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COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

No. 70424-9-I

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

PARRIS ANDREA ROSOLINO, (*f/k/a* PARIS TILTON),

Appellant,

vs.

DIANE ARMESTO,

Respondent.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Plaintiff Diane Armesto's entire opposition brief is premised on an assumption that the allegations in her complaint are *actually* true, because they have been *deemed* true by virtue of the trial court's sanctions order against defendant Parris Rosolino. But, as stated in Parris' opening brief, the trial court never engaged in a true fact finding exercise. There never has been a hearing or trial on the merits of Armesto's claims, where Parris was permitted to present her side of the case. All of the "facts" that Armesto represents as undisputed were indeed disputed by Parris, until the trial court struck all of her defenses. *See, e.g.*, RP 20-27, 1841-1960. As stated in Parris' opening brief, however, the order striking her defenses should never have been entered. The court's subsequent orders—the **Findings and Conclusions**, the **Injunction**, and the **Judgment** [collectively the "**Orders**"]—each have errors that warrant their individual reversal, but the most fundamental argument Parris makes is that all of the **Orders** are fatally flawed because the sanctions order from which they followed was flawed. Accordingly, this Court should reverse all of the **Orders** and remand the case for a proper determination under Washington law of what sanctions, if any, should be entered against Parris, and what other consequences, if any, follow from an appropriate sanctions determination.

II. ARGUMENT

1. The Trial Court Abused its Discretion in Striking Parris' Defenses as a Sanction for Violating its November 16, 2012 Discovery Order.

The trial court's November 16, 2012 Order Granting Plaintiff's Motion for Reconsideration found that Parris violated the discovery rules by (1) failing to answer questions about whether Frank Rosolino was her father, (2) failing to answer questions about her alleged embezzlement scheme, and (3) failing to fully respond to Armesto's second set of interrogatories and requests for production and failure to pay \$500 in sanctions.¹ RP 1126-1128. The court ordered Parris to appear for a second day of deposition and fully answer all questions, supplement her discovery responses, and pay a total of \$3,610 in monetary sanctions within five days of the order. The order states that failure to comply with any aspect of the order would result in Parris' defenses being stricken and judgment entered against her. RP 1126-1128.

¹ This order is another example of the extent to which Parris' *pro se* and *in forma pauperis* status was exploited by Armesto, and how Armesto's pattern of overreaching was never checked by the trial court. There was no prior order compelling Parris to answer a second set of interrogatories, only document requests. RP 239-240. Thus, the November 16 order sanctions Parris for a "violation" she never committed. Moreover, Parris contended at that time that she had produced all responsive documents in her possession. RP 1114-1115. The Court ignored Parris' claims of full production and sanctioned her for failing to produce documents that it has never been established she even has.

Parris promptly sought reconsideration of the November 16, 2012 order, stating that she would appear for her deposition but was unable to pay the full amount of the monetary sanctions within five days. RP 1129-1132. Parris also pointed out that the sanctions had not even been requested in Armesto's motion to compel. *Id.* Armesto opposed any modification of the sanctions order and, as had become the pattern in the case, the trial court agreed and signed Armesto's proposed order denying reconsideration without changing a word. RP 1255-1257; 1330-1331. The trial court was fully aware that Parris was incapable of complying with the order it had issued.

Of course, the foreordained result came to pass. On January 7, 2013, Parris' defenses were stricken for, among other things, failing to pay the monetary sanctions. RP 1831. The order dutifully recited that the court had considered and imposed lesser sanctions, that Parris' failure to comply with the prior order had been willful, and that the discovery violation substantially prejudiced Armesto's ability to prepare for trial, as required by *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). But as with most of Armesto's proposed orders in the case, this one was rubber-stamped by the trial court without any scrutiny or true analysis of the *Burnet* factors. Had the trial court actually performed that

analysis, it would have been clear that not one of the factors had been satisfied.

