Mark DeCoursey <mhdecoursey@gmail.com>

RE: FW: V&E Medical Imaging Services v. DeCoursey, No. 85563-3

1 message

McBride, Ryan P. <McBrideR@lanepowell.com> Tue, May 17, 2011 at 10:45 AM
To: Carol DeCoursey <cdecoursey@gmail.com>, Mark DeCoursey <mhdecoursey@gmail.com>
Cc: "Gabel, Andrew J." <GabelA@lanepowell.com>, "Degginger, Grant" <DeggingerG@lanepowell.com>

Per your instructions, the brief has been filed.

This email, and especially your implication that my advocacy for you in this case is somehow akin to the positions taken by those who stood in the way of desegregation, is patently wrong and personally offensive to me. Do not send me any more emails like this.

From: Carol DeCoursey [mailto:cdecoursey@gmail.com]
Sent: Tuesday, May 17, 2011 10:12 AM
To: McBride, Ryan P.
Cc: Gabel, Andrew J.
Subject: Re: FW: V&E Medical Imaging Services v. DeCoursey, No. 85563-3

Why is it that when Windermere makes unusual arguments, even when those arguments are specious or cockeyed, you always say there is a "risk" the judges will side with them? But when we want you to argue for our advantage on the basis of legislative intent (a most orthodox argument) and common justice, you refuse to take the "risk" of success -- even if would cost you nothing.

We wanted to present the matter to the Supreme Court as a public policy issue: By doing what it does, Windermere vitiates the Consumer Protection Act. And Lane Powell helped them by refusing to ask for CR 11 sanctions in the lower court and the Appeals Court equivalent.

But Lane Powell apparently does not want to address the CPA attorney fees/costs public policy issues, even though it is apparent that Windermere is using pettyfogging mechanisms to defeat the purpose of the legislation.

Plessy v. Ferguson used to be the "law" in the US, until Brown v. Board of Education changed that "law." During the famous $5,000 - $6,000 email debate with us, Grant tried to persuade us that only the Legislature made law . . . Everyone who has graduated Civics 101 knows that's not true. Judges make "law" every day of the week.

Since our chance to present the matter to the Supreme Court has been blown, we have no alternative but to say, "go ahead, file it." But we don't buy your reasoning. Windermere and Lane Powell both intend us to pay the attorney fees out of our damages award. That is why Windermere does what it does.

If it were up to Lane Powell to argue, we'd still have racial segregation in the US.

Carol & Mark

On Tue, May 17, 2011 at 8:13 AM, McBride, Ryan P. <McBrideR@lanepowell.com> wrote:

> No. Mark, we've been through the distinction between costs and attorneys fees many times. I explained the difference when we were briefing the cost bill issue in the court of appeals; I explained the difference when the court of appeals awarded us fees for the CPA claim exclusively; I explained the difference when I prepared my petition for fees in the court of appeals; I explained the difference when you wanted us to cross-petition for review. Costs are not attorneys fees. That is why there are two RAPs in play. RAP 14.1 gives a right to costs; RAP 18.1 to attorneys fees. That is why the CPA explains specifically delineates "attorneys fees" as a measure of costs.
>
> Insofar as the CPA's "costs of the suit," you are reading it too broadly; it does not, and never has, entitled the prevailing party to swoop up all attorneys fees simply because one of many claims involved was a CPA claim. That is why the courts have consistently required segregation and why the court of appeals did below. The argument you suggest is not credible.
>
> Mark, I've received half a dozen emails from you and Carol over the last day; each time I think we have put closure on this final filing, the target moves. Until this last foray, I thought we were all comfortable with the brief; I have changed the brief to include reference and attach the amicus stuff per your requests. Can I file it?
>
> ---
>
> **From:** Mark DeCoursey [mailto:mhdecoursey@gmail.com]
> **Sent:** Tuesday, May 17, 2011 2:11 AM
> **To:** McBride, Ryan P.
> **Cc:** Gabel, Andrew J.; Carol DeCoursey
> **Subject:** Re: FW: V&E Medical Imaging Services v. DeCoursey, No. 85563-3
>
> Please consider this (http://dictionary.reference.com/browse/suit):
>
> World
> English Dictionary
> **suit**
> ...

