Mark DeCoursey <mhdecoursey@gmail.com>

Re: Draft Answer to Petition for Review

1 message

Mark DeCoursey <mhdecoursey@gmail.com> Mon, Feb 7, 2011 at 9:02 AM
To: "McBride, Ryan P." <McBrideR@lanepowell.com>

Darn -- left off a line. Here is the omitted sentence, bottom of page 24:

> It is time for the liberal construction prescribed by RCW 19.86 to be applied to the attorney fees in these appeals.

On Sun, Feb 6, 2011 at 8:53 PM, Mark DeCoursey <mhdecoursey@gmail.com> wrote:

> Great work, Ryan. We have made some copy editing suggestions and corrections, and one or two more significant content suggestions. Let us know what you think.
>
> On Tue, Feb 1, 2011 at 4:03 PM, Mark DeCoursey <mhdecoursey@gmail.com> wrote:
>
>> Thanks! Looking forward to it.
>>
>> On Tue, Feb 1, 2011 at 4:01 PM, McBride, Ryan P. <McBrideR@lanepowell.com> wrote:
>>
>>> Here is the answer to the petition I prepared.
>>>
>>> **Ryan P. McBride**
>>>
>>>
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>>>
>>> Shareholder, Bio | VCard
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>>> *Lane Powell, one of Washington's "Best Workplaces" and a "Top Corporate Philanthropist" (Puget Sound Business Journal), and one of the "100 Best Companies" and "100 Best Green Companies to Work For in Oregon" (Oregon Business magazine).*
>>>
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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.

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No.

SUPREME COURT
OF THE STATE OF WASHINGTON

V&E MEDICAL IMAGING SERVICES, INC.,

Plaintiff,

v.

MARK DeCOURSEY and CAROL DeCOURSEY,

Defendants/Third-Party Plaintiffs/Respondents,

v.

PAUL STICKNEY, PAUL H. STICKNEY REAL ESTATE SERVICES, INC., and WINDERMERE REAL ESTATE, S.C.A., INC.,

Third-Party Defendants/Appellants.

ON PETITION FOR REVIEW FROM
COURT OF APPEALS, DIVISION I
(Court of Appeals No. 062912-3-I)

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Respondents Mark and Carol DeCoursey (the "DeCourseys") respectfully request this Court to deny Appellants' Petition for Review of the Court of Appeals' November 8, 2010 unanimous unpublished decision (the "Decision"). Appellants (collectively, "Windermere") make only a cursory attempt to articulate how the Decision meets any of RAP 13.4(b)'s criteria for review and, in the end, they simply repeat the same flawed arguments that the Court of Appeals methodically and thoroughly rejected in its comprehensive opinion. The Decision does not conflict with any decision of this Court or the court of appeals, nor does its unique factual and procedural setting raise any issue of substantial public interest.[1]

At this point, only the parties have a substantial interest in this case and, on that score, Windermere's petition is just another strategy to delay having to face the consequences of its misconduct. It has been more than six years since Windermere breached its fiduciary duties and the CPA and more than two years since judgment was entered. During that time, the DeCourseys have not seen a penny of the damages and fees they were

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[1] The DeCourseys asked the Court of Appeals to publish the Decision to provide precedent on three discrete issues: (1) a real estate agent's fiduciary duties may not be waived; (2) damages for breach of an agent's fiduciary duties are not limited to disgorgement of the commission; and (3) proper jury instructions on an agent's duty to disclose conflicts. The court disagreed and denied the motion. Just as important for present purposes, Windermere's petition does not seek review on any of these issues.

awarded. Windermere's legal strategy has maximized the delay and expense of this case, strategy that included a motion for JNOV, the appeal, motion for reconsideration of the appeal, and this petition. The Court of Appeals rejected Windermere's effort to deflect blame, as did Judge Fox before that, and the jury before that. Windermere has had its day in court.

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II. COUNTERSTATEMENT OF THE ISSUES

1. Although the Court of Appeals was "not convinced" that Judge Fox modified Judge Erlick's interlocutory ruling, did the Court properly hold that such modification would be consistent with CR 54(b) and well-established precedent?

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2. Given the concrete substantive evidence to support the jury's finding, is the Decision consistent with *Smith v. Preston Gates Ellis, LLP*, 135 Wn. App. 859, 147 P.3d 600 (2006)?

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3. Is the Decision consistent with Supreme Court precedent on legal causation in that the consequences were foreseeable and the assignment of liability was warranted as a matter of "logic, common sense, justice, policy, and precedent"?

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4. Given that Windermere failed to show that a pre-trial settlement compensated the DeCourseys for the same damages awarded by the jury, did the Court of Appeals properly hold that the trial court did not abuse its discretion in refusing to offset the judgment ?

