

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

BRIEF OF APPELLANT

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

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I
INTRODUCTION

The trial court, in error as a matter of law, found Ms. Lane and her attorney, Mr. Magee, jointly and severally liable for sanctions imposed pursuant to CR 11. The trial court, furthermore, did so in violation of their Constitutional Due Process Rights to be heard. Ms. Lane and Mr. Magee (Ms. Lane) now respectfully submit to this Court their appeal asking for the Order of the Trial Court to be reversed and that they be exonerated entirely from the trial court order imposing sanctions, and that all costs, attorney's fees be awarded to Ms. Lane allowable under the law and/or alternatively: respectfully request that this matter be remanded to the trial court so that Ms. Lane may have preserved and exercise her Constitutional Due Process Rights to be – on the record – heard, and present evidence, and call witnesses and confront the witness(es) against her.

II
ASSIGNMENTS OF ERROR

1. Did the court error as a matter of law in finding that this action was not warranted in existing case law? – YES
2. Did the court err as a matter of law when it found that Ms. Lane did not make a reasonable inquiry into the factual or legal basis of the action? – YES
3. Did the court err as a matter of law when it found that Ms. Lane’s attorney had not provided evidence in support of her position? – YES
4. Did the court err as a matter of law when it considered information about the identity of an “unknown” person at the meeting in question? – YES
5. Did the court err as a matter of law and violate Ms. Lane’s Due Process Rights by denying her a hearing in this matter? – YES.

III
STATEMENT OF CASE

At the behest of Ms. Lane, on June 7, 2010, a meeting took place between two parties;

(A) Ms. Lane/her real estate agent/his assistant, (Ms. Lane) and;

(B) Mr. Mark von der Burg (representing Coldwell Banker Bain Bellevue, *et al.*,)/Defendant Ms. Dawn Gadwa (representing First Citizens Bank, *et al.*,) (Mr. von der Burg¹).

The meeting took place at the offices of Coldwell Banker Bain in Bellevue, Washington in a conference room behind closed doors.

At that meeting, Ms. Lane discussed with Mr. von der Burg the terms of her purchasing a house of which Mr. von der Burg was a selling agent. The meeting concluded with Mr. von der Burg inviting Ms. Lane to deliver to him a written offer for consideration following the meeting. Ms. Lane did deliver the offer the next day. The offer was later turned down.

It was later discovered - and admitted to by Mr. von der Burg - that without Ms. Lane's consent, Mr. von der Burg secretly recorded the meeting that took place between the

¹ There were two separate Defendant's/Respondents in this matter who, material to this appeal, brought parallel motions for summary judgment and CR 11 sanctions. Pursuant to RAP 10.4(e) it is respectfully requested that Ms. Lane refer to both parties and their motions, *etc.*, by the singular reference to Mr. von der Burg while at the same time making separate distinctions as necessary when referring to particular issues.

parties on private property at a private business in a conference room behind closed doors on his iPhone.

Ms. Lane has never been investigated, nor charged with any crime related to that meeting, and, in fact, Mr. von der Burg retained counsel and sought protection of himself under the Vth Amendment for his role in making the secret recording of the private meeting at his private office.

Based on the facts admitted to Ms. Lane, and the corresponding law providing that Mr. von der Burg shall be subject to a civil action for making the recording without Ms. Lane's or anyone in her parties' consent, Ms. Lane Complained and provided to the trial court that as a matter of fact that she considered the meeting private and recorded without her consent, and provided that under the following law, this matter was actionable - specifically:

(i) RCW Chapter 9.73 – Privacy, Violating Right Of,
and there under;

(ii) RCW 9.73.030 – Intercepting, recording, or divulging private communications – consent required – Exceptions, and there under;

(ii) RCW 9.73.060 – Violating Right to Privacy – Civil Actions – Liability for Damages.

Relative to this appeal, in response, Mr. von der Burg (in fact, each defendant) first brought, a motion(s) for summary judgment which was argued on the record, (which was granted,) and then the motion(s) for CR 11 sanctions without requesting oral argument.

Ms. Lane objected to the timeliness of the of the (first) CR 11 motion, and to both motions for not requesting and providing oral argument/a hearing regarding the motion(s) (consistent with Due Process to be afforded Ms. Lane, and pursuant to King County Local Court Rule (KCLCR) 7.)

