Honorable Judge Richard D. Eadie
Hearing Date: December 28, 2012
Hearing Time: 9:00 AM

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR THE COUNTY OF KING

LANE POWELL, PC, an Oregon professional corporation,

Plaintiff,

v.

MARK DECOURSEY and CAROL DECOURSEY

Defendants

No. 11-2-34596-3 SEA

REVISED AND RENOTED MOTION TO RECONSIDER ORDER OF SUMMARY JUDGMENT

Without waiving prior objection that Judge Eadie ("Judge") is disqualified to rule in this case under CJC 2.11(A), DeCourseys files the following with the Court:

1. RELIEF REQUESTED: DeCourseys request the Court, under multiple clauses of CR 59 and CR 60, to reconsider its 12/4/12 order (**Dkt. 306**, revised from 11/16/12 **Dkt. 295**) granting Lane Powell's ("LP's") motion of partial/full summary judgment ("MSJ").[1]

2. STATEMENT OF FACTS. On 11/16/12, the Court granted LP's MSJ on LP's claim for "breach of contract." Order should be vacated on at least twelve (12) grounds.

[1] On 11/16/12, Judge forbade DeCourseys' court reporter to provide them with a certified copy of transcript. *Decl. of Elain K. Rippen*. **Dkt. 328**. DeCourseys cite statements from that hearing based on their recall, notes, and audio recordings. *Decl. of Mark DeCoursey*, 12/10/12, **Dkt. 321**. Predictably, LP has already protested this practice. DeCourseys have addressed LP's objections in their *Response to Plaintiff Lane Powell's Objections to Defendants' Sur-Reply* Etc., filed 12/12/12, which is incorporated herein as if fully set forth.

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1. Judge Is Disqualified to Rule in This Case – Court is referred to **Dkt. 196,** wherein DeCourseys argue Judge is disqualified on the basis of the Code of Judicial Conduct, 2.11(A), pertaining to issues arising from his wife's Windermere employment. In the 11/16/12 hearing, Judge admitted his disqualification by asking litigants not to talk about the facts of the case because "Windermere" is a "sensitive" subject. (**Dkt. 304**.) When LP mentioned the Windermere case (the subject of this lawsuit), Judge objected:

> I don't want to interrupt too much but I think that the issues of the Windermere lawsuit are sensitive in this case and I don't want any suggestion in this record that anything that I am doing here is affected at all by the facts of the Windermere lawsuit. So I'm going to ask you to skip over those facts.

On 12/4/12, Carol DeCoursey filed *Motion to Recuse Re: Judge's Fraud on Court & People of Washington* **(Dkt. 304**). On 12/7/12, LP responded; on 12/10/12 DeCoursey replied. **Dkt. 322.** DeCourseys incorporate their pleadings herein, as if fully set forth.

2. LP Delayed, Withheld, and Spoliated Material Evidence – DeCourseys moved the Court for a CR 56(f) continuance based on LP's discovery violations, showed that LP's invoices were fraudulently padded and argued that DeCourseys' discovery requests were designed to expose more fraud. LP withheld, spoliated, and delayed production of the evidence until after it filed for SJ, making the analysis of billing fraud impossible. The Court ruled against that CR 56(f) motion on basis of LP's assurances the material was irrelevant.

> **Sulkin: The documents they claim they want are completely irrelevant ... in any issue in this case.** For a couple of reasons. One, they were fully available to them months and months ago. They don't, they never wanted them because of this claim of privilege they assert and they don't assert and they assert again. Second ... you struck off all their counterclaims and affirmative defenses and they have no others, you've already done that, there is no other defense they have. Second the documents have no relevance to the issue of reasonable fees. [Emphasis added.]