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5. Did the Court of Appeals properly apply the CPA standard for "public interest" when it held that substantial evidence supported the jury's finding that it is likely that others "have been or will be injured in exactly the same fashion" as the DeCourseys?

6. Was the trial court's award of attorney fees supported by findings and an adequate record for review, consistent with *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632, 966 P.2d 305 (1998)?

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III. COUNTERSTATEMENT OF THE CASE

The "Statement of the Facts" and "Resume of Pleadings and Proceedings" set forth in Windermere's petition for review are one-sided, incomplete and misleading. This Court should rely on the Court of Appeals' neutral recitation of the facts and procedural history of the case, which the DeCourseys incorporate by reference. Additional facts relevant to the issues raised in the petition are discussed below

IV. ARGUMENT

A. The Court of Appeals Properly Affirmed The Award Of Attorney Fees Based On Judge Fox's Interpretation And/Or Modification Of Judge Erlick's Earlier Ruling.

Windermere's request that this Court review the Court of Appeals' decision on attorney fees should be rejected from the outset because Windermere does not identify any opinion that conflicts with the Decision, nor does it explain why the factually unique circumstances of this case

involve issues of substantial public importance. They don't. There is no error in any event. Although its statement is unclear, Windermere appears to argue that the court erred in affirming the fee award of because Judge Fox could not modify Judge Erlick's earlier ruling or, even if he could, the DeCourseys had to cross-appeal Judge Erlick's ruling. Both assertions are flat wrong.

Judge Fox did not modify Judge Erlick's earlier ruling at all. Judge Erlick's ruling stated the DeCourseys are "dismissing/not pursuing any claim for attorney fees beyond statutory fees of $250." CP 707. But as the Court of Appeals noted, that ruling did not come in the context of a motion for fees; it resolved a discovery dispute regarding the DeCourseys' duty to produce information about attorneys they had already consulted. Decision at 28-29. The right to seek fees in the future, or waiver, was not argued in the briefing or hearing. RP (8/23/2007) at 59-60; CP 1110-23. When awarding fees, Judge Fox construed Judge Erlick's ruling narrowly. "I don't believe I am reconsidering, revising, or reversing that ruling" because "I see nothing in it which would preclude the award of attorney's fees since that time." RP (2/6/09) at 6. The Court of Appeals properly found no error in Judge Fox's reasonable reading of Judge Erlick's order.

Even if Judge Erlick's ruling was intended to limit the DeCourseys from seeking fees in the future, Judge Fox was entitled to modify it. The

Court of Appeals addressed this issue as well. Decision at 29-30. It correctly held that, absent entry of a partial final judgment pursuant to CR 54(b), an interlocutory order is "subject to revision at any time" prior to final judgment. CR 54(b); *Ledcor Indus. (USA), Inc. v. Mut. of Enumclaw Ins. Co.*, 150 Wn. App. 1, 14 n. 32, 206 P.3d 1255 (2009). This is true even where a different judge makes the revision.[2] Thus, Judge Erlick's earlier ruling—however it is construed—did not prevent Judge Fox from subsequently awarding the DeCourseys attorney fees.[3]

That being the case, Windermere's argument that the DeCourseys were required to cross-appeal simply falls apart. Once Judge Fox entered his order, Judge Erlick's ruling had no adverse effect on the DeCourseys' right to attorney fees, if it ever did. At most, as construed or modified by Judge Fox, Judge Erlick's ruling barred the DeCourseys from recovering attorney fees incurred up to the date of that ruling, but not after. As the Court of Appeals correctly noted, since the DeCourseys did not seek fees incurred prior to Judge Erlick's ruling, they had no reason or obligation to

[2] *See Central Puget Sound Reg. Trans. Auth. v. Eastey*, 135 Wn. App. 446, 462-63, 144 P.3d 322 (2006) (Cox, J., concurring); *MGIC Fin. Corp. v. H.A. Briggs Co.*, 24 Wn. App. 1, 8, 600 P.2d 573 (1979).

[3] Windermere implies that denial of the DeCourseys' motion for discretionary review precluded Judge Fox from interpreting or modifying Judge Erlick's ruling. Windermere made this argument below, and the Court of Appeals rejected it out-of-hand: "The 'denial of discretionary review of a superior court decision does not affect the right of a party to obtain later review of the trial court decision …' RAP 2.3(c). Nor does denial of discretionary review affect the trial court's authority to modify its rulings. Indeed, Stickney cites to no authority suggesting otherwise." Decision at 30-31.

cross-appeal. Decision at 32; RAP 2.4(a) (cross-review only required if party seeks affirmative relief). In sum, the Court of Appeals' decision to uphold Judge Fox's fee award was proper, and not worthy of review.

