71905-0

71905-0

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

NO. 71905-0-I

SANDRA J. ARCHDALE,

Appellant/
Cross-Respondent,

vs.

SHARYL L. O'DANNE,

Respondent/
Cross-Appellant.

REBUTTAL BRIEF OF RESPONDENT ON CROSS-APPEAL

Submitted By:
LORNA S. CORRIGAN
(WSBA #13101)
NEWTON ♦ KIGHT L.L.P.
Attorneys for Respondent
1820 - 32nd Street
P.O. Box 79
Everett, Washington 98206
(425) 259-5106

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Court Rules and Statutes

Other Authorities

APPENDICES

I. ARGUMENT

A. The Trial Court's Ruling on the Motion to Strike Was an Abuse of Discretion Where that Ruling Denied any Remedy to the Defendant and Serves to Encourage the Intentional Submission of Inadmissible Evidence.

Archdale contends that the Motion to Strike could not be heard on the date scheduled for hearing on the Motion for Attorneys' Fees because O'Danne did not first obtain an order shortening time. Brief of Appellant at 12. She argues that the court's denial of the Motion to Strike was proper because the court would not have had time to review the motion. *Id.* Archdale also asserts that it was O'Danne's responsibility to have continued the hearing on O'Danne's underlying motion if O'Danne objected to Archdale's submissions. *Id.* Finally Archdale argues that CR 12(f) applies only to initial pleadings, *id.* at 13, such that it could not be applied to her declaration in opposition to the motion for an award of fees. *Id.* These arguments are without merit.

The trial court's denial of the motion for order shortening time

and to strike resulted not because the court had not had sufficient time within which to review the motion. Rather it occurred because of Archdale's objection that she had not had time to respond to the Motion to Strike in writing. *See* Corrected Findings and Order, CP 13-14, ll. 24-25 and 1-3. Such a time deficit will always result, however, when an arguably improper response is submitted to a standard motion, noted for hearing under CR 6, on five days' notice. *See* CR 6, App. 1. Under Snohomish County Local Rule 6(d)(1), opposing affidavits may be served not later noon two court days before the hearing. *See* SCLCR 6(d)(1), App. 2. Thus a moving party may find him or herself the recipient, only two days before the hearing, of affidavits containing patently inadmissible material. If so, the opposing party will have submitted such inadmissable material knowing that the moving party will be unable to file a timely motion to strike. Further, the opposing party will do so knowing that the moving party will in all likelihood be unable to secure an order shortening time.

That is precisely what occurred here, where Archdale, through counsel, refused to make herself available for hearing on a motion to shorten time at *any* time on the afternoon of the court day before the

hearing. *See* Declaration of Lorna S. Corrigan In Support of Motion to Strike, CP 308, ll. 12-21. (Counsel to Archdale was expecting a client in the late afternoon.) Archdale instead insisted that the hearing on the main motion go forward with her response intact. *Id.* at ll. 16-19.

At the hearing on the Motion for Attorneys' Fees, Archdale then opposed any hearing on the Motion to Strike, insisting that she had not had time to respond to the Motion to Strike in writing. *See* Corrected Findings and Order, CP 13-14 at ll. 24-25 and 1-3. Consequently O'Danne was left in the untenable position of having received a timely, but improper response to O'Danne's Motion for Attorneys' Fees, but having no remedy for that improper submission.

Archdale attempts to counter the obvious prejudice to O'Danne by arguing that it was O'Danne's burden, in response to the improper submission, to have sought a continuance of the hearing on O'Danne's main motion. The shifting of that burden to the moving party would force a moving party into a Hobson's choice between acquiescing in the submission of objectionable evidence or seeking a continuance of the party's own motion because of that submission. Such a result is manifestly unreasonable. The onus should have been on Archdale, had

she truthfully sought an opportunity to respond in writing to the Motion to Strike, to have requested a continuance of the hearing on the underlying substantive motion. She did not do so.

