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COURT OF APPEALS
STATE OF WASHINGTON
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V

NO. 62912-3-I
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

**V&E MEDICAL IMAGING SERVICES, INC., a Washington corporation, doing
business as AUTOMATED HOME SOLUTIONS,**

Plaintiff,

vs.

**MARK DECOURSEY and CAROL DECOURSEY, husband and wife, individually
and the marital community composed thereof,**

Respondents,

and

**HOME IMPROVEMENT HELP, a Washington corporation; RICHARD BIRGH,
an individual; CONSTRUCTION CREDIT CORPORATION, a Washington
corporation; HERMAN RECOR, ARAKI, KAUFMAN, SIMMERLY &
JACKSON, PLLC,**

Third Party Defendants,

and

PAUL STICKNEY and WINDERMERE REAL ESTATE, S.C.A., INC.,

Appellants.

**APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Michael J. Fox, Judge**

REPLY BRIEF OF APPELLANTS

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I. OVERVIEW RESPONSE

In reviewing respondents' three-and-a-half-page "Introduction and Summary" (Resp. Br. 1-4), we acquire insight into respondents' attitude to the trial court errors documented in the Opening Brief. RAP 10.3(a)(3) says the optional introduction is to be "concise."¹ Three and a half pages is not "concise." Moreover, it is not an "Introduction." It is argument (*e.g.*, "trial court properly awarded", "trial court . . . properly excluded", "court correctly instructed", *etc., etc.*). And it is difficult to overlook the fact that contrary to RAP 10.4(a)(2), the argument is single-spaced.

This raises the question, if counsel was willing to bend the rules where the deviation would be so apparent, what confidence can we have concerning representations as to facts, law, or procedure? The simple fact is, all such representations must be taken "*cum grano salis*," *i.e.*, with a copious measure of skepticism.

II. REPLY TO COUNTERSTATEMENT OF THE FACTS

The DeCourseys commence their Counterstatement of the Case with the inevitable statement that "Windermere misrepresents and

¹ Appellants' "Nature of the Case" is essentially one page.

mischaracterizes” the record. (Resp. Br. 5) They do not identify a single instance in which a single statement of fact was inaccurate.

A cursory review of the DeCourseys’ citations to the record reveals that they have systematically overstated or misrepresented the evidence. *Compare, e.g.*, Resp. Br. 1, 9 (Stickney was an officer of HIH) *with* 10/23/08 RP 57-60, 127-128; Exs. 1 & 2 (exhibits admitted for limited purpose); Resp. Br. 1, 11 (HIH/Birgh was unlicensed contractor) *with* 10/23/08 RP 138-140 (no proof that Birgh was unlicensed); Resp. Br. 1, 11, 63 (Stickney helped Birgh draft demand letter) *with* 10/22/08 RP 83-86, 88-89; 10/23/08 RP 44-45, 61-63; Ex. 15 (no real evidence that Stickney actually assisted Birgh with letter).

However, the one distortion which stands above the rest is the fallacy that Stickney was actively and intimately involved in the construction discussions between the DeCourseys and HIH. (Resp. Br. 10, 63-64) This assertion is significant because it links Stickney to the scope and complexity of the work. It makes it appear that Stickney continued to be involved in the discussions between the DeCourseys and Birgh after closing. That is not the case. Mr. DeCoursey acknowledged that the project was in a conceptual stage at the time of Stickney’s notes. (10/22/08 RP 198, 199-201) Mr. DeCoursey also testified that Stickney

was not involved in the negotiations that continued from July through October of 2004. (10/22/08 RP 209; 10/23/08 RP 21)

The extensive revisions to the scope and complexity of the work and the estimated cost are detailed in pages 22-23 of Windermere's opening brief. They do not merit a mention in the DeCourseys' brief. The DeCourseys' entire case was based on their claim that Stickney was responsible for the faulty work done by Birgh. (10/22/08 RP 191) But that work was defined after Stickney's involvement ended. No matter how hard the DeCourseys try to sweep this fact under the rug, it colors every aspect of this case.

III. WHAT IS THE CORRECT STANDARD OF REVIEW?

Respondents sprinkle statements as to the applicable standard of appellate review throughout the brief. Most are wrong. What respondents want to create is the appearance that all of Judge Fox's legally erroneous rulings were discretionary rulings, giving respondents a free pass.²

It appears that almost all issues in this appeal are questions of law subject to de novo review. Whether a party is entitled to attorney fees is

² This is not uncommon conduct for respondents. "If, as commonly happens, the respondent strays from the standard of review, use the reply brief to refocus the court on the proper standard of review." WSBA, WASHINGTON APPELLATE PRACTICE DESKBOOK §18.6 (3d ed. 2005).

an issue of law. *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 141, 144 P.3d 1185 (2006); *Boules v. Gulf*, 133 Wn. App. 85, 88, 134 P.2d 1195 (2006). The process of applying law to the facts is a question of law. *Tapper v. State Employment Sec. Dept.*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993). Whether a particular conduct gives rise to a CPA violation is a question of law. *Svendsen v. Stock*, 143 Wn.2d 546, 553, 23 P.2d 455 (2001).

IV. JUDGE ERLICH'S ORDERS ON ATTORNEY FEES MEAN WHAT THEY SAY

Judge Erlick entered an order³ which provided (CP 707):

In open court, the DeCourseys are dismissing/not pursuing any claim for attorneys fees beyond statutory fees of \$250.

(Emphasis added.)

