Mark DeCoursey <mhdecoursey@gmail.com>

RE: Please let us known your intentions

1 message

McBride, Ryan P. <McBrideR@lanepowell.com> Fri, Feb 25, 2011 at 9:13 PM
To: Carol DeCoursey <cdecoursey@gmail.com>, "Degginger, Grant" <DeggingerG@lanepowell.com>, "Gabel, Andrew J." <GabelA@lanepowell.com>, Mark DeCoursey <mhdecoursey@gmail.com>
Cc: "McBride, Ryan P." <McBrideR@lanepowell.com>

Mark and Carol - -

I tried to respond earlier this evening to this email from my blackberry, but something went wrong and I don't believe it went through. I write you now from a computer. It is important for you to understand several things.

One, while on vacation, I have monitored the email traffic between you and Lane Powell on my blackberry. I agreed 100% with everything Grant has told you. If at anytime I had disagreed with what Grant wrote, I would have taken time away from my family and my vacation to call him to voice my thoughts. There was never a need. In fact, nothing has changed over the last 10 or 12 days. Before I left, I made my advice and the bases for it very clear to you; that position has been echoed and repeated since that time. Lane Powell and I have always given you advice based on what we believe to be in your best interest and our approach to this answer to the petition for review is no different.

Two, with respect to the filing mechanics of the answer to the petition, what Grant told you was what I communicated to him more than a week ago when we were preparing to file the answer to the petition within the original deadline. At my request, I had my assistant call the Supreme Court to inquire about filing by email. They told her that they accept motions and other urgent papers for filing by email, but strongly prefer not to receive ordinary filings by email. Given that we had 30 days to prepare the answer (and now, and extra week on top of that), I communicated that to Grant and told him I didn't want take any chances, so we should be prepared to file manually to be on the safe side. Even after reading your email below, my preference is still to file the answer by messenger service.

Three, regarding the Smith case; I saw Mark's email. Mark, the factual difference you raise has long been known to me, and I chose not waste space in our brief (or in the merits briefing or during oral argument) discussing it because that particular factual difference -- the underlying tort involved, i.e., malpractice vs. breach of fiduciary -- is simply irrelevant to the issue of proximate cause -- which is the reason Windermere relies on Smith in the first place. The analysis of proximate cause is the same whether the breach of duty is mere negligence (Smith), breach of fiduciary duty (our case) or even an intentional act. In short, the question is whether the wrongful conduct at issue factually caused the plaintiff's injury; it doesn't matter for proximate cause purposes why the conduct is wrongful or how wrongful it was. (The degree of wrongfulness may matter for legal causation, which as you know is a distinct concept that applies only after proximate cause is found and, in any event, was not at issue in the Smith case). Thus, to say Smith involved innocent mistake, while our case involved more wrongful conduct, doesn't do anything to address the issue of proximate cause, nor does it provide any basis to meaningfully distinguish Smith where it counts. That is why, in discussing Smith, we focus on the different standards of review (summary judgment vs. jury finding) and the factual differences as they relate to the key issue of reliance/causation (and not duty). Mark, I thought very hard about the best way to distinguish Smith, and think the answer to the petition does the job as best as can be done.

Four, there is no good faith basis for Lane Powell to request another extension of time. On your instructions, I represented in my affidavit that you would have sufficient time to consider the answer upon your return from Mr. DeCoursey's memorial so that it could be filed by February 28. That is still true. My absence over the last week is not a basis for asking for another extension. Nothing has changed over the last week; we stand exactly in the same place we were when I requested an extension over a week ago. We've now had five weeks to respond to

the petition. You've had our draft of the answer to the petition for almost three weeks. Please make a decision. I ask, once again, that you allow us file the brief on your behalf.

From: Carol DeCoursey [mailto:cdecoursey@gmail.com]
Sent: Fri 2/25/2011 3:59 PM
To: Degginger, Grant; McBride, Ryan P.; Gabel, Andrew J.; Mark DeCoursey
Subject: Re: Please let us known your intentions

Grant--I just called the Clerk's office at the Supreme Court. I dialed (360) 357-2077 and spoke to Camilla. I explained we wanted to file a response to a petition with the Court, and asked if we could do that electronically. She assured me we could, and gave me instructions.