5. a civil proceeding; lawsuit
6. the act or process of suing in a court of law

lawsuit

1. a case in a court of law involving a claim, complaint, etc., by one party against another; suit at law.

RCW 19.86.090 states, "... to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee."

How many suits were involved here? I read the whole thing between us and Windermere as ONE suit. Many claims, and causes of action, but just one suit. The CPA specifies "the costs of THE suit". Not just the costs of the claim, but the costs of the suit.

Therefore:
After the Section I in which you bill Windermere for **$17,818.46**

Please add a second section (II) with the argument somewhat as follows requesting ("in the alternative") under the "applicable statute" (as it says in RAP 18.1(a)) **$17,818.46**

II. Even If Limited To RAP 18.1(a) "applicable statute," The DeCourseys Are Entitled To $17,818.46.

Even if this Court limited the DeCourseys to those fees specified by the applicable statute, as specified in RAP 18.1, Windermere uses a cramped and improperly narrow interpretation of the statute. RCW 19.86.090 states:

> ... may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the **costs of the suit**, including a reasonable attorney's fee.

Windermere would have the court understand this statute to mean "the costs of the claim," that is, only the arguments that specifically mention "CPA." But the statute specifies "the costs of the suit," and that could mean nothing other than the costs incurred in the whole suit. To belabor the point, the CPA suit was not a different "suit" from the real estate "suit," the proximate cause "suit," or the collateral source "suit." The entire action between Windermere and DeCourseys from 2006 until today has been but one suit, and the legislature has determined that a successful suit under the CPA shall include an award for the "costs of the suit."

RAP 14.2 specifies:

> A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.

RAP 18.1(a) specifies:

> If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review ...

And RAP 18.1(j) specifies:

> ... if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review.

The applicable law (RCW 19.86.090) has most certainly granted the DeCourseys the right to recover fees and expenses on review, and with an umbrella phrasing that includes not just the costs of the arguments about the CPA, but the costs of the entire suit. Before this Court, those costs are **$17,818.46**

Then renumber your Section II to III arguing as you have in the alternative in that section and billing for **$8,389.39**

On Mon, May 16, 2011 at 4:57 PM, McBride, Ryan P. <McBrideR@lanepowell.com> wrote:

Mark, the non-CPA stuff that I had to brief in opposition to the petition was separate from the CPA; that is, even if Windermere had not included the CPA issue in the petition, I would have done exactly the same work in briefing those sections. That is really different from the fact that the proof for various causes of action was the same at trial. Again, I think we've been over this before, but that is why segregation was impossible in the trial court, but is possible when it comes to appellate tasks.

From: Mark DeCoursey [mailto:mhdecoursey@gmail.com]
Sent: Monday, May 16, 2011 4:51 PM
To: McBride, Ryan P.
Cc: Carol DeCoursev

Subject: Re: FW: V&E Medical Imaging Services v. DeCoursey, No. 85563-3

Nicely written brief, Ryan. Very nice.

I think Carol means her header to read, "The DeCoursey's Attorney Fee Award WAS Not Limited To CPA_Related Fees." But I have talked with her since then, and she has changed her mind.

In your second line of defense, I think you should point out that CPA is a capstone judgment, thus: Proving conflict of interest, damage, causation, proximate cause, etc., were essential to satisfying RCW 19.86.090

> **RCW 19.86.090**
>
> **Civil action for damages — Treble damages authorized — Action by governmental entities.**
>
> Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, **...**

That is, wherever Windermere argued in its petition that the acts were not unfair, not deceptive, or not damaging (or were harmless), not caused by Stickney, not legally the proximate cause (etc.) and we addressed those arguments, we were arguing CPA and should be compensated for those arguments.