Windermere has failed to meet the standard set by RAP 13.4(b) for discretionary review.

B. Substantial Evidence Supports The Jury's Finding Of Cause-In-Fact; No Conflict With *Smith v. Preston Gates Ellis.*

The Court of Appeals methodically rejected Windermere's effort to assail the jury's finding of proximate cause. Decision at 11-13. There is no conflict between its Decision and its prior opinion in *Smith v. Preston Gates Ellis, LLP*, 135 Wn. App. 859, 147 P.3d 600 (2006). The Court of Appeals carefully analyzed *Smith*, and found it procedurally and factually distinguishable from the present case. This panel of the Court of Appeals would know: Judge Dwyer, who authored the Decision, was on the *Smith* panel, as was Judge Applewick, who authored *Smith*.

To begin with, *Smith* was decided on summary judgment. The court decided the causation issue as a matter of law. *Id.* at 863. Here, in contrast, the issue went to the jury. The jury was properly instructed and found proximate cause by special verdict. CP 980; CP 987. The Court of Appeals' role, therefore, was limited to deciding whether substantial evidence supported the verdict. Decision at 11; *McKinney v. State*, 134 Wn.2d 388, 406, 950 P.2d 461 (1998). Unlike summary judgment, the

court was required to defer to the jury's determination regarding the persuasiveness of the evidence and credibility of the witnesses. *City of University Place v. McGuire*, 144 Wn.2d 640, 652-53, 30 P.3d 453 (2001).

Moreover, the Court of Appeals properly concluded that there was substantial evidence to support a finding that, had Stickney informed the DeCourseys about his conflict of interest, "the DeCourseys would have hired a competent, licensed contractor and they would not be the owners of an essentially valueless house." Decision at 13. Among other things:

- The jury found Stickney's relationship with [redacted] created a conflict of interest that he should have disclosed—a finding Windermere did not challenge on appeal. CP 986. Indeed, in recommending [redacted] Stickney violated Windermere's internal policy that requires agents to give multiple referrals. RP (10/22/08) at 151; RP (10/23/08) at 10.

- More than that, Stickney told the DeCourseys that he had seen [redacted] do similar work in the past. RP (10/22/08) at 27-28; RP (10/23/08) at 56. He said that [redacted] "did the best work for the best prices," "was an expert in construction," "the best I've seen," and would do "high quality" work. Decision at 12; RP (10/22/08) at 16; RP (10/23/08) at 56; RP (10/28/08) at 163-64, 168.

- In fact, [redacted] was not even a licensed contractor, nor had Stickney seen him do similar advanced construction before. RP (10/23/08) at 37, 139-140; RP (10/28/08) at 168, 173-74. Stickney also failed to tell the DeCourseys that he had previously received complaints about [redacted] from the Calmeses, one of his other clients. Decision at 13; RP (10/23/08) at 91, 96.

- Without knowledge of any of these things, the DeCourseys relied on Stickney's recommendation; they didn't want to buy the house "as-is," and had already rejected it; but they trusted Stickney's advice that, if they used [redacted] for renovations, the house would not only be livable, it would increase in value. RP (10/22/08) at 24-26.

- The DeCourseys treated Stickney's advice as an "independent reference," made in their best interest. RP (10/22/08) at 38-39. Conversely, the DeCourseys would not have believed Stickney's assurances regarding [redacted] if they knew of the conflict of interest; they would have viewed the referral as a "testimonial from a salesman." Decision at 12; RP (10/22/08) at 38-39.

- The DeCourseys repeatedly testified that had they known that Stickney had a financial interest in pushing work [redacted] way, they never would have hired him—indeed, they would not have bought the house at all. RP (10/22/08) at 24, 38-39; RP (10/28/08) at 174.

- That testimony was corroborated by evidence of a prior event. When Stickney had previously recommended that the DeCourseys use an inspector who Stickney had "worked with for a long time," the DeCourseys declined, and chose to hire an "independent inspector" instead. RP (10/22/08) at 15.

Critically, Windermere put on no contrary evidence; Stickney did not even testify in his own defense. It was entirely reasonable for the jury to find that, had Stickney told the DeCourseys of his financial entanglements with [redacted] they would not have bought the house at all, and certainly would not have hired the unlicensed, inept [redacted] to do the renovations. Either way, the DeCourseys would not have ended up with a house requiring hundreds of thousands of dollars to repair.

