor that FCB employed to sell the Mansion, Mark Von der Burg, and a fifth person at Mr. Von der Burg's office in Bellevue. CP 369. This meeting began on June 7, 2010 at 4:00 p.m. CP 369-70.

The day before this meeting, Mr. Von der Burg became aware that unidentified individuals were living in the Mansion despite the fact that it was still listed for sale and no purchase and sale agreement had been signed. CP 368. The Kirkland Police Department was then summoned to

the Mansion, where police officer C. Mann observed Ms. Lane and two other individuals in front of the garage. CP 368. Officer Mann testified in a probable cause affidavit for Ms. Lane's arrest as follows:

I arrived at the residence with other officers and contacted Jill E. Lane (DOB 10/09/1979) and two other males in the front garage. Jill identified herself as the new home owner, showed me legal documentation to prove this, and stated that she had worked with her broker, Jim McClung to purchase the house four days earlier, when she had picked up the keys. Upon looking through her documentation, I saw her name on the forms, the name of a Living Trust, which she stated she was a beneficiary of, and the address of the home.

CP 369.

Mr. Von der Burg then arrived at the Mansion and spoke with Ms. Lane as well as Officer Mann. CP 369. During this conversation and despite Mr. Von der Burg's protestations to the contrary, Ms. Lane again asserted that she owned the Mansion. CP 369.

The following day, Ms. Lane contacted Mr. Von der Burg to schedule a meeting to discuss Ms. Lane's "ownership" of the Mansion. CP 369. The meeting occurred later the same day at Mr. Von der Burg's Coldwell Banker Bain office in Bellevue. CP 369.

The meeting consisted almost exclusively of Mr. McClung and Ms. Lane explaining to FCB employee Dawn Gadwa and Mr. Von der Burg their justification for how Ms. Lane had allegedly secured an

ownership interest and/or right of occupancy in the Mansion through a form of “squatter’s rights” theory and why she could remain there. CP 369. Although difficult to understand, this theory appeared to be predicated on the idea that FCB enjoyed only a weak form of ownership of the Mansion and that a process called “Banker’s Acceptance” was being used throughout the west coast to occupy properties and coerce or force transactions under similar circumstances. CP 370. This theory did not comport with any legal process that FCB or its realtor was aware of, but Ms. Lane argued that it was gaining increased acceptance and being utilized successfully in situations similar to Ms. Lane’s. CP 370.

Approximately two years later, Ms. Lane apparently learned as a result of her criminal trespass case that the aforesaid meeting had been recorded, allegedly without her knowledge or consent. *See* CP 370. As a result, on May 31, 2012 Ms. Lane and Mr. McClung filed this lawsuit for invasion of privacy under RCW 9.73 based on the recording of the above-described conversation. CP 370. Ms. Lane and Mr. McClung asserted in their complaint that FCB, Dawn Gadwa, Mark Von der Burg, and Coldwell Banker Bain violated the Washington Privacy Act when Mr. Von der Burg recorded the subject conversation, which conversation was allegedly recorded without Ms. Lane’s or Mr. McClung’s consent. CP 3. A transcript or meeting notes of this conversation can be found at CP 474-

478.

FCB subsequently served Ms. Lane and Mr. McClung with requests for production, interrogatories, and requests for admission, which they failed to properly respond to. CP 533. Due to their willful and intentional failure to timely and properly respond to FCB's requests for admission, the trial court ultimately entered an order on September 13, 2012 that provides Ms. Lane and Mr. McClung were deemed to have admitted the following facts:

- Neither of the Plaintiffs [Ms. Lane and Mr. McClung] ever owned the Mansion.
- The subject matter of the conversation at issue in this lawsuit concerned Plaintiffs and their occupancy of the Mansion.
- None of the Defendants ever gave Plaintiffs permission to enter the Mansion.
- None of the Defendants ever gave Plaintiffs permission to occupy the Mansion.
- Plaintiffs have no document or documents from any of the Defendants reflecting that they had permission to enter and occupy the Mansion.
- Plaintiffs unlawfully entered the Mansion.