In response, the DeCourseys filed 30 pages of material (CP 708-39) arguing that they “did not ‘waive all attorney fees’” and that it was all just a “misunderstanding.” (CP 709)

A law firm appeared (CP 747-49) and filed a “supplementation” to the motion for reconsideration. (CP 750-53) They asked for “modification of Judge Erlick’s order **finding** that the DeCourseys had

³ The Order (CP 704-07) is reproduced in the Appendix.

waived their” attorney fee claims.⁴ (CP 750) (emphasis added). They requested Judge Erlick to revise his order so that the DeCourseys could seek attorney fees in the future should they prevail. (CP 751)

Judge Erlick’s response to the argument of “misunderstanding” and the request to allow attorney fees in the future was: **NO.** (CP 768)⁵

Eighteen months later, Judge Fox, gave the DeCourseys exactly what Judge Erlick ruled they could not have. (2/6/09 RP 2-4) And he did it without entering an order vacating, modifying, or amending the finding of waiver in the August 23, 2007 order. And he did it while claiming that he was not “reconsidering, revising, or reversing” Judge Erlick’s order. (2/6/09 RP 6)

Judge Erlick’s order was interlocutory. CR 54(b); *See Snyder v. State*, 19 Wn. App. 631, 636, 577 P.2d 160 (1978). However when judgment was entered, the order became final. RAP 2.4; *See Schoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 862, 726 P.2d 1 (1986). When the DeCourseys failed to appeal the order, it became the law of the case.

⁴ Counsel now takes the position that the “finding” of waiver is not a “finding.” (Resp. Br. 18)

⁵ The Order denying DeCoursey’s motion for reconsideration (CP 768) is in the Appendix.

Beltran v. State, Dept. of Social and Health Services, 98 Wn. App. 245, 254, 989 P.2d 604 (1999), *rev. granted*, 140 Wn.2d 1021 (2000).

The question is not whether Judge Fox could have revised or vacated Judge Erlick's order; Judge Fox expressly and explicitly stated that he was not doing that. The question is whether Judge Fox correctly interpreted Judge Erlick's order. Interpretation of a court order is a question of law. *In re Marriage of Thompson*, 97 Wn. App. 873, 877, 988 P.2d 499 (1999).

No one but Judge Fox ever had any question what the order meant. Not the DeCourseys in their motion for reconsideration, not their attorneys in their supplementation, and not the Court of Appeals Commissioner in rejecting the interlocutory appeal. In their motion to Judge Fox for attorney fees, the DeCourseys stated that

Judge Erlick signed an Order that day. In the handwritten Order, Judge Erlick interceded his own hand-written note, stating that the DeCourseys had waived their right to attorney fees.

(CP 1055) The DeCourseys did not ask Judge Fox to interpret the order; they argued that "Judge Erlick's ruling should be revised" (CP 1060) and that "the ruling that the DeCourseys have waived their rights to an award of costs, including attorney fees, should be revised under Rule 54(b)." (CP 1069)

The question for this Court is simple: Does Judge Erlick's order mean what it plainly says, or does it mean what Judge Fox alone thought it meant? On *de novo* review, this Court should rule that Judge Erlick's order denying attorney fees in the future could not be interpreted out of existence.

V. JUDGE FOX LACKED THE POWER TO RECONSIDER MUCH LESS CHANGE JUDGE ERLICK'S FINDING OF WAIVER

Even if the Court considered Judge Fox's ruling to be a modification of Judge Erlick's order, Judge Fox was disqualified from ruling on the DeCourseys' request for attorney fees. RCW 2.28.030 provides:

2.28.030. Judicial officer defined—When disqualified.

A judicial officer is a person authorized to act as a judge in a court of justice. Such officer shall not act as such in a court of which he is a member in any of the following cases:

...

(2) When he was not present and sitting as a member of the court at the hearing of a matter submitted for its decision.

Judge Fox was not present and sitting at the hearing on the question of the DeCourseys' waiver of their attorney fee claim. He was disqualified.

The case law is clear that a successor judge cannot revisit a finding made by a predecessor judge. In *In re Marriage of Crosetto*, 101 Wn. App. 89, 95, 1 P.3d 1180 (2000), the court said:

Generally, a successor judge lacks authority to enter findings of fact on the basis of testimony heard by a predecessor judge. *Tacoma Recycling, Inc. v. Capital Material Handling Co.*, 42 Wn.App. 439, 441-42, 711 P.2d 388 (1985) . . . *In re Welfare of Woods*, 20 Wn.App. 515, 517, 581 P.2d 587 (1978), . . . *Wold v. Wold*, 7 Wn.App. 872, 877, 503 P.2d 118 (1972).

In *State v. Bryant*, 65 Wn. App. 547, 550, 829 P.2d 209 (1992), this court noted that it was “well-settled” that the successor judge is without authority to make findings based on what occurred before the predecessor judge.

In *Whitehead v. Satran*, 37 Wn.2d 724, 726-27, 225 P.2d 888 (1950), the court pointed out that where the order had been entered, and where a motion to set aside had been denied, and where no appeal had been taken, then a motion to reconsider before another judge could not be entertained.

Who was present at the hearing? Who received and rejected the DeCourseys’ give-us-attorney-fees-later argument? It was Judge Erlick. It was not Judge Fox. Judge Fox’s award of attorney fees is void.

**VI. JUDGE ERLICK'S FINDING OF WAIVER IS
FINAL AND A VERITY BECAUSE THE
DeCOURSEYS DID NOT APPEAL IT**

In Respondents' Brief, pages 20-21, the DeCourseys set out their response to the argument (Opening Br. 31-35) that the DeCourseys' failure to file a motion to modify the commissioner's ruling made Judge Erlick's ruling a final decision on the DeCourseys' waiver of attorney fees. Respondents brush aside the case law to assert that the denial of the discretionary review did not affect the DeCourseys' right "to obtain later review of" the trial court decision. (Resp. Br. 20)

Let us assume that this is correct. What does it mean? It means that the DeCourseys had a right "to obtain later review of" Judge Erlick's decision. But, in order to exercise that right, the DeCourseys had to do something. What? The DeCourseys had to appeal or cross-appeal. That did not occur. The DeCourseys have not sought appellate review of Judge Erlick's orders as required under RAP 5.1(d).