Finally, Archdale's argument that CR 12(f) applies only to initial pleadings and hence could not have applied to her declaration is baseless. That rule contains no such limitation, and has never been construed in the manner urged by Archdale.

> (f) Motion To Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the courts own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

CR 12(f) (amended 1992). The only constraint on a party under the rule is that the motion be brought within either the time frame for a response to a pleading or otherwise within 20 days of service of the pleading. Thus CR 12(f) may be employed in response to any pleading. *See, e.g.,* King Cnty. Fire Prot. Districts No. 16, No. 36 & No. 40 v. Hous. Auth. of King Cnty., 123 Wn.2d 819, 826, 872 P.2d 516, 519 (1994) (Motion to strike affidavits submitted on summary judgment as

containing improper legal opinions). See also Teglund 3A Wash. Prac. Rules Prac. § 11. (Party may move under CR 12(f) to strike any pleading.) The Respondent properly moved to strike under CR 12(f).

The trial court's denial of the motions for order shortening time and to strike was manifestly unreasonable and should be reversed as an abuse of discretion. *See* In re Marriage of Fiorito, 112 Wn. App. 657, 663-64, 50 P.3d 298 (2002). In the alternative, this court should simply disregard the inadmissible material on appeal. *See* Engstrom v. Goodman, 166 Wn. App. 905, 909 n. 2, 271 P.3d 959 (2012) (Court of Appeals may disregard objectionable material without a motion to strike in the Court of Appeals where argument on the issue is presented in the party's brief.)

B. O'Danne Did Not Open the Door to the Disclosure of a Purported Offer of Compromise by Offering Evidence in Support of Her Claim for Attorneys' Fees that O'Danne Had Long Been Willing to Convey Title in Exchange for a Payoff of the Mortgage.

Archdale does not dispute that the parties' settlement negotiations of June 5-13, 2013, Declaration of Sandra Archdale in Response, CP 52-53, ll. 2-20 and 1-5, were agreed by the parties to

have been confidential. Nor does she contend that O'Danne offered any evidence from those confidential settlement negotiations. Rather Archdale argues that O'Danne's offer at trial of her letter of June 14, 2010, to Archdale's then counsel, over Archdale's objection under ER 408, *see* Reply Brief of App. at 10, and O'Danne's submission, at trial and in support of her Motion for Attorneys' Fees, of a January 20, 2012, letter from O'Danne's attorney to Archdale's then attorney "opened the door" to Archdale's disclosure of an offer of compromise made in subsequent settlement negotiations. *Id.* at 8. Archdale's position is untenable. Even if the protection of offers of compromise under ER 408 can be waived, or the "door opened" by conduct other than the waiving party first offering such evidence of offers of compromise, there was no basis for finding such a waiver here.

O'Danne did not offer in evidence the substance of the confidential settlement conference of the parties, or otherwise of any offers to compromise claims as a means of resolving the litigation. She did offer evidence, at trial and in support of her Motion for Attorneys' Fees, that included evidence in the form of letters to Archdale's counsel. *See* Trial Exhs. 34 and 37. *See also* Declaration of Lorna S.

Corrigan In Support of Motion for Award of Attorneys' Fees at Exh. C; CP 76-79. Those letters indicated that O'Danne was willing, all the way up through the date that suit was filed, and indeed well after, *see* Exhs. 34 and 37, to convey title simply in exchange for a payoff of the mortgage. *Id.* The letters were directly relevant to the claim that Archdale's filing of the action had been frivolous from the inception.

O'Danne's position at trial and in her Motion for Attorneys' Fees was that the litigation was entirely unnecessary and frivolous where: 1) Archdale sought relief for which there was no support in the law (a conveyance of fee title to her that would leave O'Danne liable on the underlying mortgage), *see* Trial Brief of Defendant, CP 267, ll. 20-24; *see also* Motion for Attorneys' Fees, CP 125, ll. 13-25 and 1-7; and 2) the only relief that was ultimately awarded to Archdale could for years have been obtained by her without resort to litigation. *Id.* at CP 126, ll. 14-21. The letters were offered in support of the latter argument.

