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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

LANE POWELL, PC, an Oregon professional corporation,

Respondent,

v.

MARK DeCOURSEY and CAROL DeCOURSEY, individually and the marital community composed thereof,

Appellants.

BRIEF OF RESPONDENT

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I. INTRODUCTION

In September 2007, Lane Powell agreed to represent the DeCourseys in a case brought against them titled *V&E Medical Imaging Services, Inc. v. Mark DeCoursey, et ux., et al* (the "underlying lawsuit"). The DeCourseys, in turn, agreed to pay Lane Powell for its representation. Despite Lane Powell's work performed and excellent result achieved in the underlying lawsuit—Lane Powell prevailed at trial, obtained a judgment for damages of over $500,000, obtained an award of attorney's fees including a 30 percent multiplier, successfully defended the result on appeal up to the Washington Supreme Court, again obtaining fee awards—the DeCourseys failed to honor their obligation to pay Lane Powell.

After waiting more than two years—even continuing to wait once the DeCourseys fired the firm on the eve of collecting on the judgment and then threatened the firm with litigation—Lane Powell finally sued the DeCourseys to recover the amounts owing. For the last two years, the DeCourseys have turned the litigation into a farce, defying every single order they disagreed with, refusing to engage in discovery, and filing motion after meritless motion. After the trial court gave them chance after chance to comply with its orders, and warned them explicitly of the consequences of their recalcitrance, the court finally struck their counterclaims and affirmative defenses, finding their continued refusal to comply

to be "***without reasonable cause or justification*** and therefore [] ***willful and deliberate***." The DeCourseys, undeterred, continued on their campaign, sought reconsideration (denied), sought a stay from the trial court (denied), sought a stay from this Court (denied), sought discretionary review of twenty-two of the trial court's orders (denied), and then finally came up with a new tactic: not one but two recusal motions in which they asked that all the court's previous orders be vacated.

In the end, however, the DeCourseys have not and cannot show that the trial judge abused his discretion in denying their motions. Their motions relied on various (unsupported) conspiracy theories and the notion that the judge was biased against them because of his wife's part-time employment with a non-party with no interest in the case (that the DeCourseys dislike). Judges have an obligation to serve and may only exercise their discretion to recuse when the circumstances require recusal. Here, they do not. The trial judge went out of his way to provide the DeCourseys with chance after chance to comply with his orders and only took further steps when, after repeated warnings, they refused to comply.

Further, it is likewise notable that—despite claiming that the judge was biased against them—the DeCourseys only challenge one other ruling. But, as described below, their argument as to that ruling depends on ignoring the language of the actual agreement the parties reached and dis-

regards the effect of trial court orders that they have not appealed.

The DeCourseys have used and abused every trick in the book to delay this case and interfere with Lane Powell's opportunity to collect what they owe Lane Powell. This Court should reject their appeal.

II. RESTATEMENT OF THE ISSUES

1. Whether the DeCourseys have failed to show that the trial judge abused his discretion in declining recusal where the grounds upon which the DeCourseys relied were bizarre and plainly unsupported conspiracy theories, including the judge's wife's part-time employment with a non-party that was adverse to ***both*** Lane Powell and the DeCourseys in the underlying litigation and had no interest whatsoever in the current case?

2. Whether, on the same facts, the judge's decision violates the appearance of fairness doctrine where there was no evidence of actual or potential bias, and indeed, the court's actions affirmatively showed a lack of bias, providing the DeCourseys with chance after chance to comply with court orders before sanctions were finally (lawfully) imposed?

3. Whether, on the same facts, the judge's decision not to recuse violates due process when the facts do not present a sufficiently extraordinary situation so as to implicate the constitution?

4. Whether the DeCourseys have shown that summary judgment was improperly granted where their argument rests on ignoring the

actual language of the parties' agreement and the effect of unchallenged trial court orders that preclude their argument?

III. RESTATEMENT OF THE CASE

A. Lane Powell Enters Into a Contract with the DeCourseys for Legal Services

On or about September 19, 2007, Lane Powell entered into a written fee agreement ("Fee Agreement") with the DeCourseys[1] in which Lane Powell agreed to represent the DeCourseys in the underlying lawsuit. CP 1480–85. The Fee Agreement required the DeCourseys to pay costs and attorneys' fees to Lane Powell in consideration for Lane Powell's representation of them in the underlying lawsuit. *Id.*

Pursuant to the Fee Agreement, the DeCourseys agreed to: (1) engage Lane Powell to represent them at hourly rates, CP 1483; (2) promptly pay Lane Powell's invoices, CP 1484; (3) promptly raise any problems with the invoices; and (4) pay interest at 9% per annum on any unpaid invoices, *id.* The Fee Agreement (at CP 1484) also stated:

> **DELINQUENT ACCOUNTS**
> Should an account become delinquent, the firm has collection procedures that it will follow to ensure that the account is paid promptly. These collection procedures have been

[1] The DeCourseys, when convenient, portray themselves as poor, unsophisticated pro se litigants. That is not what they say when it suits their purposes. Indeed, in letters to Lane Powell, they boasted of their own skill in developing their case and legal theories pro se. CP 4544 (bragging about handing Lane Powell "a well-developed and researched case," "correcting errors of fact and legal nuance" once the firm took over, and a variety of similar activities).

established in fairness to the very high percentage of the firm's clients who pay their bills each month as rendered.

B. Lane Powell Obtains a $1.2 Million Verdict on Behalf of the DeCourseys in the Trial of the Underlying Lawsuit

Lane Powell's representation of the DeCourseys resulted in, among other things, the DeCourseys prevailing at a 2008 trial in the underlying lawsuit and obtaining a judgment against Paul H. Stickney, Paul H. Stickney Real Estate Services, Inc., and Windermere Real Estate/SCA, Inc. ("the Judgment Debtors") for damages in the amount of $522,200.00, with an award of Lane Powell's legal fees in the amount of $463,427.00 and taxable costs of $45,000.00, including a 30 percent multiplier. CP 1420–22. This result, particularly given that Lane Powell also obtained a settlement from one defendant of $270,000, all over a house the DeCourseys bought for less than $300,000, was exceptional.

C. Lane Powell Agrees to Represent the DeCourseys on Appeal, Pursuant to an Amendment to the Fee Agreement

On December 5, 2008, and after the trial court victory, Lane Powell wrote the DeCourseys regarding their outstanding fees. CP 1949. At the time, $270,000 was being held in the DeCourseys' trust account from a settlement with another defendant, and the judgment had not been paid. *Id.* Before the trial work, the balance due Lane Powell was $232,000. *Id.*

Lane Powell's letter began negotiations on a payment plan for the amounts outstanding and any future work should the Judgment Debtors

appeal. CP 1949. Lane Powell initially proposed releasing $50,000 of the $270,000 held in trust to the DeCourseys, subject to several conditions: (1) Lane Powell would forbear on demanding payment on the outstanding fees until payment on the judgment or settlement with the Judgment Debtors; (2) the parties would agree the outstanding fees are reasonable; (3) Lane Powell would be paid first out of any judgment or settlement; and (4) the DeCourseys would cooperate in achieving a reasonable settlement, or, "if appellate practice is required, that a reasonable payment plan be executed between [the DeCourseys] and Lane Powell." *Id.*

On December 30, 2008, the parties memorialized their revised fee agreement. Importantly, some—***but not all***—of the proposed terms were included in the final amendment to the Fee Agreement ("Amendment"). The parties agreed that Lane Powell would continue to represent the DeCourseys in connection with any appeal of the underlying lawsuit, and would release $75,000 held in the DeCourseys' trust account (more than Lane Powell proposed) to the DeCourseys. CP 633–34. The parties likewise agreed to the following conditions: (1) rather than forbear from collecting the fees owed until payment on any judgment or settlement as initially proposed, Lane Powell would simply "***forbear for a reasonable time***"; (2) as proposed, the DeCourseys agreed the outstanding fees were reasonable; (3) as proposed, the DeCourseys agreed Lane Powell would be

paid first out of any judgment or settlement; and (4) as proposed, the DeCourseys would make a good faith effort to negotiate a reasonable settlement. *Id.* The Agreement reiterated that the DeCourseys remain responsible for paying amounts still due and owing. *Id.*

Nowhere in the Amendment did the parties agree Lane Powell had to forbear on collecting its fees until the Judgment Debtors paid on the judgment or settlement, as the DeCourseys now claim. *Id.* That language was rejected. Indeed, the Amendment clearly stated the Fee Agreement terms continued to govern, except as revised in the Amendment:

> Except as otherwise stated herein, nothing in this letter agreement alters or amends the terms of agreement between the DeCourseys and LANE POWELL PC as provided in the letter of engagement.

