Honorable Judge Richard D. Eadie
Hearing Date: November 16, 2012
Hearing Time: 1:30 PM

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR THE COUNTY OF KING

| | |
|---|---|
| LANE POWELL, PC, an Oregon professional corporation,<br><br>Plaintiff,<br><br>v.<br><br>MARK DECOURSEY and CAROL DECOURSEY<br><br>Defendants | No. 11-2-34596-3 SEA<br><br>**DECOURSEYS' RESPONSE TO PLAINTIFF LANE POWELL'S MOTION FOR PARTIAL SUMMARY JUDGMENT WITH SUBJOINED DECLARATION** |

Without waiving prior objection that Judge Eadie is disqualified to rule in this case under the Code of Judicial Conduct, CJC 2.11(A), DeCourseys file the following with the Court:

## 1. RELIEF REQUESTED

DeCourseys ask the Court to deny Lane Powell's motion for summary judgment.

## 2. STATEMENT OF FACTS

Lane Powell implores the court to "end this long and expensive litigation" (*Mot.* p. 1 at 2-3). But Lane Powell chose this "long and expensive litigation." On September 22, 2011 DeCourseys offered to negotiate with Lane Powell. **Exhibit 1**. In response, Lane Powell filed this lawsuit, threatening to force DeCourseys' attorney client confidences into evidence



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if DeCourseys' did not roll-over and pay Lane Powell whatever it demanded. **Dkt. 11.** The day after it filed suit, Lane Powell boasted "it would pay $800,000 in fees in this suit to recover $300,000." **Exhibit 2.**

With the summons and complaint, Lane Powell served discovery requests and notices of videotape depositions. When it became clear that DeCourseys were informed of their rights of attorney client privileges and would not be bullied out of them, Lane Powell canceled the depositions. **Exhibit 3.**

DeCourseys declined to be blackmailed and to have the courts used for that unholy purpose. Now Lane Powell is whimpering for mercy like a bully, imploring the court to save it from two Redmond pro se homeowners.

What happened to that proud "$800,000" boast?

## 3. ADDRESSING LANE POWELL'S STATEMENT OF FACTS

**No Written Contract in Evidence**

Lane Powell asks for partial summary judgment on its breach of contract claim. *Mot.* p. 1. at 6. Lane Powell asserts its claims are based on a "written fee agreement," citing as evidence the *Declaration of Hayley Montgomery* ("*HAM*") Ex C.[1]

But the document at *HAM* Ex. C is not signed by either party. *HAM* Ex. C is not a "written fee agreement," as Lane Powell claims. *Mot.* p. 2 at 16. Without the signatures of both parties, a contract ("agreement") is not ratified.

It is at best a verbal contract, and summary judgment hearings do not decide on verbal contracts. *Askin v. STOEP*, Wash: Court of Appeals, 2nd Div. (2006):

[1] The assertion of a "written fee agreement" and "binding written contract" permeates the *Motion*. For example, *Mot.* p. 2 at 16; p. 9 at 5; p. 12 at 17; p. 23 at 11.



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> We find cases from Division One instructive on this issue. In *Garbell v. Tall's Travel Shop*, the court commented that '[o]ral contracts are often, by their very nature, dependent upon an understanding of the surrounding circumstances, the intent of the parties, and the credibility of witnesses.' *Garbell v. Tall's Travel Shop*, 17 Wn. App. 352, 354, 563 P.2d 211 (1977) (quoting *Howarth v. First Nat'l Bank*, 540 P.2d 486, 490 (Alaska 1975)). The court also observed that '[i]f a dispute exists with respect to the terms of the oral contract, then **summary judgment is not appropriate**.' *Garbell*, 17 Wn. App. at 354 (quoting *Howarth*, 540 P.2d at 490). And finally, 'the trier of fact in a trial setting should make the final determination with respect to the existence of the contractual agreement.' *Garbell*, 17 Wn. App. at 354 (quoting *Howarth*, 540 P.2d at 490). [Emphasis added]

Though DeCourseys ***do*** dispute the terms of the verbal contract with Lane Powell, the Court need not address the disputed terms. Since "summary judgment is not appropriate" to settle the terms of a verbal contract, the Court should deny Lane Powell's motion for summary judgment.

Lane Powell argues (*Mot.* p. 10 at 10-12):

> Each of the elements of breach of contract are easily met based on the DeCourseys admissions and discovery already exchanged ..."

But wouldn't the ratified contract itself be a material fact? This Court cannot rule there is "no material evidence" as Lane Powell has argued (*Mot.* p. 10 at 8-15) when the written contract is not in evidence. If there was a "written fee agreement" as Lane Powell claims, it was obviously not the document provided by Lane Powell because that document was never ratified. In effect, by presenting an unsigned document in place of a document Lane Powell alleged was signed, Lane Powell is deliberately presenting false evidence to the Court and mischaracterizing that evidence to win a case on false merits.