- Plaintiff Jill Lane was convicted of criminal trespass in Kirkland Municipal Court as a result of her entry into and occupation of the Mansion.
- Plaintiffs unlawfully remained in the Mansion.
- Plaintiffs never held a bona fide ownership interest in the Mansion.
- Plaintiffs never held a bona fide possessory interest in the Mansion, such as a license or leasehold interest.
- Plaintiffs caused fraudulent documents related to ownership interests in the Mansion to be filed with a governmental entity and/or entities.
- There were five (5) people present during the conversation referenced in Plaintiffs' Complaint, and this conversation took place between the hours of 9:00 a.m. and 6:00 p.m. in [Mansion realtor] Mark Von der Burg's Bellevue office.
- Plaintiffs expected Dawn Gadwa [of FCB] to discuss with other employees of FCB and/or First-Citizens BancShares some or all of the things that were discussed during the conversation referenced in Plaintiffs' Complaint.
- Plaintiffs did not tell or otherwise instruct any of the Defendants not to reveal the contents of the conversation

referenced in Plaintiffs' Complaint to anyone else who was not present during said conversation.

See CP 371.

On or about September 26, 2012, FCB moved for the summary judgment dismissal of Ms. Lane's Complaint, and Mr. Von der Burg filed his motion for dismissal and/or partial summary judgment regarding Ms. Lane's claims. *See* CP 366. The parties argued these motions on October 26, 2012. CP 441. On that date, the trial court granted both motions. CP 441-446. In the orders on these motions, the trial court found that the conversation at issue was not private in nature under Washington's Privacy Act, and that during the conversation at issue, Ms. Lane and Mr. McClung conveyed threats of extortion or other unlawful requests or demands. CP 443; CP 446.

On November 6, 2012, FCB filed its motion for attorneys' fees, costs, terms and sanctions pursuant to Civil Rule 11 and RCW 4.84.185, the frivolous lawsuit statute. CP 719. By way of this motion, FCB sought to recover from Ms. Lane, Mr. McClung, and their attorney, Andrew L. Magee, the \$26,075.45 in attorneys' fees and \$239.00 in costs that FCB incurred defending against Ms. Lane's claims and ultimately causing these claims to be dismissed on summary judgment. CP 719-727. Mr. Von der Burg subsequently filed his motion for sanctions on November 26, 2012.

CP 824. Ms. Lane and her attorney vigorously opposed these motions. *See* CP 862.

On November 30, 2012, the trial court entered an order regarding the motions for sanctions. CP 862. In this order, the trial court noted that Ms. Lane had produced no argument supported by admissible evidence that refuted the motions of FCB and Mr. Von der Burg. CP 862. The trial court went on to state that if there was admissible evidence that Ms. Lane was told by a judicial officer [in the Kirkland criminal trespass action] that the conversation which is the subject matter of this lawsuit was recorded in violation of the law, that could establish that Ms. Lane's position in pursuing her invasion of privacy claim, while not legally viable, was not unreasonable or frivolous. CP 862. The trial court noted that Ms. Lane had had since November 6, 2012 to provide evidence of this. CP 862. The trial court then granted Ms. Lane's request for a continuance in part and gave Ms. Lane until noon on December 11, 2012 to provide additional evidence to rebut the motions for sanctions. CP 863.

Ms. Lane filed her response to the trial court's order of November 30, 2012 on December 11, 2012. CP 864. Accompanying this response were declarations from Ms. Lane and her attorney. Mr. Magee. CP 903; CP 909.

By way of an order entered on December 13, 2012, the trial court stated it had done a preliminary review of the material submitted by Ms. Lane and that it would consider a reply from FCB and Mr. Von der Burg. CP 938. Mr. Von der Burg filed his reply on December 26, 2012, CP 939, and FCB filed its reply on December 31, 2012. CP 945.

On January 4, 2013 the trial court granted both motions for sanctions and attorney's fees and entered judgment in favor of FCB and Mr. Von der Burg against Ms. Lane and her attorney (the "**Judgment**"). CP 962. The Judgment contains the following findings of fact:

- This action was not warranted by existing case law (Ms. Lane made no argument that there was a good faith argument for extension of existing law).
- Ms. Lane did not make a reasonable inquiry into the factual or legal basis of the action.
- Ms. Lane's attorney was consistently late in filing motion papers with the trial court and opposing parties.
- Ms. Lane's attorney has not provided evidence in support of Ms. Lane's position even when given additional time to do so.
- Ms. Lane's presentation of "evidence" to the trial court supporting the assertion that there was a reasonable basis

for the claim because of statements from the lower court that the action of Ms. Lane was unlawful were based on evidence that was not even in existence prior to the filing of the complaint and a transcript of a hearing from the lower bench that was not made by a certified transcriptionist, appeared to have been selectively transcribed, and, even if considered, contained at best a statement from the trial court that identified that there might be an issue as to whether the recording was made illegally.