After I read your email, below, I called Camilla again, to make sure I had not misunderstood. Again, I was explicit. I told her I knew motions could be filed electronically, but we had a response to a *petition* and wanted to check that it, too, could be filed electronically. Once again, she assured me that the Court would accept a response to a petition electronically.

At this point, we are experiencing a crisis in confidence in you, Grant. We wish to have a second pair of eyes look at our response to Windermere's petition. We think it would be best for all concerned. Please seek an extension until March 7.

By all means, you can tell the court why we need such an extension.

Carol & Mark

On Fri, Feb 25, 2011 at 3:35 PM, Degginger, Grant <DeggingerG@lanepowell.com> wrote:

> Carol,
> I am responding to both of your emails of this afternoon. We don't have a good faith basis for seeking another extension from the Supreme Court.
> While the Supreme Court accepts motions filed electronically, they want responses to petitions for review to be filed manually. Thus, to file on Monday we will need to send a messenger to Olympia with the brief in the morning.
> Grant
>
> ---
>
> **From:** Carol DeCoursey [mailto:cdecoursey@gmail.com]
> **Sent:** Friday, February 25, 2011 2:30 PM
> **To:** Degginger, Grant; Gabel, Andrew J.; McBride, Ryan P.; Mark DeCoursey
>
> **Subject:** Re: Please let us known your intentions
>
> Grant--
>
> Thank you for your responses.
>
> No, please do not file the response as written.
>
> Mark has very pressing things to do at work, and he can't talk. I know that, at the very minimum, he wants the extra material about the Smith case included.
>
> We still have until close of business on Monday to file. If I am wrong, please let me know. I understand that the Supreme Court accepts electronic filing, and that we don't have to drive down to Olympia.
>
> Carol
>
> On Fri, Feb 25, 2011 at 1:02 PM, Degginger, Grant <DeggingerG@lanepowell.com> wrote:

Carol,

Lane Powell represents you--and you know that. Please see the responses to your questions below.

We are going over and over the same issues. Now, we need an answer to our question: Do we have authority to file the brief as written?

From: Carol DeCoursey [mailto:cdecoursey@gmail.com]
Sent: Friday, February 25, 2011 11:17 AM
To: Gabel, Andrew J.; Degginger, Grant; McBride, Ryan P.

Subject: Re: Please let us known your intentions

Andrew, Grant, Ryan:

In our last email, we asked questions of you, Grant, the answers to which will affect our decision. Perhaps you do not consider yourself to be our lawyer, as Ryan's and Andrew's names appear on our filings? Since Ryan is not available, and you do not answer our questions, we will spell out our questions more painstakingly and will specifically ask Andrew:

Andrew:

1. If we cross appeal or are seen as cross-appealing by writing an "in the alternative" option, will the attorney fees and costs be covered under CPA, or charged to us, and eventually subtracted by Lane Powell from our damages award? If you **not** cross petition and the petition is denied, you likely will receive fees for that portion of the briefing devoted to the CPA issue, as was the case at the Court of Appeals. If you DO cross petition and both the petition and the cross petition are denied you may not get any fees for the CPA issues because you may not be deemed the prevailing party. I don't fully understand your question about our fees, but suffice to say we will continue to charge for our time and costs incurred as set forth in our fee agreement.

2. Does the answer to the above question depend on whether we win the cross-appeal/"in the alternative" option of lose? No because you will not win the cross petition.

3. Will the fact that Lane Powelll has not filed any motion for CR 11 sanctions argue against our prevailing in our "Windermere has vitiated the CPA through attrition warfare" position? (Be reminded that Brent mentioned Windermere's attrition warfare tactics in his brief on attorney fees/costs.) We do not believe the cross petition you proposed is legally meritorious so this is a non-issue. Remember that the likely remedy for a CR 11 violation would have been your attorneys fees which the court granted to you anyway. In fact, the court gave you a multiplier.

Andrew, these are reasonable questions. Could you please answer them?

By the way, Mark and I make it a practice to agree to the emails we send. But right now, I can't get in touch with Mark. So I will send this off without the benefit of his review.

