

No. 62912-3-I

DIVISION I, COURT OF APPEALS
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 APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Michael J. Fox)

**RESPONDENTS' APPLICATION AND SUBJOINED AFFIDAVIT
FOR AWARD OF ATTORNEY FEES ON APPEAL**

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In its November 8, 2010 opinion in the above-captioned matter, attached hereto as Appendix A, this Court granted Respondents Mark and Carol DeCoursey's (the "DeCourseys") request for an award of attorney fees on appeal pursuant to RAP 18.1. Appendix A at 39. Although, as discussed below, the appeal involved several issues, the Court ruled that "the attorney fees awarded to the DeCourseys must be limited to those portions of the appeal related to the CPA claim." *Id.* For the reasons stated below in the subjoined affidavit of their undersigned counsel, the DeCourseys respectfully request the Court to award fees related to the CPA claim in the amount of **\$56,499.45**. The DeCourseys have filed a separate Cost Bill.

AFFIDAVIT OF RYAN P. McBRIDE

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

1. I am a member of the law firm Lane Powell PC, counsel for the DeCourseys. I am over the age of 18, have personal knowledge of and am otherwise competent to testify to the matters set forth below. I had primary responsibility for handling all aspects of this appeal on behalf of the DeCourseys, including drafting all briefs and motions and oral argument.

2. The DeCourseys incurred legal fees from Lane Powell PC in this appeal during both 2009, during which their merits brief and several motions were prepared, and 2010, during which the case was argued before the Court. True and correct copies of Lane Powell's fee statements sent to the DeCourseys during months in which fees related to the appeal were incurred are attached hereto as Appendix B. The relevant months are: April, 2009; May, 2009; July 2009; August, 2009; September, 2009; October, 2009; November, 2009; December, 2009; January, 2010; February, 2010; March, 2010; and April, 2010.

3. Each statement identifies the attorneys responsible for any given task, the nature of the task, and the attorneys' standard hourly rate. I have carefully reviewed these billing statements and have redacted all entries for tasks and fees incurred during this period that are unrelated to the appeal. I have further subtracted fees incurred on these unrelated tasks from the total fee amount for each month; the subtractions appear below the "Total Hours" and "Rate Summary" on each statement. These billing statements do not capture the fees incurred reviewing the Court's opinion and preparing this application and affidavit, which I discuss separately below.

4. As noted above, and reflected on the fee statements, I was the principal Lane Powell attorney involved in prosecuting the appeal on

behalf of the DeCourseys. I am a shareholder in the Lane Powell firm, and have practiced commercial civil litigation since graduating law school in 1997. Prior to joining Lane Powell, I was a senior associate at the Heller Ehrman LLP firm. I am a member of Lane Powell's appellate practice group and a member of the King County Bar Association's appellate section. My practice is largely devoted to appeals, and I have briefed and argued cases in all of the Washington appellate courts, as well as the United States Court of Appeals for the Ninth Circuit.

5. During the period of the appeal, my hourly rates were \$385.00 during 2009 and \$400.00 during 2010. These hourly rates reflect the standard hourly rate charged by Lane Powell to firm clients for my services during this period for work on appeals and similarly complex engagements. I understand these rates to be commensurate with those charged by comparable law firms in the Seattle legal market for litigation and appellate work of a comparable nature by attorneys with similar experience and expertise.

6. In an effort to promote efficiency and a consistent presentation, I assumed responsibility for the majority of tasks undertaken in connection with this appeal, which I will describe in detail below. Other Lane Powell attorneys did contribute some time (less than 5% of the overall fees on appeal) assisting me on the appeal, and fees for their

services are also reflected on the billings statements. These attorneys were

Redacted **Redacted** Andrew Gabel, Abe Lorber, and Grant Degginger. All of these attorneys were involved in this case at the trial level (Mr. **Redacted** and Gabel successfully tried the case to verdict below), and their involvement on appeal was primarily related to helping me master the trial court record, which, as I discuss below, was no small task. In awarding fees below, the trial court found that the hourly rates for these individuals were reasonable. Windermere did not challenge that determination on appeal, and this Court affirmed the trial court's attorney fee award. Appendix A at 35-36.

7. The total amount of fees that the DeCourseys incurred on appeal through oral argument (and an additional authority brief filed thereafter), as reflected by the billing statements, including fees both related and unrelated to the CPA issue, was **\$95,219.00**. As discussed herein, because of the Court's limitation that fees be "related" to the CPA issue, the DeCourseys do not seek recovery of this entire amount.