The trial court denied/ignored the objections(s)/motions regarding timeliness and a hearing being set on the matter, and before Ms. Lane had responded to the (second) motion, the trial

court – *sua sponte* and mid-stream, and citing no particular authority - re-framed the CR 11 legal question to Ms. Lane ordering that certain/specific evidence be put forward. Ms. Lane complied with that order. After the response by Mr. von der Burg, the trial court found in favor of Mr. von der Burg.

Ms. Lane, claiming that the trial court both;

(A) Erred as a matter of law, and;

(B) Denied Ms. Lane her Due Process Right to be heard, present evidence and call and confront witnesses at a hearing on the record, and now respectfully brings this appeal.

IV SUMMARY OF ARGUMENT

Ms. Lane did not violate CR 11 because in her Amended Complaint (Complaint):

A. There was a sound basis in fact for Ms. Lane’s claim, namely, that it was admitted as fact that Mr. von der Burg secretly (*i.e.*, without her knowledge or consent, (nor anyone else with her,) recorded the private conversation (as asserted by

timely and properly submitted affidavit of Ms. Lane in response to the CR 11 motion(s), and as admitted to by Mr. von der Burg's counsel via their motion for summary judgment and its concession that the facts alleged in the Complaint are to be taken as true and correct,) and;

B. There was sound, actionable basis warranted by existing law to bring the underlying action, namely, RCW Chapter 9.73, and specifically there under, RCW 9.73.060 – Violating Right to Privacy – Civil Action – Liability for Damages, which states and provides, by law that Mr. von der Burg shall be subject to exactly this lawsuit, and;

C. That - notwithstanding the reality that there was a basis in law and fact for Ms. Lane's Complaint - the necessary objective inquiry to be made by Ms. Lane/Ms. Lane's counsel was provided to Ms. Lane by-way-of admissions by Mr. von der Burg, similarly situated attorney's signed pleadings addressing whether recording the meeting was in violation of the law, and rulings by a sitting judge who granted a request of Mr. von der

Burg to be protected by the Vth Amendment for his role in making the recording, and;

D. That for a trial court to make a lawful finding of a CR 11 violation that Ms. Lane must be afforded Due Process, which she was denied by the trial court when she was denied a/any hearing in this matter.

V ARGUMENT

Introduction

Ms. Lane asserts that the trial court erred as a matter of law in its attempt to apply CR 11 to Ms. Lane's Complaint regarding and denied Ms. Lane Due Process by denying her any hearing in this matter.

To establish that this was the case, Ms. Lane respectfully presents the following argument in three-parts whereby she will;

- A. Present the CR 11 standard set forth by law and apply it to the Complaint and the facts of the record demonstrating that no violation of CR 11 occurred, and;
- B. Present the steps the trial court took to demonstrate the findings are error as a matter of law that CR 11 had been violated, and;
- C. Present argument establishing that Ms. Lane's Due Process Rights were violated by being denied a hearing on this matter.

A.
STRAIGHT-FORWARD ANALYSIS OF MS. LANE'S
COMPLAINT UNDER THE CR 11 STANDARD SET
FORTH BY THIS COURT ESTABLISHES THAT MS.
LANE'S COMPLAINT MAY NOT BE SUBJECT TO CR 11
SANCTIONS AND THAT THE TRIAL COURTS FINDING
SHOULD BE REVERSED

The Complaint

Under *Bryant v. Joseph Tree, Inc.*, 57 Wn. App. 107, 791

P.2d 537 (1990), this Court held that:

A plaintiff's complaint may be subject to CR 11 sanctions if the action is neither well grounded in fact nor warranted by existing law.

Bryant v. Joseph Tree, 57 Wn. App. 107, 114 (1990)

In affirming this Court, the Supreme Court of the State of

Washington states that:

Complaints which *are* “grounded in fact” and “warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law” are not “baseless” claims, and are therefore not the proper subject of CR 11 sanctions.