A. The Trial Court Did Not Consider Lesser Sanctions.

Save for monetary sanctions Parris could not pay, at no time did the trial court actually consider, much less impose, any sanction short of dismissal for failing to comply with the November 16, 2012 order. RP 2163. Certainly, lesser sanctions were available. For example, the court could have accepted the request in Parris' motion for reconsideration that it permit her to pay the monetary sanctions over time, or postpone them until after the trial. RP 1129-1132. Or, the court could have ruled that failure to give deposition testimony on the subjects of her parentage and the alleged embezzlement scheme would result in Parris being prohibited from introducing certain evidence on those subjects. Alternatively, the court could have determined *solely for the purposes of the case* that Parris was not Frank Rosolino's biological daughter. Particularly given the fact that neither parentage nor embezzlement were issues directly relevant to the defamation claims asserted in Armesto's complaint, any of these lesser sanctions would have been much less extreme than striking all of Parris' defenses to those defamation claims. Simply put, the trial court did not consider lesser sanctions, and there is no substance to the rote recitation in

the Order Granting Plaintiff's Motion to Strike Defenses that they were considered.

B. The Violation Was Not Wilful.

A party does not willfully fail to comply with a court order they lack the wherewithal to comply with. *King v. Dept. of Soc. & Health Servs.*, 110 Wn.2d 793, 797, 756 P.2d 1303 (1988). Here, it is undisputed that, as an *in forma pauperis* defendant, Parris had no ability to pay more than \$3,000 in sanctions, much less pay them within five days. RP 18-19; 1129-1132. As to the provisions of the order requiring her to continue her deposition, Parris said she would comply if the court reconsidered the monetary sanctions, and absent such reconsideration it was futile for her to testify if her defenses were going to be stricken anyway. *Id.* But despite Parris' financial situation, in its January 7, 2013 order striking Parris' defenses, the trial court accepted the conclusory assertion in Armesto's proposed order that that Parris' violation of the November 16 order was "willful." RP 1831. The statement ignores Parris' financial circumstances, of which the trial court was fully aware, and in any event is insufficient standing alone to demonstrate willfulness. *Jones v. City of Seattle*, ___ Wn.2d ___, 314 P.3d 380, 391 (Dec. 12, 2013) ("*Burnet's* willfulness prong would serve no purpose 'if willfulness follows necessarily from the violation of a discovery order.' Something more is needed.").

C. The Non-Compliance Did Not Substantially Prejudice Armesto's Ability to Prepare for Trial.

The trial court's January 7, 2012 Order Granting Plaintiff's Motion to Strike Defenses states that Parris' violations prejudiced (although not "substantially") Armesto's ability to prepare for trial. RP 1831. In what way? Certainly, the failure to pay monetary sanctions could not have prejudiced Armesto's trial preparation, even though the trial court's order indicates that it does. Similarly, there is nothing in the record to suggest that Armesto lacks a single document or fact relevant to the issues of Parris' parentage and alleged misappropriation, much less to the elements of the defamation claims Armesto actually asserted in her complaint. Indeed, it is readily apparent that Armesto already has Parris' birth certificate, her adoption records, her name change petition, both genetic blood test results, and all of the documents relating to the disposition of Frank Rosolino's estate. RP 1574-1803. In no way could Armesto's inability to conduct a second deposition of Parris on what were, at best, marginally relevant issues *substantially prejudice* Armesto in preparing for trial on the defamation claims at issue.

D. Armesto Sued for Defamation Only, Not Embezzlement.

Armesto's complaint asserts causes of action for alleged "defamation" and "defamation per se," for "outrage/intentional infliction of emotional distress," and for "false light." CP 13-15. Each cause of action is based upon allegedly false statements Parris Rosolino allegedly made "about plaintiff." *Id.* The complaint seeks unspecified specific and general damages allegedly suffered by Armesto, and an injunction to (1) prohibit Parris from contacting Armesto, (2) prohibit Parris from coming within 1000 feet of Armesto, and (3) prohibit Parris from publishing or making statements about Armesto pending a hearing on a motion for preliminary injunction. CP 15-16.

