Hon. Redacted D. Eadie
Plaintiff's (Court-Requested) Response to Defendants' Revised Motion to Reconsider Order on Motion for Summary Judgment (Noted for Consideration 12/11/12) Without Oral Argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

LANE POWELL PC, an Oregon professional corporation, Plaintiff, v. MARK DeCOURSEY and CAROL DeCOURSEY, individually and the marital community composed thereof, Defendants.	No. 11-2-34596-3SEA PLAINTIFF'S RESPONSE TO DEFENDANTS' REVISED MOTION TO RECONSIDER ORDER OF SUMMARY JUDGMENT

I. INTRODUCTION AND RELIEF REQUESTED

On November 16, 2012, and after hearing argument from both parties the Court granted Lane Powell's motion for summary judgment. Dkt. 295. The Court awarded all damages Lane Powell sought in this lawsuit (unpaid attorney's fees and costs owed pursuant to the parties' Fee Agreement), except for those attorney's fees and costs that were not already reviewed by a court for reasonableness in connection with the underlying action. *Id.* A revised version of this order was entered at the DeCourseys' request on December 4, 2012. Dkt. 306A. On December 14, 2012, the DeCourseys moved for reconsideration of the November 16, 2012 Order (as revised on December 4, 2012) ("SJ Order"). Mot. at 1. That same day, the Court reviewed for reasonableness the remaining fees, entered comprehensive findings of fact and conclusions of law, and awarded Lane

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Powell the full relief sought in this action ("Findings of Fact").[1] Dkt. 333. Nevertheless, the Court requested a response to the DeCourseys' motion.

As set forth below, the DeCourseys' motion for reconsideration of the SJ Order is without merit. The DeCourseys again concede that the reasonableness of Lane Powell's fees and costs is not an issue in this case, Mot. at 6, but at the same time accuse Lane Powell of "padding" is bills—an issue for which they were able to provide no credible evidence. Mot. at 2. Even now, months after receiving Lane Powell's entire document production, the DeCourseys cannot identify a single piece of "newly-discovered" evidence to support this theory. Instead, they offer several bizarre declarations from individuals who claim to have been present during the summary judgment hearing. Dkts. 320, 323, 326–328, 337. The fact is the DeCourseys offer no new or material evidence or argument that would justify reconsideration.

The Court has patiently given the DeCourseys every opportunity to prove an issue of material fact. The DeCourseys ***still*** cannot do so. Predictably, they devote considerable time to rehashing issues that have already been addressed and pointing out "lies" made by Lane Powell and its counsel, without bothering to demonstrate why any of these issues warrant reconsideration under CR 59 or 60. The DeCourseys' motion should be denied.

II. STATEMENT OF FACTS

The Court is thoroughly familiar with the facts of this case. The most pertinent facts are set forth in Lane Powell's Motion for Summary Judgment, Dkt. 253, and Response to Motion to Compel 11,000 Electronic Documents, Dkt. 242. As set forth in

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[1] That is, $384,881.66 in attorney's fees and cost due and owing as of the date the attorney's lien was filed, plus interest in the amount of $37,793.79 through the date of the hearing. *Id.*

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previous briefing, Lane Powell objects to and moves to strike the DeCourseys' citation to any record that is not the official court transcript. Dkt. 324 n.1.

III. EVIDENCE RELIED UPON

Lane Powell relies upon the Declaration of Robert M. Sulkin in Response to Defendants' Revised Motion to Reconsider Order on Plaintiff's Motion for Summary Judgment ("Sulkin Decl.") and the records and files herein.

IV. AUTHORITY

A. The DeCourseys Make No Effort to Address the Applicable Standards

In seeking reconsideration, a party must "identify the specific reasons in fact and law as to each ground on which the motion is based." CR 59(b). CR 59(a) sets forth nine grounds for a court to reconsider its ruling: irregularity in court proceedings, the prevailing party's misconduct, accident or surprise, newly discovered evidence, excessive or inadequate damages, error in the assessment of the recovery amount, lack of evidence to justify the decision, error in law at trial, and lack of substantial justice. CR 59(a)(1)-(9). Similarly, CR 60 sets forth eleven grounds for relief from a judgment or order by, for example, mistake, inadvertence, excusable neglect, newly-discovered evidence, or fraud. CR 60(b). The DeCourseys fail to identify a specific ground for reconsideration or vacation of the SJ Order; the motion should be denied on this basis alone.