Since a "written fee agreement" is the foundation of Lane Powell's claim for breach of contract (*Mot.* p. 2 at 16.) and Lane Powell has not produced a ratified "written fee agreement" in evidence for the Court, the Court should deny Lane Powell's motion for summary judgment.

Lane Powell gave DeCourseys to understand that the case would cost no more than



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$100,000 to end of trial. Subjoined *Declaration of Mark DeCoursey.*

**Binding Force of Lane Powell's Alleged Written Agreement**

Since the document (*HAM* Ex. C) was not ratified, it is not binding upon DeCourseys. However, because Lane Powell alleges the document in HAM Ex. C is binding upon the parties (*Mot.* p. 2 at 16), it ***is*** binding on Lane Powell. Lane Powell should not be permitted to argue tomorrow that HAM Ex. C is ***not*** binding on Lane Powell, since today Lane Powell argues that it ***is*** binding.

**"Reasonable" is Not a Contractual Term**

Lane Powell spends much of its text arguing that its fees were "reasonable." E.g., *Mot.* p. 2 at 4; p10 at 21; p. 14 through p. 16; etc. Such argument is inappropriate and irrelevant to a "written fee agreement."

**"Key" Documents Are Not Key to the Case?**

Lane Powell makes an oddly contradictory argument. It argues first that DeCourseys "will not produce key documents" (*Mot.* p. 1 at 17; p. 10 at 26; p. 11 at 3), then argues that its "case is straightforward and clearly subject to summary resolution based on the discovery already exchanged." *Mot.* p. 1 at 20. Either the privileged documents DeCourseys allegedly withheld are not "key" to the case, or the case is not "subject to summary resolution." Lane Powell cannot have it both ways.

Since Lane Powell argues with itself about the resolvability of the case at this point, the Court should deny Lane Powell's motion for summary judgment.

**No Fiduciary Should Present a Contract Like This**

Lane Powell asserts that the terms of the contract are as follows: Lane Powell may



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charge anything for its services and change the rates at any time without notice. *Mot.* p. 3 at 3. For their part, DeCourseys must pay whatever Lane Powell chooses to charge. *Mot.* p. 2 at 19-26; p. 3 at 1-5. A contract like that would simply not be equitable.

Neither Lane Powell's *HAM* Ex. C (that Lane Powell alleges was the "written fee agreement" between the parties) nor Lane Powell's *HAM* Ex. K (described at *Mot.* p. 4 at 12) suggest or require DeCourseys to consult with outside legal outside counsel prior to signing.

Lane Powell is a huge multinational, "multi-specialty" law firm established in 1875 with more than 200 lawyers.[2] A reasonable person would expect Lane Powell to be experienced in retainer agreements, litigation, and the problems that arise during representation. DeCourseys had none of that experience. The balance of knowledge on the subject of contracts and legal representation immediately turned the Lane Powell-DeCoursey relationship into a fiduciary relationship,

Playing Field Not Level. Lane Powell, with insights far superior to DeCourseys, should have protected DeCourseys' interests. As a prospective attorney interviewing a prospective client, Lane Powell stood in the position of fiduciary. Black's Law Dictionary explains (*Fiduciary*):

> The term is derived from the Roman law, and means (as a noun) a person holding the character of a trustee, or a character analogous to that of a trustee, in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires. A person having duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking. [Fifth Ed. p 563.]

A fee agreement that (among other things) enabled the attorney to raise the rates without notice and required the client to pay those fees retroactively would not be "primarily

[2] According to Lane Powell's web page, "With more than 200 attorneys in offices located throughout Washington, Oregon, Alaska and London, England, we're thoroughly versed in the industries of the Pacific Northwest as well as the legal issues that face our clients on a regional, national and international level. View



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for [the client]'s benefit."

Lane Powell could reasonably have predicted the problems that arose in the relationship. An independent counsel would have advised that a contract specify a "level the playing field" to protect both parties' interests. But those documents do not contain that suggestion or advice.

**Lane Powell Incorporates RPC in Argument**

Normally the Rules of Professional Conduct do not give rise to a cause of action. Comment 20 on the *Preamble* states, "Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached."

However, Lane Powell cites to the RPC in its argument (*Mot.* p. 16 at 15), and even cites case law incorporating the RPC into Washington law. Lane Powell cannot use the RPC as a sword against DeCourseys without becoming subject to its standards and provisions.

The RPC requires the attorney to follow the principle of "Informed Consent" (RPC1.0, Comment 6):

> In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid.

DeCourseys were not experienced litigators in 2007 or 2008 when the "written fee agreements" were allegedly signed. Therefore, this clause of the RPC should be applied.

The face value of the alleged "written fee agreement" (*Mot.* HAM Ex. C.) provides that the fees charged will be $275 per hour. Two months after beginning the representation,

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our Firm brochure." http://www.lanepowell.com/the-firm



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Lane Powell immediately hiked the fees up $300 per hour, and in 2009 then to $315. By 2011, Lane Powell had hoisted the fees to $440 and $470 per hour. *Declaration of Grant S. Degginger.*

The unbalanced nature of the contract soon manifested; DeCourseys were as sheep led to the shearing shed.