The failure to cross-appeal Judge Erlick's finding that the DeCourseys had, in open court, waived their attorney fee claim means that the finding of waiver cannot now be reviewed. *Smoke v. City of Seattle*, 79 Wn. App. 412, 422, 902 P.2d 678 (1995) (respondent's failure to cross-appeal dismissal of the §1983 claim precluded review of that ruling); *Wagner v. Beech Aircraft Corp.*, 37 Wn. App. 203, 213, 680 P.2d 425

(1984) (respondent's failure to cross-appeal decision as to setoff precluded review of that decision).

In August 2007, Judge Erlick entered an order in which he found as fact that "[i]n open court, the DeCourseys are dismissing/not pursuing any claim for attorneys fees beyond statutory fees of \$250." (CP 707) The DeCourseys and their counsel asked Judge Erlick to change his mind, to change the order and to allow fees in the future. He said, "No."

The DeCourseys sought discretionary review with this court. (CP 900-07). That was denied. (CP 908-18)

Thereafter, The DeCourseys took no steps to undo Judge Erlick's finding of waiver of attorney fees. There was no appeal or cross-appeal. There was no assignment of error.

As was demonstrated above, absent the cross-appeal, and absent the assignment of error, the finding of waiver of the attorney fee claim is not reviewable. Judge Erlick's finding of waiver is a verity. The waiver being a verity, Judge Fox's award of attorney fees is null and void.

VII. THE \$270,000 SETTLEMENT WAS FROM A SOURCE NOT WHOLLY INDEPENDENT OF STICKNEY

Throughout the trial, Mr. DeCoursey told the jury that Birgh/HHH and Stickney were joined at the hip. Mr. DeCoursey told the jury he could not distinguish between Birgh/HHH and Stickney. (10/23/08 RP 74) He

characterized Birgh and Stickney as a “team” working “together to produce a single result.” (10/22/08 RP 193) He testified that Stickney was acting as a salesman for HIH (*Id.* at 195; 10/23/08 RP 53) and characterized him as an “agent of HIH” (10/23/08 RP 29-30). Mr. DeCoursey told the jury that he believed that Stickney really was “operating as an officer of HIH.” (*Id.* at 58-59) Further, it was his contention that Stickney was a 20 percent owner of HIH. (*Id.* at 59-60) He said Stickney was “in fact” vice president and shareholder of HIH. (10/22/08 RP 177) His attorney argued that “Stickney acted as the sales agent for HIH. He sold HIH.” (10/29/08 RP 22)

Even in Respondents’ Brief, it is stated that the DeCourseys’ theory of the case is that Stickney and Birgh were joint-venturers. (Resp. Br. 37) It is clear that the DeCourseys did not receive their settlement proceeds from a “collateral source.”

In the case relied upon by the DeCourseys, *Xieng v. Peoples Natl. Bank*, 120 Wn.2d 512, 523, 844 P.2d 389 (1993), we have this definition:

The collateral source rule operates to prevent a defendant from receiving the benefit of payments made to a plaintiff from a source independent of the defendant.

So, the question is whether the \$270,000 payment made to plaintiffs DeCourseys came from a source wholly independent of Stickney. The payment was made on behalf of Birgh/HIH. As

demonstrated above, the DeCourseys' whole theory of the case was that Stickney and Birgh/HHH were **not** independent of each other. It cannot in good faith be argued that the Birgh/HHH payment was wholly independent of Stickney.

The DeCourseys' change of position also runs afoul of the doctrine of judicial estoppel. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007):

“Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.”

In the trial court, the DeCourseys urged the jury to find that Stickney had an interest in HHH, and that the relationship created a conflict of interest.⁶ (10/29/08 RP 17-22) And the jury so found. (CP 986) The DeCourseys cannot now seek an advantage (*i.e.*, the collateral source rule) “by taking a clearly inconsistent position.” Review of a question of judicial estoppel is *de novo*. *Baldwin v. Silver*, 147 Wn. App. 531, 535, 196 P.3d 170 (2008), *rev. denied*, 166 Wn.2d 1019 (2009).

Although Judge Fox correctly determined that a “double recovery” was occurring (12/5/08 RP 6), he erred as a matter of law in failing to take

⁶ Counsel argued that if HHH failed to perform, it was Stickney who bore that risk. (10/29/08 RP 22)

steps to block the double recovery. The DeCourseys' response is to argue that Birgh/HIH paid them \$270,000, not for the damage caused by the remodel contractor, but for some other damages. (Resp. Br. 40-41) But that flies in the face of the DeCourseys' claim that Stickney was "responsible for the faulty work done by Mr. Birgh" (10/22/08 RP 191), that Stickney caused Birgh to do "bad work" (10/28/08 RP 168), and that the DeCourseys' damages expert testified that everything he gave a price for was to repair Birgh/HIH's work (*id.* at 53). The DeCourseys' counsel argued that the alleged conflict caused the damages (10/29/08 RP 20, 21), that Stickney was on the hook if HIH did not do what Stickney said HIH would do (*id.* at 22), that the damages testimony was undisputed (*id.* at 28), and that the damages to fix the house were \$525,000 (*id.* at 30).

Not surprisingly, a review of the DeCoursey/HIH-Birgh Settlement Agreement (CP 1040-43) reveals that it was based on the "alleged construction defects in [the] remodeling of" the DeCourseys' home. These alleged defects were asserted in "various causes of action against HIH/Birgh." The Agreement expressly provided that "all claims have been settled." (CP 1041) The settlement also "specifically" included all claims against Stickney in his capacity as an "officer, director or representative of HIH." (CP 1040) It was in those asserted roles that the DeCourseys sought to impose liability on Stickney for a conflict of

interest. (10/22/08 RP 177, 193, 195; 10/23/08 RP 29-30; 53; 58-59) The DeCourseys' attorney argued that Stickney was in fact a representative of HIH (e.g., "sales agent for HIH"). (10/29/08 RP 22) There is no doubt but that the DeCourseys sought to recover from Stickney exactly the same elements of damage he had already received from Birgh/HIH.

In *Eagle Point Condominium Owners Ass'n v. Coy*, 102 Wn. App. 697, 702, 9 P.3d 898 (2000), this Court made it clear that it would not allow a double recover in a construction defect case:

It is a basic principle of damages, both tort and contract, that there shall be no double recovery for the same injury.