8. Nevertheless, this total is reasonable given the size and complexity—and, in many ways, unique nature—of this appeal. Indeed, much of the expense of this appeal was directly attributable to methods and strategies employed by Windermere throughout the appeal. Among other things:

a. This appeal arose from a lengthy jury trial which resulted in a verdict in favor of the DeCourseys. The record on appeal was massive. There were more than 1567 pages of Clerk's Papers, and the verbatim report of proceedings was comprised of more than 900 pages of testimony and hearings.

b. Windermere moved for and received two extensions of time to file its opening brief and an extension of time to file its reply brief; Windermere also moved for and received permission to file an overlength opening brief and an overlength reply brief. Windermere's opening brief was 72 pages long; its reply brief was 30 pages along. In total, Windermere filed more than 100 pages of merits briefing.

c. Windermere's opening brief identified fourteen (14) assignments of error, and no less than twelve (12) issues on appeal, many of which were related. In reality, Windermere's brief contained far more arguments, as Windermere raised many factual and legal challenges not specifically identified by assignment or error or separately broken out in the issues presented section of its brief.

d. To adequately respond to Windermere's overlength opening brief, the DeCourseys moved for and received an

extension of time to file their answering brief, as well as permission to file a matching overlength answering brief. The DeCourseys' answering brief was 71 pages.

e. The task of briefing the case in a concise manner was made difficult by Windermere's practice of providing an overly one-sided, and often inaccurate and distorted, recitation of the material facts and legal standards. This forced us to spend significant space to simply correct the record. For the same reason, we could not accept Windermere's "Resume of Proceedings" or "Statement of the Facts" and, instead, had to devote considerable space in the answering brief to the same topics.

f. Moreover, because Windermere raised new arguments in their reply brief, the DeCourseys were forced to file a motion to strike portions of Windermere's reply. Windermere opposed the motion to strike, and the DeCourseys filed a reply in support of the motion to strike.

g. Over the course of the appeal, Windermere filed four separate statements of additional authority (several with more than one case discussed), which I was forced to review and consider responding to. The DeCourseys, on the other hand, filed

only one statement of additional authority in response to questions raised by the Court at oral argument.

h. Oral argument was originally scheduled for March 4, 2010. Windermere moved to have the length of oral argument expanded from 10 minutes to 20 minutes per side. The Court granted the motion. This increased the amount of time and effort required to prepare for oral argument.

i. Because of a date conflict, the DeCourseys moved to have the March 4 argument rescheduled. This Court denied that motion. Ironically, just three days before the scheduled argument date, the Court *sua sponte* informed the parties that the oral argument would be rescheduled. I had already devoted significant time preparing for the lengthy oral argument, and had nearly completed my preparations, over the course of the prior week.

j. Oral argument was rescheduled to a date more than six weeks later, April 22, 2010. As before, Windermere moved for, and was granted, permission for 20 minutes of oral argument. I made every effort to utilize my original preparations for the March oral argument, but because of the significant time lag, I was forced to spend significant time re-familiarizing myself with the issues and preparing anew for oral argument.

9. It took the Court more than 6 months to issue an opinion, which I believe reflects, at least in part, the complexity of the record on appeal. The unpublished opinion spans approximately 40 pages with 24 detailed footnotes. Appendix A. As the opinion reflects, the Court found in the DeCourseys' favor, and affirmed, on almost every single issue—remanding only the \$45,000 award of costs to the trial court for recalculation. In short, through our persistent and intensive efforts, we were able to preserve the jury's damages award of \$522,200 and the trial court's attorneys' fee award of \$462,985. As noted above, the Court determined that the DeCourseys were the prevailing party on appeal and awarded attorney fees pursuant to RAP 18.1. Appendix A at 39.

10. The Court's award is "limited to those portions of the appeal related to the CPA claim." *Id.* This limitation is different than the trial court's award of fees; the trial court awarded the DeCourseys all the fees they incurred, in part, because it concluded that fees related to the CPA claim could not be reasonably segregated from the non-CPA claims. This Court specifically upheld the trial court's award in this regard. *Id.* at 36 ("the DeCourseys' CPA claim was based on Stickney's breach of fiduciary duty. Therefore, the trial court's finding that segregation was impracticable was proper.").

11. For many of the same reasons, it is difficult—and inherently imprecise—to determine exactly what portion of the \$95,219.00 incurred by the DeCourseys on appeal was “related to the CPA claim.” Review of Lane Powell’s billing statements does not provide a ready means for making this determination. As is my practice, and my style of working on appeals, I do not and cannot separately allocate time on billing entries as my work relates to any particular or discrete issue. Too often, work transcends more than one issue, issues are too related to surgically distinguish, and/or work on one issue bleeds seamlessly into work on another. Moreover, given the trial court’s ruling that the DeCourseys were entitled to all of their unsegregated fees, I had no reason to believe that I should try to create inherently artificial entries on an issue-by-issue basis as I kept time on appeal.