LP's statements should not be accepted. The word of LP's attorney was impeached repeatedly in the 11/16/12 hearing. On 11/16/12, DeCourseys argued:

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> **Mark DeCoursey**: The discovery issue comes up again because we specifically asked LP to support its costs that it billed to us, support those costs with documentation. Instead, LP in some places refused to answer the interrogatories, refused to answer the productions. This is in our motion to continue this hearing. In other places, they waved vaguely at 35 banker boxes full of documentation and said 'it's in there, it's in the discovery materials.' Well, it isn't it there. They have said, 'well, the needle is somewhere in that haystack, therefor we don't have to answer your question.' but that isn't an answer to the question. I could also say 'that answer is someplace in the public library' and that isn't an answer to the question.
>
> The … discovery materials that they dumped on us after they moved for summary judgment included what they say is 11,000 documents but in fact turns out to be 63,000 files. They even admit effectively to spoliating those files. They say in the log that they're Microsoft word files, but when they get to us, there are only pictures of those documents, pictures that cannot be indexed, cannot be searched, and cannot be compiled. All that can be done is printed and looked over laboriously. In effect, by producing that flood, late in October, after filing for summary judgment, after dragging their feet for 10 months on the production of this discovery material, they have fallen firmly into the qualification of CR 56(f) which says 'you can't do it!'

As DeCourseys argued, when a party withholds or spoliates evidence, Washington Courts must infer that the evidence spoliated would be unfavorable to the spoliating party. *Pier 67, Inc. v. King County*, 89 Wash.2d 379, 573 P.2d 2 (1977). The Court must follow the law and vacate this summary judgment ("SJ").

3. The Subject Agreement Was Not Legal – LP moved the Court for "breach of contract" and the Court granted the motion. The contract was a combination of the 9/19/07 fee agreement and a 12/30/08 letter sent by LP to DeCourseys, which DeCourseys counter-signed. LP called this "collectively 'Agreement'" (**Dkt**. **253**, p. 11 at 15) and cited the terms of the Agreement for enforcement. But as DeCourseys argued in both the written and oral argument, the subject contract was not legal under Washington law. Under *Simburg, Ketter, Sheppard & Purdy, LLP v. Oshan*, 97 Wn. App. 901 909 988, P.2d 467 (1999), attorney fee agreements that violate the Rules of Professional Conduct ("RPC") are against public policy and are unenforceable.

> In addition, attorney fee agreements that violate the Rules of Professional Conduct (RPC) are against public policy and are unenforceable by the courts. *Barr v. Day*, 124 Wash.2d 318, 331, 879 P.2d 912 (1994) (citing *Belli v. Shaw*, 98 Wash.2d 569, 578, 657 P.2d 315 (1983)).

RPC 1.8 states:

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> (h) A lawyer shall not: (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice **unless** permitted by law and **the client is independently represented** in making the agreement; … [Emphasis added]

But LP not only wrote such a contract in violation of this Rule, but argued repeatedly that the terms of the Agreement were intended to limit, and had the effect of limiting, LP's liability for malpractice and fraudulent billing:

> The time spent by LP's timekeepers has been reasonable in light of the tasks involved. The DeCourseys cannot dispute this. *Cf.* **HAM Ex. K** (in 2008 the DeCourseys agreed that LP's fees "were **honestly derived**, and were necessarily incurred in this litigation given our opponents' strategy." [Emphasis added]

LP argued the same many times in oral argument. Sulkin stated at various times:

> As to all the fees in the underlying case, they agreed in Exhibit K that they're due, owing and fair. …
>
> There are certain fees that have not been [approved] by a court, but which they agreed in Exhibit K were reasonable. …
>
> And so if we go to page 2 [or Exhibit K], they say they'll agree to pay all the fees. And not only that, they're fair and honest and everything else.

DeCourseys told the Court:

> **Mark DeCoursey:** They've taken that clause, they've inserted, imported it into the summary judgment and they've used it exactly as the Rules of Professional Conduct forbids them to do, which is as a prospective … limitation on our ability to claim malpractice against LP.
>
> That is an illegal term, according to the RPC. Mr. Sulkin has not addressed that. But that is illegal under RPC – I think it's 1.8. It says that a lawyer shall not make an agreement prospectively limiting a lawyer's liability to a client. And that's they way they used it over and over again, in the written pleading for this and in his oral argument. So under the RPC, that agreement is void. Under that case [*Simburg, Ketter, Sheppard & Purdy, LLP v. Oshan*, 97 Wn. App. 901 909 988, P.2d 467 (1999)], it's not a valid agreement.