Id. at 702 (emphasis added).

The *Eagle Point* prohibition on double recovery is based on a long line of Washington case law.⁷ In *Ashley v. Lance*, 80 Wn.2d 274, 281, 493 P.2d 1242 (1972), the Supreme Court pointed out that an injured party was entitled to recover only the amount necessary to compensate for the actual harm suffered. In *Brink v. Griffith*, 65 Wn.2d 253, 259, 396 P.2d 793 (1964), the Supreme Court stated that while the plaintiff could set out alternative theories on separate claims, public policy would not allow him to recover twice "for the same elements of damage."

⁷ See Opening Brief, p.46, n.15.

The DeCourseys sought to recover from Stickney exactly the same elements of damage growing out of the Birgh/HHH remodel. (10/22/08 RP 191; 10/28/08 RP 53, 168; 10/29/08 RP 21-22) Judge Fox correctly determined that he was allowing a “double recovery” (12/5/08 RP 6), but he made an error of law when he did not halt it.

VIII. THE FAILURE TO ESTABLISH A "PUBLIC INTEREST IMPACT" ELEMENT IS FATAL TO THE CPA CLAIM

Twice in the last year, the Supreme Court has struck down efforts to expand private disputes into ones which affect the public interest. Respondent does not attempt to come to grips with either case.

In *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 604-05, 200 P.3d 695 (2009), in reversing the Court of Appeals, the court gave this background:

The purpose of the CPA is to “protect the public.” RCW 19.86.920. “[I]t is the likelihood that additional plaintiffs have been or will be injured **in exactly the same fashion** that changes a factual pattern from a private dispute to one that affects the public interest.” “[T]here must be shown a real and substantial potential for repetition, as opposed to a hypothetical possibility of an isolated unfair or deceptive act’s being repeated.”

A private plaintiff must show that his lawsuit would serve the public interest. For private disputes, “it may be more difficult to show that the public has an interest in the subject matter.”

(Citations omitted.)

The court went on to identify four factors which the court evaluates in deciding whether a private dispute affects the public interest. In the appellant's opening brief (Opening Br. 47-50), it was demonstrated that as to factor #3, "whether the defendant actively solicited this particular plaintiff," it was undisputed that Stickney did not actively solicit the DeCourseys. 165 Wn.2d at 605. The DeCourseys were referred to Stickney by a member of the United Methodist Church Board of Directors. (10/22/08 RP 8-9, 181) The DeCourseys chose Stickney because of the referral and his position with the church, not because of any solicitation. (*Id.* at 181)

Subsequently, in *Ambach v. French*, ___ Wn.2d ___, 216 P.3d 405, 410-11 (2009), the court again reversed because it found that the particular conduct involved did not give rise to a CPA violation. It pointed out again that failure to prove active solicitation was fatal to the CPA claim:

Ambach's failure to state a cognizable CPA claim is not just that she attempts to disguise her personal injuries as sounding in business or property, but also that she fails to allege the truly public nature of Dr. French's actions. In *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 200 P.3d 695 (2009), we held no CPA claim could be had where the claim relates to the doctor's "judgment and treatment of a patient," and the claimant fails to submit evidence that the injurious procedure was "advertised or marketed." . . . Because *Michael* could not show that the dentist's office "advertised to the public in general" or actively solicited

the claimant's business, we held she "failed to show her lawsuit would serve the public interest." . . .

Though Ambach's case is before us only on the issue of whether her injury is to "business or property," the structure of her CPA claim is similar to *Michael's*. She also fails to allege that Dr. French actively solicited her as a patient or advertised shoulder surgeries to the general public.

The DeCourseys argue that they were injured by the referral to HHH, but they submitted no evidence that the referral was "advertised or marketed." And as noted above, Stickney did not solicit the DeCourseys; they sought him out. The CPA claim fails.

**IX. WITHOUT FINDINGS, WITHOUT
CONCLUSIONS, AND WITHOUT AN
INDEPENDENT REASONABLENESS
DETERMINATION, THE ATTORNEY FEE AWARD
IS VOID**

Eleven years ago, the Supreme Court set out a clear and simple formula to be followed when making an attorney fee award.⁸ When the method was utilized, it would give the appellate court a clear record upon which to review the fee award. The primary burden was on the party seeking fees, but the trial court was to play an "active" role as well in assessing the reasonableness of the fee award.

That did not occur here. Even when defense counsel reminded the

⁸ *Mahler v. Szucs*, 135 Wn.2d 398, 433-35, 957 P.2d 632, 966 P.2d 305 (1998).

court of its obligation (2/6/09 RP 10-11), the court declined to make the necessary findings.

Shortly after *Mahler* came out, this Court had the occasion to enforce it in *American Civil Liberties Union v. Blaine Sch. Dist. No. 503*, 95 Wn. App. 106, 120, 975 P.2d 536 (1999). Rather than making an independent determination of the reasonableness of the hours claimed or fees charged, the trial court merely awarded an amount counsel suggested. This Court reversed the award as being improper because it was made without an independent reasonableness determination.⁹

The Supreme Court continues to reverse attorney fee awards when they lack specificity. *Brand v. Dept. of Labor & Industries*, 139 Wn.2d 659, 674, 989 P.2d 1111 (1999) (no “specific reasons”; “no specific findings”); *Svendsen v. Stock*, 143 Wn.2d 546, 560, 23 P.3d 455 (2001) (no written findings to explain the analyses); *In re Estate of Jones*, 152 Wn.2d 1, 21, 93 P.3d 147 (2004) (lack of “appropriate” findings and conclusions).

In one of the cases where the trial court got it right, it had gone through the complex procedural history of the case and weeded out the

⁹ This court has indicated that “findings” are so important that the parties may not waive them. *Morgan v. Kingen*, 141 Wn. App. 143, 164-65, 169 P.3d 487 (2007).

time not reasonably related to the favorable claims, time unnecessarily spent, and unproductive time. It took the trial judge 35 findings of fact to justify his reasonable fee calculation. *Chuong Van Pham v. City of Seattle*, 159 Wn.2d 527, 540, 151 P.3d 976 (2007).