What Armesto's complaint does not allege is that Parris misappropriated money from the Rosolino estate, nor does it seek relief on behalf of the "estate" for such alleged conduct.² Nevertheless, Armesto's opposition brief from the very beginning seeks to perpetuate the fallacy that her complaint was filed "to protect the integrity of the Rosolino estate" against Parris' alleged "calculated campaign to misappropriate

² Armesto also did not seek an order prohibiting Parris from stating that Frank Rosolino is her father, or for that matter any of the provisions of the trial court's injunction that are currently stayed. This alone warrants reversal, as it well-established that a default judgment cannot provide relief beyond what is requested in the complaint. *Sceva Steel Buildings, Inc. v. Weitz*, 66 Wn.2d 260, 262, 401 P.2d 980 (1965).

royalties from the estate.”³ Brief of Respondent, at 1. That is the mythical foundation upon which all of Armesto’s arguments in opposition to Parris’ appeal are based. But the language of her complaint belies the theory. This is a defamation case, not an embezzlement claim.

The “misappropriation” theory is a sideshow that ultimately took the trial court’s focus from the true issues in the case. The theory is not probative of any elements of any of the claims Armesto asserted in her complaint. Yet, as Armesto admits, it was only her inability to pursue discovery into Parris’ “purported biological relationship to Rosolino and right to any portion of his estate” that was the basis of the trial court’s entry of sanctions orders and, ultimately, a default judgment against Parris. *See* Brief of Respondent, at 2. Armesto does not claim she was unable to conduct discovery into what Parris said or wrote about her, or whether those statements were or were not true.

³ As a threshold matter, there is no such thing as the “Rosolino estate.” It ceased to exist as an entity in 1982, when, as Armesto points out, she was discharged from her duties as executrix and the estate was closed. Brief of Respondent, at 6. In Frank Rosolino’s will, Armesto was bequeathed only a 1/3 interest in a parcel of real estate and the copyright to 4 specific songs, none of which are the subject of any alleged action by Parris Rosolino. CP 747. She has no right to any other assets that may once have belonged to the estate. The only person potentially with standing to “protect” or pursue claims on behalf of what once was the Rosolino estate is the surviving residual beneficiary named in Frank’s will, Jason Rosolino. *Id.*

Instead, Armesto asserts that discovery into Parris' parentage and alleged "scheme to embezzle" from a non-existent entity will reveal the motive behind her defamatory statements about Armesto. Brief of Respondent at 23. But intent or motive are completely irrelevant to Armesto's defamation claims. A defamation plaintiff must prove four elements: (1) falsity, (2) an unprivileged communication, (3) fault, and (4) damages. *LaMon v. Butler*, 112 Wn.2d 193, 197, 770 P.2d 1027, *cert. denied*, 493 U.S. 814 (1989). In the case of a non-public plaintiff, the allegedly defamed party need only show that the defendant knew, or in the exercise of reasonable care should have known, that the defamatory statement was false or would create a false impression in some material respect. *Vern Sims Ford v. Hagle*, 42 Wn. App. 675, 680, 713 P.2d 736 (1986) (citing *Taskett v King Broad. Co.*, 86 Wn.2d 439, 445, 546 P.2d 81 (1976)). Motive, or malice, is only relevant in a defamation case brought by a public figure. *Demopolis v. Peoples Nat'l Bank of Wash.*, 59 Wn. App. 105, 108 n.1, 796 P.2d 426 (1990) (citing *LaMon*, 112 Wn.2d 193).

The trial court's acceptance of a rote recital in Armesto's proposed order that the *Burnet* factors had all been considered means nothing if in fact no analysis of those factors actually occurred. *Burnet*, 131 Wn.2d at 494 (noting that the trial court's reasoning "should, typically, be clearly stated on the record so that meaningful review can be had on appeal.").