Judge ignored the objection that the contract was not legal, and argued for LP's position.

> **Richard D. Eadie:** But you agreed in this apparently that Lane Powell's fees were reasonable.

Then Judge granted the summary judgment to LP, a judgment that was possible only by granting that the illegal contract was valid. Judge made an error.

4. LP Vitiated the Contract with Fraudulent Billing – DeCourseys showed that the contract was an agreement for legal services, but LP invoiced time that attorneys and

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paralegals were manning photocopy machines. DeCourseys showed LP padded its bills by $42,000 using that method, impugning the invoices in the *Degginger Decl.* (**Dkt. 255**). DeCourseys showed that LP withheld and spoliated evidence of further fraud.

Despite these material facts, Judge permitted LP to argue repeatedly that DeCourseys did not dispute or object to the invoices in the *Degginger Decl.* And despite DeCourseys' vocal objections about those statements, Judge echoed LP's argument:

> **Richard D. Eadie:** This is based upon material facts that are really undisputed. And that is what their burden is to show, material facts that are not disputed. And you may disagree about a lot of things, but it's a question of whether there's a disagreement about any evidence to support a disagreement, not material facts that are important to the decisions made. And I'm going to find that in terms of the obligation for attorney's fees to LP, that they've met that burden. … Those fees were put forward here, the request was made for those fees, and there was no objection to those fees. … I will look at the law and find out whether I can rely on the absence of objection.

The language of the Agreement indicates the Agreement is for legal representation. The agreement does not include photocopying at those hourly rates. That is fraud.

5. The Order is Improper. Orders Fact-Finding Without Trial. – CR 56 states:

> (h) **Form of Order**. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered.

A. The Order of 12/4/12 violates that Rule: It does not list and designate the "documents and other evidence called to the attention of the trial court" during the 11/16/12 hearing.

B. The 12/4/12 Order states*, "Plaintiff's motion for **partial** summary judgment is granted…*" (p. 2, 20, emphasis added.) Yet caption states Order is for Summary Judgment.

C. Order requires LP to file *"a brief of whether the court has an obligation to review for reasonableness the fees and costs that have nor already been found reasonable*." (P.2, 24-26, P.3, 1-5). Judge and LP have created a partial/full SJ Order hybridized with an order for fact-finding without a trial. But a CR 56 SJ cannot include fact-finding.

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6. "Reasonable" Was Not a Term of the Contract – In written and oral argument, LP argued its fees were "reasonable." DeCourseys argued that LP had moved for summary judgment on its "breach of contract" claim, and "reasonable" is not a term of any contract between DeCourseys and LP. In the *Motion*, LP defined the 9/19/07 and 12/30/08 documents collectively as "the Agreement" (p. 11 at 15). No third party's opinion of "reasonable" is relevant. The rate specified in the Agreement is $275 per hour for Brent Nourse, $270 per hour for Andrew Yates, and between $230 and $400 per hour for "other attorneys" who may "assist" in the case, implying higher rates will be in the minority.

The rates in the Agreement were never revised, but the invoices in the *Degginger Declaration* include billings for $440 and $470 per hour. LP now argues that the Agreement enabled LP to charge any rate at any time for any lawyer chalking up any number of hours for doing or not doing anything, and DeCourseys are obligated to pay the invoice. Such a contract is inequitable and unenforceable under Washington law.