> **RCW 19.86.090**
>
> **...** together with the costs of the suit, including a reasonable attorney's fee.

The legislation does not limit the atty fee award to just the parts of the suit wherein CPA is mentioned. Instead, it specifically states, "the costs of the suit."

On Mon, May 16, 2011 at 3:24 PM, Carol DeCoursey <cdecoursey@gmail.com> wrote:

---------- Forwarded message ----------
From: **Carol DeCoursey** <cdecoursey@gmail.com>
Date: Mon, May 16, 2011 at 2:46 PM
Subject: Re: FW: V&E Medical Imaging Services v. DeCoursey, No. 85563-3
To: "McBride, Ryan P." <McBrideR@lanepowell.com>

Ryan --

Duh . . .

Just realized . . . maybe your header for section I should read: "The DeCoursey's Attorney Fee Award WERE Not Limited To CPA_Related Fees." That would tie in perfectly with the plain-English meaning of the Supreme Court's fee award, and tie in nicely with the amicus brief material. (Can you attach the amicus brief as an exhibit?)

What those Windermere SOBs are doing is *arguing* with the Supreme Court decision! "No, the Supremes did not really say that, they said this . . . "

Why should we fall for it? They've got gall, I'll say that for them.

Good job reiterating what has gone on before vis a vis sending out bills through the ceiling, by the way.

On Mon, May 16, 2011 at 2:27 PM, McBride, Ryan P. <McBrideR@lanepowell.com> wrote:

> Okay. I'll try to make the stuff in section II clearer, and I'll add the sentence about the amicus and another sentence summarizing what the amicus said re Windermere litigation tactics. I hope you are generally pleased with the effort. I plan on filing this first thing tomorrow.
>
> ---
>
> **From:** Carol DeCoursey [mailto:cdecoursey@gmail.com]
> **Sent:** Monday, May 16, 2011 2:22 PM
> **To:** McBride, Ryan P.
> **Cc:** Mark DeCoursey
> **Subject:** Re: FW: V&E Medical Imaging Services v. DeCoursey, No. 85563-3
>
> Ryan:
>
> 1. There is some language in Section II that does not communicate, at least to us. We don't quite know what you mean to say, and suggest that you might want to rewrite those sentences.
>
> The language begins with the words "The court's commissioner recognized that the DeCourseys would have been ..." and ends with the words "

The language begins with the words "The court's commissioner recognized that the DeCourseys would have been . . ." and ends with the words . . . contained only the CPA issue."

2. Your brief would be strengthened by adding certain words the end of the passage that begins "If ever there was a case . . ." and ends with the words "a foregone conclusion." These words are as follows:

"This conduct is habitual for Windermere, as the Ruebel/bloor amicus brief (attached) pointed out to the Supreme Court. Against Windermere's objection, the Supreme Court accepted the amicus brief, and subsequently made its award of attorney fees without excluding fees incurred to address non-CPA matters."

Ryan, the Ruebel/Bloor brief pointed out to the Supremes IN SPADES what we are pointing out . . . and the Supremes *accepted* the brief over objections -- obviously they thought the information meaningful for their deliberations. And their conclusion was just what it should have been. Including mention of the content of amicus brief would immeasurably strengthen our arguments here.

Best wishes,

Carol

On Mon, May 16, 2011 at 11:12 AM, Mark DeCoursey <mhdecoursey@gmail.com> wrote:

---------- Forwarded message ----------
From: **McBride, Ryan P.** <McBrideR@lanepowell.com>
Date: Mon, May 16, 2011 at 10:50 AM
Subject: RE: FW: V&E Medical Imaging Services v. DeCoursey, No. 85563-3
To: Mark DeCoursey <mhdecoursey@gmail.com>
Cc: "Gabel, Andrew J." <GabelA@lanepowell.com>, "Degginger, Grant" <DeggingerG@lanepowell.com>

Mark, when I used the word "probably" I meant to convey the fact that I had not yet devoted a lot of time thinking about the order of argument or what specific arguments to make; I promised I would make the argument that we are entitled to all fees in the reply, and I will do so. I have attached the brief. It is due tomorrow.