Similarly, in *Diamaco, Inc. v. Mettler*, 135 Wn. App. 572, 575-76, 145 P.3d 399 (2006), *rev. denied*, 161 Wn. 2d 1019 (2007), this Court approvingly noted “extensive findings,” and that the trial court was “meticulous in reviewing” the attorney fee request. He noted how many days it took to try the case, and how many it should have. He examined in detail the billable hours submitted and found “an inordinate amount of time” was spent preparing and reviewing documents. He found the hours charged during the trial were “excessive.” Contrast this “meticulous” review to what the trial court did here: everything counsel did was reasonable; all the billing rates are reasonable; everything is reasonable.

As a review of the Clerk’s Papers reveals, this was a procedurally complex case. That being so, it placed a burden on the trial court to enter specific reasons, and specific findings to support the award. Other courts have demonstrated the ability to make a meticulous review of the time spent and the hourly charge for that time. Despite the specific admonition from the Supreme Court and this court, that was not done in this case. After over 10 years, everyone knows the rules. It is now time to raise the

consciousness. Rather than giving the party a slap on the wrist and a remand, it is time to raise the incentive to do it right the first time. No more two bites at the apple. Failure to follow the directive of *Mahler* should result not in a remand, but in a dismissal of the attorney fee claim.

**X. THE \$45,000 COST AWARD IS STILL
INEXPLICABLE**

Respondents' effort to explain that the "Total Taxable Costs: \$45,000.00" (CP 1492, 1493) in the judgment is really \$45,442.03 falls short. (Resp. Br. 33) Moreover, both numbers exceed the limitations of RCW 4.84.010. Respondents' ultimate response is to speculate that the court was construing the word "expenses" more broadly than the statutory term "costs." (Resp. Br. 34) There is nothing in the record to support such speculation. In fact, it was pointed out to the court that the statute, the case law, and the submissions did not support what he was doing. (2/6/09 RP 8-10) He said he was not going to respond. (2/6/09 RP 11) The cost award was error.

**XI. THE DECOURSEYS' RELIANCE ON THE
REPSA IS MISPLACED**

In a last effort to justify the attorney fee award, the DeCourseys invoke the REPSA. (Resp. Br. 26) The DeCourseys do not quote the language relied upon. This is because the facts never made the provision applicable. The provision at ¶ q. (CP 1438) provides:

If Buyer or Seller institutes suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorneys' fees and expenses.

In this case, the buyer DeCourseys did not institute suit against the seller, nor did the seller sue the DeCourseys. Nor was the suit concerning this Agreement. The attorney fee provision was never activated. This Court said in *Braut v. Tarabochia*, 104 Wn. App. 728, 734, 17 P.3d 1248 (2001), an attorney fee provision such as this "cannot be enforced against" a non-party to the agreement. In *Watkins v. Restorative Care Center, Inc.*, 66 Wn. App. 178, 195, 831 P.2d 1085, *rev. denied*, 120 Wn.2d 1007 (1992), the court pointed out that the attorney fee agreement was between Pavloffs and RCC and that it would "be both unfair and contrary to law to enforce the" Pavloffs/RCC attorney fee agreement against Watkins.

The situation here is identical. The attorney fee provision is between the buyer and the seller. And it is further limited to a suit "concerning this Agreement." This attorney fee provision was never activated in the first place, and never applied to Windermere in the second place.

XII. THE JURY INSTRUCTIONS WERE ERRONEOUS

On page 48, the DeCourseys quote Instruction Nos. 7 and 9. However, if we turn to the record (CP 973, 975), we find that the DeCourseys have presented an abbreviated version of each instruction.

Specifically, the DeCoursey have deleted, without indication, the lead-in sentence in each instruction. As a consequence, the reader may be misled as to what the jury was told. As presented in the brief, it appears that Stickney had a reasonable obligation to the DeCourseys.

However, when we add back the deleted sentences, we read that Stickney had an extremely broad obligation such that any time any real estate agent has any business or professional relationship with any third party, which includes the theoretical possibility of an indirect benefit, there is a conflict. That is not the law in Washington.

In *Cogan v. Kidder, Mathews & Segner, Inc.*, 97 Wn.2d 658, 664, 648 P.2d 875 (1982), the court held that the seller's broker did not have a duty to disclose that it was representing the buyer in an assignment of the agreement to a third party. In *Ward v. Coldwell Banker*, 74 Wn. App. 157, 872 P.2d 69, *rev. denied*, 125 Wn.2d 1006 (1994), this Court reversed a judgment against the broker. The trial court there, as here, was of the view that every financial or business relationship must be disclosed. This Court said that it was "clear" that such was not the law. The broker did not breach its fiduciary duty by failing to disclose that it had guaranteed the purchaser's bank loan (74 Wn. App. at 167). The instructions were in error.

XIII. THE MEASURE OF DAMAGES FOR A CONFLICT OF INTEREST DOES NOT INCLUDE CONSTRUCTION DEFECT DAMAGES

In Washington, the measure of damages for failing to disclose a conflict of interest is disgorgement of the benefit obtained by the party failing to disclose the interest. In *Mersky v. Multiple Listing Bureau of Olympia, Inc.*, 73 Wn.2d 225, 231, 437 P.2d 897 (1968), the Supreme Court explicitly stated a special measure of damages for failing to disclose a conflict of interest:¹⁰

This, in turn, entitles the principal, upon discovery of the undisclosed relationship, to rescind the transaction, recover any profit gained by the broker from the transaction, or recoup the commission paid to the broker by virtue of the transaction.

It is safe to assume that the DeCourseys' counsel has made a diligent search for a case from any jurisdiction to support its assertion that a conflict of interest claim can give rise to a construction defect damages claim. The lack of such citation together with the multitude of cases limiting recovery to the commission speaks volumes. As a careful review of *Mersky* brings out, there is strong public policy which limits damages to the commission.