In the letter of June 14, 2010, for example, O'Danne reiterated what she had always been willing to do: convey in exchange for a payoff. *See* Exh. 34.

> If Ms. Archdale simply and legally would gain her financing or pay off the condo as we agreed upon then there would be no issue at all. Ms. Archdale refuses to do this and instead wishes for me to assign title to her and carry her debt. . . . This has been and is all that it will take, indeed ever would have taken, for her to receive the . . . [*sic*] over the years to do this and she has refused.

See Exh. 34. In the letter dated January 20, 2012, O'Danne's counsel, Geoffrey Jones, wrote to Archdale's then counsel, Ryan Sternoff. *See* Exh. 37. Mr. Jones stated in the letter that "Ms. O'Danne stands ready and willing to transfer title to Ms. Archdale as soon as the arrangements are made to pay off this Deed of Trust." *See* Exh. 37. Mr. Jones also indicated that "[t]his is Sharyl O'Danne's position now and has been ever since Sharyl O'Danne pledged her credit and took out a loan to allow your client to purchase this property." *Id.*

In response to O'Danne's Motion for Award of Attorneys' Fees, Archdale offered some of the substance of a confidential settlement conference between the parties. *See* Declaration of Sandra Archdale In Response to Motion for Attorneys' Fees, CP 53, ll. 52-53, ll. 17-20 and 1-10. She did so in an attempt to prove that O'Danne had not in fact always been willing to convey simply for a payoff of the mortgage, but

instead had also sought the payoff of a pre-existing judgment against Archdale. *See* Response to Motion for Attorneys' Fees at 4, CP 65.

What Archdale fails to acknowledge, however, is that the settlement conference at which Archdale contends the offer of compromise was extended occurred some three years after Archdale filed suit, *see* Summons, CP 296 (showing filing date of Summons and Complaint of June 4, 2010), by which time O'Danne had personally incurred over $30,000 in attorneys' fees in defending against Archdale's spurious claims. *See* Declaration of Lorna S. Corrigan In Support of Motion for Attorneys' Fees at Exhibit C, CP 80-109 (detailing fees incurred up to the final day of the settlement conference). Even if Archdale's version of the content of an offer of compromise made in the course of the settlement conference was accurate, and even if a waiver of ER 408 could have occurred absent a preceding offer by O'Danne of the substance of such a conference, an offer of compromise made by her three years into litigation is irrelevant to the basis for Archdale's suit at the time it was filed. Any offer of compromise made three years down the line is simply not probative on the issue whether Archdale needed to resort to litigation in the first instance in order to get obtain

title in exchange for a releasing O'Danne from the mortgage.

No door was opened and no waiver of ER 408 occurred as to an offer of compromise extended by O'Danne by reason of evidence offered by O'Danne of her position for approximately nine years preceding the litigation, *see* November 13, 2013, VRP at 178, ll. 14-17, that she required only a release from liability under the mortgage before she would convey to Archdale. *See* November 13, 2013, VRP at 18, ll. 2-9 ("It's always been that she will get the title" if Archdale either re-financed in her own name or paid off the mortgage.) *See also* Exh. 37, p. 2; CP 78. The trial court's denial of the motion to strike was an abuse of discretion and should be reversed, or, in the alternative the evidence of an offer of compromise should be disregarded on this appeal.

II. CONCLUSION

For the reasons set forth above, the trial court's denial of O'Danne's motions for order shortening time and to strike should be reversed. In the alternative Archdale's evidence of an offer of compromise by O'Danne should simply be disregarded on appeal. Further, O'Danne requests an award of her reasonable attorneys' fees

and costs on appeal. A party having received an award of her attorneys' fees and costs following trial, *see* Corrected Findings and Order, CP 11-14, is generally entitled to receive them on appeal as well. Xieng v. Peoples Nat. Bank of Washington, 61 Wn. App. 572, 587, 821 P.2d 520 (1991), *aff'd* 120 Wn.2d 512, 844 P.3d 389 (1993).