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This evidence distinguishes the verdict here from *Smith*. In *Smith*, the plaintiff claimed that his attorney's malpractice resulted in him signing a one-sided contract that allowed a builder to overbill without significant liability. The plaintiff claimed that had he known the risks, he would not have signed the contract. *Smith*, 135 Wn. App. at 865. The court found

the plaintiff's speculation insufficient to overcome the defendant's showing that the plaintiff knew the risks, and signed the contract anyway:

> Smith testified that he would not have signed the contract of Preston had advised him that there was a risk that the cost of construction could exceed the $275 per square foot he had set as the outer limit of his budget. However, … Smith understood that the contract did not specify his desired maximum price. … And, Smith had substantial knowledge about the risks of a "cost plus" contract.
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> … Smith had first-hand knowledge of the risk of cost overruns and knowledge that the cap discussed … was neither expected to be relied on nor included in the contract. Nothing in the record supports Smith's contention that if [Preston] had cautioned him about these same risks, Smith would not have signed the contract. Nothing in the record supports a bare allegation of causation based on [Preston's] failure to repeat the known risks.

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Id. at 866-67.[4] Unlike *Smith*, there was no evidence that, had Stickney told the truth, the DeCourseys would have hired anyway. The evidence was one-sided the other way, and far more "concrete" than in *Smith*, where the plaintiff could only speculate that, "he *might* have looked for another builder." *Id.* at 865 (emphasis added). The DeCourseys' testimony was unequivocal that they would not have hired nor bought the house had they known of Stickney's conflict; indeed, it was Stickney's deception that induced them to go forward in the first place. There is no conflict with *Smith*, and no basis for review.

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[4] The court also rejected the plaintiff's arguments with respect to other contract provisions because they did not contribute to the builder's intransigence, nor did they limit the amount of the plaintiff's earlier settlement with the builder. *Id.* at 867-69.

Windermere has failed to meet the standard set by RAP 13.4(b) for discretionary review.

C. The Court of Appeals Properly Found Legal Causation.

Nor is there merit in Windermere's suggestion that the Decision contradicts this Court's opinions on legal causation. Windermere argues that legal causation "turns primarily on foreseeability," and that the Court of Appeals "ignored" that issue. Petition at 16. Both claims are wrong. While foreseeability may be relevant to legal causation, foreseeability is ordinarily a question of fact for the jury, not the court. *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 478, 951 P.2d 749 (1998); *Crowe v. Gaston*, 134 Wn.2d 509, 520, 951 P.2d 1118 (1998). Nor did the Court of Appeals ignore that issue. To the contrary, the court considered and rejected Windermere's foreseeability claim. Decision at 16 n. 8.

"Whether an act may be considered a superseding cause sufficient to relieve a defendant of liability depends on whether the intervening act can reasonably be foreseen by the defendant[.]" *Crowe*, 134 Wn.2d at 519. The Court of Appeals held that the jury was properly instructed (CP 980) and there was "ample evidence" to support the jury's finding that "[redacted] and [redacted] negligence was reasonably foreseeable." Decision at 16 n. 8. The evidence bears this out. Stickney worked to convince the DeCourseys to trust [redacted] judgment and competence because he had a

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hidden financial interest in ███ income, not because he believed ███ could do the job; Stickney had never seen ███ do similar renovations, nor did he tell the DeCourseys that ███ was not a licensed contractor. Having brought an unqualified contractor into the purchase package, it certainly was foreseeable that the contractor would botch the job.

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The Court of Appeals also properly refused to absolve Windermere of liability for this foreseeable result. Legal causation turns on "mixed considerations of logic, common sense, justice, policy, and precedent." *Schooley*, 134 Wn.2d at 479. None of these considerations justify overturning the verdict. The court carefully analyzed the strong policies underlying a real estate agent's duty of loyalty and "obligation to be forthright and straightforward in the handling of the [principal's] business." Decision at 14; *Mersky v. Multiple Listing Bureau of Olympia, Inc.*, 73 Wn.2d 225, 230-31, 437 P.2d 897 (1968). That policy entitles the principal to assume that the agent is acting in its best interests. When the agent violates that trust for personal benefit, the Court of Appeals was correct to find that logic, common sense, justice and public policy all demand that the agent be held responsible for the consequences. There was no error, and certainly no conflict with any decision of this Court.

Windermere has failed to meet the standard set by RAP 13.4(b) for discretionary review.

D. Substantial Evidence Supports The Jury's Finding Of A Public Interest Impact Under The CPA.

Windermere's argument that the Decision conflicts with the CPA's "public interest" element is baseless. Windermere claims that a "plaintiff must show that the defendant actively solicited this particular plaintiff." Petition at 17. Wrong. This Court has repeatedly held that no one factor relevant to the public interest inquiry—including "active solicitation"—is dispositive nor is it necessary that all be present. *Svendsen v. Stock*, 143 Wn.2d 546, 559, 23 P.3d 455 (2001); *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). Indeed, this Court and the Court of Appeals have upheld CPA claims against real estate brokers and agents, and found public interest impact, in the absence of active solicitation. *Svendsen*, 143 Wn.2d at 559; *Bloor v. Fritz*, 143 Wn. App. 718, 737, 180 P.3d 805 (2008); *Edmonds v. John L. Scott Real Estate*, 87 Wn. App. 834, 847, 942 P.2d 1072 (1997).