Here, it is quite evident here was no such analysis. The trial court abused its discretion in striking Parris' defenses and entering judgment against her as a discovery sanction. Consequently, that order should be reversed, and the **Findings and Conclusions**, the **Judgment**, and the **Injunction** that are based on that discovery order must be reversed as well.

2. The Injunction is an Unconstitutional Prior Restraint on Speech

Armesto's brief reads as if the trial court's permanent **Injunction** is narrowly tailored to prohibit only defamatory speech. But other than in its first enumerated item, the **Injunction** is not tailored at all. The speech it enjoins is not confined to allegedly defamatory statements about Armesto, it prohibits any posting on the internet "about Armesto," regardless of content. RP 2170. It enjoins other speech that isn't about Armesto at all, much less defamatory, such as prohibiting the use of the name Rosolino or "implying that she is the natural, biological, or adopted daughter of Frank Rosolino" to anyone under any circumstances *Id.* It requires Parris to remove all posts "relating to Armesto," regardless of content. It also, according to Armesto and the trial court, requires Parris to remove from her Facebook page childhood photos of Parris and Frank Rosolino—meaningful personal mementos of the only father figure Parris ever had in her life—on the theory that the photos, *though authentic*, imply a blood relationship with Mr. Rosolino. *Id.* As to each of these

sweeping provisions of the **Injunction**, Armesto's citations to cases addressing narrow limitations on "unprotected" speech are irrelevant.

It is precisely because of the potentially significant implications for infringement of freedom of speech that damages, not injunctive relief, are the generally accepted remedy for defamation. *Metro. Opera Ass'n, Inc. v. Local 100 Hotel Employees & Restaurant Employees Int'l Union*, 239 F.3d 172, 177 (2d Cir. 2001) (noting that because damages are the generally accepted remedy for defamation "[i]n addition to the First Amendment's heavy presumption against prior restraints, courts have long held that equity will not enjoin a libel.") (citing *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976)). Armesto offers no authority for her assertion that Parris' statements are "not protected" from injunction in this case. Brief of Respondent, at 27. None of the cases cited at p. 32 of Armesto's opposition brief involve the issuance of an injunction prohibiting speech as a remedy in a private dispute over allegedly defamatory statements. See *Bering v. Share*, 106 Wn.2d 212, 721 P.2d 918 (1986) (action to enjoin picketers from harassing patients and staff, and using abusive language in the presence of children, in front of abortion clinic); *Rhinehart v. Seattle Times*, 98 Wn.2d 226, 654 P.2d 673 (1982) (appeal of an order prohibiting pretrial dissemination by defendants of information obtained in discovery from a defamation plaintiff); *In re*

Marriage of Meredith, 148 Wn. App. 887, 201 P.2d 1056 (2009) (marriage dissolution, where prohibition on contacting government agencies regarding ex-wife’s immigration status was reversed as overly broad and therefore an invalid prior restraint); *Maheu v. Hughes Tool Co.*, 569 F.2d 459 (9th Cir. 1977) (defamation action involving question of damages, not enjoined speech). As discussed below, the fact that Armesto can cite to no case in Washington where a content-based injunction was issued in a private defamation lawsuit is because such “relief” cannot withstand constitutional scrutiny.

Even if defamatory speech (presuming for the purposes of this argument that such speech occurred, although there has been no adjudication of the merits of that claim) could be enjoined in a private lawsuit, the **Injunction** issued against Parris is unjustifiable. If it is not “precisely drawn” to prohibit only unprotected speech and nothing else, the **Injunction** constitutes an unlawful prior restraint. *Bering v. Share*, 106 Wn.2d at 236 (citing *Consolidated Edison Co. v. Public Serv. Comm’n*, 447 U.S. 530, 540 (1980)). The **Injunction** goes well beyond prohibiting specific instances of defamatory speech that have already been uttered, enjoining speech that has not yet occurred and would not be defamatory if spoken. Even if the **Injunction** had been precisely drawn and limited to defamatory statements that had already been published,

under either the First Amendment to the United States Constitution, or Article 1, § 5 of the Washington Constitution, a content based prohibition on speech may only be sustained if it serves a compelling state interest. *Bering*, 106 Wn.2d at 236, 244.

