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COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 JUN 10 PM 2:43

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 RESPONDENT MARK VON DER BURG

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I. INTRODUCTION

This appeal is an unfounded continuation of a frivolous lawsuit that richly merited the prompt dismissal it received below. Due to the broad discretion afforded the trial courts in these matters, the lack of evidence offered by Plaintiff/Appellant Jill Lane (“Appellant” or “Ms. Lane”) and her counsel in support of this case, and the clear statutory bars to recovery under RCW 9.73.030, this Court should affirm the decision of the lower court (the “Trial Court”). Additionally, Respondent Mark Von der Burg (“Respondent” or “Mr. Von der Burg”) should be awarded reasonable fees and costs on appeal.

Pursuant to RAP 10.1(g), Mr. Von der Burg joins in and fully incorporates by reference the following portions of co-Respondent First-Citizens Bank & Trust Company’s (“FCB”) Brief (with modifications referenced in italics):

- 1) Introduction;
- 2) Restatement of the Issues Pertaining to Assignments of Error – *With additional Assignment of Error #8;*
- 3) Statement of the Case – *With additional facts noted herein;*
- 4) Argument – *With additional argument noted herein;*
- 5) Conclusion; and
- 6) Appendices.

II. RESTATEMENT OF THE ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Mr. Von der Burg offers the following addition to the Restatement of the Issues prepared by FCB:

8. Whether the trial court abused its discretion when it awarded Mr. Von der Burg \$16,000.00 in terms and sanctions against Ms. Lane and her attorney? Answer: No.

. III. STATEMENT OF THE CASE

Mr. Von der Burg offers the following facts to supplement the Statement of the Case prepared by FCB:

- 1) The actions of the Appellant and her accomplices in illegally occupying the property at issue are virtually identical to the criminal practices utilized by the now defunct Dorean Group. Notably, the Dorean Group principals were convicted of federal criminal charges for their unlawful activities and their legal counsel was sanctioned by the court for his participation in their conduct. CP 9, n. 2.
- 2) Mr. Von der Burg informed Ms. Lane and her counsel that the filed lawsuit was actionable under CR 11 and related sanctions by letter on July 10, 2012, sent in accordance with the requirements of *Biggs v. Vail*, 124 Wn.2d 193, 876 P.2d 448 (1994). CP 154, 172-173. This letter was sent well in advance of the October 26, 2012 order by the Trial Court granting Mr. Von der Burg's and FCB's respective Motion for Dismissal and Motion for Dismissal and/or Partial Summary Judgment. No substantive response was ever received in response to this letter. CP 154.
- 3) Similar to FCB, Mr. Von der Burg was compelled to expend considerable time and resources in defending against this lawsuit and requested sanctions in the amount of \$18,440.50 in attorneys' fees and \$465.92 in costs. CP 151, 174-186.

IV. ARGUMENT

Mr. Von der Burg offers the below additional arguments to supplement the arguments offered by FCB.

A. Substantial evidence supports the trial court's finding that Ms. Lane did not make a reasonable inquiry into the factual or legal basis for this action.

Counsel for Ms. Lane argues that he did, in fact, make a reasonable inquiry into the factual or legal basis for this action, and, consequently, should not be liable for sanctions. Appellant's Brief at 6-7, 22-24. Counsel is mistaken. As noted by the Trial Court, the "evidence" supplied by Ms. Lane and her counsel comprised items of information that were not even in existence at the time of filing the Complaint in this case. CP 301. In support of her argument on appeal, Ms. Lane invites this Court's attention to several items of purported evidence:

- 1) Affidavits of Ms. Lane in response to CR 11 sanctions (Appellant's Brief at 6-7);
- 2) Declaration of Mr. Von der Burg at summary judgment (*Id.* at 7, 15);
- 3) Ruling of a Kirkland Municipal Judge that Mr. Von der Burg could properly invoke his Fifth Amendment rights against self-incrimination (*Id.* at 7-8, 25-27);
- 4) Declarations and signed pleadings by a prosecuting attorney for the City of Kirkland in the criminal trespassing case against Ms. Lane (*Id.* at 23); and
- 5) An e-mail from Mr. Von der Burg to a prosecuting attorney for the City of Kirkland that purportedly admitted to recording the conversation without Ms. Lane's consent (*Id.* at 22).