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The Court of Appeals recognized that the issue does not turn on "active solicitation," but whether "there is a likelihood that others have been or will be injured in exactly the same fashion." Decision at 19; *Hangman Ridge*, 105 Wn.2d at 790. That issue was for the jury,[5] the jury

[5] *Hangman Ridge*, 105 Wn.2d at 790 ("Whether the public has an interest … is to be determined by the trier of fact.").

was properly instructed (CP 978), and the jury found for the DeCourseys. Substantial evidence plainly supported that finding. Among other things:

- Stickney's deceptive acts were committed during the course of his business as a Windermere real estate agent—a business which was advertised to the general public through the media, websites, lawn signs, business cards and the like. Decision at 20 & n. 12; RP (10/22/08) at 9-14, 185; RP (10/23/80) at 103-08, 137-38.

- Stickney's deceptive acts were not unique to the DeCourseys; Stickney admitted that he had referred ████ to over 30 clients in the past five years and, as with the DeCourseys, he did not disclose his business relationship with ████ to any of these clients; indeed, he never recommended any other contractor to a client—in violation of Windermere policy. Decision at 19-20; RP (10/23/08) at 131, 134.

- Stickney and the DeCourseys had unequal bargaining power; Stickney had been a licensed real estate agent for fifteen years; the DeCourseys, on the other hand, had previously purchased only one home and were inexperienced in the Washington market. Decision at 20 & n. 13; RP (10/22/08) at 8-9; 205-206; RP (10/23/08) at 8.

Perhaps even more important, a former client of Stickney gave first-hand testimony about a nearly identical experience. Like DeCourseys, the Calmeses did not want the house in as-is condition. RP (10/23/08 at 85). Like DeCourseys, Stickney made specific misrepresentations concerning █████ abilities. *Id* at 94. Like the DeCourseys, the Calmeses testified that Stickney encouraged them to hire ████ without disclosing the conflict of interest; in fact, Stickney told them "he had no financial relationship with Mr. █████ *Id* at 86-87, 94-95. Also like the DeCourseys, the Calmeses testified that Stickney's promise that ████

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would do a good job turned out to be wrong; the Calmeses ultimately had to fire [redacted] because of poor performance. *Id.* at 87-89, 95.

Windermere contends that Stickney never had a complaint about [redacted] work. The Calmeses gave evidence to the contrary. RP 10/23/08 at 96.

The DeCourseys' dispute with Windermere implicated at least three of the four public interest factors. Decision at 20.[6] Further, the evidence showed that it was Stickney's business practice to recommend [redacted] without disclosing his conflict of interest, and he had done it many times in the past. That, along with the Calmeses' testimony, was more than enough for the jury to find "a likelihood that others have been or will be injured in exactly the same fashion." Washington case law is replete with decisions upholding verdicts against real estate agents and brokers for violation of the CPA. This case is no different.

Windermere has failed to meet the standard set by RAP 13.4(b) for discretionary review.

E. The Trial Court Did Not Abuse Its Discretion In Applying The Collateral Source Rule And Refusing An Offset.

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[6] The Court of Appeals found no "active solicitation," but more of the story was presented in trial court. After the original referral Stickney sent the DeCourseys property listings and directed them to the Windermere web site almost daily. RP (10/22/08) at 12-14. The parties had no agency agreement; the DeCourseys were free to use another agent. Stickney's persistent efforts to keep the DeCourseys' business was nothing other than active solicitation.

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The Court of Appeals held that the trial court did not abuse its discretion when ruling that evidence of the settlement was inadmissible under the "collateral source rule," and that no offset was warranted. Decision at 21-23. Not only does Windermere ignore that deferential standard of review, it cannot identify any prior decision of this Court or court of appeals that conflicts with the Decision. There aren't any. The court's analysis was entirely consistent with existing precedent.[7]

Windermere correctly recites the collateral source rule, but ignores the facts. The rule prevents a defendant from benefiting from payments made to a plaintiff from "a source independent of the defendant." *Xieng v. Peoples Nat'l Bank*, 120 Wn.2d 512, 523, 844 P.2d 389 (1993). The settlement from was "a source independent of" Windermere. Windermere and were separate parties, represented by separate counsel, and subject to separate claims. That there was a business relationship between Stickney and the basis the conflict of interest—does not mean that Stickney/Windermere and were one and the same. And, contrary to Windermere's cherry-picked citations, that was not the DeCourseys' theory at trial:

[7] Indeed, Windermere waived its right to appeal the trial court's collateral source ruling The collateral source rule is a rule of evidence. *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000). As the Court of Appeals noted, although Windermere assigned error to the trial court's exclusion of evidence related to the settlement, it did not provide a corresponding issue statement, nor did it present authority or argument on the evidentiary issue in violation of RAP 10.3(a)(4) and (6). Decision at 24 n. 16.