A. The Injunction Serves No Compelling State Interest

Neither the Permanent **Injunction** nor the Supplemental **Findings and Conclusions** which it incorporates state that the **Injunction** serves any governmental interest, much less a compelling one. The fact is, no such compelling state interest exists. This is a purely private lawsuit between 2 individuals, which does not threaten any broader interest.

This **Injunction** stands in stark contrast to the one at issue in *Bering*, where the trial court specifically found, based on medical testimony, that use of words like “killer” and “murderer” in the presence of children “inflicted trauma on the children overhearing such references...” 106 Wn.2d at 237. In *Bering*, the trial court’s identification of the interest that was being protected allowed the appellate court to evaluate whether in fact the interest was a compelling one. Based on federal and state law, the court found that, although the state had a lesser interest in regulating such words when directed to adults, there was a compelling interest in protecting children from harm. *Id.*, at 241.

Because the trial court did not identify a compelling state interest that the **Injunction** seeks to protect, this Court has no way of evaluating whether the **Injunction** is narrowly tailored to serve that interest. Under either federal or state constitutional law, that flaw is sufficient to warrant reversal, where a court has imposed permanent content-based restrictions on speech in a private defamation lawsuit.

B. The Injunction is Not Narrowly Drawn to Serve a Compelling State Interest.

Even if this court were to presume that Armesto's defamation claims implicate a compelling state interest, the **Injunction** the trial court issued is too broad to withstand constitutional scrutiny. In *In re Marriage of Suggs*, the Washington Supreme Court observed that "[l]abelling certain types of speech as 'unprotected' is easy. Determining whether specific instances of speech actually fall within the 'unprotected' areas of speech is much more difficult." 152 Wn.2d 74, 82, 93 P.2d 161 (2004). In those rare circumstances where a trial court can prohibit speech, it must be done with the utmost care. As the United States Supreme Court has stated:

An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pinpointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. In other words, the order must be tailored as precisely as possible to the exact needs of the case.

Carroll v. President & Comm'rs of Princess Anne, 395 U.S. 175, 183-84 (1968) (citations omitted), cited with approval in *In re Marriage of Suggs*, 152 Wn.2d at 83. Here, assuming there was defamation and that it implicated a compelling state interest, then prohibiting further *defamatory statements about Armesto* would be the narrowest way to accomplish the “pinpointed objective” of remedying the defamation. It is only those statements for which Armesto sought relief in her complaint. Prohibiting truthful postings about Armesto, enjoining publication of authentic childhood photos, and compelling someone to change their name “broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”

C. Armesto’s Recent Contempt Motion Filed With the Trial Court Illustrates the Danger of the Injunction.

A motion for contempt filed just this week by Armesto epitomizes the harm that can result when an injunction prohibiting speech is not narrowly tailored. In her motion, Armesto asks the trial court to sanction Parris \$268,000, and to warn Parris that the court may impose imprisonment, for “failing to take steps” that Armesto contends are required under her interpretation of the court’s September 13, 2013 Order Granting Defendant’s Motion for Partial Stay. RP 2223-2225. That order requires Parris not to communicate

that Armesto was criminally complicit in the deaths of Frank and Justin Rosolino and, to the extent practicable, to remove internet posts she made where she previously made such allegations. *Id.* Yet Armesto's latest contempt motion⁴ contends that Parris should be fined and potentially imprisoned for, among other things:

-a post on her Facebook page that reads: "The Oz Great and Powerful was awesome last night!! I love the fight against good and evil and the wicked witch gets what she deserved in the end and the daughter of goodness prevails in the spirit of the father! What a great movie!!"