CP 634.

D. Lane Powell Prevails on Appeal Against the Judgment Debtors

The Judgment Debtors appealed. CP 3450. Over the next two and a half years, Lane Powell continued to provide legal services to the DeCourseys, and they continued to receive invoices and benefit from Lane Powell's work. CP 3492–97.

Lane Powell successfully defended the judgment before both the Court of Appeals and the Supreme Court. CP 3449–85, 3488. This Court affirmed the trial court's award of attorneys' fees and costs for Lane Powell's (as yet not fully paid) fees to the DeCourseys, including the thirty

percent multiplier. CP 3481–84. This Court also awarded $47,600.61 in fees and costs incurred in defending against the appeal. CP 3444–47. The Supreme Court awarded $11,978.89 in fees and costs incurred in answering the Judgment Debtors' petition for review.[2] CP 3487–91. The DeCourseys, however, still did not pay any of these amounts to Lane Powell and, in fact, had not made a payment since 2008. CP 203.

E. The Judgment Debtors Approach Lane Powell to Pay the Judgment; the DeCourseys Immediately Fire Lane Powell

After the Supreme Court denied the petition for review and before the mandate issued, the insurer for Windermere (one of the Judgment Debtors) approached Lane Powell about making a partial payment of the judgment to cut off interest accruals on the amount to be paid. CP 1439, 3503. On August 2, 2011, Lane Powell informed the DeCourseys about Windermere's overture. CP 1439. Recognizing such a payment would trigger their obligation to pay Lane Powell's fees under the Amendment, the DeCourseys immediately terminated Lane Powell's representation by letter dated August 3, 2011. CP 3506.

To protect its rights to the outstanding fees and costs, Lane Powell filed and served an attorneys' lien on August 3, 2011—the same day the DeCourseys terminated its representation. CP 3512–13. The lien was

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[2] The Court modestly reduced the DeCourseys' fee request, awarding $11,978.89 of the $16,718.46 the DeCourseys sought. CP 3490–91.

filed in accordance with RCW 60.40.010 and applicable law for the value of services rendered and costs advanced on behalf of the DeCourseys in an amount not less than $384,881.66 plus interest after August 3, 2011. *Id.* In this regard, Lane Powell's lien stated (at CP 3512):

> NOTICE IS HEREBY GIVEN that the undersigned attorneys, Lane Powell PC, claim a lien pursuant to RCW 60.40.010, for services rendered to Defendants and Third-Party Plaintiffs Mark and Carol DeCoursey and expenses incurred on their behalf in the amount of not less than $384,881.66. The lien is for amounts due to Lane Powell, together with interest, for services performed in conjunction with an action before the trial and appellate courts.

F. The DeCourseys Threaten Litigation and Refuse to Honor Their Obligation to Pay, Leaving Lane Powell No Choice but to Sue the DeCourseys for its Fees

Despite the work performed, excellent result achieved, and the DeCourseys' consistent expression of appreciation for Lane Powell's good work, the DeCourseys did not honor their obligation to pay Lane Powell. CP 1434–35. On September 22, 2011, attorney Paul Fogarty sent a lengthy letter to Lane Powell on their behalf with a long list of complaints the DeCourseys now claimed to have had with Lane Powell over the course of their four-year relationship. CP 1445–63. Mr. Fogarty also threatened litigation, indicating that the DeCourseys intended to file a lawsuit, and perhaps seek class action status against Lane Powell. CP 1463. The letter even stated that the DeCourseys believed that "personal liability is warranted" and intended to "pursue those claims" as well. *Id.* Nowhere

in the letter did Mr. Fogarty state that the DeCourseys intended to pay Lane Powell as they were contractually bound to do. CP 1445–63.

When no payment was forthcoming, Lane Powell filed a complaint against the DeCourseys in early October 2011 for breach of contract, quantum meruit, and foreclosure of attorney's lien. CP 1–6. The DeCourseys' amended answer admitted that they entered into a contract with Lane Powell for its representation of them in the underlying lawsuit. CP 200–31 ¶ 5. They admitted Lane Powell's representation resulted in the DeCourseys obtaining a judgment for damages in the amount of $522,200, and receiving an award of Lane Powell's fees in the amount of $463,427 and taxable costs of $45,000. *Id.* ¶¶ 7, 23 & 24. They admitted Lane Powell sent them regular invoices and the balance shown as of September 2011 was $389,042.68. *Id.* ¶ 15. They admitted they had not paid Lane Powell since December 2008 and the lien was unpaid. *Id.* ¶¶ 14 & 28.

In addition, the DeCourseys counterclaimed for legal malpractice, breach of fiduciary duty, breach of contract, "Undisclosed Conflict of Interest," Consumer Protection Act violations, malicious prosecution, unjust enrichment, and extortion. *See generally id.* Their claims were far-ranging, including 207 paragraphs containing a litany of complaints regarding Lane Powell's work. *Id.*

The DeCourseys likewise asserted numerous affirmative defenses,

many of which overlapped with their counterclaims. *Id.* ¶¶ 31–42. These include: that their termination of Lane Powell was permitted by the parties' agreement (¶ 32); "failure of consideration," "prior breach," and "breach of contract" (¶ 33); "legal fee creep" (¶¶ 34–35); "estoppel" as to Lane Powell's quantum meruit claim (¶ 36); "unclean hands" (¶ 37); "malice" (¶ 38); "fraud" (¶ 39); "illegality" (¶ 40); "duress and/or coercion" (¶ 41); and failure to state a claim upon which relief can be granted (¶ 42).

G. From the Outset, the DeCourseys Thumbed Their Noses at the Trial Court and, Without Justification or Excuse, Refused to Comply with the Court's Orders

From the outset of the litigation, the DeCourseys made clear they simply would not comply with court orders and they would instead make every effort to delay resolution of the case. Indeed, they made a habit of non-compliance that continued throughout the litigation and have failed to comply with any trial court order. They likewise moved to reconsider virtually all of the trial court's orders, sometimes more than once.

When Lane Powell discovered the DeCourseys had compromised its lien by collecting the full amount of their judgment in excess of $800,000 (including significant amounts designated as attorneys' fees), granting a full satisfaction of judgment and depositing only the principal amount of Lane Powell's attorneys' fees into the Court Registry, Lane Powell moved the trial court for an order requiring the DeCourseys to de-

posit approximately $57,000 into the Court Registry to account for accruing interest as provided in the lien. CP 506–16. The trial court granted the motion, ordering the DeCourseys to pay the additional amount into the registry of the court. CP 704–05. The DeCourseys moved for reconsideration of that order, which motion was denied. CP 708–19, 1308. The DeCourseys refused to comply and did not seek a stay. CP 914–15.

When Lane Powell propounded discovery requests relevant to, among other things, the DeCourseys' malpractice claims, the DeCourseys refused to produce massive amounts of relevant responsive documents on the claim that they were still entitled to maintain an attorney-client privilege over their communications with Lane Powell in the underlying lawsuit. CP 171–81, 815–22. The DeCourseys filed two, largely duplicative, motions seeking protection for these documents. CP 5917–25, 5997–6007, 36–54. Lane Powell opposed on the basis that the DeCourseys had waived the privilege due to the nature of their counterclaims against Lane Powell. CP 461–62, 160–61. The Court denied both motions, ruling that the DeCourseys were not entitled to maintain their privilege assertions over the relevant and responsive documents Lane Powell had requested. CP 232–33, 504–05. The DeCourseys moved to reconsider the trial court's orders and those motions were denied. CP 234–45, 588–89; *see also* CP 706–07. Nonetheless, the DeCourseys failed to produce the doc-

uments and did not seek a stay of the trial court's orders.

When it became clear the DeCourseys were continuing to thumb their nose at the trial court's orders, Lane Powell moved to compel the production of the documents. CP 752–60. The DeCourseys opposed, persisting in their claim of privilege. CP 942–52. Again, the trial court ordered the DeCourseys to produce the documents. CP 977–78. Again, the DeCourseys moved to reconsider (also denied) but refused to comply with the court's order and failed to seek a stay. CP 979–88, 1028–29.

H. As a Direct Result of Their Admitted Refusal to Comply with Numerous Court Orders, the DeCourseys' Affirmative Defenses and Counterclaims for Malpractice are Stricken

Due to the DeCourseys' continued refusal to comply with virtually every trial court order, Lane Powell was forced to move—three times—for contempt and discovery sanctions. CP 912–16, 1030–39, 1586–1675. The Court granted all three motions and ordered the DeCourseys to pay Lane Powell's reasonable attorneys fees. CP 1262–63, 2035–43, 2411–12. The Court found the DeCourseys' continued refusal to comply to be "***without reasonable cause or justification*** and therefore [] ***willful and deliberate***" (emphasis added) and "has prejudiced Plaintiff's preparation of this case." CP 1263. After both this Court and the trial court denied the DeCourseys' (belated) request for a stay (CP 1266–67, 1342–43, 1393), and after the DeCourseys not only refused to comply with the trial court's

orders but even ignored inquiries regarding their intentions for compliance, the trial court ultimately exercised its discretion and ordered their counterclaims and affirmative defenses stricken. CP 2035–43.

