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Mark DeCoursey <mhdecoursey@gmail.com>

Re: Response to Petition for Review

1 message

Mark DeCoursey <mhdecoursey@gmail.com> Mon, Feb 14, 2011 at 3:28 PM
To: "Degginger, Grant" <DeggingerG@lanepowell.com>
Cc: "McBride, Ryan P." <mcbrider@lanepowell.com>, "Gabel, Andrew J." <GabelA@lanepowell.com>, Carol DeCoursey <cdecoursey@gmail.com>

On Mon, Feb 14, 2011 at 1:04 PM, Degginger, Grant <DeggingerG@lanepowell.com> wrote:

> Mark and Carol - -
>
> Ryan forwarded your emails to me and I thought it best if I respond at this point. I know you've thought a lot about this, but we want to reiterate our strong belief, and advice, that you allow us to file the brief as written. It is not in your best interests for you to file a brief with these additional pages. I know you've been over this with Ryan, but let me reiterate some things.
>
> The Supreme Court can't give you attorney fees for non-CPA claims. It is not a matter of Supreme Court discretion, or interpretation of its own rules. It is a matter of the CPA itself. If there was no CPA claim in this case, or the CPA claim was not at issue on appeal, there would be no entitlement to attorney fees - - that is the case most of the time. The legislature allowed successful plaintiffs to recover fees for their CPA claims, but not other claims.

Our lawsuit was a CPA suit from the beginning. Windermere wishes to redefine it, after the fact, to turn our courtroom success into a Pyrrhic victory. Sure, we won all the battles, but we would be losing the war.

There is nothing in the CPA statute that says: "When those who are found in violation of the CPA file an appeal, and bring up all matters under the sun, moon, and stars in that appeal, the victims are not entitled to attorney fees when they defend themselves." Windermere has used a strategy that neutralizes the attorney fee award provision of the CPA.

Obviously, such neutralization was not the legislative intent when the legislature wrote the CPA must be "liberally construed."

> The only way to change that is to change the law. Only the legislature can do that.

Grant, judges interpret or "change" the law every day of the week. One week slavery is OK, the next week it is not. One week abortion is not OK, next week it is. OK, these are federal examples. How about something more homegrown -- Hangman Ridge, for example? Lawyers with chutzpah make new arguments every day of the week, particularly to Supreme Courts, and judges with chutzpah often see the wisdom of the arguments.

> For that reason, a declaration from me would be procedurally improper and it wouldn't make a difference anyway.

Lane Powell lawyers have written many declarations for our filings. Why would yours be "procedurally improper"? You could explain why a law firm like Lane Powell is reluctant to take on CPA cases, and why you have to charge 9% interest. The economics of law firms is definitely a part of public policy, as shown by the CPA legislation.

> I'd be happy to help you figure out who in the legislature could consider the issue.

Rodney ("Senator Windermere") Tom from our district, maybe? I don't think that is really a practical suggestion.

:-)

> Beyond the fact that there is no legal basis for it, we don't want to do anything that would increase the possibility that the court would grant review. If it grants review, then the judgment itself would be in jeopardy and far more attorney fees will have be incurred to preserve the court of appeals' decision at the Supreme Court level. Both are outcomes that you should want to avoid. You're right that the attorney fees issue shouldn't cause the court to want the court to hear the case, but we don't want to even send a signal that we agree with Windermere that this case raises unusual or important issues. Because the court simply can't grant the fees you seek, we don't see any benefit in increasing the risk of interest, even if it is very slight.
>
> Your follow up email regarding costs suggests that you want the Supreme Court to reverse the court of appeals on the cost issue. That request would be treated as a cross-petition, and would allow Windermere to file a reply - - in which they could reiterate their belief that the petition should be granted on all issues. But worse, we would effectively be inviting the Supreme Court to accept review in our own right - - which is the last thing we want to do. We want the court to deny the petition as quickly as possible. It just doesn't make any sense to risk a million dollar judgment over a $30,000 issue.

In the first place, folks, this is not about $30,000. Close to $100,000 is already struck from the award. This figure is computed by adding the $50,000 on the appeal fees that cannot be recovered, plus the $40,000 remand, from which slim pickins will be left after RCW 4.84.010 is applied. Add to this the fees consumed in the remand and this petition, and we are already $100K down.

So suppose we file the brief as currently written, quietly accepting our loss. And suppose for a moment that Windermere's case is accepted for review anyway -- this is a risk, too. We would lose possibly another $50 - $75,000 -- even if we "won" the appeal.

We are not in a position to write off $150,000 -- $175,000. But we would have no one to blame but ourselves -- our brief moment to protest our loss came and went, and we said nothing. Who would want that on their tombstone?

> If you want to discuss this, please contact me. We need to know soon whether you will allow us to file the brief or not.

All things considered, would prefer to take our risks on the cross-appeal. We have already heard the tone of the courts on the case -- twice over. A reversal at this point is highly unlikely -- particularly on the strength of Windermere's arguments thus far. The momentum is in our favor. A Supreme Court would have to be powerfully motivated to slap down a jury, a respected Superior Court judge, and that robust Opinion from the Court of Appeals.

Unless, of course, the Supreme Court is on the take? :-)

> **Grant Degginger**

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