This is, of course, the exact same tactic taken employed by Appellant and her counsel at the Trial Court level. All but one of the Plaintiff/Appellant's items of

“evidence” did not exist prior to the filing of the Complaint on May 31, 2012.

Consequently, none of these items are relevant to the analysis of whether the lawsuit was “well grounded in fact” and “warranted by existing law” under CR 11 at the time of filing. “In deciding whether to impose sanctions, the court should evaluate a party’s pre-filing investigation by inquiring what was reasonable for the attorney to have believed at the time he filed the complaint.” *Manteufel v. Safeco Ins. Co. of Am.*, 117 Wn. App. 168, 176, 68 P.3d 168 (2003). Here, the Appellant’s pre-filing investigation consisted of a leap to judgment that, if a conversation was recorded without knowledge or consent, it must be actionable, regardless of the circumstances of the conversation. That is not the law, and is not a reasonable basis to file a lawsuit.

In this case, the only item offered by Appellant that pre-dated the filing of the Complaint was the purported e-mail from Mr. Von der Burg. Assuming *arguendo* that this e-mail fully supported the Appellant’s contention that the meeting was recorded without Ms. Lane’s consent, it is still wholly insufficient to comprise a reasonable factual or legal basis to file a lawsuit. The e-mail does not defeat, in any way, the double statutory bars under RCW 9.73.030(1)(a) and RCW 9.73.030(2) that the conversation must be a “private communication” and must not be utilized to convey “threats of extortion, blackmail...or other unlawful requests or demands” to merit protection. The fact that Ms. Lane and counsel filed the lawsuit and persisted in it, despite repeated warnings from the Respondents that the case was actionable under CR 11 and other statutes, reinforces the appropriate nature of the sanctions awarded.

Even when provided additional time by the Trial Court to produce evidence indicating that Ms. Lane and her counsel had engaged in a reasonable *prefiling* inquiry

regarding the bases for the action, they were unable to produce admissible evidence. Unfortunately, it appears that Ms. Lane peremptorily seized on the purported e-mail from Mr. Von der Burg and filed a lawsuit in hopes that the case had settlement value. This is, of course, entirely in accord with the Plaintiff/Appellant's behavior in unilaterally occupying the property at issue and attempting to extort the Respondents to fraudulently gain title. Despite being informed of the case's fatal defects, counsel and Ms. Lane persisted in pursuing the case, resulting in an expensive and unnecessary lawsuit.¹ The Trial Court appropriately found that there was no factual or legal basis and the Court of Appeals should affirm that decision.

B. The Trial Court provided appropriate due process to the Appellant.

Ms. Lane and her counsel contend that due process requires that the Trial Court provide a live, in-person hearing prior to awarding sanctions. Appellant's Brief, 30-32. That is incorrect. When a court considers a CR 11 motion, there is no due process right to a full evidentiary hearing. *Watson v. Maier*, 64 Wn. App. 889, 899-900, 827 P.2d 311 (1992). Whether and to what extent any additional hearing is required will vary depending on the nature of the case. *In re Whitesel*, 111 Wn.2d 621, 630 763 P.2d 199 (1988). The federal advisory committee note to FRCP 11 observes that "in many situations, the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary." *Watson*, at 900.

In this case, the Trial Court had ample opportunity to evaluate the merits of the CR 11 motions by virtue of the twin Motion for Dismissal and Motion for Dismissal

¹ Indeed, Mr. Von der Burg has been damaged more than the costs and expenses associated with this suit would facially indicate. Like all realtors, he makes his living based on the sale of property and the price he receives from it. In this case, the actions of Ms. Lane and her allies resulted in the property being labeled a "squatter house" and being reduced in price by over \$400,000.00, with all the attendant consequences for Mr. Von der Burg's commission. CP 331-332, 362.