> Q. Are you essentially saying that Paul Stickney and ███ were the same person?
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> A. Absolutely not.
>
> Q. So ███ was separate from Mr. Stickney even though he was an officer and shareholder?
>
> A. Yes.

RP (10/22/08) at 177. The DeCourseys' theory was that Stickney and ███ had overlapping interests, not overlapping identities. Certainly, Stickney and ███ saw it that way. Why else would ███ settle claims asserted against them without including Stickney and Windermere?

Moreover, when evaluating whether a settlement was made by an "independent source," courts examine the "nature of the benefit" as much as its source—an issue upon which the defendant carries the burden of proof. *Xieng*, 120 Wn.2d at 524-26. To avoid the collateral source rule, a defendant must prove that the payment was intended to indemnify the defendant. *Id.* Windermere presented no such evidence and, indeed, the settlement agreement shows that ███ intended no such benefit:

> This release, accord and satisfaction includes, but is not limited to release of ███ their insurers and bonding companies, from any liability, obligation or duty relating to THE LAWSUIT. This release specifically includes all claims against Paul Stickney, who is a defendant in THE LAWSUIT, but only in the capacity of an officer, director or representative of ███ **This release does not include, and does not affect, THE DeCOURSEYS' claims against Paul Stickney individually, or in any other capacity, Paul H. Stickney Real Estate Services, Inc., and/or Windermere.**

CP 1040-41 (emphasis added). The settlement was intended to benefit [redacted] only, not Windermere or Stickney; it left the DeCourseys' claims against them untouched. The trial court properly excluded evidence of the settlement. As discussed below, the Court of Appeals also properly held that because the settlement did not compensate the DeCourseys for the same damages sought at trial, evidence of the settlement would have been irrelevant and prejudicial. Decision at 24.

Nor did the trial court abuse its discretion in refusing to offset the verdict by the amount of the settlement. *Robinson v. McReynolds*, 52 Wn. App. 635, 640, 762 P.2d 1166 (1988) (offset reviewed for abuse of discretion). The Court of Appeals correctly noted that where a nonsettling defendant requests an offset because the plaintiff received proceeds from a settling defendant, "the non settling defendant bears the burden of proving double recovery." Decision at 21. Windermere argues that this rule doesn't apply because the cases cited by the court involved insurance. Petition at 21. Windermere doesn't explain why that makes a difference, and it doesn't. It is settled law that offset is an affirmative defense for which the defendant carries the burden of proof. *Xieng*, 120 Wn.2d at 526

("As with other issues raised … to reduce or mitigate their damages, the burden of proof on this issue should be placed on the [defendant].").[8]

The Court of Appeals likewise was right to hold that the trial court properly exercised its discretion in finding that Windermere did not carry its burden. Decision at 22-23. Windermere presented no evidence that the DeCourseys received a double recovery. To the contrary, the record showed that the settlement did not, and was not intended to, compensate the DeCourseys for the same damages ultimately awarded by the jury:

- The settlement agreement gives [redacted] a release from liability. CP 1041-42. It does not, however, allocate the settlement amount to any aspect of the DeCourseys' damages. As the Court of Appeals recognized, [redacted] obviously paid some significant portion of the amount to avoid the risks and expenses of trial and appeal. Decision at 23. The verdict did not compensate the DeCourseys for the amount they received in return for this release.

- Moreover, as the Court of Appeals also recognized, a critical aspect of the settlement was an agreement that the DeCourseys "delete" complaints related to [redacted] on various websites they published, and to "forever refrain from publishing" references to [redacted] Decision at 4-5, 23; CP 1041-42. These provisions were so valuable to [redacted] that the agreement contains a liquidated damages clause that requires the DeCourseys to pay $25,000 each time they are breached. If the judgment were reduced by the amount of the settlement, then the DeCourseys would receive nothing for relinquishing this right.

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- Finally, some of the DeCourseys' damages against [redacted] were unique and/or not awarded by the jury. Prior to settlement, the trial court ruled that [redacted] violated the CPA by failing to register

[8] *See also Locke v. City of Seattle*, 133 Wn. App. 696, 713, 137 P.3d 52 (2006); *Maziarski v. Bair*, 83 Wn. App. 835, 841, 924 P.2d 409 (1996).