**Fraud Vitiates a Contract**

In *Coson v. Roehl*, 387 P. 2d 541 - Wash Supreme Court (1963), the Court wrote:

> The policy reasons behind the majority rule are discussed in the classic case of Angerosa v. White Co., 248 App. Div. 425, 290 N.Y.S. 204 (1936):
>
> "... To deny relief to the victim of a deliberate fraud because of his own negligence would encourage falsehood and dishonesty ...
>
> "... In this jurisdiction protection is given to one who is injured by falsehood or deception; **fraud vitiates everything which it touches**, and destroys the very thing which it was devised to support; the law does not temporize with trickery or duplicity. A contract, the making of which was induced by deceitful methods or crafty device, is nothing more than a scrap of paper, and it makes no difference whether the fraud goes to the factum, or whether it is preliminary to the execution of the agreement itself...." [Emphasis added]

Lane Powell argues that the regular invoices sent to DeCourseys somehow committed DeCourseys to payment if they did not protest the invoice within 30 days. *Mot.* p. 22 at 6. However, DeCourseys were not privy to the operations within Lane Powell's offices – nor were the courts that were reviewing the timesheets. (Nor were the descriptions of the activities on the invoices a true reflection of the activities being billed.)

In the small amount of discovery Lane Powell timely produced, DeCourseys learned that:

I. in this age of electronic court filings, email, and the electronic transmission of documents, Lane Powell claimed to have photocopied more than 60,000 pages on DeCourseys' nickel, and

II. Lane used highly paid attorneys and paralegals (rather than document clerks) to



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operate the photocopying machines.

The photocopying logs obtained in discovery show that timekeepers Gabel ($205-225/hr.), Harrell ($165/hr.), Jacobs ($150/hr.), Lorber ($225/hr.), Norby ($110/Hr.), Reich ($170-180/hr.), and Volbeda ($225/hr.) were operating the photocopying machine, often for jobs of hundreds of pages, and sometimes for more than a thousand. **Exhibit 4**. See *Second Declaration of Mark H. DeCoursey* for analysis.

The invoices (available as exhibits on the *Declaration of Grant Degginger*) show the timekeepers billed their time while they watched the machine work, and the incidents were frequent enough to show that Lane Powell was routinely padding their bills with this work. DeCourseys have calculated that Lane Powell padded its invoices by as much as $42,000.

Given Lane Powell's cavalier attitude to its position of trust, a reasonable person would suspect more deviltry is hidden in the details – possibly to be found in the discovery that Lane Powell withheld from production for so long, much of which it still withholds.

And in point of fact, DeCourseys did plenty of complaining contemporaneously. **Exhibit 16.**

**DeCourseys' Counterclaims and Defenses**

When the Court struck DeCourseys' counterclaims and affirmative defenses (Dkt. 164, July 6, 2012; Dkt. 227, August 17, 2012), the Court did not negate the requirement for Lane Powell to be consistent with the facts, to follow its agreements, and to abide by the law. Likewise, the Court did not order that an unsigned agreement became a signed agreement. That order did not dissolve all rationality as Lane Powell would like to argue.

If Lane Powell alleges a document is a contract, the Court must hold Lane Powell to



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its obligations under that contract before it determines the considerations that are due. The Court is still bound by the principles of equity, regardless of any trimming of claims and defenses under earlier rulings.

**Lane Powell Violated the Contract It Alleges Was in Force**

Lane Powell compresses and confuses the events under which the attorney client relationship terminated (*Mot.* p. 11 at 7), but those events are key to Lane Powell's claim that DeCourseys breached the contract, and the facts to not support the claim.

On August 2, 2011, DeCourseys informed Lane Powell to cease work on the case, preparatory to terminating the representation. **Exhibit 5**. More than five hours later (**Exhibit 6**), Lane Powell informed DeCourseys that a quickie settlement with Windermere was in the works. The email strongly implied that Lane Powell had no intention of repairing previous errors in the case, such as Lane Powell's blundering agreement to shave the post-judgment interest rate below statutory levels to 3.49%, and its failure to request application of the 2010 amendment to the statutory post-judgment interest rate (RCW 4.56.11).

That sequence is important, and Lane Powell's statement that "DeCourseys breached their fee agreement with Lane Powell" must be examined in detail. The alleged "written fee agreement" states:

> Your termination of our representation does not eliminate your responsibility to pay for work performed prior to termination.

That is miserably ambivalent language. Does it mean DeCourseys must pay "prior to termination," as Lane Powell argues? Or does the phrase refer to "work performed prior to termination," as DeCourseys would read it to mean?