and/or Partial Summary Judgment filed by FCB and Mr. Von der Burg, respectively, and Ms. Lane's responsive briefs. Additionally, the Trial Court had the opportunity to intimately familiarize itself with the case through oral arguments held on October 26, 2012. As is made clear by review of the record, Mr. Lane and her counsel were provided notice and multiple opportunities to be heard in the CR 11 matter. It was after Ms. Lane and her counsel failed to produce admissible evidence in response to the motion for sanctions that the Trial Court issued the order of November 30, 2012. This order observed that no admissible evidence had been produced and provided yet another opportunity for Ms. Lane to search for and produce evidence defending against the CR 11 allegations. CP 195-196. The order provided until December 11, 2012 for Ms. Lane to provide any such evidence to the Trial Court. This deadline similarly came and passed without submission of admissible evidence. In short, the Appellant was provided notice, an opportunity to be heard, and multiple opportunities to present any evidence that would defend against the CR 11 motions. Due process was appropriately served in this case.

C. The Trial Court did not abuse its discretion when it awarded Mr. Von der Burg \$16,000.00 in terms and sanctions against Ms. Lane and her attorney. (Restatement of Issues Pertaining to Assignment of Error #8).

The Trial Court did not abuse its discretion in awarding sanctions against Ms. Lane and her attorney. Abuse of discretion means the "decision is manifestly unreasonable or is based on untenable grounds or untenable reasons." *Bird v. Best Plumbing Group, LLC*, 175 Wn.2d 756, 774-775, 287 P.3d 551 (2012). Here, there is ample support for the Trial Court's decision. As demonstrated above, the Trial Court recognized that Ms. Lane and her counsel could not produce evidence that pre-dated the filing of the Complaint. Moreover, the "evidence" produced that pre-dated the filing of

the Complaint did not defeat the twin statutory bars of RCW 9.73.030. This was determined after the Trial Court accorded additional time to Ms. Lane and her counsel to produce evidence supporting the reasonableness of the Complaint. Additionally, it was determined after Mr. Von der Burg submitted declarations demonstrating that nearly \$19,000.00 had been expended in defending the litigation to date. The Trial Court's findings of fact were supported by the record and clearly demonstrate the frivolous nature of this lawsuit. As such, the Trial Court acted appropriately to sanction the party and counsel behind this frivolous, harassing litigation. Accordingly, the Court of Appeals should affirm the Trial Court's award of \$16,000.00 to Mr. Von der Burg.

D. Mr. Von der Burg is entitled to attorneys' fees and costs.

Finally, FCB moved for attorneys' fees and costs. Respondent's Brief, at 21-22. Similarly, Mr. Von der Burg fully joins in the request, incorporates FCB's arguments pursuant to RAP 10.1(g), and moves for attorneys' fees and costs on his own behalf on this appeal as well. This case has already been a burden for Mr. Von der Burg and this appeal merely exacerbates the financial harm caused by Ms. Lane and her counsel. As the Trial Court found the case was legally and factually insupportable, attorneys' fees and costs are richly appropriate on appeal as they were below.

V. CONCLUSION

“A famous lawyer once said: ‘[a]bout half of the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop.’ Consistent with that admonition, CR 11 allows courts to sanction lawyers who do not know when to stop.” *Watson* at 891 (quoting *McCandless v. Great Atl. & Pac. Tea Co.*, 697 F.2d 198, 201-02

(7th Cir. 1983)(internal citation omitted).² Unfortunately, this appeal similarly pertains to an attorney and client who do not know when to stop. This costly, harassing litigation was unreasonably instigated, unnecessarily pursued, and must be concluded. For all of the reasons cited above, Mr. Von der Burg requests that this Court of Appeals affirm the Trial Court's Judgment and Order Granting Defendants' Motions for Sanctions, and award Mr. Von der Burg attorneys' fees and costs incurred in this appeal.

DATED this 13th day of June, 2013.

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² Quote attributed to Elihu Root, U.S. Secretary of State, 1905-1909.

CERTIFICATE OF SERVICE

I certify that on this date, a copy of the document to which is affixed was caused to be served and delivered upon the following:

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