The trial court's order striking the DeCourseys counterclaims and affirmative defenses was thoughtful, careful, and deliberate. The trial court included pages of detailed findings, none of which the DeCourseys challenge on appeal. For instance, the Court found that:

- The DeCourseys discovery responses to Lane Powell were "incomplete." CP 2036.
- "Despite these orders, the DeCourseys still withheld discovery based on the same objections the Court had previously rejected." CP 2037.
- The DeCourseys "did not comply with the Court's orders and did not seek a stay." *Id.*
- "Despite the fact that the [court's orders] consistently rejected the DeCourseys' privilege arguments, they continued to obstruct discovery.... The DeCourseys' arguments in this regard are unreasonable and frivolous." CP 2038.
- As a result, "Lane Powell's efforts to litigate this case on the merits have been stymied." *Id.*
- The trial court's order on Lane Powell's motion for contempt "found their continued refusal to comply to be '***without reasonable cause or justification*** and therefore ***willful and deliberate***.'" CP 2039.
- Despite the trial court's explicit prior warning that "further and more serious sanctions, including the possibility of striking claims, defenses, or pleadings, or entry of default may follow from any further failure to abide by court orders or rules," the DeCourseys "failed to comply with the" trial court's order. CP 2039–40.
- The DeCourseys even ignored Lane Powell's inquiries re-

garding their intentions for compliance. CP 2040.

The trial court was clearly troubled by the DeCourseys' continued refusal to comply with its orders and reluctant to strike their counterclaims and affirmative defenses. In this regard, the trial court stated:

> The discovery violations by Defendants are substantial and have been repeated despite this court's orders to compel. The imposition of further deadlines would not be likely to result in meaningful compliance. The discovery sought by Plaintiff is clearly material to its case and to its defense of Defendants' counterclaims and affirmative defenses. After considerable reflection on this case, the court is unable to conceive of any lesser sanction than striking Defendants' counterclaims and affirmative defenses that has any reasonable prospect of permitting Plaintiff to proceed to trial on the merits of its claim, in a reasonably timely manner.

CP 2041. The trial court again found that the DeCourseys' refusal to comply with its orders has "been ***without reasonable cause or justification*** and therefore ... ***willful and deliberate***." *Id.* (emphasis added). The trial court further found that the DeCourseys had substantially prejudiced Lane Powell's ability to prepare for trial. *Id.* Thus, the court concluded:

> Having considered lesser alternatives, the Court finds that such alternatives are not warranted under the circumstances.... Considering the DeCourseys' extended pattern of willful disregard of this Court's orders, and the fact that this Court specifically warned the DeCourseys that these sanctions would result from continued non-compliance, the sanctions imposed are the only appropriate sanctions here.

CP 2042.

The DeCourseys' motion to reconsider the trial court's dismissal of their affirmative defenses and counterclaims was likewise denied as was

their attempt to seek interlocutory review from this Court. CP 2242–53, 2413–14, 3280–81. In denying the reconsideration motion, the trial court again made clear the care and thought that went into his decision.

> Both before and after the entry of the July 6, 2012 Order, this Court has given substantial thought to the incentives that might persuade Defendants to engage in good-faith discovery, but on this record there is apparently nothing that the Court can do that would have that result, otherwise this motion for reconsideration would have been preceded by fully responsive answers to the outstanding discovery.

CP 2413–14. In other words, despite months and months of recalcitrance, the court remained willing to give the DeCourseys yet another chance if only they would abide by their discovery obligations. Because they would not, the consequences of their actions remained in place.

I. The DeCourseys Seek Discretionary Review of Numerous Trial Court Orders and This Court Denies Their Request

Before this appeal, the DeCourseys sought discretionary review. Indeed, throughout the summer of 2012, the DeCourseys filed several notices of discretionary review and/or appeal—sweeping in virtually every order the trial court entered: that is, twenty-two orders, including the orders discussed above. CP 1309–10, 2101–02, 3599–3624. This Court denied review as to each, including their attempt to appeal the order striking their counterclaims and affirmative defenses. CP 3280–81. Notably, in this appeal, the DeCourseys do not appeal these orders.

J. The DeCourseys Consistently Make Bizarre and Unfounded Conspiratorial Accusations Against Lane Powell, the Trial Court, and Others

When the DeCourseys were not disregarding the trial court's orders, they occupied their time making bizarre and unfounded conspiratorial accusations against Lane Powell, the trial court, and others. A short (and by no means exhaustive) list includes:

- The DeCourseys demanded that the trial court "clear the appearance of impropriety from the record" and "take disciplinary action" as to alleged ex parte contact between the court and Lane Powell that simply never occurred. CP 415–18; *see also* CP 552–53 (Lane Powell Response), 588–89 (trial court's order).
- In connection with their eventual recusal motion, the DeCourseys made a veiled accusation against the entire King County Superior Court system, suggesting that their case had been deliberately assigned to Judge Eadie, apparently as part of some conspiracy. CP 2708 n.1, 2753 n.1.
- They also accuse Judge Eadie of "bigotry towards DeCourseys" and "fraud." CP 2714–15.
- At the same time (and continuing throughout the case), the they claimed that "[t]his entire case to date has been tainted with Lane Powell's fraud on the court." CP 2752.
- The DeCourseys claimed, with no evidence whatsoever, that the trial court "punished DeCourseys for filing an ADAAA accommodation request." CP 2915.
- The DeCourseys, citing language from the trial court's order striking their counterclaims and affirmative defenses, declared that "the Court demonstrates that it is interested ONLY in the 'Plaintiff's' claims." CP 2917.
- They argued the judge "encourag[ed]" them to claim privilege and "set DeCourseys up for entrapment." CP 2920.

K. The DeCourseys Move (Twice) to Recuse Trial Court Judge Eadie and Vacate All Previous Orders

After refusing to comply with the trial court's orders, losing in their attempt to seek discretionary review, and looking for a way to obtain a do-over, the DeCourseys demanded that Judge Eadie recuse himself and vacate all orders based on an alleged "conflict of interest" that was not disclosed. CP 2707–16. Their entire argument rested on the proposition that he is somehow biased against the DeCourseys by virtue of his wife's part-time employment as a Windermere agent. CP 2708–09.

They made this serious accusation despite knowing that Ms. Eadie did not even work out of the same office that was involved in the underlying lawsuit and that during the pertinent year she made as little as $4,000 (and certainly less than $20,000) for the entire year. CP 2725, 2723. At the time of the DeCourseys motion, it seems that Ms. Eadie had only one listing for a single condo in Shoreline. CP 2723.

Further, the "support" for the DeCourseys motion was lacking. They presumed that "Windermere has been a benefactor to the Eadie family for almost a decade." CP 2710. They claimed that:

> Judge Eadie's rulings against the DeCourseys have been so irrational, relentless, and prejudiced, and have departed so far from the accepted and usual course of judicial proceedings, it is hard to avoid the conclusion that, with the assignment of this case to Judge Eadie, the process was intended from the beginning to be an ambush.

CP 2864. They suggested that virtually all of the trial court's actions were

part of some conspiracy to advance Lane Powell's interests and harm the DeCourseys. CP 2711–12.[3] The DeCourseys belatedly filed an affidavit of prejudice on August 12, 2013. CP 2786–89, 2825–26.

The Court denied the DeCourseys' motion on September 5, 2012. CP 2924–25. In denying the motion, the Court wrote (at CP 2924–25):

> This case, *Lane Powell v. DeCoursey*, involves Plaintiff law firm's claim that Defendants have not paid the fees due Plaintiff for legal services rendered in a lawsuit involving Windermere Real Estate Company. Defendants, while they were being represented by Plaintiff, prevailed in that lawsuit and received a judgment in their favor that has now been satisfied as between Windermere and the parties to this action and concerning which all appellate remedies have been exhausted. As Plaintiff points out, both the Plaintiff and Defendants in this case were adverse to Windermere in the previous action.
>
> Plaintiff's complaint in the case before this court makes no claims for relief from Windermere, nor does the Defendants' comprehensive and detailed Answer, Affirmative Defenses and Counterclaims. The present case was when filed, and remains today, an action brought by a law firm against a former client that it contends is obligated to it for unpaid fees. Windermere is not now, and never has been a party to this action.

