Hon. Richard D. Eadie
Plaintiff's Response in Opposition to Defendants' Motion to Vacate and Recuse
Noted for Consideration: 08/14/12
(Defs.' Request for Shortened Time Pending/Opposed by Plaintiff)
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 OPPOSITION TO DEFENDANTS' MOTION TO VACATE AND RECUSE

Defendants Mark and Carol DeCoursey ("DeCourseys") ask the Court to recuse itself and vacate all orders entered in this case based on an alleged undisclosed conflict of interest that prejudices them. However, the DeCourseys offer ***no*** evidence demonstrating the actual prejudice or potential bias necessary for judicial disqualification. They do not even address, let alone explain how they meet, the standard that applies here. In reality, the DeCourseys do not like the fact that they must comply with Court orders, and ask the Court to recuse itself, vacate all orders entered in this case, and allow them a "do over." Their transparent attempt to (yet again) avoid complying with Court orders and salvage what little remains of this case should be denied. Indeed, the DeCourseys' motion is a clear tactical maneuver that, itself, is prohibited by the very rules on which they rely.

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I. STATEMENT OF FACTS

The Court is well-versed in the facts of this case. For a more detailed factual recitation, however, see Plaintiff's Motion for Entry of Judgment, Dkt. 192.

II. EVIDENCE RELIED UPON

Plaintiff relies on the Declaration of Malaika M. Eaton in Opposition to Defendants' Motion to Vacate and Recuse and Exhibits A–B attached thereto, and the records and files herein.

III. AUTHORITY

A. The DeCourseys Did Not File an Affidavit of Prejudice

Under RCW 4.12.050, a party seeking disqualification of a judge may file an affidavit of prejudice before the judge has made any rulings. RCW 4.12.050. The DeCourseys concede that they did not file an affidavit of prejudice at the outset of this case. Mot. at 9.[1] Because the DeCourseys failed to do so, they have an affirmative obligation to demonstrate prejudice on the part of the Court. *In re Marriage of Farr*, 87 Wn. App. 177, 188, 940 P.2d 679 (1997) (citing RCW 4.12.040; *State v. Cameron*, 47 Wn. App. 878, 884, 737 P.2d 688 (1987)). As set forth below, they cannot.

B. Based on This Record, the DeCourseys Have Not (and Cannot) Show That the Court's Impartiality Might Reasonably Be Questioned

The DeCourseys ask the Court to recuse itself and vacate all orders entered in this case based on an alleged "conflict of interest" that was not disclosed. Their entire argument rests on the proposition that the presiding judge is somehow biased against the DeCourseys by virtue of his wife's employment as a Windermere agent. Mot. at 2–3. However, the DeCourseys' claim of possible bias is purely speculative—they have failed

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[1] The DeCourseys try to excuse this failure by arguing that they would have filed an affidavit of prejudice, had the Court only "disclosed his disqualification." Mot. at 9. As demonstrated below, if the Court believed a disqualifying conflict of interest was present, it would surely have disclosed it.

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to present *any* evidence that the Court is either unwilling or unable to be impartial in this matter.

The Washington Code of Judicial Conduct ("CJC") requires disqualification of a judge who is biased against a party or whose "impartiality might reasonably be questioned." CJC Rule 2.11(A)(1). A judge is likewise disqualified if he or his "spouse … has an economic interest in the subject matter in controversy." CJC Rule 2.11(A)(3). In lieu of withdrawing from the proceeding, a judge may "disclose on the record the basis of the disqualification," after which the parties may agree to proceed on the grounds that "the judge's relationship is immaterial or that the judge's economic interest is *de minimis*." *Id.* CJC Rule 2.11(C).

Unlike when a party files an affidavit of prejudice under RCW 4.12.050 (where prejudice need not be shown and is simply presumed), "a trial court is presumed to perform its functions regularly and properly without bias or prejudice." *Bus. Serv. of Am. II, Inc. v. WaferTech LLC*, 159 Wn. App. 591, 600, 245 P.3d 257 (2011) (citing *In re Marriage of Meredith,* 148 Wn. App. 887, 903, 201 P.3d 1056 (2009)). "The test for determining whether a judge's impartiality might reasonably be questioned is an objective one that assumes the reasonable person knows and understands all the relevant facts." *Id.* A party claiming prejudice must support the claim with ***evidence*** of the trial court's actual or potential bias. *State v. Dominguez,* 81 Wn. App. 325, 328–29, 914 P.2d 141 (1996).