Many thanks,

Carol

On Fri, Feb 25, 2011 at 9:30 AM, Degginger, Grant <DeggingerG@lanepowell.com> wrote:

Carol and Mark,

It's Friday. The brief is due Monday in Olympia. We need your decision today.

From: Carol DeCoursey [mailto:cdecoursey@gmail.com]
Sent: Friday, February 25, 2011 8:08 AM

To: Degginger, Grant
Cc: Gabel, Andrew J.; Mark DeCoursey; McBride, Ryan P.
Subject: Re: Please let us known your intentions

Grant, Ryan, Andrew, especially Grant:

Throughout this conversation, you have insisted that that we are enjoying a great outcome, without ever accepting our invitation to "do the math" and showing us the great outcome.

In fact, you anticipate the shortfall in the legal fees and costs will come from our pocket, from our damages award. Tell us why is it OK with you that the shortfall comes out of our pocket, rather than Windermere's?

We warned you about Windermere's attrition warfare program again and again. But you refused to write motions for CR 11 sanctions. Please tell us about Lane Powell's policy of not writing CR 11 motions, and how it serves and protects clients like us who can't write off the losses.

Snow we can take. A snow job we decline to take . . .

You insist what is happening to us is "the law" and recommend we go to the Legislature. But you cannot provide us with any subsection of RCW 19.86 that provides for our situation nor sanctions it. In fact, what is happening to us is contrary to Legislative intent. Read RCW.19.86.920. "Liberally construed" does not mean "vitiated" or "amputated" through litigation attrition warfare. The CPA fee and costs provision was not intended to trap the litigants, to bleed their damages award from them.

Ignoring the truth of what we say will not make it go away. What we're dealing with vis a vis the shortfall that you intend to come out of our pocket is judge-made law, not statutory law. So telling us to go to the Legislature is like telling us to spit in the wind.

We remember being at Lane Powell one day and complaining to Dennis Strasser about Windermere's litigation attrition warfare. He defended the Windermere lawyers, "They are just doing their job," he said. Well, when Windermere runs up huge legal bills and costs for us, and Lane Powell takes the shortfall from our damages, is Windermere just doing its job?

Grant, even if you think we'll have to eat sawdust, don't ask us to believe it's ice cream.

We informed you of Windermere's pattern of abuse of the court system and made the documentation available to you through our webpage, Windermere-Victims.com. We warned you about what was happening, and asked that you protect us against it.

Suppose the Supreme Court heard the question of Windermere's vitiation of the CPA and the public policy impact it has, given the Dept. of Licensing failure/refusal to enforce real estate law. Given Lane Powell's refusal to ask for CR 11 sanctions and failure to mention Windermere's pattern of abuse, are you concerned the Supremes might hear the argument and say: "Too bad, ya'll shudda taken steps to protect yourselves."

And if they do tell us that, what's to worry? Your legal bills would surely be covered by the CPA.

Tell us why the Supreme Court would not be interested in hearing about the vitiation of the CPA. We truly want to know.

And to keep the record straight, in this correspondence, we have not yet stated we have decided against including the "three pages," the contingent "in the alternative" option, or appealing the remand.

Give us answers, and we'll get on with it.

Carol & Mark

On Thu, Feb 24, 2011 at 5:35 PM, Degginger, Grant <DeggingerG@lanepowell.com> wrote:

> Carol,
> I'm not sure I understood your email. We have already discussed at length why a cross appeal of any kind is not in your best interest. We have explained that a legislative change will be necessary to achieve the outcome you desire. That said, we will need an answer to the question we posed in our email this morning.
>
> Hope the snow isn't too bad in Redmond.
> Grant
>
> ---
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> **From:** Carol DeCoursey [mailto:cdecoursey@gmail.com]
> **Sent:** Thursday, February 24, 2011 10:18 AM
> **To:** Degginger, Grant
> **Cc:** Gabel, Andrew J.; Mark DeCoursey; McBride, Ryan P.
> **Subject:** Re: Please let us known your intentions
>
> Grant--
>
> Thank you for this nice letter. We are glad y'all still like us! Allow us to make a suggestion.
>
> This state needs a real Consumer Protection Act. When a huge, predatory corporation like Windermere vitiates the CPA by litigation attrition warfare and loses, the plaintiffs' attorney fees should be paid by the predator. Those fees should not be deducted from the plaintiffs' damages award.
>
> That's only fair and just. Ryan should not have had to deal with the pettifogging arguments concerning the apportionment of attorney fees. That is rubbish.
>
> The purpose of the legal system is to dispense justice, not provide a gold mine for those who use pettifoggers' tricks to crush the good guys.
>
> This state needs competent people who will stand up for the public good.
>
> Lane Powell does pro bono work. Please consider taking on an aggressive CPA cross-petition to the Supreme Court, pro bono. (That is, no "in the alternative" language.)
>
> There is no chance that the real estate business will be conducted honestly when the Dept. of Licensing holds that using unfair and deceptive practices is not a violation of the real estate laws. Have you seen that famous letter?
> http://renovationtrap.com/dol/081208-dol.pdf
>
> This is a social policy issue par excellence. Think about, guys. This state needs help. This country

needs help.

Grant Degginger for Governor. In the alternative, Ryan McBride for Governor. In the alternative, Andrew Gabel for Governor.

:-)

Carol & Mark

On Thu, Feb 24, 2011 at 9:12 AM, Degginger, Grant <DeggingerG@lanepowell.com> wrote:

> Carol and Mark,
>
> First, Mark, I wanted to express my condolences over your father's passing and I hope your family found strength by being together in Vancouver over the weekend.
>
> Second, if we understand your email correctly, we are glad to see that you no longer intend to file the additional three pages of argument that we discussed last week. We continue to strongly believe that your highest priority should be to have the Supreme Court deny review and one of our takeaways from our call last week was that you agreed. However, what we understand your new alternative to be--adding a footnote or an additional sentence in the text requesting "in the alternative" that the Court grant review of the scope of attorneys fees and costs recovery if they grant review of Windemere's appeal--presents the same multiple dilemmas. First, it allows Windemere yet another opportunity to submit a brief in opposition to granting review of your issue. As we have said multiple times, giving Windemere the last word is not in your best interest. Second, the request itself is not legally viable--the reasons for which we discussed at length last week. Finally, merely "slipping it in" to the brief will be insufficient to have the Court give it serious consideration.
>
> We do not wish to withdraw. The brief that Ryan wrote is excellent, and I believe you agree with that. We have thoroughly and seriously considered the points you raised last week. Our best professional judgment is that the brief should be filed as is. We have won at the trial court. We have won at the Court of Appeals. We have repeatedly demonstrated our commitment to your case. We are mindful that in litigation there are no guarantees, however, we have provided you with the best advice we have. We sincerely hope that over the last three years of work for you that we have earned your trust. At the end of the day, the final decision is yours. We ask that you authorize us to file Ryan's brief as it has been written.
>
> I will be heading into a deposition for the better part of the day. Andrew is available if you would like to talk further. I can speak with you late in the day as well.
>
> Grant
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> ---
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> **From:** Carol DeCoursey [mailto:cdecoursey@gmail.com]
> **Sent:** Wednesday, February 23, 2011 2:59 PM
>
> **To:** McBride, Ryan P.; Gabel, Andrew J.; Degginger, Grant
> **Cc:** Mark DeCoursey
> **Subject:** Please let us known your intentions
>
> Ryan, Andrew, Grant:
>
> Concerning the February 28 deadline on our answer to Windermere's petition before the Supreme Court:
>
> Is it your intention that Lane Powell withdraw as our counsel if we instruct you to broach the subject

of Windermere's vitiation of the Consumer Protection Act through litigation attrition warfare?

As you know, we have suggested that we oppose a hearing by the Court of any of Windermere's issues, but that we add an "in the alternative" clause to the effect that if the Court decides to hear any of Windermere's issues, they hear the vitiation of the CPA through litigation attrition warfare issue.

We need to know were we sit.

We have no intention of firing y'all!

:-)

However, we need to know if you intend to quit, given instructions as above.

Could we have your answer by close of business, today, Wednesday?

Carol & Mark

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