Notwithstanding the trial court's order, Mrs. DeCoursey moved

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[3] Their arguments relied on positions that the trial court had properly rejected on numerous occasions, misstated the record, and ignored contrary evidence. For example, they claimed the trial court allowed Lane Powell to violate court rules but ignored the fact that the trial court had allowed them to file overlength briefs and otherwise violate court rules (including even on reply for their motion to recuse). *E.g.*, CP 36–56, 189–96, 483–88, 2858–65, 5176–83. They also suggested—incorrectly—that the trial court held them in contempt for posting a bond and appealing, when in fact, they were held in contempt for failing to comply with numerous court orders. CP 2712.

again seeking recusal and to vacate all of Judge Eadie's orders. CP 5100–72. This motion was even more outlandish than the last. She demanded that the judge "apologize for using his status as a King County Superior Court judge to commit fraud." CP 5100. She accused him of using "his office to pursue a private agenda." CP 5100–01. She claimed that the trial court "functioned as a surrogate for Lane Powell and surreptitiously acted as a member of its legal team." *Id.*; *see also* CP 5109. She described the proceedings as a "Kangaroo Court." CP 5101, 5106, 5110. She again suggested that the entire King County Superior Court system was engaged in a conspiracy to stack the court against her "to achieve a pre-determined result," suggesting that "a fixer arranged [the] case assignment" to the trial court. CP 5102. She claimed that Lane Powell and the trial court were sending secret signals to each other from the outset and that Lane Powell was "directing the court" and "calling the shots." *Id.*, 5105. She stated that the trial court was "relying on advice given by Windermere's lawyers." CP 5104. She suggested, based on a bizarre interpretation of the record, that the trial court and Lane Powell had engaged in ex parte contact on multiple topics. CP 5105, 5107. She claimed that her own conduct in disregarding and refusing to comply with court orders was somehow "contrived" by Lane Powell and the trial court so that the court would have an excuse to strike her counterclaims and affirmative defenses. CP

5108. None of these claims were supported by appropriate evidence. The trial court likewise denied this motion. CP 5508–09.

L. Lane Powell Moves for Summary Judgment on its Breach of Contract Claim

Because the DeCourseys' affirmative defenses and counterclaims had been stricken, and because they had conceded in connection with their discretionary review attempt that "all of their defenses to the [] lawsuit are contained within their counterclaim[s] and affirmative defenses," CP 3393, and that "the case for [the] DeCourseys is over for all practical purposes," CP 3612, Lane Powell moved for judgment on the pleadings. CP 2431–41. The trial court denied that motion, seeking to give the DeCourseys a chance to pursue any defenses (as opposed to affirmative defenses) that may remain. CP 2878.

Lane Powell moved for summary judgment. CP 3349–4090. By that time, all that remained for resolution was, in essence, a simple breach of contract claim for Lane Powell's unpaid invoices in which all material facts were either admitted or undisputed.

Lane Powell set forth undisputed evidence establishing the elements of its claim against the DeCourseys. It showed that the parties entered into a written agreement in which Lane Powell agreed to represent the DeCourseys in the underlying lawsuit and the DeCourseys, in turn,

agreed to pay Lane Powell for that work. CP 3353–54, 3356, 3362. It showed that the parties agreed to a modification of the original Fee Agreement in which Lane Powell agreed to "forbear for a reasonable time on collecting the balance" due and owing. CP 3355. It showed that the DeCourseys, despite Lane Powell's (extremely successful) work on their behalf, refused to honor their obligation to pay, thus damaging Lane Powell. CP 3354–57, 3363–65. Because the contract was one for legal fees, Lane Powell also addressed the reasonableness of its fees, arguing that the DeCourseys were estopped from claiming that the fees charged were unreasonable because, to a large extent, the fees had already been found reasonable in the underlying lawsuit. CP 3365. As to those not already reviewed, Lane Powell showed that the fees were reasonable as a matter of law based on evidence that was not in dispute. CP 3367–75.

The DeCourseys did not oppose the merits of the motion—and did not dispute the reasonableness of Lane Powell's fees. CP 4410–31. Instead, they raised baseless arguments that were either based on deceptions or legally irrelevant. For example, they claimed that the parties did not have a written fee agreement because the copy submitted (in error) was not a signed version. CP 4411–12. But the DeCourseys themselves had produced and relied on the signed version. CP 4767, 4777–82. The DeCourseys complained that the hourly rates had increased over the four

years of representation. CP 4415–16. But they ignored the fact that the Fee Agreement allowed that very thing. CP 4778. They claimed that Lane Powell's attorneys had billed them for time spent making photocopies. CP 4416–17. But the DeCourseys ignored the fact that the actual invoices show that ***none*** of lawyers billed for such activities. CP 4768 n.6.

And, pertinent to this appeal, ignoring the actual language of the Amendment and that their counterclaims and affirmative defenses had been stricken, they claimed that Lane Powell was obligated to continue to forbear until the Judgment Debtors paid the judgment. CP 4419. The DeCourseys, however, offered no response to the obvious point. No reasonable jury could conclude that Lane Powell did not forebear for a reasonable time, the actual requirement of the parties' agreement. Lane Powell waited two-and-a-half years from their last payment. CP 4767. It waited an additional two months after being fired. *Id.* It continued to wait even when the DeCourseys threatened to pursue personal and class-based claims against the firm and its lawyers individually. CP 1463.

M. The Court Grants Lane Powell's Summary Judgment Motion

The trial court granted Lane Powell's summary judgment motion and ordered that judgment be entered against the DeCourseys "as to those attorney's fees and costs Lane Powell claims as damages that have [been] found reasonable by another court" in the underlying lawsuit. CP 5174. It

reserved ruling pending further briefing on the hours that "have ***not*** already been found reasonable" by another court. CP 5174–75.

The parties submitted additional briefing that was intended to address the reasonableness of the $152,256.10 in fees and small amount of costs that had not been previously reviewed and found reasonable. Lane Powell carefully presented the issues to the trial court for evaluation. CP 4882–5099. It showed that of those fees, roughly half were paid without protest by the DeCourseys years ago. CP 4883. Lane Powell described some of the reasons justifying the fees in the underlying lawsuit, including the fact that the Judgment Debtors' strategy was, in part, to seek to introduce at trial the DeCourseys' conspiracy theory views (including their views of Israeli involvement in the 9/11 attacks) published online under Mrs. DeCourseys' maiden name Carol A. Valentine. CP 4884–85; *see also* CP 3698–99, 5075, 5070 (DeCourseys describing their conspiracy theory that "9-11 was an inside job masterminded by Jews"), 5352–62.

The DeCourseys—again—did not meaningfully respond. CP 5176–5318. They again claimed that there should be no evaluation for reasonableness and did not identify a single time entry with which they took issue. CP 5177, 5342. Thus, instead of addressing the issue at hand, they largely re-hashed their previously-rejected arguments or came up with new (equally baseless) arguments. For example, they argued that be-

cause it was Lane Powell on their behalf that argued in favor of a fee award in the underlying lawsuit (and not them directly), they were not estopped from contesting the fees previously awarded. CP 5180–81.

On December 14, 2012, the trial court entered Findings of Fact and Conclusions of Law. CP 5522–27. The trial court found that, over the course of the parties' attorney-client relationship and pursuant to a binding written contract, Lane Powell charged the DeCourseys a total of $639,232.26 for attorneys' fees. CP 5524–25. It found that the DeCourseys were estopped from contesting the amounts that had been held reasonable in the underlying litigation. CP 5525. Of the amounts not paid and not previously reviewed by another court, the trial court found these amounts reasonable as well. CP 5525–26. The court also found that the DeCourseys had paid Lane Powell $313,808 for their services, and that $325,424.26 was still due and owing. CP 5524. With the additional $97,251.19 in interest (nine percent contractual rate), the total judgment amount entered was $422,675.45. CP 5523. The trial court specifically found that "Windermere Real Estate has no interest, direct or indirect, in the determination of the reasonableness of these fees or the hourly rates charged." CP 5527.

The DeCourseys' motion for reconsideration of the summary judgment order was denied. *See* CP 5543–59, 5760–62. Final judgment

was entered in this case on March 8, 2013, on the merits. CP 6158–61. A second judgment was entered on March 28, 2013, for the sanctions awards. CP 6162–64. The DeCourseys appealed. CP 5851–68, 6165–77.