Bryant v. Joseph Tree, Inc., 119 Wn. 2d 210, 219-20, 829 P.2d 1099 (1992) (emphasis added)

The undisputed facts publicly disclosed (and to Ms. Lane) by Mr. von der Burg prior to filing of and contained in the Complaint are that Mr. von der Burg recorded a conversation at his office behind closed doors at which Ms. Lane was present without her knowledge or consent. CP 410-

13

The Revised Code of Washington in existence at the time, and as stated in the Complaint states that:

(1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any: (b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device

is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

RCW 9.73.030(10(b))/CP 326-7

And RCW 9.73.060 states:

Any person who, directly or by means of a detective agency or any other agent, violates the provisions of this chapter shall be subject to legal action for damages, to be brought by any other person claiming that a violation of this statute has injured his or her business, his or her person, or his or her reputation. A person so injured shall be entitled to actual damages including mental pain and suffering endured by him or her on account of the violation of the provisions of this chapter, or liquidated damages computed at the rate of one hundred dollars a day for each day of violation, not to exceed one thousand dollars, and a reasonable attorney's fee and other costs of litigation.

RCW 9.73.060/CP 327

The fact(s) that Mr. von der Burg recorded the conversation at his office without Ms. Lane's consent were grounded in the fact that they were publicly admitted to by Mr. von der Burg *before* (during, and after) the Complaint was filed. CP 410-13

Existing statutory law warranted the action wherein it states that any person (*e.g.*, Mr. von der Burg) who, directly or

by means of a detective agency or any other agent, violates the provisions of RCW Chapter 9.73 shall be subject to legal action for damages, to be brought by any other person claiming that a violation of this statute has injured his or her business, his or her person, or his or her reputation. CP 327

Under the law set forth by *Bryant v. Joseph Tree, Inc.*, by this Court and the Supreme Court, Ms. Lane's Complaint, therefore, may *not* be subject to CR 11 sanctions.

Summary Judgment v. Complaint

Prior to the motion(s) for CR 11 sanctions being brought, this matter came before the trial court on a motion(s) for summary judgment by Mr. von der Burg which was granted over Ms. Lane's arguments of a contrary view of the law by-way-of the trial court finding either that the conversation recorded without Ms. Lane's consent was either not a "private" conversation, or was a statutory exception to a violation of RCW Chapter 9.73 - *i.e.*, based on the court's determination

that Ms. Lane's lawyer's (Mr. Magee's) view of the law was
"wrong."

Under *Bryant*, this Court states that:

A complaint is *legally* frivolous where it is not based on a plausible view of the law. *Aetna Life Ins. Co. v. Alla Med. Servs., Inc.*, 855 F.2d 1470, 1475 (9th Cir. 1988). "[T]he mere fact that a claim does not prevail, or 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." *Townsend v. Holman Consulting Corp.*, 881 F.2d 788, 792 (9th Cir. 1989) (citing *Hudson v. Moore Business Forms, Inc.*, 836 F.2d 1156, 1159 (9th Cir. 1987)); *accord, Jensen*, 873 F.2d at 1329 (quoting *Hudson*, 836 F.2d at 1159); *Spokane and Inland Empire*, 55 Wn. App. at 111.

Bryant v. Joseph Tree, Inc., 57 Wn. App. 107, 115 (1990)

The Supreme Court, furthermore, stated that:

The fact that a complaint does not prevail on its merits is by no means dispositive of the question of CR 11 sanctions. CR 11 is not a mechanism for providing attorney's fees to a prevailing party where such fees would otherwise be unavailable. *John Doe v. Spokane & Inland Empire Blood Bank*, 55 Wn. App. 106, 111, 780 P.2d 853 (1989)

Becoming subject to summary judgment, however, the action was dismissed, *i.e.*, Ms. Lane did not prevail - *not* because there was not a basis in fact or law, but rather - because

the trial court had a different view of the law than Ms. Lane/Ms. Lane's counsel, thus exonerating, as a matter of law, the Complaint and Ms. Lane/Ms. Lane's counsel from sanctions under any aspect of CR 11.

Specifically, the trial court found that as a matter of law the conversation fell under an exception to a violation of RCW 9.73 listed under RCW 9.73.030(2)/a differing view than Ms. Lane that as a matter of law, the conversation was private, (CP 443). Ms. Lane's Response, supported by Supreme Court law, disputed that view of the law, (CP 402-3) *i.e.*, Ms. Lane had a sound basis in law in fact, but, according to the trial court, nothing more than a differing view of the law regarding the exception.