7. LP Failed to Perform Under the Agreement – The contract required specific performance by LP that LP failed to perform. After setbacks in the Court of Appeals, LP failed to ask for reconsideration and to cross-appeal to the Supreme Court to protect DeCourseys' awards. LP failed to ask for treble damages under the CPA. LP secretly bargained down the post-judgment interest rate from 12% ordered by the trial court to 3.49%, a rate below the statutory rate, while demanding DeCourseys pay LP 9% interest. LP failed to present tens of thousands of dollars of attorney fees in its cost bills, fees it is now attempting to collect from DeCourseys. In many other ways, LP failed to keep the specific terms of the Agreement, the implicit terms of fiduciary duty, and the implicit contractual

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terms of honest dealing; enumerated in part in DeCourseys' *Response,* **Dkt. 275***,* Ex. 1.

The court cannot grant consideration to LP and ignore the LP's failures to perform.

8. Judge Eadie Accepted LP's False Statements As Facts – During 11/16/12 hearing, LP's counsel R. Sulkin contradicted himself and made demonstrably untrue statements. LP's statements should not be accepted in a Court of Law.

A. In his opening arguments on DeCourseys' motion to continue the hearing, Sulkin stated that a responsive brief filed on Friday, November 9 met the requirements in LCR 7 for a hearing on Tuesday, November 12, even considering that November 11 was a court holiday. Judge Eadie accepted this baldly false statement.

B. Sulkin contradicted himself with abandon:

> **Sulkin:** First, they just need the two reasons. First they just hired a new lawyer. That's reason number one. That was the declaration of Lish Whitson saying, "I may join."

Thirty seconds later, Sulkin simply reversed himself:

> **Sulkin:** They didn't hire Mr. Whitson so he's not even hired.

As Maxwell Smart might say: "Would you believe they have a lawyer? Would you believe they don't?" See Dcls. of Diane Walter, **Dkt. 320**; Charles Dahm, Dkt. # assigned; and Gerald Dodaro, Dkt. # not assigned.

C. Later, apparently attempting to distance LP from the *Simburg Ketter* precedent, Sulkin argued that the 12/30/08 letter ("Exhibit K" of the MSJ) was originated by DeCourseys:

> Exhibit K is a letter they sent to us, OK? It's framed as re-writing it to them....You'll see it's a fax from them to Mr. Nourse in LP where they sign asking Nourse to sign too. OK, in other words the first page of the exhibit is the fax, a one page fax. And you'll see it's from Mark DeCoursey to Brent Nourse.

DeCourseys immediately protested and later demonstrated the falsity of Sulkin's statement. But Judge was disinterested. Sulkin's argument is contradicted by the sworn *Declaration of Hayley A. Montgomery* (**Dkt. 254**):

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> **Exhibit K**: Facsimile cover sheet, dated December 30, 2008, from Mark DeCoursey to Brent Nourse, attaching letter dated December 30, 2008, **from Brent Nourse to Carol and Mark DeCoursey**, amending portions of Fee Agreement pertaining to collection of fees and executed by Mark and Carol DeCoursey; [Emphasis added.]

D. LP stated on 11/16/12 that all fees sought by LP as damages had been approved as "reasonable" by one court or another. Judge asked:

> **Richard D. Eadie:** So, all the fees that you are seeking by way of damages that were fees that were occurring in the Windermere litigation have been addressed by the trial court and the court of appeals and the supreme court. ...

Sulkin answered: "*Yes, with an asterisk if I may."* But the "asterisk" does not address the many fees invoiced for the Windermere litigation that were invoiced to DeCourseys and omitted from the fees motions, amounting to more than $100,000.

E. Emboldened by Judge's willingness to accept his lies, Sulkin went on to misrepresent the events at the courts of appeal, the grounds on which the attorney fees were granted by the trial court, and DeCourseys' objections to LP's evidence. Sulkin told the court:

> First on the issue of the cost, the **$45,000 that they now claim fraud on**. Those costs were viewed by Judge Fox and approved. In fact if we look at Exhibit H, which is the Court of Appeals decision, and if you turn, your honor, to page 36 of that opinion, it explains exactly what happened. What happened was that Judge Fox... and I'm at the second full paragraph... what happened was Judge Fox ordered the defendants to pay costs, the **$45,440**. In other words, he looked at everything and he said, "You owe it under the **real estate purchase and sale agreement**."
>
> And the Court of Appeals said, "Wait a minute, you're not suing the seller." So the very costs that they're claiming were the **subject of fraud**... All the reasons I gave you apply there. [Emphasis added.]