IV. ARGUMENT

A. Standard of Review and Appellants' Procedural Errors

The Washington Code of Judicial Conduct ("CJC"), the appearance of fairness doctrine, and due process only require disqualification of a judge who is biased against a party or whose impartiality may reasonably be questioned. *In re Welfare of R.S.G.*, 174 Wn. App. 410 ¶ 39, 299 P.3d 26, 35 (2013). "For a judge to be biased or prejudiced against a person's cause is to have a preconceived adverse opinion with reference to it, without just grounds or before sufficient knowledge. It is a particular person's state of mind that affects his opinion or judgment." *In re Application of Borchert*, 57 Wn.2d 719, 722, 359 P.2d 789 (1961). Trial courts are presumed to perform their functions without bias or prejudice. *E.g., R.S.G.*, 174 Wn. App. ¶ 39, 299 P.3d at 35.

Except in situations involving a clear and nondiscretionary duty to recuse, a trial court's ruling on a recusal motion is reviewed for an abuse of discretion. *State v. Chamberlin*, 161 Wn.2d 30, 37 n.4, 162 P.3d 389 (2007); *Tatham v. Rogers*, 170 Wn. App. 76, 87, 283 P.3d 583 (2012); *Kauzlaurich v. Yarbrough*, 105 Wn. App. 632, 654, 20 P.3d 946 (2001);

State v. Bilal, 77 Wn. App. 720, 722, 893 P.2d 674 (1995). In addition, the claimant must demonstrate actual prejudice. *R.S.G.*, 174 Wn. App. ¶ 38, 299 P.3d at 35.

Although a trial court's recusal decision is discretionary, judges are prohibited from withdrawing from a case absent a valid reason. In Washington and elsewhere, "'[i]t is the duty of a judge ... to exercise the judicial functions duly conferred on him by law, and he has no right to disqualify himself in the absence of a valid reason.'" *Williams & Mauseth Ins. Brokers, Inc. v. Chapple*, 11 Wn. App. 623, 627, 524 P.2d 431 (1974) (citation omitted) (reversing recusal decision premised upon judge's family member's connection to one of the parties). "The mere possibility of conscious or unconscious bias or prejudice is not enough" to support recusal. *Id.* at 630. Instead, as one treatise explains:

> A judge should try to avoid recusal consistent with the judge's obligation to the court system. ***Indeed, where the standards governing disqualification have not been met, disqualification is not optional; rather, it is prohibited. There is as much obligation upon a judge not to recuse himself or herself when there is no occasion to do so as there is for the judge to do so when there is occasion for such action.***

48A C.J.S. JUDGES § 291 (Sept. 2013 database) (emphasis added); *see also* CJC 2.7 (requiring judges to hear cases unless recusal is required).

A reviewing court will not find a violation of the appearance of

fairness doctrine absent "[e]vidence of a judge's actual or potential bias[.]" *Chamberlin*, 161 Wn.2d at 37 & n.4; *State v. Post*, 118 Wn.2d 596, 619 & n.9, 826 P.2d 172, 837 P.2d 599 (1992). Speculation will not suffice and potential bias is assessed under an objective, "reasonable person" standard. *Tatham*, 170 Wn. App. at 93–96.

Review of a claim that a judge's bias violated due process is even more exacting. Such claims are limited to "extraordinary situations." *Id.* at 90–91 (citations omitted).

In addition, claims of judicial bias must be carefully scrutinized when, as here, the claims follow adverse rulings and/or otherwise appear to be tactical in nature. 48A C.J.S. JUDGES § 221 (Sept. 2013 database); *see Bilal*, 77 Wn. App. at 722.

The DeCourseys ignore these well-settled standards and fail to make any showing of prejudice or proffer evidence of actual or potential bias requiring recusal. Their appeal is premised largely if not entirely on arguments and claims never made to the trial court. Neither of the DeCourseys' recusal motions cited a single case, nor did the DeCourseys ever assert a due process claim. CP 2007–16, 2858–65, 5100–11, 5388–92. RAP 2.5(a)(3) offers the DeCourseys no relief regarding their belated constitutional claim, as they fail to demonstrate manifest error, i.e., error with plausible practical or identifiable prejudicial consequences. *State v.*

Grimes,165 Wn. App. 172, 185–86, 267 P.3d 454 (2011), *rev. denied,* 175 Wn.2d 1010 (2012); *State v. Abuan*, 161 Wn. App. 135, 146, 257 P.3d 1 (2011). Finally, claims such as those made by the DeCourseys are properly raised in a CR 60(b) motion. *Tatham*, 170 Wn. App. at 76. The DeCourseys failed to use that procedure or satisfy its burdens.

B. The DeCourseys' Appeal is Simply An Attempt to Get a "Do-Over" On An Unfavorable Resolution

Throughout this case, the DeCourseys have attempted to unwind virtually all of the trial court's orders in an endless litany of tactical delaying maneuvers. They have sought reconsideration of virtually every trial court order—including one that was favorable to them—in this entire case. CP 234–303, 304–73, 708–49, 979–1027, 2136–241, 2242–98, 2914–21, 3337–47, 4820–23, 4853–67, 5510–21, 5543–46. None of those motions has been granted. They sought discretionary review of virtually all trial court orders entered in the case, twenty-two in all, including several discovery orders requiring them to produce documents they claimed were privileged, to deposit money into the court registry, and the orders finding them in contempt of court and assessing discovery sanctions for deliberate non-compliance with the trial court's orders. CP 1309–10, 2101–02, 3599–624. Although both this Court and the trial court denied their (multiple but belated) requests for stays, they still refused to comply with any

of the orders. When this Court denied discretionary review, they asked the trial judge to recuse himself and vacate all previous orders in the case. *See supra* Section III.K. The trial court denied those motions as well—indeed, they have no merit. *Id.* Now the DeCourseys ask this Court to wipe the slate clean due to an alleged bias or prejudice toward them solely by virtue of the trial judge's wife's part time employment with a non-party.

To the extent any prejudice or bias exists in this case, it is limited to the bias the DeCourseys have against the presiding judge, Lane Powell, and others. Unfortunately, the DeCourseys goal in this litigation was never to address the merits—to resolve a dispute regarding attorneys' fees. The DeCourseys have used their unbridled vitriol for anybody and everybody who disagrees with them in an attempt to cloud the material issues in this case, in the hope they will not have to pay Lane Powell amounts that are indisputably owe. In short, the DeCourseys do not like the fact that they must comply with court orders and pay Lane Powell, 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) restart their campaign of delay should be denied. Indeed, their motion was a clear tactical maneuver that, itself, is prohibited by the very rules on which they rely.

C. Judge Eadie Did Not Abuse His Discretion in Denying the Recusal Motions

After running out of other tactics to delay the case, the DeCourseys tried to unwind the trial court's orders by moving for Judge Eadie's recusal. Ignoring that his rulings reflected the fact that their legal positions were untenable and they had repeatedly disobeyed court orders, the DeCourseys argued that Judge Eadie ruled against them because his wife had earned as little as $4,000 and certainly less than $20,000[4] as an independent broker affiliated with Windermere in 2011. CP 2707–16, 5100–11; *see* CP 2736. The DeCourseys are vehemently anti-Windermere and the underlying lawsuit was premised on acts by a Windermere broker for which Windermere was vicariously liable. Mrs. Eadie had no connection to those allegations and did not work in the same office as the broker sued by the DeCourseys and Lane Powell.

The DeCourseys cited multiple Judicial Canons in their motion, but none applied to the circumstances at issue or supported recusal on any basis as tenuous as a judge's wife's part-time employment as an independent contractor by a non-party. The DeCourseys also cited RCW 4.12.050, but that statute requires a party seeking removal of a judge to demonstrate actual prejudice when, as here, the judge has already made discretionary

[4] Mrs. Eadie earned more in earlier years, but this case was not filed until 2011. *See* CP 2725–34.

rulings. *E.g.*, *State v. Hawkins*, 164 Wn. App. 705, 713, 265 P.3d 185 (2011), *rev. denied,* 173 Wn.2d 1025 (2012). Lane Powell pointed out those critical facts in its opposition to the DeCourseys' motion. CP 2831–35. In reply, the DeCourseys resorted to name-calling and accusations that Lane Powell and its attorneys were liars; that Lane Powell had worked with Windermere to its former clients' (the DeCourseys) disadvantage in the underlying case; and that Judge Eadie's rulings were:

> [S]o irrational, relentless, and prejudiced, and have departed so far from the accepted and usual course of judicial proceedings, it is hard to avoid the conclusion that, with the assignment of this case to Judge Eadie, the process was intended from the beginning to be an ambush.

CP 2864. Tellingly, the DeCourseys do not cite any "irrational, relentless, and prejudiced" rulings in their brief to this Court.