¹⁰ In the majority of cases, forfeiture of the commission is the remedy authorized by the court. *Girard v. Myers*, 39 Wn. App. 577, 588, 694 P.2d 678 (1985); *Ross v. Perelli*, 13 Wn. App. 944, 946, 538 P.2d 834 (1975); *Koller v. Belote*, 12 Wn. App. 194, 198-99, 528 P.2d 1000 (1974); *Mersky*, 73 Wn.2d at 233.

**XIV. STICKNEY WAS NOT A PROXIMATE
CAUSE, A CAUSE IN FACT, OR A LEGAL CAUSE
OF THE DeCOURSEYS' DAMAGES**

In *Smith v. Preston Gates Ellis LLP*, 135 Wn. App. 859, 864, 147 P.3d 600 (2006), *rev. denied*, 161 Wn.2d 1011 (2007), this Court set out the basics of proximate cause:

Proximate causation has two elements, cause in fact and legal causation. “Cause in fact refers to the ‘but for’ consequences of an act, that is, the immediate connection between an act and an injury.” Legal causation is based on policy considerations determining how far the consequences of an act should extend. Proximate cause is determined by the “but for” test. . . . Proximate cause is usually the province of the jury. However, the court can determine proximate cause as a matter of law if “reasonable minds could not differ.”

Id. at 864 (citations omitted).

The Court ultimately held that plaintiff would not be able to establish “but for” proximate cause. The situation here is identical. We look to the DeCourseys’ claimed injury and ask to what act is there an “immediate connection”? The immediate, the direct cause of the defects, was the work performed by Birgh. If Birgh had not performed defective work, there would have been no damage. Stickney did not do the work. Birgh did.

In *Smith*, the Court cited the plaintiff’s testimony when he was asked what he would have done differently if he knew about the problems (135 Wn. App. at 870). He probably would have gotten a different builder

and probably would have reviewed the whole project. The Court said this was “undoubtedly true” but it was “speculation” and as speculation could not support the causation element of his claim. Here, the DeCourseys speculate that if they had known, then they would have gotten a different builder and reviewed the whole project. Like *Smith*, this speculation is fatal to their claim.

The DeCourseys cannot prove legal causation. “Legal causation involves a determination of whether liability should attach given cause in fact and is a question of law for the court based on policy considerations as to how far the consequences of the defendant’s act should go.” *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 51, 176 P.3d 497 (2008). Applied to the facts of this case, that question is whether a real estate agent who fails to disclose a joint venture with a contractor should, as a matter of policy, be liable if the contractor performs defective work. This determination begins with considerations of “common sense.” *Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 283, 979 P.2d 400 (1999).

Washington courts consistently apply “common sense” to prevent tort liability from extending beyond reason. Here, the construction defects were completely unconnected with any alleged conflict. The DeCourseys did not allege that Stickney had an interest in defective work, only that he had an interest in seeing that Birgh was hired and received payment. If

Birgh performed faulty work, he likely would not be paid, thereby defeating the theoretical purpose of referring business to him. Stickney had no interest in defective work. If Stickney had any interest in how Birgh did his work, it was that he do good work. Bad work would be counterproductive under the DeCourseys' analysis.

In *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 176 P.3d 497 (2008), the court stated: ““unless a reasonable limit on the scope of defendants’ liability is imposed, defendants would be subject to potentially unlimited liability to virtually anyone who suffers mental distress caused by the despair anyone suffers upon hearing of the death or injury of a loved one.”” *Id.* at 52.

In *Kim v. Budget Rent A Car Systems, Inc.*, 143 Wn.2d 190, 15 P.3d 1283 (2001), the Supreme Court rejected legal cause because of the remoteness in time and because: “One who fails to remove the keys from their vehicle should not be ‘answerable in perpetuity for the criminal and tortious conduct of others.’” *Id.* at 205.

The record reflects a myriad of decisions and actions by the DeCourseys and Birgh which occurred after Stickney’s exit. Mr. DeCoursey said that Stickney’s involvement effectively terminated in July 2004. That was before any plans were drawn. (*See* 10/22/08 RP 209; 10/23/08 RP 21.)

The DeCoursey/Birgh agreement was amended, culminating in a final October 12, 2004 Construction Estimate. (10/23/08 RP 24-26; Ex. 12) The earliest set of construction drawings that was entered into evidence was dated August 15, 2004. (Ex. 11, pp. 3-4) The final estimate refers to plans dated October 10, 2004. (Ex. 12) To the extent that Stickney set in motion a chain of events, his involvement was limited to a small segment at the beginning of the chain. He had no role in deciding how or where it went; he played no role in deciding what “it” was.

“Common sense” and sound policy dictate the conclusion that a failure to disclose was not the legal cause of the construction defects. On this legal question, the Court should rule that the connection is too tenuous, too broken by subsequent events, and too remote for Stickney to be the proximate cause of the construction defects.

XV. THE TORT DAMAGE CLAIM IS BARRED BY THE ECONOMIC LOSS RULE

This Court summarized the economic loss rule in *Townsend v. Quadrant Corp.*, ___ Wn. App. ___, 218 P.3d 230, 239 (2009):

The economic loss rule maintains the fundamental boundaries of tort and contract law. *Alejandre v. Bull*, 159 Wash.2d 674, 682, 153 P.3d 864 (2007). The rule ensures that a party to a contract cannot recover in tort the risk the parties had already allocated through contracts. *Id.* at 682-83, 153 P.3d 864.

[T]he purpose of the economic loss rule is to bar recovery for alleged breach of tort duties

where a contractual relationship exists and the losses are economic losses. If the economic loss rule applies, the party will be held to contract remedies, regardless of how the plaintiff characterizes the claims. . . . The key inquiry is the nature of the loss and the manner in which it occurs., *i.e.*, are the losses economic losses, with economic losses distinguished from personal injury or injury to other property.

