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Carol DeCoursey <cdecoursey@gmail.com>

Re: Feb. 16 call. Let's do the math

1 message

Carol DeCoursey <cdecoursey@gmail.com> Fri, Feb 18, 2011 at 7:57 AM
To: "Degginger, Grant" <DeggingerG@lanepowell.com>, "McBride, Ryan" <mcbrider@lanepowell.com>, "Gabel, Andrew J." <GabelA@lanepowell.com>

On Thu, Feb 17, 2011 at 10:49 AM, Degginger, Grant <DeggingerG@lanepowell.com> wrote:

> Carol,
> I'm afraid that the description of our conversation of the 15th (not the 16th as stated in your email) omitted a number of crucial statements and misstated others.

Grant: Your memory and mine on the date of the call are identical. I thought the call took place on the 15th, but Mark's cell phone recorded the call has having taken place on the 16th, so we went with the cell phone's memory rather than mine. That's what you get when you rely upon technology, rather than humans.

:-)

And I'm glad you know that our awards amount to approx. one million, not a million and a half. That's what we think, too. We've done the math. That's why we are concerned.

> The purpose of the call was to discuss our concern with the additional three pages of arguments that you and/or Mark had written and which you wanted us to include in the brief in opposition to review that Ryan had prepared. At the beginning of the call, I explained that there were three reasons why we could not include them: First, we concluded that the arguments were not supported by the statutes and case law. Second, we do not believe that we could argue that they represented a reasonable extension of existing law.

Quite frankly, we wish Lane Powell was as aggressive in pursuing those principles with our opponents as it is with us. Windermere has a prolific imagination for improbable arguments that waste our resources and the court's time. But Lane Powell has never filed a CR 11 motion to the court, despite our requests that it do so. Lane Powell has a policy against asking for CR 11 sanctions. That goes to the heart of the current issue. We are paying to answer Windermere's recreational litigation and Kamikazi (dead on arrival) arguments with money we do not have.

We wish you'd shown more interest in taking the costs of Windermere's abuse out of Windermere's hide, not ours.

The extensibility of law is not an easy call, and judging by the wide variety of arguments among lawyers, even the experts do not agree on such things. From private ownership of firearms and abortions to prayer in the schools, the arguments for reinterpretation of the law through Supreme Court review are all over the map. What we ask here is no earth-shaking reversal, but simply a review of the arbitrary presumption by the Court that RCW 19.86 is defined by 4.84.010, a presumption that originated in the courts, not in the legislature.

> Third, I explained that filing a cross appeal is ill-advised and not in your best interest because it puts at risk the substantial victories, including the judgment in excess of $1 million at the trial court, the affirmance of the trial court judgment (except for a portion of the cost award which represented less than 5% of the total judgment), and the award of over half your attorneys fees on appeal. Both Ryan and I emphasized that it is not in your interest to give Windemere the last word to the Court and by filing a cross appeal, the other side will get the opportunity to respond.

You would not be concerned if you had actually read Windermere's briefs. :-) Windermere has not successfully argued anything in the whole case, and Ryan can tell you why.

> Ryan explained why under the law, you only were entitled to obtain attorneys fees on appeal for the CPA claim and that he had done his best to argue for as large an award as possible based the law and his experience preparing the appellate briefing. Ryan also explained that if Windemere had only appealed the judgment for breach of fiduciary duties and not the CPA claim, there would have been no basis for seeking fees on appeal. You responded by saying that the law is an ass and this it allows corporations to screw the public.

Let's put Charles Dicken's quip aside, if it is a distraction. That quip was not the bulk of our response. We pointed out that the CPA is always a capstone judgment. The defendant may be padding the billing, watering the beer, or breaching fiduciary duties. The plaintiff's case contains many elements of proof, and the defense's case also contains many elements. But they ae all part of the CPA case. After the initial judgment on the wrongness of the situation, the court may then be asked to consider whether the conduct constitutes an "unfair and deceptive practice" and satisfies the other criteria for a CPA claim. Since the initial judgment on watering the beer or breaching fiduciary duties is an essential component of the CPA finding, the attorney fee provisions of the CPA should apply to re-arguing those issues on appeal.

> I responded by pointing out that the best revenge is to win by getting review denied, executing on your judgments and then you will have an effective platform to address any changes in the law that you believe are appropriate, having won.

How could the CPA plaintiffs' loss of $150,000 - $175,000 -- money they don't have -- be regarded as “having won”? When we’ve raised the issue of our loss, you have recommended that we take the matter up with the Legislature. The Legislature could do nothing about our loss. And we’re in court now. The court *could* do something about it.

But let us be perfectly clear that we are not working on revenge. Windermere and its law firm are composed of people who have their own lives and no doubt make enough trouble for themselves without our help. We wish only to be made whole and to leave behind us a world that is a little better for those who come after, including future Windermere customers who are wronged.

> Towards the end of the conversation, we discussed what you would be putting at risk by advocating for acceptance of review. We explained that the court could reverse everything you have been awarded thus far, including the over $1 million judgment (we didn't say $1.5 million) and the amount awarded by the Court of Appeals for attorneys fees as the prevailing party.

Of course we stand that risk regardless of what we do. Even with your suggested strategy, we could lose everything. Such is the nature of litigation. But as we explained in our previous email, the chance of a reversal at this point is very low. A long line of decisions and precedents have confirmed that the courts agree our cause is the right one. The Supreme Court would have to accept some bizarre "extension of existing law" to turn against all that judicial opinion. Add to that the quality of argument that Windermere has employed heretofore, we are really facing a microscopic risk. Much bigger risk is that the court will accept one or more of their arguments for review because they want to add their two cents, and we will be dinged 50-100K just for the pleasure of winning yet again -- with no hope of recovering those costs. How does your strategy protect us from that?