Judge Eadie denied the motion to recuse, explaining:

> This case, *Lane Powell v. DeCoursey*, involves Plaintiff law firm's claim that Defendants have not paid the fees due Plaintiff for legal services rendered in a lawsuit involving Windermere Real Estate Company. Defendants, while they were being represented by Plaintiff, prevailed in that lawsuit and received a judgment in their favor that has now been satisfied as between Windermere and the parties to this action and concerning which all appellate remedies have been exhausted. As Plaintiff points out, both the Plaintiff and Defendants in this case were adverse to Windermere in the previous action.
>
> Plaintiff's complaint in the case before this court makes no claims for relief from Windermere, nor does the Defendants' comprehensive and detailed Answer, Affirmative Defenses and Counterclaims. The present case was

> when filed, and remains today, an action brought by a law firm against a former client that it contends is obligated to it for unpaid fees. Windermere is not now, and never has been a party to this action.

CP 2924–25.

Just a few months later, in December 2012, Mrs. DeCoursey brought a motion titled: "Motion to Recuse Re: Judge's Fraud on Court and People of Washington." CP 5100. She asserted that Judge Eadie had:

> used his office to pursue a private agenda and attack critics of [Windermere]. He has knowingly and repeatedly allowed Lane Powell ... to lie and has forwarded their known lies as judicial verities. He has functioned as a surrogate for Lane Powell and surreptitiously acted as a member of its legal team.... [H]e has made untruthful statements to mask his prejudice and his conflict of interest. The proceedings in this case fit the definition of Kangaroo Court.

CP 5101. She additionally accused the King County Superior Court of deliberately assigning Lane Powell's fee collection action to Judge Eadie "to achieve a pre-determined result." CP 5102. She accused the judge of following directions from Lane Powell's lawyers and of lying about the nature of his wife's employment. CP 5102–11. In her Reply, she articulated the fundamental premise of the judicial bias claim, alleging that:

> Judge Has Personal Interest In Outcome. LP says of the present lawsuit that Windermere "has nothing to do with the attorney's fees DeCourseys [allegedly] owe Lane Powell." (Rsp. PI, 21; P2, 1-2) Certainly Windermere is not a party. But the issue is: Does Judge have a pony in the race? The answer is "Yes." Judge and his Wife enjoy economic benefits from Windermere and its continued preeminence in real estate sales. Folks who sue Windermere and publicize the government corruption that shields the company

> from honest competition hurt Windermere. So Judge certainly has an economic interest in sending a public message: "If you sue Windermere, even if you win, you will end up with a net loss. So don't sue Windermere." Judge also gets to scratch his grudge against critics of the company that gives him economic benefits.

CP 5389. Of course, Mrs. DeCoursey proffered no evidence supporting her allegations, other than the fact that Mrs. Eadie worked as an independent contractor/real estate agent affiliated with Windermere; a job that yielded her less than $20,000 in 2011.

In stark contrast to the DeCourseys' invective, the trial court here showed great patience with the DeCourseys. The trial court only struck the DeCourseys' counterclaims and affirmative defenses as a last resort. *See supra* Section III.H. First, the DeCourseys refused to comply with virtually any of the trial court's orders. *Id.* Second, after the DeCourseys were held in contempt and the trial court had imposed discovery sanctions, the DeCourseys still refused to comply. *Id.* Third, after both the trial court and the Court of Appeals had denied requests for a stay related to the orders, the DeCourseys still refused to comply. *Id.* Fourth, after receiving inquiries regarding their intentions for compliance, the DeCourseys refused to even respond. *Id.* Only then did the trial court exercise its discretion to strike the DeCourseys' counterclaims and affirmative defenses. *Id.* When the DeCourseys sought reconsideration, the trial court made clear that it would have granted the request had the DeCourseys made any at-

tempt to comply in the interim, but they had not. CP 3566–67.

A trial court's ruling on a motion to recuse is reviewed for abuse of discretion. A court abuses its discretion when its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. *Tatham*, 170 Wn. App. at 87. Based on the evidence upon which the DeCourseys relied—Judge Eadie's wife's independent contractor employment by a non-party—and given the evidentially unfounded related arguments for recusal they presented (fraud, court-stacking, lies, and collaboration between Judge Eadie and Lane Powell), there is no basis to find that Judge Eadie abused his discretion in denying their motions. The DeCourseys do not claim otherwise on appeal. Nor have they shown any actual prejudice as a result of Judge Eadie's wife's employment—a burden they must meet when, as here, they failed to timely file an affidavit of prejudice. *R.S.G.*, 174 Wn. App. ¶ 38, 299 P.3d at 35.[5]

[5] The DeCourseys try to excuse their failure to file a timely affidavit of prejudice by arguing that they would have filed one if the judge disclosed his alleged disqualification at the outset. Br. at 31. Of course, if Judge Eadie thought a disqualifying conflict of interest was present, he would have disclosed it. Indeed, throughout the case, Judge Eadie has (correctly) maintained that no disqualifying interest exists. Further, any fault as to the "late discovery" is their own. The Public Disclosure Commission filings on which they rely are dated April 10, 2011, April 15, 2010, April 3, 2009, and April 16, 2007. This case has been pending since October 2011, and it was only after the court entered orders against them and the case was coming to a close did they "discover" that Judge Eadie's wife is a Windermere agent. They 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, 905 P.2d 355 (1995); *State v. Carlson*, 66 Wn. App. 909, 916, 833 P.2d 463 (1992).

Indeed, not only did Judge Eadie properly exercise his discretion in denying the DeCourseys' recusal motions, that was the only appropriate result given the motions' patently tactical nature. "[A] defendant who has reason to believe that a judge should be disqualified must act promptly ... and 'cannot wait until he has received an adverse ruling and then move for disqualification.'" *In re Swenson*, 158 Wn. App. 812, 818, 244 P.3d 959 (2010). Thus a party cannot use a recusal motion as a tactical device to avoid the effect of an adverse ruling, nor can a party force recusal by its own misbehavior. *Id.; see also Bilal,* 77 Wn. App. at 722; 48A C.J.S. JUDGES § 221, *supra.* The DeCourseys' recusal efforts fail under both tenets. Their recusal motions sought to avoid the effects of adverse rulings—rulings entered as a result of their own misconduct—and were premised on such wild (wholly unsupported) accusations of judicial impropriety as to appear to be designed to force Judge Eadie to remove himself.

The DeCourseys also failed to identify any evidence from which a court could find that Judge Eadie had a "preconceived adverse opinion" regarding this fee dispute/legal malpractice case. Although they claim he had full knowledge of the details of their anti-Windermere campaign early on in this litigation, that is not the case. Lane Powell's complaint offered no details regarding the underlying case and noted Windermere's involvement only by a shorthand reference. CP 1–6. The answer and coun-

terclaims likewise did not delve into the merits. CP 7–35. Instead, it focused on Windermere's lawyers' cost-enhancing litigation tactics. *Id.*

Then, in a motion improbably seeking to invoke the attorney-client privilege as a basis for refusing to answer discovery propounded by Lane Powell, the DeCourseys cited the publicity generated by their anti-Windermere activities (claiming that publicity prevented them from identifying individuals with knowledge of the instant fee dispute/malpractice litigation). CP 50–51. But the DeCourseys also advised the Court that:

> Lane Powell has complained of breach of contract, *quantum meruit,* and lien foreclosure. No person not a party to the contract or a witness to performance could supply information that would affect a verdict on this matter. ***It does not matter what DeCourseys have told anyone, what anyone else knows, or what anyone else has witnessed the record of the written agreement and of Lane Powell's performance is objective fact and above personal opinion***.

CP 52 (emphasis added).

In short, from the onset, the DeCourseys have claimed that matters related to their anti-Windermere campaign are irrelevant to this litigation. Yet now they claim that the irrelevant assertions made in their motion for a protective order required Judge Eadie to recuse himself simply because his wife was affiliated with Windermere. Not surprisingly, the DeCourseys cite no authority supporting that claim. Nor do they explain how, at that early stage in the proceedings, their disclosures would have

caused Judge Eadie to develop "a preconceived adverse opinion" regarding their dispute with Lane Powell "without just grounds or before sufficient knowledge." *Borchert*, 57 Wn.2d at 722. That omission, like their failure to proffer anything but speculation supporting their claim of bias and their utter failure to demonstrate prejudice, is dispositive.

On appeal, the DeCourseys nevertheless claim Judge Eadie had a duty to recuse himself because the CJC requires disqualification of a judge who is biased against a party or whose "impartiality might reasonably be questioned." CJC Rule 2.11(A).[6] The CJC defines "impartiality" as the "absence of bias or prejudice in favor of, or against, particular parties, as well as maintenance of an open mind in considering issues that may come before a judge." CJC, Terminology. The DeCourseys claim this case is one in which a judge's "impartiality might reasonably be questioned" because under the CJC, such situations include circumstances where: "The judge knows that ... the judge's spouse ... is: ... a person who has more than a de minimus interest that could be substantially affected by the proceeding." CJC Rule 2.11(A)(2)(c).