This is serious misrepresentation of the facts. DeCourseys accuse LP of fraud on fees, not on costs (though DeCourseys did argue that LP had failed to support the costs in the invoices). The $45,440 mentioned by Sulkin were costs DeCourseys spent out of pocket and fully documented for the Windermere court. **Dkt. 310,** Dcl. of Mark DeCoursey, ¶32.

But even worse, the Windermere court had full support for awarding "expense of the suit" under the REPSA. As told in the 2/6/09 *Order* (see **Dkt. 254,** Exhibit E):

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1. Defendants argued they were third-party beneficiaries of the Real Estate Purchase and Sale Agreement at issue in this lawsuit;
2. Plaintiffs are entitled to recovery attorneys' fees and costs from Defendants under the attorneys' fees clause of the Real Estate Purchase and Sale Agreement that was at issue in this lawsuit;

Windermere did not contest the REPSA clause of that Order. But *sua sponte*, the Court of Appeals disallowed the REPSA argument, with a consequent loss to DeCourseys of about $100,000. LP failed to reargue this loss on a motion to modify or cross appeal to the Supreme Court, despite contractual obligations to do so. Thus did Sulkin exonerate his client's malpractice by knowingly distorting and falsifying the facts. Judge's acquiescence to Sulkin's false statements is contrary to the C JC 2.15:

> (B) A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the **lawyer's honesty, trustworthiness**, or fitness as a lawyer in other respects should inform the appropriate authority. … [Emphasis added]
>
> (D) A judge who receives credible information indicating a substantial likelihood that a lawyer has committed a violation of the **Rules of Professional Conduct** should take appropriate action. [Emphasis added]

In particular, Sulkin repeatedly violated RPC 3.3:

> (a) A lawyer shall not knowingly:
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; …

F. DeCourseys presented contemporaneous emails disputing LP's invoices. **Dkt. 275**, Ex. 16. They also accused LP of fraudulent billing. See P.4, No. 4, above. Despite this, LP repeatedly told Judge that DeCourseys did not dispute the invoices.

9. Courts Did Not Find LP's Fees Reasonable – Contrary to LP's representations, no court has approved LP's full invoices, not even for that specific court.

A. Judge Fox at the trial court level did not see the full costs because LP failed to present all the invoices. LP omitted the billings for Nov.-Dec., 2008, and Jan. thru Mar., 2009. See *Degginger Decl.* (**Dkt. 255**), invoices dated Dec. 2008, and Jan., Feb., Mar., and Apr. 2009.

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This amounted to approximately $32,246.5 by Paul Fogarty's computation. (**Dkt. 275**, Exhibit 1.)

B. The Court of Appeals did not see Degginger and Nourse's hours on appeal, or McBride's hours for the billing affidavit because LP did not present them. The CofA denied the fees for the paralegals, and trimmed the fees for McBride from $56,499.45 down to $47,600. This is a cut of almost 20% on the fraction of fees that were presented. See *Degginger Decl.* **Dkt. 255**, invoices for Mar. 2009 thru Jan. 2011. **.**

C. The Supreme Court was not presented with Degginger's fees or all of McBride's fees (totaling about $27,989) for the answer to petition, and still it approved neither the hours nor the rates. McBride presented a bill for only $16,718.46. The Court found the bill to be "frankly…excessive" and approved only $11,978. Of the real costs and fees, this is a mere 42% of the LP bill to DeCourseys. See *Degginger Decl.* **Dkt. 255** invoices for Mar. 2011 thru Aug. 2011**.**

10. LP Is Estopped by Previous Arguments – Previously, LP prevailed on the argument that DeCourseys were withholding "key documents" essential to its case, that DeCourseys' refusal to produce privileged documents "has seriously undermined LP's ability to prosecute this lawsuit" (**Dkt. 112** p. 2 at 8-10), and that "due to the DeCourseys' recalcitrance with respect to discovery, Lane Powell's efforts to litigate this case on the merits were completely stymied."[2] By such arguments, LP succeeded in having DeCourseys' claims and affirmative defenses struck. Even in the *MSJ*, LP argued that DeCourseys "will not produce key documents" (**Dkt. 253** p. "1" at 17; p. "10" at 26; p. "11" at 3).