Once again, however, I must take time to correct some things you have written below. One, you did not instruct us to argue about Windermere's litigation history in response to Windermere's petition; you demanded that we cross-petition for review. For reasons that are well-known to you, we wouldn't do that as it was not in your best interests. Two, we did not refuse to obtain an extension for you so that you could obtain another lawyer. If you recall, that is precisely what we offered to do; I specifically remember telling you on the phone that if you wanted to hire another firm to represent you in opposing the petition for review and/or cross-petitioning for review, we would seek an extension of 30 days so that we could withdraw and you could retain new counsel. Thanks.

From: Mark DeCoursey [mailto:mhdecoursey@gmail.com]
Sent: Monday, May 16, 2011 10:26 AM
To: McBride, Ryan P.
Cc: Gabel, Andrew J.

Subject: Re: FW: V&E Medical Imaging Services v. DeCoursey, No. 85563-3

Looking forward to your early response. As usual, Carol and I will need time to discuss.

On Mon, May 16, 2011 at 12:44 AM, Mark DeCoursey <mhdecoursey@gmail.com> wrote:

Well, Ryan, let's review the situation.

We studied Windermere's litigation history, while you and Grant did not. We told you Windermere would petition the Supreme Court, and they did.

In our response to Windermere's petition, we instructed you to argue Windermere's litigation history vis a vis the CPA and attorney fees. We drafted the text for you. But you and Grant refused to include our argument. We begged you to get an extension so another lawyer could evaluate Grant's statement that there was no support in law or precedent for our argument; if we wanted to change "the law," Grant said, we should go to the Legislature. You refused to ask for an extension and threatened to withdraw if we insisted on using the CPA argument.

On the billing submission to the Supreme Court, again we asked you to argue Windermere's litigation history vis a vis the CPA and atty fees. Again we wrote the text for you. You said you would make the argument in the reply "if" Windermere tried to whittle down the attorney award. On May 6, at 3:32 PM, you wrote:

> ... if they do, I have ample opportunity to address the issue in the reply (and the last word). If Windermere argues that we can only get CPA-related fees, we can take that on in our reply.

There is no "if" about it. Of course, Windermere would try to whittle down the atty fee award, exactly as we predicted. Now we recall your promise. Yet you are telling us what you will "probably" do. Why is there any question?

On Fri, May 13, 2011 at 4:31 PM, McBride, Ryan P. <McBrideR@lanepowell.com> wrote:

probably i will first argue that the court should give us all our fees; then i will argue that, even if we are limited to cpa-related fees, the amount hickman proposes is not right; and third that my rate is reasonable and the court of appeals has already rejected the same argument based on hickman's arbitrary assessment that my very fine services are only worth $300 an hour even if his not-so-fine services are only worth $175.

From: Mark DeCoursey [mailto:mhdecoursey@gmail.com]
Sent: Friday, May 13, 2011 8:19 AM
To: McBride, Ryan P.
Cc: Degginger, Grant; Gabel, Andrew J.
Subject: Re: FW: V&E Medical Imaging Services v. DeCoursey, No. 85563-3

Please give us a short paragraph outlining how you will answer this.

On Thu, May 12, 2011 at 4:35 PM, McBride, Ryan P. <McBrideR@lanepowell.com> wrote:

Hickman's objection.

From: Key, Cathi [mailto:ckey@rmlaw.com]
Sent: Thursday, May 12, 2011 3:25 PM
To: supreme@courts.wa.gov
Cc: McBride, Ryan P.; mdavis@demcolaw.com; peter@tal-fitzlaw.com; Hickman, William; Clifton, Mary
Subject: V&E Medical Imaging Services v. DeCoursey, No. 85563-3

from
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by
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