The problem with that argument is that Mrs. Eadie's interest in Windermere—a company for which she works as an independent contrac-

[6] Court rely on the CJC for disciplinary purposes only. In this regard, the DeCourseys are doing precisely what the CJC prohibits: using it to "obtain [a] tactical advantage[] in proceedings before a court." CJC, Scope, note 6.

tor—is not "more than a de minimus one" and her interest in Windermere could in no way be "substantially affected" by a proceeding in which Windermere is not even a party. Moreover, the DeCourseys did not cite this subsection to the trial court. "RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them." *State v. Guzman Nunez*, 160 Wn. App. 150, 157, 248 P.3d 103 (2011), *aff'd,* 174 Wn.2d 707, 285 P.3d 21 (2012).

D. The DeCourseys have Failed to Demonstrate a Violation of the Appearance of Fairness Doctrine

The DeCourseys' primary claim is that Judge Eadie's continuing involvement with their case violated the appearance of fairness doctrine. The doctrine does not reach nearly so far as they assert. Recent decisions confirm that the doctrine is satisfied if a reasonably prudent and disinterested person would conclude—based on the all of the relevant facts—that "all parties obtained a fair, impartial, and neutral hearing." *Tatham*, 170 Wn. App. at 96. Moreover, because trial courts are presumed to perform their functions regularly and properly without bias or prejudice, '"[a] party asserting a violation of the [appearance of fairness] doctrine must produce sufficient evidence demonstrating bias, such as personal or pecuniary interest on the part of the decision maker; mere speculation is not enough.'" *Id.* (quoting *In re Pers. Restraint of Haynes*, 100 Wn. App. 366, 377 n.23,

996 P.2d 637 (2000)).

The DeCourseys are veteran conspiracy theorists. Their attacks on Windermere demonstrate that fact, as do the allegations made in their motions to recuse and elsewhere—allegations that the Superior Court deliberately assigned this matter to Judge Eadie and that Judge Eadie and Lane Powell, and Lane Powell and Windermere, are all in cahoots. *See supra* Section III.J–K. Their suspicions regarding Judge Eadie are not the suspicions of reasonably prudent persons. Indeed, even if one were to believe that Judge Eadie was sympathetic toward Windermere (a belief unsupported by any evidence whatsoever and which Judge Eadie denied), it defies credulity to think that Judge Eadie would be inclined to favor Lane Powell over the DeCourseys, as it was Lane Powell lawyers who tried the case against Windermere and succeeded in obtaining a significant judgment against it. *See supra* Section III.D.

Given these facts, a reasonable person could conclude that Judge Eadie favored Lane Powell over the DeCourseys only if—as the DeCourseys attempted to do with their accusations of a kangaroo court, secret signals, lies, and the deliberate assignment of this case to a "Windermere sympathizer"—Lane Powell and Judge Eadie were somehow working together. The DeCourseys point to no evidence of such collaboration and none exists. That, coupled with the presumption of regularity de-

scribed above, is dispositive. *Tatham*, 170 Wn. App. at 93–96 (party claiming violation of appearance of fairness doctrine must produce evidence demonstrating bias, such as a personal or pecuniary interest; mere speculation is not enough).

Not only is the DeCourseys' claim evidentially insufficient, they cite no case supporting finding a violation of the appearance of fairness doctrine under the facts at issue here. While the DeCourseys' appellate brief cites many cases and makes judicious use of carefully excerpted quotations, a review of their cases establishes that none involve a finding of an appearance of fairness violation based a judge's spouse deriving modest independent contractor income from a non-party whose actions are not in issue in the case being decided. Broad principles such as those upon which the DeCourseys rely are significant only when examined in context. They carefully avoid delving into the facts of the cases on which they rely.

Several cases they cite in which the reviewing court found an appearance of fairness violation involved situations in which the judge or hearing officer could directly benefit if he or she ruled a certain way. *See Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. Wash. State Human Rights Comm'n*, 87 Wn.2d 802, 557 P.2d 307 (1977) (tribunal member presided over hearing while her employment application to Commission, a party, was pending); *Swift v. Island Cty.*, 87 Wn.2d 348, 552 P.2d 175

(1976) (planning commissioner was chairman of and stockholder in bank that would benefit from approval of plat); *Buell v. City of Bremerton*, 80 Wn.2d 518, 495 P.2d 1358 (1972) (planning commission chair owned property that would appreciate as a result of rezone ruling); *Hayden v. City of Port Townsend*, 28 Wn. App. 192, 622 P.2d 1291 (1981) (commission's chair's employer would receive substantial benefit from rezone).

Others involve judges who made ex parte inquiries about a party. *E.g.*, *Sherman*, 128 Wn.2d 164 (judge directed intern to inquire about chemical dependency monitoring process for physician whose wrongful termination claim was before the court); *State v. Romano*, 34 Wn. App. 567, 662 P.2d 406 (1983) (judge sought to confirm defendant's statements regarding his income by making independent inquiry); *see also In re Sanders*, 159 Wn.2d 517, 145 P.3d 1208 (2006) (justice had ex parte conversations with sex offenders whose cases were pending before Supreme Court); *State v. Madry*, 8 Wn. App. 61, 504 P.2d 1156 (1972) (judge participated in an investigation that found defendant's hotel was a center of prostitution).[7]

The remaining cases upon which the DeCourseys rely involved

[7] Other decisions upon which the DeCourseys rely either rejected appearance of fairness violation claims or affirmed the trial court's recusal ruling. *State v. Gamble*, 168 Wn.2d 161, 187–88, 225 P.3d 973 (2010); *Diimel v. Campbell*, 68 Wn.2d 697, 698, 414 P.2d 1022 (1966); *Nationscapital Mortgage Corp. v. State*, 133 Wn. App. 723, 758–62, 137 P.3d 78 (2006).

claims of a pre-existing relationship between the court or tribunal member, and a party or its attorney. *State ex rel. Bernard v. Bd. of Educ.*, 19 Wn. 8, 52 P. 317 (1898) (party alleged that tribunal member "was a personal enemy," "was a prime mover in having the charges preferred or prosecuted," and his "mind was made up" before the case commenced); *Tatham*, 170 Wn. App. 76 (trial judge had close personal relationship with party's attorney). No such relationship exists—or is alleged—here.

Tellingly, none of these decisions involve an alleged appearance of fairness violation based on the potential of an indirect benefit to a marital community (as opposed to a benefit to the trier himself); and none involve bias allegations premised on the trier's alleged connection to a non-party. That, alone, is grounds for affirming Judge Eadie's rulings; rulings that (with one exception) the DeCourseys do not challenge on appeal. The DeCourseys' failure to challenge the underlying rulings that they claim (untenably) were infected by bias strongly suggests that they recognize that Judge Eadie's adverse rulings reflect the legal consequences of their positions, not some bias of the trial court. *In re Marriage of Wallace*, 111 Wn. App. 697, 706, 45 P.3d 1131 (2002).

The appearance of fairness doctrine (as well as the CJC and due process) applies only if the court's impartiality may reasonably be questioned. *R.S.G.*, 174 Wn. App. ¶ 39, 299 P.3d at 35; *Wolfkill Feed & Ferti-*

lizer Corp. v. Martin, 103 Wn. App. 836, 841, 14 P.3d 877 (2000). "For a judge to be biased or prejudiced against a person's cause is to have a preconceived adverse opinion with reference to it, without just grounds or before sufficient knowledge. It is a particular person's state of mind that affects his opinion or judgment." *Borchert*, 57 Wn.2d at 722. The DeCourseys cite no evidence that Judge Eadie had a preconceived adverse opinion of them, or a preconceived favorable opinion regarding Lane Powell (or Windermere). Indeed, Judge Eadie affirmed on the record that he was not biased in any way in favor of Windermere, let alone Lane Powell: "I don't have any prejudice or bias in favor of Windermere.... I'm not defensive for Windermere." RP at 58–59. Recognizing the DeCourseys' concerns, he assured them that if his review required "evaluating the litigation that involved Windermere directly and might involve then some evaluation of Windermere's conduct," then he would consider recusing himself at that point.[8] *Id.* Judge Eadie's approach was correct. Under these facts he had no duty to recuse himself, and the appearance of

[8] Of course, none of the issues before Judge Eadie involved an evaluation of Windermere directly, and thus there was no need for recusal. Moreover, Judge Eadie's assurances were significant. In *Wolfkill,* appellants claimed the trial judge could not be impartial because their opponent's brief contained inadmissible information. 103 Wn. App. at 840–41. The court assured the parties it would ignore the inadmissible information. *Id.* at 841. The Court of Appeals held that appellant's "claim of possible bias is purely speculative" and that the trial court did not abuse its discretion in denying his motion for recusal. *Id.* Here, as in *Wolfkill*, the DeCourseys' trial court allegations of prejudice or bias were belied by Judge Eadie's assurances and are purely speculative.

fairness doctrine was not in any way implicated by his involvement.