[2] LP argued this on March 8, 2012 **Dkt. 101** p. 9 at 23; June 7, 2012 **Dkt. 133** p. 2 at 12-15; June 27, 2012 **Dkt. 148** p. 5 at 8-9; Aug. 8, 2012 **Dkt. 192** p. 4 at 11-12; among others.

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But in the *MSJ* p. 1 at 20, LP also argued the opposite: "Lane Powell's case is straightforward and clearly subject to summary resolution ***based on the discovery already exchanged***." [Emphasis added]. Either Lane Powell's efforts *completely stymied* as it claimed (**Dkt. 192**), or the case is *subject to summary resolution* (**Dkt. 253**). LP cannot maintain both positions and prevail on both. LP is estopped from now claiming there are no issues of material fact and that it has the evidence it needs for SJ.

DeCourseys' counterclaims and defenses should be restored and the SJ order vacated.

11. LP's Witness and Declarer Is Impeached. When DeCourseys asked LP to keep its 12/30/08 promise to appeal any losses or adverse decisions, LP refused to cross-appeal DeCourseys' losses. In justifying its refusal, Grant Degginger told astonishing lies. In an email, Degginger said the Supreme Court had no "discretion" over the CPA:

> The only way to change that is to change the law. Only the legislature can do that. (**Dkt. 275,** Exhibit 13)

But Court of Appeals stated in the *Opinion* that the ruling was based on precedent, not on statute. The precedent cited was *Nordstrom, Inc. v. Tampourlos* , in which LP represented Nordstrom. The Supreme Court has discretion to modify its earlier rulings -- and has "discretion" to interpret legislation, thus creating precedents. On the bases of Degginger's stunning dishonesty, on 2/28/11 LP refused to honor its contract with DeCourseys. **Dkt. 275,** Exhibit 17 (transcript of 2/28/11 phone call).

12. LP Was Unable to Support Its Motion with Evidence – In Discovery, DeCourseys specifically requested support for LP's costs. LP a) refused to answer, b) produced heavily redacted documents with no information, c) indicated the information could be derived from the production of 61,307 electronic files and 35 boxes of paper. LP refused to produce privileged material (see *Motion to Cancel or Continue*, **Dkt. 271**). From this failure to

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comply with discovery obligations, the Court must infer that LP cannot support the costs it invoiced to DeCourseys. Therefore, LP's MSJ must be denied.

3. STATEMENT OF ISSUES. Can Judge grant summary judgment for breach of contract on an illegal attorney agreement with fraud, non-performance, untruths, violations of law, discovery violations, judicial estoppel, impeached declarations, and failures to meet the summary judgment standard? Should courts be used to effect a shakedown under color of law?

4. EVIDENCE RELIED UPON. The briefs and oral arguments for this action, the court records in this case, and the subjoined declaration of Mark DeCoursey with exhibits.

5. AUTHORITY. LP's motion for SJ depends on the declarations of impeached affiants and declarants. Its evidence is disputed, and it has otherwise failed to meet its burden of proof under CR 56. *Wilson v. Steinbach*, 656 P. 2d 1030, 98 Wash. 2d 434 - Wash: Supreme Court, 1982:

> A summary judgment motion under CR 56(c) can be granted only if the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law

LP's MSJ is also judicially estopped by its previous arguments in this court.

This motion to reconsider also relies on the authority of the Code of Judicial Conduct, the Rules of Professional Conduct, and ER 806 which provides for impeachment of declarations.

6. ORDER. A proposed order accompanies this motion.

DATED this 14th day of December, 2012

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