Mr. von der Burg, (citing *Danzig v. Danzig*, 79 Wn.App. 612, 616 (1995) and quoting *Berge v. Gorton*, 88 Wn.2d 756, 759, 567 P.2d 187 (1997)), furthermore, removes any doubt as to the existence to a basis in fact and law in the Complaint precluding the finding of a CR 11 violation when in his Motion

for Summary Judgment he declares, “When considering the motion, the court must accept the facts alleged in the complaint as true.” CP 333

The facts stated in the Complaint are that Ms. Lane asked for a private meeting and that the private meeting was unlawfully recorded using an electronic device. CP 326

RCW 9.73.030, and as cited in Ms. Lane’s Complaint states, “. . . it shall be unlawful for any individual . . . to intercept, or record any: (b) Private conversation, by any device electronic or otherwise . . . ” (CP 326-7) And, RCW 9.73.060, (and as stated in the Complaint,) states that for the violation, Mr. von der Burg, “shall be subject to legal action for damages.” CP 327

Simply:

1. Mr. von der Burg’s Motion for Summary Judgment admits to the factual basis in Ms. Lane’s Complaint which;
2. Correspond verbatim to the statute alleged to have been violated, which then:

3. Expressly – as a matter of statutory law – provides that Mr. von der Burg shall be subject to this action.

Under any circumstances, this is at the very least, (and if not more,) a plausible view of the law.

That the trial court deemed Mr. von der Burg's actions to be an exception under RCW 9.73.030, or the recording of a *non-private* conversation first requires an admission by the trial court that Mr. von der Burg recorded the conversation without Ms. Lane's, (nor anyone else's) consent and then, therefore, that the action was based on a plausible view of the law, and then, a finding by the trial court of a different view of the law than Ms. Lane/Ms. Lane's attorney.

It is insufficient, therefore, to warrant sanctions under any aspect of Rule 11 because the Complaint was recognized by the trial court as based on a plausible view of the law and was not only warranted, but directed to be taken by the State of Washington Legislature and the Governor when RCW 9.73.060 was enacted.

B.
TRIAL COURT'S FINDINGS ARE FUNDAMENTALLY
FLAWED AND UNSOUND AND ERROR AS MATTER OF
LAW

The trial court's Judgment and Order Granting

Defendants' Motions for Sanctions (Order) indicates that it reviewed the entire file in this case before making its findings. In it, there is no reference to any case law, statutory law, nor constitutional law to serve as a basis for its findings (CP 318) Ms. Lane assigns error to the following findings of the trial court:

1. "The action was not warranted by existing case law (the plaintiff made no argument that there was a good faith argument for extension of existing law)" (CP 318)

Under *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210 (1992), it states, "Complaints which *are* "grounded in fact" and "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law" are not

“baseless” claims, and are therefore not the proper subject of CR 11 sanctions.” *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d at 219-220.

Under *Bryant v. Joseph Tree, Inc.*, 57 Wn. App. 107, 791 P.2d 537 (1990), this Court states, “A plaintiff’s complaint may be subject to CR 11 sanctions if the action is neither well grounded in fact nor warranted by existing law.” *Bryant v. Joseph Tree, Inc.*, 57 Wn. App. at 114 (internal citations omitted)

Under *Madden v. Foley*, 83 Wn. App. 385, 922 P.2d 1364 (1996), it states, “A complaint is legally frivolous if it is not based on a plausible view of the law.” *Madden v. Foley*, 83 Wn. App. at 391 (citing *Bryant v. Joseph Tree, Inc.*, 57 Wn. App. 107, 115 791 P.2d 537 (1990), *affirmed*, 119 Wn.2d 210, 829 P.2d 1099 (1992))

Under *Roeber v. Dowty Aerospace*, 116 Wn. App. 127, 64 P.3d 691 (2003), it states, “CR 11 authorizes sanctions when a complaint lacks a factual or legal basis and the attorney who

signed the complaint failed to conduct a reasonable inquiry into the factual and legal bases of the claims. . . . Sanctions may be imposed only if the complaint lacks a factual or legal basis *and* if the attorney failed to conduct a reasonable inquiry.” *Roeber v. Dowty Aerospace*, 116 Wn. App. at 141-42

Moreover, *Roeber*, in affirming that the trial court’s refusal to impose sanctions under CR 11, states:

In this case, Mr. Roeber raised colorable issues of termination based on discrimination and failure to accommodate a disability. He established a medical abnormality and provided evidence and authority for his belief that Dowty fired him because of that abnormality or because he sought accommodation for that abnormality. His evidence did not establish a prima facie case, but it provided something more than the complete lack of a factual basis. Additionally, his attorney provided legal authority for recovery, if the facts had supported a prima facie case. Although ultimately unsuccessful, his complaint was not totally without basis in law or fact.