12. Similarly, the fact that the CPA claim was only one of the twelve or so “Issues on Appeal” identified in Windermere’s opening brief does not provide a meaningful basis to assess the portion of the DeCourseys’ fees related to the CPA issue. First and foremost, a great deal of the appeal was devoted to understanding and synthesizing the massive trial court record, presenting the factual and procedural background in the briefs, and being intimately familiar with that record for oral argument (twice). All of that significant work had to be done no

matter how many issues were raised on appeal and, more importantly, would have had to be done were the CPA claim the only issue raised on appeal. This is particularly so because, as both the trial court and this Court concluded, there was no meaningful segregation of facts at trial: the facts underlying Windermere's breach of fiduciary duty were the facts underlying the CPA claim. For example, and as a benchmark, Windermere devoted approximately 25 of 72 pages in its opening brief (35%) to summarizing the trial court record and facts.

13. Moreover, in addition to Windermere's claim that the jury improperly found "public interest impact" under the CPA (Appendix A, pp. 19-22), other issues on appeal directly related to the CPA claim, and thus are encompassed in the Court's RAP 18.1 award. Specifically, as this Court recognized, the trial court awarded attorney fees to the DeCourseys because they prevailed on their CPA claim at trial—and, indeed, that is the basis of the Court's award on appeal. Much of the appeal (both in issues presented, the amount at stake, and the time spent in the briefs and at argument) was spent defending the trial court's attorney fee award. All of that work on appeal was necessarily part and parcel of defending the DeCourseys' victory below on the CPA issue. Put simply, were there no CPA claim, there would be no attorney fee award. Again, just as a benchmark, Windermere devoted approximately 16 of 43 pages of

argument (37%) to the CPA/fee issue. The DeCourseys likewise devoted approximately 21 out of 53 pages of argument (40%) to the CPA/fee issue.

14. Based on the foregoing, and my actual work on and familiarity with the appeal, it is my good-faith, and conservative estimate that the DeCourseys incurred on appeal **\$56,499.45** in fees related to the CPA claim. I base this estimate on the following:

- a. One-third of the \$95,219.00 total amount incurred (not including fees related to this motion) on appeal, or approximately **\$31,739.67**, were incurred on tasks necessary to perfect, prepare and argue the appeal generally (without reference to any particular issue, including the non-CPA issues), and thus were necessarily “related” to the CPA claim. This amount includes meeting with and communicating with the DeCourseys and members of the trial team regarding the trial court proceedings and record; my multiple reviews of the extensive record (CP and VRP) and work related to preparing and synthesizing the record for use during the appeal; my review of and response to Windermere’s various procedural motions and additional authorities, including motions for extension of time, overlength briefs and additional time for oral argument; and, most significantly, drafting portions of

the merits brief, and preparing for oral argument (twice), as it related to the factual and procedural background of the case.

b. Of the remaining \$63,479.33 total fees incurred, another one-third, or approximately **\$21,159.78**, was spent addressing legal arguments directly related to the CPA claim. This amount includes researching and briefing the CPA “public interest impact” issue and the trial court’s award of attorney fees pursuant to the CPA; drafting the motion to strike portions Windermere’s reply brief (which included new arguments on the attorney fee issue); preparing for oral argument (twice) as it related to those issues; and filing additional authority following oral argument on the attorney fee issue.

c. Finally, the DeCourseys have incurred at least another 9 hours of my time (at my current rate of \$400.00 per hour), or approximately **\$3,600.00**, in connection with my review of the Court’s decision and my preparation of this application and affidavit, including review and redaction of the various billing statements attached hereto. This amount is too recent to be included in any of those billing statements. The DeCourseys reserve the right to add to this figure if they file a reply brief in support of this fee application.

15. In my experience, the total segregated fees sought, \$56,499.45, are reasonable and entirely consistent with the amount of fees I would expect to be incurred in a one or two issue appeal following an extensive jury trial. It is also reasonable amount given what was at stake with respect to the CPA claim and associated fee award: \$469,285.00.

Ryan P. McBride

Subscribed and sworn to before me on _____.

NOTARY PUBLIC for the State of Washington, residing at _____
My appointment expires: _____

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Based on the foregoing, the DeCourseys respectfully request the Court award them **\$56,499.45** for fees incurred on appeal related to their CPA claim.

RESPECTFULLY SUBMITTED, November __, 2010.

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 November __, 2010, I caused to be served a copy of the foregoing **Respondents' Application and Subjoined Affidavit For Award of Attorney Fees on Appeal** on the following person(s) in the manner indicated below at the following address(es):

Matthew F. Davis, Esq. Demco Law Firm, P.S. 5224 Wilson Avenue S, Suite 200 Seattle, WA 98118-2587	William R. Hickman, Esq. Reed McClure 601 Union Street, Suite 1500 Seattle, WA 98101-1363
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- .. by CM/ECF
- .. by Electronic Mail
- .. by Facsimile Transmission
- .. by First Class Mail
- by Hand Delivery
- .. by Overnight Delivery

Kathryn Savaria