The rule in Washington Courts is that the language of the contract is given the



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interpretation most favorable to the non-drafting party. The language in this document clearly indicates by use of first and second person pronouns that Lane Powell is the drafter of the document. Lane Powell bears the burden to ensure that the language was not ambivalent.[3]

Therefore, DeCourseys did not have the obligation to pay prior to termination – indeed, no payment on the Windermere judgment was available until three months later, on November 3, 2011. **Exhibit 7.** Payment prior to that date was impossible, as Lane Powell knows now and knew then.

In addition, even if Lane Powell's "written fee agreement" were a written contract between the parties, it was explicitly modified on December 30, 2008 (*HAM* Ex. K), which Lane Powell cites as a binding agreement on the parties (*Mot.* p. 11 at 21). In that letter, Lane Powell agreed to "forebear collection on outstanding fees for a reasonable period." *HAM* Ex. K.

In Lane Powell's letter to DeCourseys of December 5, 2008 (**Exhibit 8**), Lane Powell defined "reasonable period" to mean:

> First, we will forbear on demanding payment on the balance of the amount owed until payment on the judgment or settlement with Windermere.

Since no part of the Windermere judgment was paid until November 3, 2011, Lane Powell cannot claim the contract was breached until at the earliest, November 3, 2011. Lane Powell cannot both breach the agreement it claims was in force, and demand that DeCourseys be bound by it.

**Lane Powell Breached the Contract before DeCourseys' Alleged Breach**

[3] This is particularly true, given Lane Powell's public boasts of its breadth and depth of experience.



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In the December 30, 2008 letter, Lane Powell promised not to collect until payment of the judgment. But Lane Powell filed this suit on October 5, 2011, a full 29 days before the earliest payment on the Windermere judgment was possible. By so doing, Lane Powell violated a key term of the December 30, 2011 letter of agreement.

On November 3, 2011 when Windermere made the first payment on the judgment, because Lane Powell was already in breach, DeCourseys were not bound by the any agreement with Lane Powell. To protect the interests of all parties, DeCourseys put the face amount of the lien into the Court Registry rather than the coffers of Lane Powell.

**Lane Powell Knew and Approved of the Efforts to Secure the Windermere Judgment**

Lane Powell argues to this Court that DeCourseys injured Lane Powell by attempting to secure the Windermere judgment after terminating Lane Powell – DeCourseys were somehow in the wrong and being sneaky. *Mot.* p. 7 at 6-14.

That argument is, quite frankly, ridiculous. No one could expect DeCourseys to leave a $1.2 million judgment in limbo for any longer than necessary. In addition, Lane Powell was fully aware that DeCourseys were working on the judgment. Lane Powell expressed its knowledge and approval of those efforts in writing. **Exhibit 9**:

> To the contrary, we would like to see that the DeCourseys are paid. ... The DeCoursey are free to negotiate **any arrangement they want** with Windermere's insurer concerning payment .... [Emphasis added.]

Dwyer wrote "any arrangement." A reasonable person would understand those words to mean "any arrangement." The letter does not state that any arrangement would require prior approval from Lane Powell. It strongly implies the contrary.

Lane Powell's written approval and endorsement of DeCourseys efforts to secure the Windermere judgment was signed on September 28, 2011, just one short week before Lane



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Powell filed suit.

**Lane Powell Spoliated the Evidence**

Lane Powell argues (*Mot.* p. 10 at 15):

> Further, the DeCourseys cannot—as they must—present ***evidence*** (as opposed to mere argumentative assertions) that any material facts are in dispute.

Lane Powell has spoliated tens of thousands of documents that might indeed have been contrary evidence. "Spoliation" includes withholding and hiding evidence, as well as destroying evidence. Black's Law Dictionary defines spoliation as:

> The spoliation of evidence is the intentional or negligent withholding, hiding, altering, or destroying of evidence relevant to a legal proceeding.

As argued and evinced in DeCourseys' *Motion to Cancel or Continue the Hearing on Lane Powell's Motion for Partial Summary Judgment*, November 5, 2012,[4] Lane Powell is hiding and withholding evidence. The evidence Lane Powell *has* produced was produced after filing for summary judgment. That is, the production was so recent as to qualify DeCourseys for a CR 56(f) continuance. Subjoined *Decl. of MHD*

This Court cannot rule there is "no material evidence" as Lane Powell has argued (*Mot.* p. 10 at 8-15) when Lane Powell has withheld 11,000 electronic records and 35 boxes of paper documents from DeCourseys and from the Court until October 24, 2012, more than ten months after they were due under the rules of discovery. And as Lane Powell admits, it is producing those documents only now "in compliance with the Court's order." See DeCourseys *Motion to Cancel or Continue Hearing on Plaintiff's Motion for Partial Summary Judgment*, November 5, 2012, Ex. 5.