Roeber v. Dowty Aerospace, 116 Wn. App. at 142 (emphasis added)

Without citing any authority, the trial court’s Order states explicitly that the action was not warranted in existing *case* law, and, therefore, was in violation of CR 11.

Multiple authorities, however, state that the controlling standard is, *e.g.*, that all that Ms. Lane must show in her Complaint for it not to be subject to sanctions under CR 11 is that it was supported by existing law, warranted by existing law, and was a plausible view of the law, or that there was a legal basis, or that there were colorable issues, *i.e.*, something more than a complete lack of factual basis and legal authority providing for recovery if the facts as alleged had supported a *prima facie* case instead of having to show exclusively that it was supported by existing case law.

As has been demonstrated explicitly as a matter of fact, *supra*, and as contained in Ms. Lane's Complaint, it is clear that the legislature created the basis in law for bringing an action when it enacted RCW 9.73.060 whereby it states that if a person violated, as alleged, (based here on admitted, corresponding facts,) RCW 9.73.030, or any part of chapter 9.73, that the person, *shall* be subject to an action. The basis in law is a statute authorizing that Mr. von der Burg, "shall be

subject to legal action for damages, to be brought by any other person claiming that a violation of this statute has injured his or her business, his or her person, or his or her reputation.” RCW 9.73.060/CP 327

To state, as the trial court did, that Ms. Lane would have had to have established a basis in existing case law is error.

2. “The Plaintiff did not make a reasonable inquiry into the factual or legal basis of the action;” CP 318

Under *Bryant*, the Supreme Court states:

The reasonableness of an attorney’s inquiry is evaluated by an objective standard. CR 11 imposes a standard of “reasonableness under the circumstances”. . . . [and that the court] should test the signer’s conduct by inquiring what was reasonable to believe at the time the pleading, motion or legal memorandum was submitted. The court should inquire whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified.

Bryant, 119 Wn.2d at 220 (internal citations omitted)

Was it reasonable before Ms. Lane/Mr. Magee submitted the Complaint to believe:

(a) That Mr. von der Burg recorded the conversation without Ms. Lane's consent, and;

(b) That there was a basis in law to bring the action.

Because it was admitted to Ms. Lane, in an e-mail message exchange between Mr. von der Burg and a prosecuting attorney for the City of Kirkland and then delivered to Ms. Lane where Mr. von der Burg admitted to (a) recording the conversation without Ms. Lane's consent, and (b) that the Revised Code of Washington (9.73.060) provides that if that is done that Mr. von der Burg shall be subject to an action, then the only answer can be yes, it was reasonable to believe, and that a reasonable inquiry had been made and that there was a basis in law and fact in support of Ms. Lane's complaint.

Did Ms. Lane provide evidence that a reasonable attorney in like circumstances would have found that:

(a) Mr. von der Burg recorded the conversation in violation of the law, and;

(b) That the violation of the law supported bringing an action against Mr. von der Burg.

In the case that revealed Mr. von der Burg's wrongdoing, the prosecuting attorney who knew nothing more, *i.e.*, was under not only "like" circumstances, but in fact, under the exact same circumstances as Ms. Lane, was to present Mr. von der Burg as a witness against Ms. Lane. That same attorney, who was also subpoenaed to testify on behalf of Ms. Lane acknowledged that he would be able to testify, under oath, that, "VDB [Mr. von der Burg] illegally tape recorded a meeting between himself and the Defendant [Ms. Lane] on June 7, 2010" CP 252

The attorney also admitted in a signed pleading that his "testimony would not offer any probative evidence and simply bring out the fact that VDB [Mr. von der Burg] committed a crime" when he recorded the conversation in question. CP 256 (emphasis added)

This evidence was provided to the trial court, (as requested by-way-of the trial court's *mid-stream* order) but, erringly discredited by the trial court's Order wherein it states that the "evidence was not even in existence prior to the filing of the complaint" CP 318

Under the law, however, the question is not when an attorney in like circumstances would have made a record of a similar conclusion, but merely that regardless of when, that a reasonable attorney knowing nothing more than what Mr. Magee knew at the time the Complaint was filed would have arrived at the same conclusion - that Mr. von der Burg committed a crime/violated RCW 9.73.030. The evidence presented proves just that and the trial court erred in concluding otherwise.