B. The DeCourseys Present No Basis to Reconsider the SJ Order

1. The DeCourseys offer no new material evidence.

The DeCourseys do not—as they must—identify new evidence on a material issue of fact that could not have been discovered and raised before the close of summary judgment briefing (including supplemental briefing on the issue of reasonableness of Lane Powell's fees). *See* CR 59(a)(4) & 60(b)(3); *see also Fishburn v. Pierce Cnty. Planning & Land Servs. Dep't.*, 161 Wn. App. 452, 472, 250 P.3d 146 (2011). Instead, the DeCourseys spend considerable time pointing out "lies" they claim Lane Powell's counsel

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told during the summary judgment hearing.[2] Mot. at 7–8. Setting aside the fact that Lane Powell's counsel did not misrepresent the record, the DeCourseys have failed to demonstrate that argument of counsel warrants reconsideration in this case. The material facts are simple. Lane Powell offered evidence demonstrating that the DeCourseys breached the parties' Fee Agreement and that the fees charged to the DeCourseys were reasonable. Summ. J. Mot. at 11–14; Degginger Decl. ¶¶ 3–5; McBride Decl. ¶¶ 3–7; Gabel Decl. ¶¶ 2–3. The DeCourseys offered no credible evidence in response,[3] taking the curious position that the reasonableness of Lane Powell's fees is not relevant to this case. *See, e.g.*, Mot. at 6; Dkt. 275 at 4; Dkt. 308 at 2. Despite the DeCourseys' urging not to, the Court independently reviewed Lane Powell's time entries and the skill, reputation, experience, and ability of its timekeepers, and concluded that the fees were reasonable as a matter of law. Dkt. 333.

The DeCourseys point only to several bizarre declarations from individuals who claim to have been present for the summary judgment hearing. Dkts. 320, 323, 326–328, 337. None of them relate to the issue of Lane Powell's fees and costs. In each, the declarant presumes some improper relationship between Lane Powell's counsel and the

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[2] For example, the DeCourseys' allegation that Lane Powell represented to the Court that courts have "approved LP's full invoices" is simply incorrect. Mot. at 9. Lane Powell at no point represented that the Court has approved ***all*** of the fees invoiced to the DeCourseys. Indeed, Lane Powell's supplemental briefing specifically addresses (and this Court subsequently found reasonable) all fees and costs charged to the DeCourseys that had not already been approved or reviewed by courts in the underlying litigation. Dkts. 300, 314.

[3] The DeCourseys identify only one piece of evidence that was submitted in response to the Degginger Declaration: their argument that Lane Powell "padded its bills" by invoicing "time attorneys and paralegals were manning photocopy machines." Mot. at 4–5. As set forth in Lane Powell's reply in support of its motion for summary judgment, the DeCourseys' analysis of photocopying fees are misleading and unreliable. Dkt. 284 n.6 ("For example, attorney A. Gabel's November 1, 2007 time entry does not reflect ***any*** time spent photocopying, let alone the entire 2.5 hours he billed that day for legal research. If A. Gabel made copies, he didn't bill for his time." (citations omitted)). These incredible affidavits are insufficient to withstand summary judgment. *Gingrich v. Unigard Sec. Ins. Co.*, 57 Wn. App. 424, 430, 788 P.2d 1096 (1990) (summary judgment proper if affidavits totally lack credibility—they must raise more than "metaphysical doubt").

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1 presiding judge that is neither grounded in fact nor in reality. *Id.* Indeed, the declarants
2 demonstrate no basis for their accusations, but merely parrot the DeCourseys'
3 conspiratorial view that Judge Eadie "played favorites" with Lane Powell's counsel and
4 deprived the DeCourseys of a fair hearing. *Compare* Dkts. 320, 323, 326–328, 337 *with*
5 Dkt. 304. These declarations have nothing to do with the material issues on summary
6 judgment, and even if they did, they are not sufficient to withstand summary judgment.
7 *Snohomish Cnty. v. Rugg*, 115 Wn. App. 218, 224, 61 P.3d 1184 (2002) (An "affidavit
8 submitted in response to motion for summary judgment does not raise a genuine issue of
9 fact unless it sets forth facts evidentiary in nature, i.e. information as to what took place,
10 an act, an incident, a reality as distinguished from supposition or opinion.").