[4] The arguments in that motion and the evidence it cites, including the briefs cited by that motion and the evidence they cite, are incorporated herein as though fully set forth. In particular, those motion include **Dkt. 237** (September 21, 2012), **Dkt. 244** (October 1, 2012), **Dkt. 249** (October 12, 2012), **Dkt. 257** (October 22,



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Since Lane Powell improperly withheld that material for ten months, and produced it only after a motion to compel and a court order and the current motion for summary judgment, Lane Powell's effort to hide and withhold evidence is clear to any observer. Given the volume of evidence withheld and the effort expended to avoid producing it, the Court must infer that the evidence would be contrary to its claims and would provide significant issues of material fact that would preclude summary judgment. In *Pier 67, Inc. v. King County*, 89 Wash.2d 379, 573 P.2d 2 (1977), the court held:

> [W]here relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him.

Though Lane Powell argues that none of those documents would make any difference to the summary judgment (*Mot.* p. 11 at 1-2 and fn. 4), the statement is presented only in argument, not even in affidavit. One litigant's argument about what use another might make of the data that the first litigant has withheld is purely speculative and inadmissible and self-serving. The court is required to infer that the evidence withheld Lane Powell's would be unfavorable to Lane Powell's claims and defenses.

DeCourseys discovery requests seek material evidence that Lane Powell acted improperly in the Windermere lawsuit, protected its positional conflicts of interest with other clients by avoiding the creation of CPA precedents, and planned the contract violations that are in evidence.

DeCourseys' also seek evidence of Lane Powell's internal communications about its contract and fiduciary violations in the Windermere case. Of particular interest are the

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2012), **Dkt. 269**(?) October 29, 2012, **Dkt. ??** (November 5, 2012)..



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actions of Grant Degginger, who, as mayor of Belleview courted the very interests that were opposed to DeCourseys in the Windermere case.

Lane Powell will argue and has argued that it withheld the discovery production because DeCourseys refused to sign a written waiver of privilege. **Dkt. 242** p. 2 at 2; p. 7 at 7-9:

> Consistent with its ethical obligations, Lane Powell has not produced documents which may be subject to the DeCourseys' privilege claim. Lane Powell is willing to produce those documents ***as long as*** the DeCourseys agree in writing that the privilege is waived. ... Notwithstanding these objections, Lane Powell is willing to produce those documents ***as long as*** the DeCourseys agree in writing that the privilege is waived. [Emphasis in original.]

However, Lane Powell recently admitted (*Mot.* p. 10 fn. 4) that of the documents withheld – listed in 739 pages of logs – none were privileged:

> In any event, Lane Powell has already produced to the DeCoursey a 739-page production log, wherein Lane Powell describes each of the responsive, **non-privileged documents** it intends to produce ... [Emphasis added.]

Since the documents were "non-privileged," why did Lane Powell withhold them for ten months after production was due (i.e., January 18, 2012), and oppose DeCourseys' motions to compel, claiming that by demanding those documents, DeCourseys were waiving privilege? Dkt. 261 p. 5 at 12-18:

> To be sure, it is and remains Lane Powell's position that the production of these materials in discovery waives the privilege. This is consistent with Washington law: deliberate production of privileged documents in discovery waives the privilege.

The truckload of documents thus produced after its summary judgment motion was filed consist of 61,307 computer files, 35 banker boxes of paper, and another 242 redacted files on a DVD. *Declaration of Mark DeCoursey*, subjoined to Mtn. of November 5, 2012 (Dkt. Number not yet assigned).

Obviously, no human could review that volume of evidence in the few days between its tardy production and the date this response is due. Lane Powell's obvious intention is to



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prejudice DeCourseys and make the preparation of a response based on that evidence impossible.

In addition to that material, withheld for ten months then dumped in a blizzard after filing for summary judgment, Lane Powell has withheld all attorney-client privileged material, as shown its statements quoted above. It has also failed to produce the 10,917 documents named in the October 16, 2012 log.

The one inference the Court may draw from such conduct is that the spoliated and withheld evidence was counter to the interests and claims of the withholding party. Lane Powell's own conduct in this case is reason enough by itself to deny Lane Powell's motion for summary judgment.

**Lane Powell Acquired a Proprietary Interest in the Case**

Lane Powell alludes to the close connection between the Code of Professional Conduct and public policy. *Mot.* p. 16, at 13-20. DeCourseys had a right to expect professional conduct from Lane Powell attorneys. But Lane Powell's transgressions of the Code of Professional Conduct are egregious and repeated. For example, RPC 1.8, Conflict of Interest, states:

> (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client . .

Before DeCourseys agreed to be represented by Lane Powell, they were told that the projected expenses through to end of trial would be $100,000. *Subj. Decl. of MHD.* By end of trial activities, DeCourseys had been invoiced for more than $480,000.



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Throughout, Windermere worked to increase the cost of the litigation. No maneuver or argument was too puerile or specious. While representing its agent in court, Windermere argued its agent "wasn't an agent of Windermere"! The Superior Court Case Summary -- the docket -- is 19 pages long and records 467 items, a testament to Windermere's abuse of process.