E. The DeCourseys have Failed to Show a Due Process Violation

For the first time on appeal, the DeCourseys assert that Judge Eadie's refusal to recuse himself violated due process. Their claim fails for the fundamental reason that constitutional claims can be raised for the first time on appeal only if the appellant demonstrates manifest error, i.e., error with practical or identifiable prejudicial consequences, that justifies reviewing this claim of error for the first time on appeal. RAP 2.5(a)(3); *Grimes*, 165 Wn. App. at 185–86; *Abuan*, 161 Wn. App. at 146. As explained above, the DeCourseys have not, and cannot, demonstrate prejudice. While Judge Eadie ruled against them, he did so for sound legal and evidentiary reasons—including the DeCourseys' ongoing documented refusal to comply with court orders requiring them to produce discovery.

In any event, no due process violation occurred. A party attempting to show a due process violation arising from a trial judge's failure to recuse faces a very high burden. As the *Tatham* court recently explained:

> Despite the breadth with which the U.S. Supreme Court has expressed the right to a "'fair trial in a fair tribunal,'" "***most questions concerning a judge's qualifications to hear a case are not constitutional ones***...." "Instead, these questions are, in most cases, answered by common law, statute, or the professional standards of the bench and bar."
> ...
>
> *Caperton* [*v. A.T. Massey Coal Co.*, 556 U.S. 868, 877, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009)], reaffirmed ***that***

> ***"'most matters relating to judicial disqualification [do] not rise to a constitutional level,'" and that "[p]ersonal bias or prejudice 'alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause.'"*** It emphasized that state codes of judicial conduct provide more protection than due process requires, and that "***most disputes over disqualification will be resolved without resort to the Constitution.***" ... "***A due process review of a challenged failure to recuse would be limited to cases of extraordinary support***"...

170 Wn. App. at 90–92 (emphasis added; internal citations omitted). The DeCourseys' claims in no way meet this burden.

Nor do any of the cases the DeCourseys cite support their due process claim. In *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 100 S. Ct. 1610, 64 L. Ed. 2d 182 (1980), for example, a due process violation was alleged because sums collected as civil penalties were returned to the department that assessed them. The Court rejected that assertion, explaining that:

> [I]t is exceedingly improbable that the ... enforcement decisions would be distorted by some expectation that all of these contingencies would simultaneously come to fruition. We are thus unable to accept appellee's contention that, on this record and as presently administered, the reimbursement provision violates standards of procedural fairness embodied in the Due Process Clause.

446 U.S. at 252. The facts at issue here involve a similarly remote connection. It is "exceedingly improbable" that Judge Eadie's decisions in a case involving Lane Powell and its former clients would be "distorted by" a concern and/or interest in his wife's part time employment by a non-party. It is even more improbable that Judge Eadie's decisions would be

distorted to disfavor the DeCourseys, given that Lane Powell represented them and its efforts garnered a substantial judgment against Windermere.

That the DeCourseys' due process claim is untenable is also shown by their reliance on cases involving fundamentally different facts than those here.[9] In *Caperton*, for example, the appellate judge at issue had received over $3 million in campaign contributions from one of the parties in the matter being heard. 556 U.S. at 2256–57. In *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 824, 106 S. Ct. 1580, 89 L. Ed. 2d 823 (1986), the justice who authored an opinion establishing a right to punitive damages and easing other restrictions on insurance bad faith actions, was at the same time pursuing bad faith litigation against his own insurer. The justice's opinion "had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case." *In re Murchison*, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955), involved a judge who presided over a grand jury proceeding, formed a belief that certain witnesses had perjured themselves and/or were insolent, and then later presided over those witnesses' criminal contempt proceeding. As expressly recognized by our Supreme Court, "[t]he judge in *Murchison* became 'part

[9] The remaining cases upon which the DeCourseys rely were not decided on due process grounds and thus are inapposite to their due process claim. *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988); *Port City Constr. Co. v. City of Mobile*, 609 F.2d 1101 (5th Cir. 1980).

of the prosecution and assumed an adversary position.'" *Chamberlin*, 161 Wn.2d at 39 (quoting *Murchison, supra*). In *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972), the mayor of a town that derived much of its income from fines and penalties also presided as judge over certain fine-generating offenses.

Here, the DeCourseys premise their due process claim on speculation that the judge's wife's part-time employment by a non-party somehow affected his decisions. But they do not cite a single case that supports finding a due process violation here, and *Tatham* establishes that such claims require far more extreme circumstances than those here. Facts, not speculation, are required to show a denial of due process and overcome the presumption of propriety afforded to judges. *Chamberlin*, 161 Wn.2d at 38. The DeCourseys have not come close to meeting that burden.

F. The Trial Court Did not Err in Entering Summary Judgment in Favor of Lane Powell on its Breach of Contract Claim

Leaving aside recusal, the only order the DeCourseys claim is in error is the trial court's decision to grant summary judgment. Br. at 48–50. And the only argument they raise is that summary judgment should not have been granted because Lane Powell supposedly repudiated the contract. *Id.* But this argument is based on disregarding the language of the parties' actual agreement and it ignores the effect of trial court orders

the DeCourseys failed to challenge (and are thus binding on appeal).

The DeCourseys argue that Lane Powell promised not to demand further payment until the judgment or settlement proceeds from the underlying litigation were paid, and then broke that promise by filing this lawsuit. Br. at 48–50. They further argue that the filing of the lawsuit constituted a repudiation that released them from their obligation to perform. *Id.*

As described above, however, the actual agreement the parties executed did ***not*** contain a promise to forebear until the judgment was paid. *See supra* Section III.C. The parties had discussed such a provision and ***rejected it*** in favor of the language requiring Lane Powell to forebear for a reasonable time. *Id.*[10] Indeed, the DeCourseys were able to convince Lane Powell to take less money at the time in exchange for this change.

The DeCourseys do not now (nor did they below) make any credible argument that any reasonable jury could have concluded that Lane Powell did not forebear for a reasonable time when it waited two-and-a-half years from the DeCourseys' last payment, waited again even when they fired the firm, and waited again even when they threatened to sue the firm and its lawyers personally. CP 4767. This failure is dispositive.

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[10] Indeed, even if the letter on which they rely was the parties' final agreement—and it is not—they leave out critical parts of that letter that undermine their position. For instance, the letter also requires that "if appellate practice is required," the parties will execute "a reasonable payment plan." CP 4497. In other words, even in the initial proposal, the parties never contemplated that Lane Powell would completely forbear until after an appeal was concluded.

Even if it were not, however, the DeCourseys ignore the effect of the court's order striking their claims and defenses. Notably, they did not brief this issue as an issue of repudiation below, but discussed it as "prior breach," one of their affirmative defenses (and also a counterclaim) that was stricken. *See supra* Section III.H; CP 3521–22, 3544. They now reframe the argument in an attempt to duck the trial court's order. But because they failed to challenge that order on appeal, it is a verity now.[11]

V. RAP 18.9(a) REQUEST FOR FEES

The DeCourseys assert arguments that were never raised in the trial court and arguments lacking in any evidentiary support. Under RAP 18.9(a), the Court can award fees a party incurs responding to a frivolous appeal. *See Mahoney v. Shinpoch*, 107 Wn.2d 679, 691, 732 P.2d 510 (1987). Lane Powell therefore asks the Court to award it the fees it incurred responding to the DeCourseys' frivolous appeal.

VI. CONCLUSION

For all the reasons stated herein, Lane Powell respectfully asks the Court to affirm the trial court's entry of summary judgment, its rulings on recusal, and to award Lane Powell the fees and costs it incurred respond-

[11] Even if the Court were to accept the DeCourseys' attempt to rewrite the parties' agreement, there would be no need to remand on quantum meruit claim, as the DeCourseys' suggest. Br. at 50. On this record, that claim has, for all intents and purposes, been resolved in Lane Powell's favor. CR 3365 (noting that the same undisputed facts supported quantum meruit and reserving the right to seek judgment on the lien foreclosure claim if necessary).

ing to the DeCourseys' frivolous appeal.

DATED this 30th day of September, 2013.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on September 30, 2013, I caused a copy of the foregoing **BRIEF OF RESPONDENT** to be served by electronic mail to:

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