> as a contractor, and awarded the DeCourseys summary judgment on this basis. CP 1229-31. The DeCourseys would have received a substantial fee award against [redacted] on the CPA claim. CP 1042. The DeCourseys also claimed that [redacted] overbilled them and deprived them of the use and enjoyment of their home. CP 592-595. The jury's award included none of these things.

In short, Windermere made no effort to carry its burden of proving, and there is no evidence in the record to show, that the [redacted] settlement resulted in even a partial double recovery for the DeCourseys. The Court of Appeals' decision does not warrant review on this basis either.

Windermere has failed to meet the standard set by RAP 13.4(b) for discretionary review.

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F. The Trial Court Established An Adequate Record For Review; No Conflict With *Mahler v. Szucs*.

Windermere cursorily argues that the Decision conflicts with the decision in *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632, 966 P.2d 305 (1998). It doesn't. In *Mahler*, this Court held that a trial court must enter findings and otherwise develop a record for appellate review. *Id.* at 435-36. The Court of Appeals recognized this law, cited *Mahler* repeatedly, and held that the *Mahler* standard was satisfied because "the trial court established an adequate record for review." Decision at 33. As the court recognized, and *Mahler* requires, the trial court "made specific findings that the number of hours expended and the billing rates charged by the DeCourseys' attorneys were reasonable." *Id.* The findings not only addressed the reasonableness of the hours expended and billable rate, they

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addressed the bases for recovery and segregation of fees. CP 1456-58.

More than that, and as the Court of Appeals also recognized, the DeCourseys presented extensive documentation to support the trial court's findings. Decision at 33. This material included an attorney declaration attaching all attorney time records, which detailed the hours worked and by whom, a description of each task, the billable rates for each individual, and redactions to segregate out non-recoverable fees. CP 1234-79. In line with *Mahler*'s admonition that trial courts not "accept unquestioningly fee affidavits from counsel," 135 Wn.2d at 435, the record shows that Judge Fox carefully reviewed and relied on these materials. RP (2/6/09) at 4 ("I have reviewed the billings presented by plaintiffs."); *id.* at 11 ("there is a considerable record before me … And that is where the material is that I have relied on, as well as my experience in viewing the trial.").

Finally, there is no merit to Windermere's argument that the Decision conflicts with *Mahler* because the findings themselves don't list the number of hours billed or hourly rates. *Mahler* does not require that level of detail; what matters is that there is an adequate record for review. As discussed above, the hours billed and the hourly rates were amply reflected in the materials presented to, relied upon and accepted by the trial court when it entered its findings. Indeed, in *Mahler*, the Court noted that counsel's submission to the trial court "need not be exhaustive or in

minute detail." 135 Wn.2d at 434. Certainly, *Mahler* doesn't impose that kind of burden on the trial court either—as Windermere suggests.[9] The Decision does not conflict with *Mahler*. There was more than an adequate record for review, and findings, to support affirmance of the fee award.

Windermere has failed to meet the standard set by RAP 13.4(b) for discretionary review.

G. The DeCourseys Are Entitled To An Award Of Attorney Fees For Answering The Petition For Review.

RAP 18.1(j) permits this Court to award reasonable attorney fees and expenses incurred preparing and filing an answer to a petition for review. The Court of Appeals awarded the DeCourseys attorney fees on appeal for those portions of the appeal related to the CPA claim. Decision at 37.

DeCourseys respectfully point out that Windermere is the largest real estate company in the Pacific Northwest. Windermere and its insurance company are represented by a legal team with decades of experience in both real estate and appeal process, as attested in their own declarations.

[9] That is especially true here, since Windermere did not argue in the trial court that the number of hours billed, or hourly rates, were unreasonable. As the trial court noted, "I don't find any particular dispute with any particular individual entries that have been presented to me." RP (2/6/09) at 4.

Now Windermere comes asking for Supreme Court review with arguments that do not meet the bar for such review; but this Petition gives insight into Windermere's use of the court system. Now the Court has new information on the application of the phrase, "reasonable attorney fees and expenses."