- The information about the identity of the unknown [fifth] person at the meeting (which was the basis for finding that the meeting was not private) appeared to be within the control of Ms. Lane, but she chose not to reveal it and yet continued to oppose FCB's motion for summary judgment.

Based on these findings of fact, the trial court entered judgment in favor of FCB against Ms. Lane and her attorney, jointly and severally, in the amount of \$16,000 for terms and sanctions. CP 964. The trial court also entered judgment in favor of Mr. Von der Burg against Ms. Lane and her attorney, jointly and severally, in the amount of \$16,000 for terms and sanctions. CP 964.

Ms. Lane moved for reconsideration of the sanctions rulings on

January 14, 2013, and the trial court denied this motion on January 15, 2013. CP 965; CP 971. Ms. Lane and her attorney subsequently filed their notice of appeal concerning the Judgment on February 11, 2013. CP 315.

Division One of the Washington Court of Appeals affirmed the trial court's rulings in an unpublished opinion filed on April 21, 2014. In doing so, the Court of Appeals awarded attorney fees and costs to FCB and Mr. Von der Burg on the grounds that the "appeal lacks merit and is frivolous[.]" Court of Appeals decision at 14.

The Appellants filed their motion for reconsideration in the Court of Appeals on May 12, 2014, which motion was supported by attached exhibits that purport to be Coldwell Banker Bain's "Privacy Policy" and were not before the trial court or the Court of Appeals when it rendered its ruling. *See* Appellants' motion for reconsideration at 15. The Appellants argued in their motion for reconsideration that Coldwell Banker Bain and Mr. Von der Burg acted improperly by not disclosing the existence of the Privacy Policy during the course of the litigation, with the apparent implication being that the Appellants relied upon the Privacy Policy during the fateful meeting at Mr. Von der Burg's office in June of 2010. The Court of Appeals denied Appellants' motion for reconsideration on May 15, 2014, and Ms. Lane and her attorney filed their petition for

review on June 16, 2014.

As for the Privacy Policy, Appellants admit on page 6 of their petition for review that they did not discover it until after the Court of Appeals rendered its opinion. Further, there is no evidence in the record that Ms. Lane relied on the Privacy Policy at the time of the conversation at issue in June of 2010. In addition, the Appellants have not explained why they did not locate this Privacy Policy earlier, nor have the Appellants explained how a non-Coldwell Banker Bain client like Ms. Lane could possibly have a reasonable expectation of privacy based on the Privacy Policy.

III. ARGUMENT

A. **The Decision Of The Court Of Appeals Is Not In Direct Conflict With A Decision Of The Supreme Court Or Another Decision Of The Court Of Appeals.**

A petition for review will be accepted by the Washington Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Washington Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals. RAP 13.4(b). The reality is the Court of Appeals' decision in this case is not in conflict with a decision of the Washington Supreme Court or another decision of the Court of Appeals. Tellingly, the Appellants have not even specifically tried to argue differently in their

petition for review, nor have they provided any legal authority in support of such a proposition. Regardless, the fact is RAP 13.4(b)(1) and (2) do not provide any basis for granting the Appellants' petition for review.

B. The Petition For Review Does Not Present A Significant Question Of Constitutional Law Or Involve An Issue Of Substantial Public Interest That Should Be Determined By The Supreme Court.

A petition for review can also be accepted under RAP 13.4(b) if a significant question of state or federal constitutional law is involved or the petition involves an issue of substantial public interest that should be determined by the Washington Supreme Court. RAP 13.4(b)(3), (4).

Once again, the Appellants have failed to even try to satisfy the requirements of RAP 13.4(b) by articulating exactly how the Appellants' petition could possibly be granted in accordance with this rule. Nevertheless, the reality is this case does not present a significant question of constitutional law, nor does it involve an issue of substantial public interest. In actuality, this case is nothing more than a frivolous lawsuit that should never have been filed.

C. The Court of Appeals Correctly Determined The Trial Court Did Not Abuse Its Discretion When It Sanctioned Ms. Lane And Her Attorney.

A decision to impose sanctions is vested in the sound discretion of the trial court and will only be overturned on appeal where there is an

abuse of that discretion. *E.g.*, *Douglas v. Hill*, 148 Wn. App. 760, 199 P.3d 493 (2009). The Court of Appeals reviews the trial court's factual findings to see if they are supported by substantial evidence and, if so, whether the findings support the trial court's conclusions of law. *Keever & Assocs., Inc. v. Randall*, 129 Wn. App. 733, 737, 119 P.3d 926 (2005), *review denied*, 157 Wn.2d 1009 (2006).