Civil Rule 11 of the Washington State Court Rules states:

> . . . The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) it is well grounded in fact;
>
> (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.
>
> . . . If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

But despite Windermere's repeated violations of CR 11, Lane Powell simply parried every worthless argument without seeking CR 11 sanctions. This of course resulted in more earnings for Lane Powell.

RPC 1.8 commentary [16] states:

> "... when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires."

After Lane Powell "acquired an ownership interest" in DeCourseys' case, it was indeed difficult for DeCourseys to terminate the relationship, just as the Bar Association predicted. DeCourseys became captives, and the captivity lasted for years (until August 3,



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2011). And as this lawsuit shows, simply terminating the representation was characterized as tort by Lane Powell. Civil Rule1, Scope of Rules, states that:

> These rules govern the procedure in the superior court in all suits of a civil nature whether cognizable as cases at law or in equity with the exceptions stated in rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

On December 5, 2008, Lane Powell wrote (**Exhibit 8**):

> Windermere's tactics tend to drive litigation costs higher ...

Attorney Paul Fogarty opined:

> Though the legal fees soared through the trial and appeal, and though the DeCourseys pleaded with Lane Powell to complain, not once did LP move for CR 11 sanctions (or the RAP equivalent ) to discourage Windermere's strategy. Instead, LP proceeded as if asserting frivolous arguments in a lawsuit was par for the course. It certainly enriched LP." (**Exhibit 1**, Page 9, Para. 1.)

As Fogarty pointed out, not once did Lane Powell seek the most obvious remedy that was available to protect us -- CR 11 sanctions.

**Courts Did Not say Lane Powell's Fees Were Reasonable**

Lane Powell spends much text in the Motion arguing that all three levels of Court approved of Lane Powell's fees and found them to be reasonable. *Mot.* p. 10 et seq. This is a highly deceptive statement.

Contrary to Lane Powell's argument, the courts did not award DeCourseys the full amount of Lane Powell's invoices. LP invoiced DeCourseys for a total of almost $700,000 over the course of the Windermere litigation. In comparison, the courts awarded DeCourseys only about $550,000 for fees. Lane Powell does not explain that discrepancy.

Lacking contrary evidence (some of which is now available to DeCourseys, as told above), the courts ruled on Lane Powell's timesheets as they were written. The courts did not know that attorneys were billing their time to the case while standing beside the photocopiers, for example. And neither did DeCourseys.



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The courts also did not know about the hours Lane Powell was billing to DeCourseys and not taxing to Windermere in its fees motions. One block of such hours includes the tens of thousands of dollars chalked up in November and December of 2008 and in January, February, and March of 2009 – invoices that the courts never saw. **Exhibit 1**, pp. 13-14.

The Court of Appeals was not asked to award DeCoursey for the full cost of the appeal. As shown in the Affidavit for Fees, Lane Powell billed DeCourseys for almost $100,000, while asking for only $56,499 from Windermere. **Exhibit 10**. And even at that, the Court found the request too hefty and trimmed the award to $47,600. **Exhibit 11**.

**Lane Powell Abandoned DeCourseys' Claims**

Besides trimming the cost of the appeal to less than half of Lane Powell's invoice, the Court of Appeals disallowed DeCourseys' $45,000 in costs awarded by the trial court.

Part of the problem with the attorney fee award at the Court of Appeals was that Lane Powell permitted the Court of Appeals to forget that the basis of the Award in the trial court had two legs. One basis for the award was the Consumer Protection Act, and the other was the Real Estate Purchase and Sale Agreement which Windermere had argued governed the case. **Exhibit 12**, clauses 4-5. Despite the clause in the December 30, 2008 agreement (*HAM* Ex. K) requiring Lane Powell to appeal any adverse rulings, Lane failed to file a Motion to Modify at the Court of Appeals, and to cross-appeal to the Supreme Court to recover DeCourseys' losses.

**Lies My Lawyer Told Me**

When DeCourseys asked Lane Powell to keep its December 30, 2008 agreement to appeal any losses or adverse decisions, Lane Powell refused, apparently because



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DeCourseys' case stood an excellent chance of establishing precedent that would have hurt Lane Powell's other clients and its customary client base. This was a situation that Fogarty called a "positional conflict of interest." **Exhibit 1**, para. 3.

To justify Lane Powell's refusal to cross-appeal DeCourseys' losses, Grant Degginger told a whopper. There is really no other way to describe it. In an email, Degginger wrote to DeCourseys, **Exhibit 13**:

> The only way to change that is to change the law. Only the legislature can do that.

Using that justification, Lane Powell adamantly refused to honor its contract to defend DeCourseys' awards. **Exhibit 17**.

The Court of Appeals stated in the Opinion that the ruling was based on precedent, not on statute. And oddest of all – the precedent cited was the *Nordstrom, Inc. v. Tampourlos* precedent – in which Lane Powell represented Nordstrom.