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Throughout this matter, Windermere has defended breach of fiduciary trust using its power of the purse. Windermere refused to settle without litigation and insisted the case go all the way through trial. Windermere filed numerous motions for summary judgment, sought amendment to orders denying summary judgment, failed to cooperate in discovery, and continuously threatened to pursue discovery regarding the DeCourseys' political and religious views.[10]

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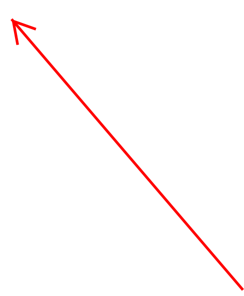
No argument was too puerile or spurious. Windermere argued that (1) Stickney was a third party beneficiary of the Purchase and Sales Agreement, (2) that Stickney was not a Windermere agent; and (3) that Windermere was not vicariously liable for Stickney. Revealing the invalidity of its own arguments, Windermere conceded the last two points before trial.[11] But most significantly, before trial, Stickney's attorney told DeCourseys' attorney that DeCourseys should settle for half of their

[10] Plaintiff's Motion In Support Of An Award Of Attorneys' Fees And Costs, January 9, 2009, CP 1055

[11] *Op cit.* CP 1055-6



damages because "everyone knows [DeCourseys] are out of money and can't afford to go to trial."[12]

Windermere exacerbated the DeCourseys' trial preparation costs when it listed experts and witnesses on its pre-trial witness list causing the DeCourseys' attorneys to prepare for expert and lay cross-examinations,[13] and then failed to call any experts or witnesses during trial. Windermere presented no case at trial, but nonetheless requested a JNOV. When denied, Windermere filed for appeal. When disappointed in appeal, Windermere requested a reconsideration of that decision. That being denied, Windermere comes to the Supreme Court.

With full knowledge of the disparate purses of the litigants, Windermere resorts to a legal strategy equivalent to attrition warfare. According to that strategy, if DeCourseys' legal purse is exhausted before the final gavel in the last court, Windermere might prevail by default. This court should not pander to that strategy.

At trial, Windermere admitted that it felt threatened by the exposure of this strategy and asked witness Mark DeCoursey, "Is it your intention in this lawsuit to destroy Windermere?"[14] RP 10/28/08 at 160.

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[12] *Op cit*, CP 1055.

[13] *Op cit*, CP 1056

[14] The DeCourseys researched numerous other cases involving Windermere, and found it consistent in this strategy. The research is contained in the web page, http://Windermere-Victims.com. RP 10/28/08 at 159.

The purpose of the Consumer Protection Act is set forth in RCW 19.86.920:

> The legislature hereby declares that the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition . . . To this end this act shall be liberally construed that its beneficial purposes may be served.

When a sizable corporation defends breach of fiduciary trust and uses the power of the purse to litigate by attrition, the Consumer Protect Act is effectively defeated. The award of attorney fees and expenses to ordinary citizens is the only practical mechanism for CPA enforcement.

On November 8, 2010, the Court of Appeals awarded the DeCourseys attorney fees on appeal for those portions of the appeal directly related to the CPA claim (i.e., about 50%). Decision at 37. That award was reasonable, based on the information before the court.

But now Windermere has more fully revealed its strategy, and new information is before the Court. It is time for the liberal construction prescribed by RCW 19.86 to be applied to the attorney fees in these appeals.

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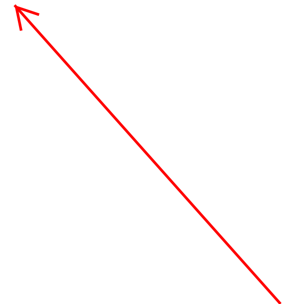
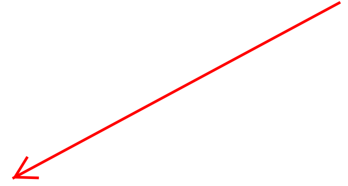
V. CONCLUSION

Windermere must not be permitted to make an end-run around the Consumer Protection Act. Corporations must know that a war of attrition



in litigation will not prevail in Washington courts. Citizens of ordinary means must know they have access to justice.

For the reasons set forth above, the DeCourseys respectfully request this Court to (a) deny the petition for Supreme Court review; (b) award attorney fees for the expenses involved in answering this petition; and (c) retroactively award full attorney fees incurred by answering Petitioner's appeal to the Court of Appeals, including expenses for preparing the non-CPA sections.



Deleted: For the reasons set forth above, the DeCourseys respectfully request this Court to deny the petition and to award them attorney fees.

RESPECTFULLY SUBMITTED this __th day of February, 2011.

LANE POWELL PC

By___________________________________
Ryan P. McBride, WSBA No. 33280
Attorneys for Respondents Mark and Carol DeCoursey

CERTIFICATE OF SERVICE

I hereby certify that on February ___, 2010, I caused to be served a copy of the foregoing ANSWER TO PETITION FOR REVIEW on the following person(s) in the manner indicated below at the following address(es):

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- ☐ by **Electronic Mail**
- ☐ by **Facsimile Transmission**
- ☑ by **First Class Mail**
- ☐ by **Hand Delivery**
- ☐ by **Overnight Delivery**

____
Kathryn Savaria