-Several other internet posts that even Armesto acknowledges were written by people other than Parris.

Armesto also wants Parris held in contempt for (1) a Facebook post that reads: "...Dear Diane, why don't you put yourself in a white can and pray with all of your might that Jason gets back his sight?"; and (2) four archived versions of Frank Rosolino's Wikipedia page (not the *current* Wikipedia page), only one of which is attributed to Parris. The Facebook post does not accuse Armesto of a crime and so is not covered by the plain terms of the **Injunction**. The archived page attributed to Parris does not reference Armesto by name and in

⁴ Given the fact that Armesto's motion for contempt was just filed, Parris has supplemented her designation of clerk's papers, per RAP 9.6(a), but reference to specific pages in the record are not yet available.

any event, has long since been removed from Rosolino's active Wikipedia page. All of the archived pages include a disclaimer that the page has been revised and the reason for the revision "may have been that this version contains factual inaccuracies."

Armesto's motion for contempt illustrates how an injunction on speech can become fodder for a personal vendetta and significantly chill constitutional rights, particularly if the injunction is not precisely drawn. When Parris cannot even post a factually accurate comment about the content of a movie⁵ without facing a motion to have her put in jail, her right to freedom of speech has become an empty charade. To make matters worse, because the **Injunction** arises from a discovery sanction that prohibited Parris from defending herself, Armesto is free to attribute "defamatory" posts to Parris without any proof that Parris actually made them.

Regardless of whether defamatory speech can or cannot be enjoined in a private lawsuit, the **Injunction** issued against Parris

⁵ "Oz the Great and Powerful" is a Disney film released in 2013 as a prequel to the classic film "the Wizard of Oz." The primary villain of the 2013 film is the wicked witch Evanora, who murdered the father of Glinda the good witch. At the end of the film, Glinda helps Kansan Oscar Diggs (the latter-day "Wizard of Oz") defeat Evanora, and avenge her father.

undeniably impinges on her right to engage in protected speech. As such, it cannot pass constitutional muster and must be reversed.

3. The Trial Court Lacked Authority to Vacate the District Court's Order Changing Parris Name to Rosolino.

Armesto contends that the trial court had jurisdiction under RCW 4.24.130 to vacate the district court's order changing Parris' name. Brief of Respondent, at 40 citing (15A Wash. Pract. § 9.4 (2013)). But the authority cited by Armesto only notes that no court has yet decided whether the superior courts in fact have original trial jurisdiction over a name change petition. 15A Wash. Pract. § 9.4 (2013) ("To date, [RCW 4.24.130(1) has] not been interpreted as granting *exclusive* jurisdiction in the district courts . . ."). Moreover, the name change petition statute grants jurisdiction only when a "person desiring a change of his or her name" makes an original application. RCW 4.24.130(1). It does not apply when the superior court purports to act in an appellate capacity, reviewing and vacating an order of sister court. Opening Brief of Appellant, at 11. A superior court can only take such action in its statutorily authorized "limited appellate jurisdiction." See *Dougherty v Dep't of Labor & Indus.*, 150 Wn.2d 310, 318, 76 P.3d 1183 (2003). Armesto's discussion of original jurisdiction under RCW 4.24.130 is therefore irrelevant.

Even if the trial court had jurisdiction to vacate the district court's order, Armesto's discussion of the merits of such a hypothetical review suffers from the same defect as its discussion of the **Injunction**—it treats as substantively undisputed “facts” that were never alleged in the complaint, which have never been determined based on a hearing or trial, and which are in fact disputed by Parris. Parris has never been adjudged, after a presentation of evidence, to have fraudulently changed her name, particularly in the sense of proof of the elements of fraud by an appropriate evidentiary standard. *See Kirkham v. Smith*, 106 Wn. App. 177, 183, 23 P.3d 10 (2001) (identifying the nine elements of fraud that must be proven by clear, cogent and convincing evidence). Armesto's complaint accuses Parris of “falsely claiming to have once been a Rosolino before the adoption in 1972,” but it does not allege fraud. RP 3. And undisputed evidence presented to the trial court shows that “Parris Rosolino” attended kindergarten and had a bank account opened in her name prior to 1972. RP 255-59.