On this record, no reasonable person would conclude that the Court's impartiality might reasonably be questioned. The vast majority of "evidence" the DeCourseys cite regarding the Court's alleged impartiality is simply a list of orders with which they disagree. Mot. at 5–6. The DeCourseys' disagreement with these rulings is not "evidence of bias." *See In re Marriage of Farr*, 87 Wn. App. at 188. The DeCourseys are likewise wrong on other issues they highlight. For instance, the DeCourseys suggest that the Court has permitted Lane Powell to file documents late and then speculate that this demonstrates

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bias. They disregard, however, that the Court has permitted them to violate Court rules without sanction. *See, e.g.*, Dkts. 11, 20, 42.

The DeCourseys likewise suggest that the Court is biased against them because of their history of adversity with Windermere. Mot. at 2–3. That too is groundless under the circumstances here. Lane Powell and the DeCourseys were equally adverse to Windermere in the underlying lawsuit. Dkt. 1 ¶¶ 3.1, 3.3. As such, the DeCourseys have not (and cannot) show that the Court's alleged affiliation with Windermere favors or prejudices either party. These facts were obvious from the outset. *Id.* Presumably, if the Court believed his alleged affiliation with Windermere presented a potential conflict of interest, the Court would have disclosed that fact long ago.[2] *See* CJC Rule 2.11, Cmt. 5.

The DeCourseys' likewise claim that the Court has an economic interest in the outcome of this matter. Mot. at 2–3. This too is meritless. Lane Powell filed and served an attorneys' lien in the Windermere lawsuit after judgment had been entered against Windermere. **Ex. A.**[3] When the DeCourseys failed to pay Lane Powell the attorney's fees they owed, Lane Powell filed the instant lawsuit in early October 2011. Dkt. 1. Thus, this lawsuit in no way implicates any of Windermere's interests. Windermere is not and has never been a party to this lawsuit. In fact, before this lawsuit had even begun, Windermere was obligated to (and eventually did) pay the judgment against it. **Ex. B.** The DeCourseys' suggestion that the Court has an economic interest in whether the Windermere judgment amounts go to the DeCourseys or to the lawyers who represented them in obtaining a judgment from Windermere is preposterous. *See* Mot. at 5.

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[2] The DeCourseys also argue that the Court's failure to disclose this "material fact" was fraudulent, thereby excusing them from complying with "every order" entered in this case, pursuant to Civil Rule (CR) 60(b)(4). Mot. at 9. They fail, however, to cite any case law supporting such a notion. Again, this is a transparent attempt to avoid complying with orders the DeCourseys do not like and to get a chance to restart the lawsuit from the beginning.

[3] Exhibits A–B are attached to the accompanying Declaration of Malaika M. Eaton in Opposition to Defendants' Motion to Recuse and Vacate.

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Despite the fact that this case has been pending before the Court since October 2011, the DeCourseys only "discovered" this alleged conflict of interest after countless orders (including three contempt findings, fee awards, and discovery sanctions) were entered against them, their counterclaims and defenses were stricken, and a motion for entry of judgment is pending.[4] This motion is nothing more than (yet another) transparent effort by the DeCourseys to avoid complying with Court orders and salvage their baseless counterclaims and defenses. In this regard, the DeCourseys are doing precisely what the CJC prohibits: they are using the CJC to "obtain [a] tactical advantage[] in proceedings before a court." CJC, Scope, note 6. The motion should be denied.

IV. CONCLUSION

For the reasons set forth herein, Lane Powell respectfully requests the Court deny the DeCourseys' Motion to Vacate and Recuse. A proposed order is lodged herewith.

DATED this 15th day of August, 2012.

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[4] Any fault as to the late "discovery" of this alleged conflict of interest is their own, the DeCourseys were required to "use due diligence in discovering possible grounds for recusal" and then "promptly seek[] recusal." *See Sherman v. State*, 128, Wn.2d 164, 205 n.15, 905 P.2d 355 (1995). They did not.

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