The RPC does not provide a rule whereby a lawyer is permitted to lie to the client.

**Lane Powell Violated RPC 1.8**

Lane Powell opened the door by arguing the RPC (*Mot.* p. 16 at 15; p. 22 at 11). Now it must shiver in the draft. Lane Powell argues (*Mot.* p. 18 at 10-12):

> The time spent by Lane Powell'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 Lane Powell's fees "were **honestly derived**, and were necessarily incurred in this litigation given our opponents' strategy." [Emphasis added]

Lane Powell violated the RPC egregiously in writing such a document and having DeCourseys sign it. Now by using it in court as a shield to malpractice claims, it is in gross violation of the Bar, and hence, public policy. RPC 1.8 states:

> (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]



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DeCourseys were not advised to seek (and were not represented by) independent counsel when signing the December 30, 2008 agreement. In its zeal and greed, Lane Powell has forgotten the fundamental principles of its profession, and stands in violation of the public policy under which it operates.

Lane Powell challenges DeCourseys to demonstrate that Lane Powell's alleged Agreement (the alleged written fee agreement in combination with the December 30, 2008 letter) is "unenforceable under the Rules of Professional Conduct (RPC)." *Mot.* p. 16 at 14-20. DeCourseys have met the challenge, and Lane Powell's motion for summary judgment should therefore be denied.

**Lane Powell Boasts of Its Success**

Lane Powell took a winning case (developed by DeCourseys pro se) and bilked it for what it was worth. *Mot.* P. 2 at 9-13; p. 3 at 17-24. In all its boasting of success, Lane Powell does not mention that it repeatedly advised DeCourseys to surrender for a loss of hundreds of thousands the day before the jury returned its verdict. **Exhibit 14.**

And that advice to surrender on the eve of victory was not the first time. Lane Powell had recommended self-destructive settlements on several previous occasions, which in each case would have yielded DeCourseys a huge net loss. **Exhibit 15, 16.**

**Lane Powell Asks the Court to Award Compound Interest**

On page 13, Lane Powell calculates (and asks the Court to agree) that the principle amount on the invoice was $389,042.68, and that pre-judgment interest should be calculated using that amount as the principal. The computation at *HAM* Ex. GG uses the same base. The text argues that such computation is "provided for in the parties' Agreement."



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Lane Powell has carefully avoided the admission that more than $63,000 of the amount it alleges for the principal is interest already calculated. The document Lane Powell alleges is the "written fee agreement" does not provide for interest on the interest or compound interest, and Lane Powell has never previously billed for compound interest. Unless Lane Powell can demonstrate an explicit right or agreement under the contract Lane Powell alleges and can prove was in force, the Court must deny this demand.

**Lane Powell Charges DeCourseys with Unjust Enrichment**

Lane Powell charges that DeCourseys were unjustly enriched by the lawsuit. This is simply not true. In the first place, Lane Powell itself developed and argued the theory of collateral damages, and informed us and the court that we were entitled to same.

In the second place, even given the collateral damages and the fee multiplier, we did not come out as winners of a windfall by the lawsuit. As shown by the numbers in the *Declaration of Carol DeCoursey*, there was no profit to be had. And of the damages won in court, Lane Powell wants to take the greater share.

## III. STATEMENT OF ISSUES

Can a summary judgment be granted when multiple issues of fact are still unsettled?

Can the court grant summary judgment for breach of contract when the moving party cannot provide the "written fee agreement" it alleges the defendant breached?

Can summary judgment be granted to a plaintiff who has withheld tens of thousands of documents from discovery until days before the hearing, and then claims "there are no issues of material fact" and "the defendants have no evidence"?

Can a plaintiff win summary judgment claiming breach of contract while the plaintiff



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itself is in prior breach?

Can summary judgment for breach of contract be granted on an agreement that is demonstrably in violation of the Rules of Professional Conduct and public policy?

## IV. EVIDENCE RELIED UPON

The subjoined declaration of Mark DeCoursey and accompanying exhibits. Lane Powell's *Motion*, associated declarations, and exhibits. The Court records in this case.

## V. AUTHORITY

RPC, CR 56, RCW 4.56.11

Black's Law Dictionary, 5th Ed., 8th Ed.,

*Askin v. STOEP*, Wash: Court of Appeals, 2nd Div. (2006)

*Pier 67, Inc. v. King County*, 89 Wash.2d 379, 573 P.2d 2 (1977)

*Garbell v. Tall's Travel Shop*, 17 Wn. App. 352, 354, 563 P.2d 211 (1977)

*Coson v. Roehl*, 387 P. 2d 541 - Wash Supreme Court (1963)

## VI. ORDER

A proposed order accompanies this motion.