Id. at 683-84, 153 P.3d 864 (citations omitted).

The economic loss rule applies to tort claims brought by homebuyers.

The DeCourseys were homebuyers. They brought a tort claim.

Stickney and the DeCourseys had a contractual relationship. (Ex. 24; 10/22/08 RP 205) The economic loss rule (“ELR”) applies.

Division II gave a more succinct summary in *Water’s Edge Homeowners Ass’n v. Water’s Edge Associates*, ___ Wn. App. ___, 216 P.3d 1110, 1120 (2009):

Washington’s economic loss rule prohibits plaintiffs from recovering purely economic damages in tort when the plaintiff’s entitlement to damages is based in contract. *Alejandre v. Bull*, 159 Wn.2d 674, 683, 153 P.3d 864 (2007).

The key inquiry is the nature of the loss and the manner in which it occurs, *i.e.*, are the losses economic losses, with economic losses distinguished from personal injury or injury to other property.

. . .

... it appears that the economic loss rule would likely apply to the HOA's misrepresentation and fiduciary duty claims, which sound in tort.

The key inquiry is the nature of the loss, and the manner in which the damage occurred.¹¹ Here, the loss claimed was for faulty work (10/22/09 RP 191) and to repair the remodeling work (10/28/08 RP 53). Those are purely economic damages. The DeCourseys had dismissed "any and all claims for general damages." (CP 707)

Washington law is clear that the ELR does bar the DeCourseys' tort claim.¹² The DeCourseys' reliance on a Division II case (*Jackowski v. Borchelt*, 151 Wn. App. 1, 209 P.3d 514 (2009)), is misplaced as the limitation therein is not supported by *Townsend*, *Water's Edge*, *Alejandro*, or *Berschauer/Phillips*. The ELR bars the tort damage claim.

XVI. CONCLUSION

In the opening brief, we asked: How did the DeCourseys end up with the house, the \$270,000, and the \$1,000,000 judgment? The answer is still: The court made multiple mistakes: making a real estate agent into

¹¹ *Stieneke v. Russi*, 145 Wn. App. 544, 556, 190 P.3d 60 (2008) ("the key inquiry is the nature of the loss and the manner in which the damage occurred."), *rev denied*, 165 Wn.2d 1026 (2009).

¹² In a pre-*Alejandro* case, the court reviewed the Washington law of ELR and held that it barred the claimant from recovering economic damages from design professionals in tort. *Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 833, 881 P.2d 986 (1994).

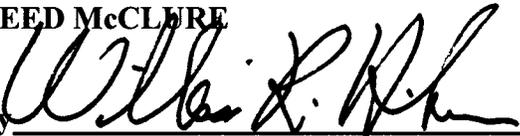
a virtual insurer of a remodel contractor; reinstating a dismissed attorney fee claim; giving a double recovery; linking a conflict of interest with construction defect damages; giving misleading instruction as to the definition of conflict; giving misleading instructions on damages.

In response to the demonstrated legal errors, the DeCourseys muddle and distort irrelevant facts. This is done primarily not to answer the legal issues but rather to cast Stickney in an unfavorable light and to prevent the reader from realizing that Stickney played no role in the extensive revisions to the scope, complexity, and the cost of the remodel. Stickney was not responsible for the faulty work.

This Court needs to reverse the judgment and remand the case with instructions to dismiss.

DATED this 19th day of Nov., 2009.

REED McCLURE

By 

William R. Hickman WSBA #1705
Attorneys for Appellants

DEMCO LAW FIRM

By Matthew F. Davis WSBA #20939
L'Nayim Shuman-Austin WSBA #30505
Attorneys for Appellants

060240.000049/238221

The Honorable John P. Erlich
Motion Date: August 3, 2007

FILED
KING COUNTY, WASHINGTON

AUG 23 2007

SUPERIOR COURT CLERK
MARCELLA PARDUCCI
DEPUTY,

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

V & E MEDICAL IMAGING SERVICES, INC., a)
Washington Corporation dba AUTOMATED
HOME SOLUTIONS,

NO. 06 2 24906 2 SEA

Plaintiff,

v.

MARK DECOURSEY and CAROL
DECOURSEY, et al.,

Defendants.

GRANTING, IN PART, AND
ORDER DENYING DECOURSEY
MOTION FOR ORDER OF
PROTECTION UNDER RULE 26(C)
AND GRANTING CROSS MOTION
FOR SANCTIONS PURSUANT TO CR
~~37(A)(2) AND (A)(4)~~ FOR REFUSING
TO ANSWER DEPOSITION
QUESTIONS *gpe*

v.

RICHARD BIRGH, et al.,

Cross and Third Party
Defendants.

(Clerk's Action Required)

THIS MATTER came regularly before this Court on defendants-third party plaintiffs
Mark and Carol DeCoursey Motion for Order of Protection Under Rule 26(c) and third party
defendant City of Redmond's Cross Motion for Sanctions Pursuant to CR 37(A)(2) and (A)(4)
for Refusing to Answer Deposition Questions. Oral argument was held on August 23, 2007.
Mark and Carol DeCoursey appeared *pro se* and of the City of Redmond appeared by and

(G7B69261.DOC;1/00020.050293/)

PROPOSED ORDER - 1

ORIGINAL
APPENDIX A

OGDEN MURPHY WALLACE, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

1 through by its counsel Geoff Bridgman and Ogden Murphy Wallace, PLLC. The Court has
2 considered the arguments presented, the pleadings, records and files herein, including:

- 3 1. Motion for Order of Protection with attached Exhibits A - D.
4
5 2. Third Party Defendant City of Redmond's Opposition to DeCoursey Motion for
6 Order of Protection Under Rule 26(c) and Cross Motion for Sanctions Pursuant to CR 37(A)(2)
7 and (A)(4) for Refusing to Answer Deposition Questions.

8 3. Declaration of Geoff Bridgman In Support of Third Party Defendant City of
9 Redmond's Opposition to DeCoursey Motion for Order of Protection Under Rule 26(c) and
10 Cross Motion for Sanctions Pursuant to CR 37(A)(2) and (A)(4) for Refusing to Answer
11 Deposition Questions with Attached Exhibits 1- 11 thereto.