Generally, Washington's Privacy Act prohibits the recording of any "private conversation" without first obtaining the consent of all the persons engaged in the conversation. RCW 9.73.030(1). The Legislature did not define the term "private" in RCW 9.73. *State v. Clark*, 129 Wn.2d 211, 224, 916 P.2d 384 (1996) (*en banc*). Washington appellate courts have addressed that term by analyzing under the circumstances of a particular case whether a given conversation or communication was private. *Id.* at 224, 916 P.2d 384.

In determining whether a conversation is "private" under the Privacy Act, factors for consideration include the duration and subject matter of the conversation, the location of the conversation and the presence or potential presence of a third party, and the role of the non-consenting party and his relationship to the consenting party. *Clark*, 129 Wn.2d at 227, 916 P.2d 384. Although the question of whether a particular conversation is "private" under the Privacy Act is a question of

fact, where the facts are undisputed and reasonable minds could not differ, the issue may be determined as a matter of law. *E.g., Clark*, 129 Wn.2d at 225, 916 P.2d 384.

Here, even if the Appellants were somehow able to demonstrate that review should be granted, there simply is no question that the lower courts correctly ruled the conversation at issue was not “private” under the Privacy Act. Five (5) people were present during this conversation. The conversation occurred during normal business hours at Mr. Von der Burg’s Bellevue office. The conversation consisted almost exclusively of Ms. Lane explaining her justification for how she had secured an ownership interest and/or right of occupancy in the Mansion through a form of “squatter’s rights” and why she could remain there. The record reflects Ms. Lane and Mr. McClung expected Dawn Gadwa of FCB to discuss with other employees of FCB some or all of the things that were discussed during this conversation. Moreover, neither Ms. Lane nor Mr. McClung told or otherwise instructed Ms. Gadwa or Mr. Von der Burg not to reveal the contents of the conversation to anyone else who was not present during said conversation.

Given these facts, no reasonable person could conclude that the conversation at issue was private in nature. As such, the lower courts correctly held Ms. Lane had no cause or excuse to bring this action. Based

on this finding and related findings, which are supported by substantial evidence,¹ the trial court did not abuse its discretion by entering judgment in favor of FCB against Ms. Lane and her attorney in the amount of \$16,000.

Another reason why the sanctions awards should stand is because Ms. Lane's Privacy Act claims are plainly barred by statute as a matter of law. Ms. Lane and her attorney should have determined as much prior to filing this lawsuit. Specifically, Washington's Privacy Act allows the recording of private conversations "which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands[.]" RCW 9.73.030(2)(b). Such conversations "may be recorded with the consent of [only] one party to the conversation." *Id.*

Ms. Lane's illegal conduct during the conversation at issue, in which the trial court found that Ms. Lane conveyed threats of extortion or other unlawful requests or demands to FCB, serves as a complete bar to Ms. Lane's Privacy Act claims. This bar would exist even if the conversation at issue could be characterized as "private" in nature.

Moreover, Ms. Lane admitted in this lawsuit that she never held any bona fide ownership or possessory interest in the Mansion. and that

¹ This evidence is largely summarized by the replies of FCB and Mr. Von der Burg in support of their sanctions motions, which can be found at CP 124-28, CP 145-49, and CP 939-55.

she caused fraudulent documents purporting to state an ownership interest in FCB's property to be filed with governmental entities. CP 375-76. In addition, it is undisputed that Ms. Lane was criminally convicted for trespassing in the Mansion. CP 376. Nevertheless, Ms. Lane set up a meeting with Mr. Von der Burg and Ms. Gadwa to discuss her illegal occupancy of the Mansion as well as her fraudulent scheme to obtain ownership of it. CP 376. Based on the foregoing, there is no question that Ms. Lane's conversation with FCB and Mr. Von der Burg is not protected by the Privacy Act, and the trial court rightly held as much.

In light of these and other findings, the trial court rightly sanctioned Ms. Lane and her attorney. After all, this is a case in which the trial court found after exhaustive briefing that "[t]he action was not warranted by existing case law," Ms. Lane "did not make a reasonable inquiry into the factual or legal basis of the action," Ms. Lane's "attorney has been consistently late in filing motion papers," and Ms. Lane's "attorney has not provided evidence in support of [Ms. Lane's] position even when given additional time to do so[.]" CP 301.