11 Of course, there was nothing improper about the hearing. As the Court has
12 concluded on numerous occasions, there is no evidence suggesting the presiding judge
13 was unfairly biased to either party. Dkt. 235; Sulkin Decl. ¶¶ 3–4. In its Findings of Fact,
14 the Court specifically stated that no conflict of interest exists:

15 > In so finding the Court also finds that Windermere Real Estate has no
> interest, direct or indirect, in the determination of the reasonableness of
16 > these fees or the hourly rates charged.

17 Dkt. 333 at 6. Even the DeCourseys' own quotation to their unofficial tape recording of
18 the summary judgment hearing demonstrates that the Court is not biased in this case. *See*
19 Mot. at 2 (". . . I don't want any suggestion in this record that anything that I am doing
20 here I affected at all by the facts of the Windermere lawsuit."). Lane Powell's counsel
21 does not know Judge Eadie personally or socially, and has not had any ex-parte
22 discussions with him. Sulkin Decl. ¶ 3. Besides conspiracy theories and baseless
23 opinions, the DeCourseys can identify no credible evidence that would warrant
24 reconsideration or vacation of the SJ Order.
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2. The DeCourseys' remaining criticisms of the SJ Order fail.

The DeCourseys criticize the SJ Order in several other ways, but do not identify even one ground—a piece of newly-discovered evidence, irregularity in the proceedings, or an error in law—that warrants reconsideration or vacation of the SJ Order. *See* CR 59(a) & CR 60. Even assuming reconsideration or vacation was warranted (it is not) and the DeCourseys were allowed to simply reargue issues that were already argued and ruled upon (they cannot), the DeCourseys still have not demonstrated how they should prevail on the merits.

First, the DeCourseys argue that the Court erred in finding the DeCourseys breached a contract (the Fee Agreement and Amendment) they claim is unenforceable under RPC 1.8. Dkt. 284 at 5. They are mistaken. As set forth in Lane Powell's reply to its motion for summary judgment, Lane Powell agreed to continue representing the DeCourseys in the underlying action even though the DeCourseys could not pay Lane Powell's bills, in exchange for the DeCourseys' agreement that Lane Powell's fees were reasonable and would be paid first out of any judgment or settlement. Mot. for Summ. J. at Ex. K. This aspect of the Amendment—the aspect to which the DeCourseys take issue—in no way "prospectively limit[s]" Lane Powell's liability to the DeCourseys for ***malpractice***. RPC 1.8(h).

Second, the DeCourseys' complaints regarding the "form" of the SJ Order are likewise without merit. It is unclear what the DeCourseys mean when they say that the SJ Order did not "designate" documents called to the Court's attention at the summary judgment hearing. Mot. at 5. The SJ Order plainly identifies each of the documents filed with the Court in connection with the motion for summary judgment. Dkt. 306A at 2. In addition, footnote 1 explains that while Lane Powell's motion was styled as a partial summary judgment (because it was based only Lane Powell's breach-of-contract claim), the motion seeks the full amount of damages and thus operates as a full summary

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1 judgment. Dkt. 306A n.1. Finally, contrary to the DeCourseys' arguments, the issue of
2 whether an attorney's fees and costs are reasonable under RPC 1.5 is an issue of law, not
3 fact. *See Eriks v. Denver*, 118 Wn.2d 451, 458, 824 P.2d 1207 (1992) ("The question of
4 whether an attorney's conduct violates the relevant [RPC] is a question of law."); *see also*
5 *Brown v. State Farm Fire & Cas. Co.*, 66 Wn. App. 273, 283, 831 P.2d 1122 (affirming
6 reasonableness determination based upon the Court's own familiarity with the attorneys
7 seeking fees, knowledge of their general reputation in the legal community, and a
8 comparison with the fees charged by other lawyers). As such, the DeCourseys cannot
9 demonstrate that the SJ Order's "form" was faulty in a way that warrants reconsideration
10 or vacation.