3. "The plaintiff's attorney has not provided evidence in support of the plaintiff's position even when given additional time to do so;" CP 318

Not only did Ms. Lane provided the evidence presented *supra* regarding a making a reasonable inquiry, Ms. Lane presented additional evidence that is not disputed by Mr. von der Burg, but rather admitted, namely, that when Mr. von der Burg was to be called as a witness he retained counsel, (the same that represents him here,) and petitioned the trial court (in which Mr. von der Burg was to be a witness) for Mr. von der Burg to be permitted to invoke his Vth Amendment rights against self-incrimination regarding being asked to testify about the conversation and recording thereof. CP 278

Mr. von der Burg was granted permission to invoke his Vth Amendment rights, and what was established with the trial court, therefore, was that, “Thus, the judgment debtor [witness [Mr. von der Burg]] must demonstrate a reasonable factual predicate that his answer could incriminate him in order to sustain his claim of privilege.” CP 210, *See Eastham v. Arndt*, 28 Wn. App. 524 (1981) *citing F.D.I.C. v. Sovereign State Capital, Inc.* 557 F.2d 683 (9th Cir. 1977); *State ex rel. Howard*

v. Allison, 431 S.S. 2nd 233 (Mo. App. 1968); *Kirtley v. Abrams*,
184 F. Supp. 65 (E.D.N.Y 1960)

When counsel for Mr. von der Burg argued for invocation of the 5th Amendment, he stated that in doing so it was;

[A]nticipated to result in an incriminating answer but then also, each link of a chain which would be used in a subsequent prosecution. My concern for our client, the reason we are invoking these two particular areas of privilege today is that the very first thing that needs to be proven in any subsequent case against my client is that this meeting on June 7th actually occurred.

CP 211-12

Mr. von der Burg, in petitioning and being granted permission to exercise his 5th Amendment rights admittedly established a reasonable factual predicate that he could be incriminated because he recorded the conversation in question, and his attorney admitted that if Mr. von der Burg were to answer questions about making a recording of the conversation that it would result in an incriminating answer that would lead to subsequent prosecution for recording the conversation.

Mr. von der Burg himself, simply, established all that is contained in Ms. Lane's Complaint, namely, "colorable" issues as to law (RCW 9.73.030/9.73.060) and fact (that he recorded the conversation without Ms. Lane's consent) and that Mr. von der Burg could be subject to prosecution, *i.e.*, an action for his role in recording the conversation. Ms. Lane need do only that to avoid CR 11 sanctions, and she did, and Mr. von der Burg admitted to, and took the same position so that he could invoke his Vth Amendment rights.

Mr. von der Burg's invocation of his Vth Amendment rights necessitated the establishment of a factual predicate providing Ms. Lane's Complaint not totally without a basis in law or fact. This evidence established to the trial court that it should have refused to impose sanctions under CR 11. *See Roeber v. Dowty Aerospace*, 116 Wn. App. 127, 142 (2003)

Accordingly, the trial court erred as a matter of law in imposing sanctions under CR 11

4. “The information about the identity of the unknown person at the meeting (which was the basis for finding that the meeting was not private) appeared to be within the control of the plaintiff, but she chose not to reveal it and yet continued to oppose the defendant’s motion for summary judgment.” CP 318-19

Under RCW 9.73.060, it states that a person/Mr. von der Burg shall be subject to legal action for a violation of any part of RCW Chapter 9.73, and; That the action is “to be brought by any other person claiming that a violation of this statute has injured his or her business,” RCW 9.73.060/CP 327

Nowhere does it say that Ms. Lane, as a person present at the meeting/conversation has to identify anyone else there for her to bring suit against Mr. von der Burg under the law.

Under *Bryant*, furthermore, the Supreme Court, in response to the question of whether an attorney may supplement the factual record at a CR 11 hearing held that when there is a basis in law, *i.e.*, a legal basis in the Complaint,

that the attorney may supplement the factual record in response to a CR 11 matter, and that:

Moreover, Washington's notice pleading rule does not require parties to state all of the facts supporting their claims in their initial complaint. CR 8(a) provides that: "A pleading which sets for a claim for relief . . . shall contain . . . *a short and plain statement of the claim* showing that the pleader is entitled to relief . . .