DATED this 5th day of November, 2011

Carol DeCoursey

Carol DeCoursey

Pro se

Mark DeCoursey

Mark DeCoursey

Pro se



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**Declaration of Mark DeCoursey**

Mark DeCoursey hereby swears and affirms as follows:

I, Mark DeCoursey, being of legal age and competent to testify, do testify under penalty of perjury that:

1. Before we agreed to have Lane Powell represent us in the Windermere suit, Lane Powell represented that the case would go to trial for $100,000.
2. After trial activities, Lane Powell's total bill stood at $480,000.
3. By the end of 2008, we had paid Lane Powell more than $313,000.
4. Carol and I properly propounded and served our first set of discovery requests to Lane Powell on December 19, 2011. See Ex. 1 of DeCourseys' October 21, 2012 motion, **Dkt. 257**.
5. Lane Powell's recent production of 61,307 electronic records and 35 banker boxes of paper documents could not be analyzed and reviewed by any human alive in the time available before the response to summary judgment is due. The sheer volume – withheld for ten months then released in a flood – simply forbids it.
6. In addition, Lane Powell's logs indicate it is withholding another 10,917 electronic documents, as described in our November 5, 2012 *Motion to Cancel or Continue*.
7. In addition, Lane Powell indicates (as argued and referenced in the accompanying motion) that it is withholding all materials it deems contain attorney-client privilege, and has not even named those privileged documents in its October 16, 2012 log, despite the Court's Order of October 2, 1012.
8. **Exhibit 1** is a true and correct copy of a letter sent by Atty. Paul Fogarty to Lane Powell on September 22, 2011.



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9. **Exhibit 2** is a true and correct copy of an email sent to DeCourseys by Paul Fogarty on October 6, 2011.

10. **Exhibit 3** is a true and correct copy of an email sent by Lane Powell's counsel Malaika Eaton on November 14, 2011.

11. **Exhibit 4** is a true and correct copy of internal office service logs produced in discovery by Lane Powell.

12. **Exhibit 5** is a true and correct copy of an email sent by Mark DeCoursey to Ryan McBride of Lane Powell on August 2, 2011 at 9:50 AM.

13. **Exhibit 6** is a true and correct copy of an email sent by Mark DeCoursey to Ryan McBride of Lane Powell on August 2, 2011 at 3:01 PM.

14. **Exhibit 7** is a true and correct copy of the *Amended Final Judgment* filed November 3, 2011.

15. **Exhibit 8** is a true and correct copy of a letter from Brent Nourse of Lane Powell to Carol and Mark DeCoursey dated December 5, 2008.

16. **Exhibit 9** is a true and correct copy of a letter sent by Michael Dwyer of Lane Powell to Atty. Paul Fogarty who was representing DeCourseys in negotiation with Lane Powell at the time.

17. **Exhibit 10** is a true and correct copy of a brief written by Ryan McBride of Lane Powell filed with the Court of Appeals Div. I on November 17, 2010.

18. **Exhibit 11** is a true and correct copy of the ruling issued by the commissioner of the Court of Appeals, Div. I, date January 4, 2011.



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19. **Exhibit 12** is a true and correct copy of the King County Superior Court order on costs and attorney fees for the Windermere case filed on February 6, 2009.

20. **Exhibit 13** is a true and correct copy of an email sent by Grant Degginger of Lane Powell to Mark DeCoursey on February 14, 2011 at 1:04 PM.

21. **Exhibit 14** is a true and correct copy of a letter from Brent Nourse of Lane Powell to Carol and Mark DeCoursey dated October 30, 2008.

22. **Exhibit 15** is a true and correct copy of a letter from Brent Nourse of Lane Powell to Carol and Mark DeCoursey dated September 19, 2008.

23. **Exhibit 16** is a true and correct copy of a set of letters and emails sent by DeCourseys to Lane Powell between 2008 and 2011.

24. **Exhibit 17** is a true and fair copy of the transcript of a phone call between Lane Powell (in the persons of Grant Degginger and Ryan McBride)

DATED this 5th day of November, 2012

Mark DeCoursey

Pro se



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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

**ORDER ON PLAINTIFF'S LANE POWELL'S MOTION FOR PARTIAL SUMMARY JUDGMENT [PROPOSED]**

This matter having come for hearing before this Court on Defendant DeCourseys' motion, and the Court having reviewed the records and files pertaining to this action, including:

1. *Plaintiff Lane Powell's Motion for partial Summary Judgment Hearing* with associated declarations and exhibits.
2. *DeCourseys' Response to Plaintiff Lane Powell's Motion for partial Summary Judgment Hearing* with *Subjoined Declaration of Mark DeCoursey* and exhibits
3. Lane Powell's reply, if any.
4. The Court's own files on this matter

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The Court **ADJUDGES, ORDERS, AND DECREES** as follows:

Defendant's Motion is **DENIED**.

1. _____

2. _____

3. _____.

Signed this _____ day of _____, 2012.

_____
Judge Richard Eadie

Submitted by:

_____/s Mark and Carol DeCoursey_____
Mark DeCoursey, Carol DeCoursey
Pro se



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