The only conclusion to be drawn from the record is that Ms. Lane and Mr. McClung unlawfully occupied the Mansion and subsequently met with FCB and Mr. Von der Burg for the express purpose of attempting to defraud FCB and governmental entities in order to obtain ownership of the

Mansion. The record further reflects this lawsuit was filed without any reasonable inquiry into the facts or law surrounding Ms. Lane's claims, and that this suit was filed for an improper purpose. For these reasons, there is no question that the Court of Appeals rightly held that the trial court properly exercised its discretion by awarding sanctions against Ms. Lane and her attorney.

D. The Court Should Award FCB Reasonable Attorney's Fees And Costs Incurred In Responding To The Petition For Review.

Attorney's fees can be awarded on appeal when an appeal is frivolous. *See, e.g., In re Recall Charges Against Feetham*, 149 Wn.2d 860, 72 P.3d 741 (2003); *see also* RAP 18.1(j) (providing for award of attorney fees and expenses to party who prevailed in the Court of Appeals if a petition for review is subsequently denied). An appeal is frivolous if there are "no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility" of success. *Id.*

The Court of Appeals rightly determined that this appeal is frivolous. There are no debatable issues upon which reasonable minds might differ in this case, and this appeal is so totally devoid of merit that there is no reasonable possibility of success. Moreover, although this point is not discussed in the Court of Appeals' decision, the trial court

rightly found that Ms. Lane conveyed threats of extortion or other unlawful requests or demands to FCB during the conversation at issue. Thus, Ms. Lane's Privacy Act claims are plainly barred by statute as a result, and said claims would be barred even if the conversation at issue was "private" in nature, which it was not.

Finally, the Appellants have not even *tried* to explain how their petition for review could possibly be granted under RAP 13.4(b). They have provided no legal authority or argument that explains how review could possibly be granted under this rule. In actuality, the Appellants seek review in order to re-litigate the issues presented to the Court of Appeals, some of which were raised for the first time in the Appellants' motion for reconsideration. Truth be told, the Appellants do not even have a colorable argument as to how review could properly be granted under RAP 13.4(b). This serves as yet another example as to why the petition for review is frivolous and why an award of attorney's fees and costs in favor of FCB is warranted herein.

IV. CONCLUSION

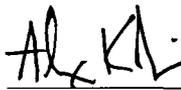
The decision of the Court of Appeals is not in direct conflict with a decision of the Washington Supreme Court or another decision of the Court of Appeals, and this case does not present a significant question of constitutional law or involve an issue of substantial public interest.

Instead, this case constitutes a sad example of a frivolous lawsuit that unfortunately has not yet been laid to rest.

The Court of Appeals correctly determined that the trial court did not abuse its discretion when it entered judgment against Ms. Lane and her attorney for terms and sanctions, nor did the Court of Appeals err by awarding FCB and Mr. Von der Burg their attorneys' fees and costs incurred on appeal due to the frivolous nature of the appeal. Accordingly, FCB respectfully asks this Court to deny the Appellants' petition for review and award FCB its costs and attorney's fees incurred in responding to said petition on the grounds that this appeal is frivolous.

RESPECTFULLY SUBMITTED this 15th day of July, 2014.

EISENHOWER CARLSON PLLC

By: 

Alexander S. Kleinberg, WSBA # 34449
Chad A. Arceneaux, WSBA # 40442
Attorneys for First-Citizens Bank &
Trust Company

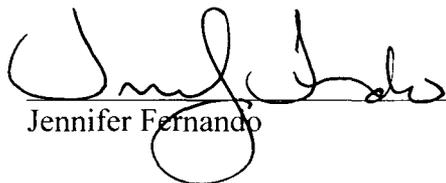
DECLARATION OF SERVICE

I, Jennifer Fernando, am a legal assistant with the firm of Eisenhower Carlson PLLC, and am competent to be a witness herein. On July 15, 2014, at Tacoma, Washington, I caused a true and correct copy of First-Citizens Bank & Trust Company's Answer to Petition for Review to be served upon the following in the manner indicated below:

| | |
|---|--|
| Andrew Magee 1001 Fourth Avenue Plaza 44th Floor Seattle, WA 98154 <i>amagee@mageelegal.com</i> Attorney for Appellants | <input checked="" type="checkbox"/> by Legal Messenger <input checked="" type="checkbox"/> by Electronic Mail |
| Hunter Abell Williams Kastner 601 Union Street, Suite 4100 Seattle, WA 98101 <i>habell@williamskastner.com</i> Attorney for Mark Von der Burg and Coldwell Banker Bain | <input checked="" type="checkbox"/> by Legal Messenger <input checked="" type="checkbox"/> by Electronic Mail |

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 15th day of July, 2014, at Tacoma, Washington.


Jennifer Fernando