11 Third, the DeCourseys argue that the Court erred in not continuing the summary
12 judgment hearing. In essence, the DeCourseys seek reconsideration of the Court's order
13 denying their CR 56(f) motion to continue hearing on Lane Powell's motion for summary
14 judgment, which was decided on November 16, 2012. Mot. at 2. As an initial matter, the
15 DeCourseys fail to demonstrate how the Court can reconsider a decision upon which they
16 did not move within 10 days. *See* CR 59(b). Further, as set forth in previous briefing and
17 as already ruled by the Court numerous times, Lane Powell did not withhold or spoliate[4]
18 evidence, or delay production of the same. Dkts. 242, 261, 265, 278, 282, 248, 270, 269.
19 The record is clear that the DeCourseys could have had Lane Powell's production many
20 months ago, but delayed the case to avoid addressing the material issues. *Id.* The
21 documents in Lane Powell's production are immaterial to the issues on summary
22 judgment—according to the DeCourseys themselves, they had no defenses (including
23 their argument that Lane Powell's fees were unreasonable), counterclaims, or affirmative
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[4] Any redactions to documents produced in discovery were to remove confidential information relating to other Lane Powell clients. Dkt. 265 at 7. The Court should not draw the improper inferences from the redactions that the DeCourseys' suggest. Mot. at 11-12.

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1 defenses. Dkts. 253, 284. The DeCourseys have had documents responsive to their
2 discovery requests for two months now, and have yet to submit even one new piece of
3 credible evidence in support of their theory that Lane Powell "fraudulently padded" the
4 bills. Mot. at 2, 5. This failure is telling.

5 Put simply, the DeCourseys have not shown that reconsideration or vacation of the
6 SJ Order (let alone the Court's denial of their continuance request) is warranted.

7 **C. The DeCourseys Improperly Attempt to Re-Argue Issues That Have Been**
8 **Stricken or Are Not Relevant to Summary Judgment**

9 The DeCourseys improperly use the remainder of their motion for reconsideration
10 to rehash baseless arguments that were either stricken with their affirmative defenses and
11 counterclaims[5] or previously briefed and ruled upon in connection with other motions.
12 Again, the DeCourseys make no effort to demonstrate how reconsideration or vacation of
13 these orders is warranted.

14 The DeCourseys re-argue the merits of their two previous motions for recusal,
15 without demonstrating how they have timely sought reconsideration of the order(s)
16 denying recusal or how reconsideration is otherwise appropriate. Mot. at 2. Even if it
17 was, as set forth in previous briefing, Dkts. 196, 312, and above, the DeCourseys have
18 presented no credible evidence demonstrating that the presiding judge's "impartiality
19 might reasonably be questioned." CJC 2.11(A). Lane Powell relies on its previous
20 briefing on this issue. Dkt. 196, 312. Windermere has nothing to do with the attorney's
21 fees and costs the DeCourseys owe Lane Powell, and the DeCourseys have offered no
22 credible evidence to suggest otherwise.

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25 [5] *Compare* Mot. at 3–4 (accusing Lane Powell of violating RPCs), *with* Ans. ¶¶ 34–35 & 250–53 (setting forth counterclaim for breach of fiduciary duty); *compare* Mot. at 2 & 5 (accusing Lane Powell of
26 fraudulent billing practices), *with* Ans. ¶ 39 (setting forth affirmative defense of fraud); *compare* Mot. at 6–7 & 11 (assigning error to various aspects of Lane Powell's representation of the DeCourseys in connection with the underlying action), *with* Ans. ¶¶ 259–61 (setting forth counterclaim of malpractice).

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Finally, the DeCourseys' allegations that Lane Powell malpracticed, i.e. did not perform under the Fee Agreement, likewise fail. Mot. at 6-7. Their ability to pursue malpractice allegations was stricken with their counterclaims and affirmative defenses, and is wholly separate from the issues on summary judgment. Dkt. 164. Further, DeCourseys fail to cite to the record or any case law to support their allegations. Mot. at 6–7 & 11. They provide no expert opinion or any evidence supporting their position.[6] Of course, bare argumentative assertions like these (without supporting evidence or citation to the record), are insufficient to withstand summary judgment. *Strong v. Terrell*, 147 Wn. App. 376, 384, 195 P.3d 977 (2008), *review denied*, 165 Wn.2d 1051 (2009).

V. CONCLUSION

For the reasons set forth herein, Lane Powell respectfully requests that the Court deny the DeCourseys' Revised Motion to Reconsider Order of Summary Judgment. A proposed order is lodged herewith.

DATED this 21st day of December, 2012.

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[6] Indeed, Judge Fox found Lane Powell's "effort" in litigating the case was exceptional. Mot. Summ. J. Ex. HH at 7.

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