Bryant, 119 Wn.2d at 222

In response, (but not as part of a hearing) to Mr. von der Burg's CR 11 motion(s), Ms. Lane, by declaration, did in fact identify the person in question, stating that she, "attended the meeting with my real estate agent, James McClung, and the person who I knew to be his assistant." CP 237

Ms. Lane need not identify anyone else present when a conversation is recorded to bring suit under RCW 9.73.060 providing, by law, that Mr. von der Burg shall be subject to an action. Absent the identity of another person present does not render Ms. Lane's Complaint/pleading a violation of CR 11, but comports with CR 8(a), and, as permitted, Ms. Lane timely and

properly identified the person in her declaration in support of her response to the CR 11 motion(s) – all of which precludes, as a matter of law, finding a CR 11 violation for Ms. Lane’s Complaint not identifying a person present at the meeting, and the trial court erred, as a matter of law, for doing so.

C.

MS. LANE WAS DENIED DUE PROCESS WHEN THE TRIAL COURT DENIED HER A HEARING AND THE OPPORTUNITY TO BE HEARD AND PRESENT EVIDENCE AND CALL WITNESSES AND CONFRONT THE WITNESSES AGAINST HER

Under *Bryant*, the Supreme Court states that:

CR 11 procedures ‘obviously must comport with due process requirements.’ Fed. R. Civ. P. 11 advisory committee note, 97 F.R.D. at 201. Due process requires notice and an opportunity to be heard before a governmental deprivation of a property interest. *Tom Growney Equip., Inc. v. Shelley Irrig. Dev., Inc.*, 834 F.2d 833, 835 (9th Cir. 1987)(citing *Bodie v. Connecticut*, 401 U.S. 371, 379, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971)). . . . The respondents therefore provided Bolin with notice prior to oral argument that they were seeking CR 11 sanctions. At oral argument, Bolin had the opportunity to be heard on this issue.

Bryant, 119 Wn.2d at 224/(CP 105)

King County Local Court Rule (KCLCR) 7, furthermore, states:

(B) Scheduling Oral Argument on Dispositive Motions. The time and date for hearing shall be scheduled in advance by contacting the staff of the hearing judge.

KCLCR 7(b)(4)(B)

The Defendant(s) in this matter served and filed and noted for consideration their Motion(s) for CR 11 sanctions without oral argument in violation of the law set forth in *Bryant*, and

KCLCR 7. CP 72/74

Ms. Lane, subsequent to the noting of the motions for consideration without oral argument, filed an objection citing both KCLCR 7 (to include the fact that the motion was set untimely and objected to as such which, under KCLCR 7 renders the motion(s) not to be considered up and until the trial court imposes terms/sanctions) and *Bryant* requesting, accordingly, that the motions be stricken and for them to be considered without oral argument to be a violation of Ms. Lane's Due Process Rights. CP 102-108

The trial court - rather than following the law and preserving Ms. Lane's Due Process Rights to be heard, and,

e.g., to be present evidence and testimony and confront the witnesses against her and create a record for review – denied both Ms. Lane’s motion to strike the Defendant’s motion(s) and motion for oral argument. CP 195

Ms. Lane’s Due Process Rights, therefore, were violated when she was not only not granted, but denied any opportunity to be heard in this matter by the trial court which proceeded to impose sanctions/deprive Ms. Lane of her property interests as identified in *Bryant*. The trial court, therefore, erred as a matter of law and violated Ms. Lane’s rights in doing so.

VI CONCLUSION

The trial court erred as a matter of law and the trial court’s order imposing sanctions should be reversed and all costs, attorney’s fees, *etc.*, allowable under the law should be awarded to Ms. Lane because:

A. The Complaint in this matter, as a matter of fact and law clearly possesses a basis in law and fact and a reasonable

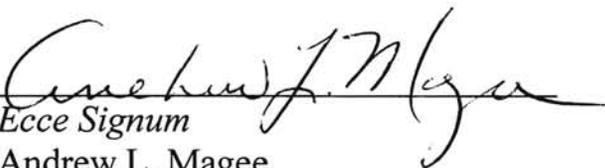
inquiry was made by Mr. Magee before signing and filing it initiating this action, and;

B. The trial court categorically erred and failed as a matter of law in its attempt to apply the CR 11 standard to Ms. Lane's Complaint, and;

C. In the alternative, this matter should be remanded to the trial court with instructions to provide a hearing with oral argument – and substantial and adequate time to prepare – to preserve and allow Ms. Lane to exercise her constitutional Due Process Rights

DATED this 13th day of May, 2013

Respectfully Submitted


Ecce Signum
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