The trial court lacked authority to vacate the district court's order and require Parris to change her name. Armesto's arguments to the contrary miss the point of Parris' appeal and are unpersuasive.

4. Awarding Armesto All of Her Attorney Fees in the Case Under CR 11 was improper.

The proposition that CR 11 sanctions can only be awarded for the signing of pleadings in violation of the rule is not a technical one, it is fundamental. Civil Rule 11 is entitled: “Signing and Drafting of Pleadings, Motions, and Legal Memoranda; Sanctions.” Sanctions awarded under CR 11 are limited to the amounts reasonably expended in responding to sanctionable filings. *Biggs v. Vail*, 124 Wn.2d 193, 201, 876 P.2d 448 (1994).

CR 11 is not intended to act as a fee-shifting mechanism. *Id.* at 197. Yet the trial court in this case employed the rule as a means of shifting *all* of Armesto’s litigation fees and costs—every dollar—to Parris. PR 2174-2176. Ignoring the appellate courts’ admonition that sanctions may only be awarded for amounts actually expended in *responding* to filings, the trial court here even awarded Armesto the costs of drafting and filing a complaint, and moving for a temporary restraining order and injunction, before Parris had even filed a single pleading that could be responded to. The law here is so clear that Armesto’s effort to convince this Court to uphold the entirety of the trial court’s CR 11 sanctions in the face of such uncontroverted authority itself violates the rule and should be sanctioned.

Even if there had been pleadings signed by Parris that could be considered in violation of CR 11, the failure of Armesto and the trial court to notify Parris that she may be subject to sanctions for any particular filing would prevent any award of sanctions. Both parties and judges who perceive a possible violation of CR 11 must bring it to the offending party's attention as soon as possible. *Biggs*, 124 Wn.2d at 198. The purpose of the rule is deterrence; that purpose is not served if a court waits until the end of an action to sanction a party, and the party is given no opportunity to be heard on the issue. *Id.*

The trial court's order awarding Armesto all of her costs and attorney fees under CR 11 was in clear violation of Washington law and must be vacated. The order should also be vacated because it is based upon the trial court's erroneous imposition of the extreme discovery sanction of dismissal, as discussed above.

5. The Damages Award Against Parris Cannot Be Sustained

Armesto's argument to uphold the trial court's damages award is that proof of damages is not required in a case of defamation per se. Brief of Respondent, at 41-43. But the **Findings and Conclusions** underlying the judgment do not indicate that the court treated defamation per se any differently than Armesto's other causes of

action when it came to awarding damages. RP 1975-1980. The thought process Armesto now ascribes to the trial court is not part of the record on appeal for the simple reason that it did not occur.

Moreover, Armesto's complaint does not allege the type of defamation per se that is actionable without proof of special damage. There are two meanings of the words "per se" when used in defamation actions. The words may signify either (1) that the communication is libelous on its face or (2) that it is actionable without proof of special damages. *Amsbury v. Cowles Pub'g Co.*, 6 Wn.2d 33, 737, 458 P.2d 882 (1969). In order to be the second type of defamation per se—the type that does not require proof of special damages, the subject publication must expose a person to hatred, contempt, ridicule, or obloquy. *Caruso v. Local Union No. 690 of Int'l Brotherhood of Teamsters*, 100 Wn.2d 343, 353, 670 P.2d 240 (1983). Armesto's complaint only asserts a cause of action for the first type of defamation per se—that Parris' statements were defamatory on their face. RP 14. Consistent with that allegation, the trial court made no factual finding that the defamation at issue here exposed Armesto to hatred or contempt. RP 1975-1980; *see also Caruso*, 100 Wn. 2d at 354 ("In all but extreme cases the jury should determine whether the article was libelous per se.").