12 4. Reply To -- Third Party Defendant City of Redmond's Opposition to DeCoursey
13 Motion for Order of Protection under Rule 26(c) and Cross Motion for Sanctions Pursuant to CR
14 37(a)(2) and (a)(4) For Refusing to Answer Deposition Questions Motion for Order of Protection
15 Under Rule 26(c)(sic).

17 5. Supplemental Declaration of Geoff Bridgman In Opposition to Decoursey Motion
18 for Order of Protection Under CR 26(c) and In Support of City of Redmond's Cross Motion for
19 Sanctions Pursuant to CR 37(a)(2) and (a)(4) for Refusing to Answer Deposition Questions;

20 6. Supplemental Pleading To Motion for Order of Protection Under Rule 26(c) with
21 attached Exhibits A - C thereto.
22

23 After giving due consideration of all of the materials above, the Court Orders that the
24 following materials are stricken:

- 25 1.
26 2.

Case Name: V. E. Medical v. DeCoursey

Cause Number: 06-2-24906-2 SEA

It is hereby ordered that:

(1) The DeCourseys may assert marital privilege regarding direct communications between them. The privilege may be asserted by the communicating spouse. The non-communicating spouse shall nevertheless testify regarding the areas identified in Swearingen v Vic's 1 Wn.2d 843, 848 (1958).

(2) Neither Mr. nor Mrs. DeCoursey may interrupt, coach, interject, or guide during the other's deposition, except to assert ~~marital~~ privilege.

(3) Communications between the DeCourseys and their attorneys are privileged, except where such communications have been publicized.

(4) There shall be no further examination ~~of~~ regarding Mr. DeCoursey's selective service status, or reason for moving to Canada.

(5) Both DeCourseys may be examined regarding bias with the foundation that Carl DeCoursey is the Carl Valentine who authored materials submitted by with the Bridgman declaration dated July 27, 2007.

(6) Mrs. DeCoursey shall answer questions as to

Carl DeCoursey

Date: _____

Judge

Copy Received

Copy Received

Attorney for Plaintiff

Attorney for Defendant

Bar Number: _____

Bar Number: _____

Case Name: V + E Medical Imaging Services v. DeCoursey
Cause Number: 06-2-24906-2 SEP

whether she is the Carol A. Valentine identified
in the preceding paragraph.

(7) Counsel for the City of Redmond shall
remain from making comments and or affirmative
statements during the examinations of the DeCourseys

~~THEY~~ NOT BE REQUIRED TO

(8) The DeCourseys shall testify regarding
attorneys' fees incurred, including the identity
of the attorney, the fees incurred, and the amounts
paid. This does not affect attorney client
privilege. In open court, the DeCourseys
are dismissing but pursuing any claim for attorneys fees beyond
(9) No fees or costs to any party. ^{statutory fees} of \$250.

(10) The DeCourseys dismiss any and all
claims for general damages (physical,
physiological, emotional) related to their
financial loss. There shall be no
allowing into any claims for general
damages.

Date: August 23, 2007

Judge Sam P. Choi

Copy Received

[Signature]
Attorney for Plaintiff

Bar Number: 25242

Copy Received

[Signature]
Attorney for Defendant

Bar Number: _____

FILED

KING COUNTY, WASHINGTON

OCT 04 2007

SUPERIOR COURT CLERK

BY MAUREEN ANN BELL

DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

V & E Medical Imaging Services, Inc.,)

Plaintiff,)

v.)

Mark DeCoursey and Carol DeCoursey, et ano,)

Defendants.)

v.)

Richard Birgh, et al,)

Cross and 3rd Party Defendants)

No. 06-2-24906-2 SEA

ORDER DENYING DEFENDANTS

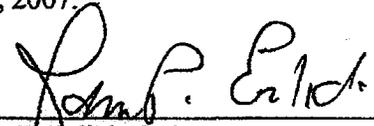
DECOURSEYS' MOTION FOR

RECONSIDERATION

THIS MATTER having come on before the undersigned Judge of the above-entitled Court upon Defendants Decourseys' Motion for Reconsideration of this Court's ruling on Defendant's Motion for Order of Protection Under Rule 26(C) and the Court having considered the motion and the records and files herein, NOW, THEREFORE, it is hereby

ORDERED, ADJUDGED, and DECREED that the Motion for Reconsideration is DENIED.

DATED this 4th day of October, 2007.


John P. Erlick, Judge

ORDER DENYING MOTION FOR RECONSIDERATION - 1

ORIGINAL

APPENDIX B

John P. Erlick, Judge
King County Superior Court
516 Third Avenue
Seattle WA 98104
(206) 296-9345

That she is a citizen of the United States of America; that she is over the age of 18 years, not a party to the above-entitled action and competent to be a witness therein; that on the date herein listed below, affiant deposited in the United States mail, postage prepaid, copies of the following documents:

1. Appellants' RAP 10.4(b) Motion for Permission to File Overlength Reply Brief;
2. Reply Brief of Appellants; and
3. Affidavit of Service by Mail

addressed to the following parties:

Brent L. Nourse / Ryan McBride
LANE POWELL, P.C.
1420 Fifth Avenue, #4100
Seattle, WA 98101-2375

Matthew F. Davis /
L'Nayim Shuman-Austin
DEMCO LAW FIRM, P.S.
5224 Wilson Avenue South, #200
Seattle, WA 98118-2587

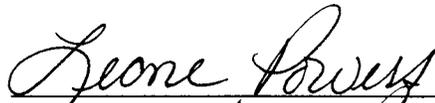
DATED this 19th day of November, 2009.



Cathi Key

SIGNED AND SWORN to before me on November 19, 2009 by

Cathi Key.



Print Name: Leone Powers
Notary Public Residing at Sno Co. WA
My appointment expires: 8/11/2010

060240.000049/239007 doc