> Your email expresses concern about attorneys fees. The irony is that attempting to cross appeal prolongs the fight, and increases fees which likely will not be recoverable.

We think the argument is just, Grant. That is why we should make it. Windermere should not be permitted to lose so completely in trial, then nullify the award with frivolous appeals.

> We have previously responded regarding the interest rates on judgments and the provisions in our engagement letter to which you referred. I don't think it is necessary to review it again. We regularly send you invoices, including one within the last month, describing the work we perform and what the balance is on your account.

We have never questioned the amount of attorney time spent.

> We note that we have not received a payment since December, 2008,

This is in accordance with Lane Powell's letters of agreement of December 5 and 30, 2008.

> nevertheless, we obtained a very successful result for you in the Court of Appeals. If you would like to have a conversation about our fees, then let's deal with it directly.

We are not having a conversation about the fees, but about the fee awards. You have never responded to the points we raised in our November 7, 2010 letter, either. You promised to do so, but you never have. We are now having another conversation about the same subject.

> Fair to say, it is our opinion that the results speak for themselves--which makes this conversation perplexing.

Brent and Andrew and your team did a great job, but so did we. We handed you a super case that was well set up. Lane Powell did not even have to re-write our Third Amended Answer, which was used as a basis for litigation.

And the victory Lane Powell won was in large part due to our refusal to follow some very bad advice Lane Powell gave us. Let us take a step backward. During Discovery, Windermere failed to send in any construction experts. Wow! They blew it -- Windermere had no experts to oppose our expert. Then in the 11th hour, Windermere wanted to bring an expert into the house to determine the "fair market value" of the house in its current condition, so they could allegedly make us a settlement offer. The claim was nonsensical, of course, for a number of reasons, but LP exerted pressure on us do this. Because we refused, Windermere went to trial without any experts to oppose ours.

Thank you, Carol and Mark . . .

Even Even with a 3.49% interest rate on unpaid fees rather than the 9% you desire, we have brought you a boat-load of money. What's not to like?

> I can't respond to your comment about tax treatments of any awards. I certainly have not had a conversation with you on that topic. You will have to be more specific.

Grant, as chair of the construction division of Lane Powell, have you never represented a CPA plaintiff before? Your tax people should have informed you about a CPA plaintiff's net recovery. We are working with a CPA on this. Ballpark figures: On an award of $500,000 in fees and costs, we'd owe the IRS $150,000.

So actually the picture is worse than we first thought: We are looking at losing $300,000 - $325,000 on this "victory."

Understanding that tax is not your area, please just accept the statement from our CPA as fact, certified by a professional in the field. The award is being reduced to a Pyrrhic victory.

> Talk to you soon,
> Grant

From: Carol DeCoursey [mailto:cdecoursey@gmail.com]
Sent: Thursday, February 17, 2011 9:00 AM
To: Degginger, Grant
Cc: McBride, Ryan P.; Gabel, Andrew J.; Mark DeCoursey
Subject: Feb. 16 call. Let's do the math

Grant:

This email will confirm that on February 16, at your request, Mark and I spoke to you, Ryan McBride, and Andrew Gabel, via conference call on the subject of our response to Windermere's petition before the Supreme Court. The phone call took place between 10:00 and 10:31 a.m. approximately.

Among other things, you said Lane Powell would not represent us if we asked the Court to consider Windermere's abuse of the courts and its strategic attack on the CPA.

During the phone conversation, I expressed concern that by the time we paid off what we owed (our legal fees and expenses, the loans we took out to support the case, etc.) we would not be able to fix our house. You corrected me. I understood you to say that Mark and I had been awarded "a million and a half" dollars in our lawsuit -- that there would be plenty of money to fix the house.

On August 5, 2010 we sent you a letter asking that Lane Powell not charge us 9% interest on outstanding fees and costs, and that Lane Powell be satisfied with a 3.49% interest, the same interest rate Windermere is paying us. In a response on August 5, you refused our request.

On November 7, 2010, we sent you a letter pointing out some of the problems we found in Lane Powell's representation of us on the subject of fees and awards. We again mentioned the 9% interest rate you are changing. On November 18, 2010, you wrote back, stating you did not have the time to answer the points we raised.

Concerning the exorbitant legal expenses and costs Windermere has racked up for us in their strategy of litigation by attrition warfare: Please be reminded that several times throughout the litigation, we asked for a motion to impose CR 11 sanctions on Windermere. We were told that Lane Powell has a policy which prohibits its attorneys from requesting such sanctions.

1. Grant, please address the points we raised in our November 7, 2010 letter.
2. It is necessary for us to get a picture of how much we will owe Lane Powell at the end of this siege. Please include the fees/expenses you have already incurred in the preparation of Ryan's Supreme Court response. And an estimate of how much the remand will cost. Of course we understand that you cannot predict what portion of our costs will be disallowed during the remand. Nor can you estimate the taxes we will have to pay to the IRS on the fees and costs award. (By the way, Lane Powell told us there would be no IRS taxes due on the fees and costs award. As it happens, Lane Powell was wrong about that.)
3. Please confirm that we have been awarded a million and a half dollars.

With this information, we can do the math.

Best wishes,

Carol & Mark

> please delete it and notify me immediately, and please do not copy or send this message to anyone else.
>
> Please be advised that, if this communication includes federal tax advice, it cannot be used for the purpose of avoiding tax penalties unless you have expressly engaged us to provide written advice in a form that satisfies IRS standards for "covered opinions" or we have informed you that those standards do not apply to this communication.