Armesto did not prove special damages. At most, she estimated money that she has spent for recordings that she had unilaterally decided not to release. Appellant's Opening brief, at 14-15. Armesto has not identified any sales of her music that would have occurred but for Parris' alleged statements.⁶ She submitted no competent proof to substantiate the award of damages, and therefore the award should be reversed.

6. Armesto's Requests for a Partial Remand and For Attorney Fees Are Inconsistent and Meritless.

The final 2 sections of Armesto's brief are irreconcilable. Brief of Respondent, at 47-49. First, acknowledging that this Court might find merit in some of Parris' arguments and be inclined to reverse, respondent asks that a remand be limited. Then, as if the notion of Parris succeeding on any of her arguments is so inconceivable as to render all of them frivolous, Armesto asks that the Court award her attorney fees on appeal. These arguments are fundamentally contradictory, each suggesting the weakness of the other.

⁶ Armesto claims she recorded "four new CD's that could not be released" because her reputation has been damaged, but she also cites to her website, www.dianearmesto.com, where she lists 4 of her CD's that can be purchased at "fine stores," and also indicates that she is currently in studio working on a new CD. Brief of Respondent, at 4, 41.

As discussed above, every order entered by the trial court from November 16, 2012 forward was in error. None of them can be saved because the foundation of each is the initial erroneous decision to impose discovery sanctions that Parris was unable to comply with, and the subsequent extreme sanction of dismissal without satisfying the *Burnet* factors. In light of the important constitutional issues and fundamentally sound arguments Parris raises in her appeal, Armesto's request for an award of fees is frankly absurd, and reflects a "let's see how far I can push this" attitude that necessitated this appeal in the first place.

III. CONCLUSION

A trial court should rarely if ever limit a citizen's constitutional right to free speech as a discovery sanction, without permitting the party whose speech is being chilled to defend herself on the merits. Parris, a *pro se* and *in forma pauperis* defendant, was denied her day in court for a discovery violation relating issues of dubious relevance when the violation was not willful, when it could have been remedied in a far less extreme manner, and when it did not substantially prejudice Armesto's ability to prepare her defamation claims for trial. The resulting injunction on Parris' right to speak falls far short of well-established constitutional standards, and is otherwise vague and overbroad. Parris now faces obsessive monitoring of her activity by Armesto, who is attempting to use the

erroneous orders to prevent Parris from engaging in indisputably non-defamatory speech. For the reasons set forth above, and in Parris' opening brief, this court should reverse all of the trial court's orders from November 16, 2012 forward, and remand the case for a proper determination under Washington law of what achievable sanctions, if any, should be entered against Parris, and what other consequences, if any, follow from an appropriate sanctions determination

DATED this 16th day of January, 2014.

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CERTIFICATE OF SERVICE

Elizabeth G. Pitman affirms and states:

That on this day, I caused to be served a true and correct copy of Appellant’s Reply Brief, by the method indicated below, and addressed to each of the following:

Paul E. Fogarty Dearmin Fogarty 705 Second Avenue, Suite 1050 Seattle, WA 98104	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/>	U.S. Mail, Postage Prepaid Hand Delivered Overnight Mail Facsimile Transmission Electronic Mail
Matthew J. Segal Jamie L. Lisagor Pacifica Law Group, LLP 1191 Second Avenue, Suite 2100 Seattle, WA 98101	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/>	U.S. Mail, Postage Prepaid Hand Delivered Overnight Mail Facsimile Transmission Electronic Mail

I declare under penalty of perjury under the laws of the State of Washington and the United States of America, that the foregoing is true and correct to the best of my knowledge.

EXECUTED this 16th day of January, 2014.

Elizabeth Pitman