Respectfully submitted this 16th of December, 2014.

NEWTON ♦ KIGHT L.L.P.

By: _____

LORNA S. CORRIGAN
WSBA #13101
Attorney for Respondent O'DANNE
1820 32nd Street
P. O. Box 79
Everett, WA 98206
(425) 259-5106
Fax: (425) 339-4145
Lorna@NewtonKight.com

APPENDIX 1

CR RULE 6. TIME

(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any superior court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, a Sunday nor a legal holiday. Legal holidays are prescribed in RCW 1.16.050. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. (b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion, (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or, (2) upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 50(b), 52(b), 59(b), 59(d), and 60(b). (c) Proceeding Not To Fail for Want of Judge or Session of Court. No proceeding in a court of justice in any action, suit, or proceeding pending therein, is affected by a vacancy in the office of any or all of the judges or by the failure of a session of the court. (d) For Motions--Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time. (e) Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

APPENDIX 1

APPENDIX 2

SCLCR RULE 6. TIME

(d) For Motions--Affidavits.

(1) *Notes for Civil Motions Calendar*. Responding documents and briefs must be filed with the clerk and copies served on all parties and the court no later than 12 noon two (2) court days prior to the hearing. Copies of any documents replying to the response must be filed with the clerk and served on all parties and the court not later than 12 noon of the court day prior to the hearing. This section does not apply to CR 56 summary judgment motions. Absent prior approval of the court, responsive or reply materials will not include either audio or video tape recordings.

APPENDIX 2

APPENDIX 3

ER 408

COMPROMISE AND OFFERS TO COMPROMISE

In a civil case, evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. [Adopted effective April 2, 1979; amended effective September 1, 2008]

APPENDIX 3

COURT OF APPEALS, DIVISION 1
SEATTLE, WASHINGTON

SANDRA J. ARCHDALE, Appellant/ Cross-Respondent, vs. SHARYL L. O'DANNE, Respondent/ Cross-Appellant.	)	NO. 71905-0-I CERTIFICATE OF SERVICE BY MAIL

STATE OF WASHINGTON)
) SS.
COUNTY OF SNOHOMISH)

VALETA G. KING, being first duly sworn on oath, deposes and states:

I am over the age of twenty-one years and a resident of the County of Snohomish, State of Washington.

On December 16, 2014, I caused the Rebuttal Brief of Respondent on Cross-Appeal to be served on Appellant/Cross-Respondent, SANDRA J.

NEWTON • KIGHT L.L.P.
ATTORNEYS AT LAW
1820 32ND STREET
P.O. BOX 79
EVERETT, WA 98206
(425) 259-5106
FAX: (425) 339-4145

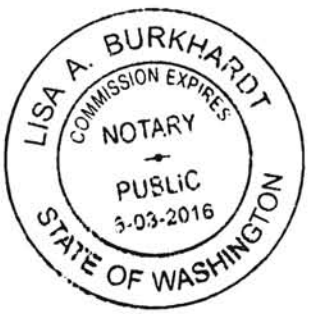
ARCHDALE, by depositing in the United States mail at Everett, Washington, an envelope with first-class postage prepaid, by regular mail, containing said documents, to:

Joel P. Nichols
Attorney at Law
DENO MILLIKAN LAW FIRM, PLLC
3411 Colby Avenue
Everett, WA 98201
(Attorney for Appellant/Cross-Respondent)

Valeta G. King
VALETA G. KING

SUBSCRIBED AND SWORN TO before me this 16 day of December, 2014.

(SEAL)



Lisa A. Burkhardt
LISA A. BURKHARDT, NOTARY PUBLIC in and for the State of Washington.
My appointment expires: 5/3/2016

NEWTON • KIGHT L.L.P.
ATTORNEYS AT LAW
1820 32ND STREET
P.O. BOX 79
EVERETT, WA 98206
(425) 259-5106
FAX: (425) 339-4145