No. 101920-3

Court of Appeals No. 82840-1-I
(Consolidated with Nos. 82840-4-I, 82840-8-I & 82843-6-I)

SUPREME COURT
OF THE STATE OF WASHINGTON

RALPH PALUMBO,

Appellant,

v.

RICHARD WAKAZURU AND KENNETH WAKAZURU,

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

Bryan C. Graff, WSBA #38553
Britenae M. C. Pierce, WSBA #34032
Helen M. Lubetkin, WSBA #55498
RYAN, SWANSON & CLEVELAND, PLLC
1201 Third Avenue, Suite 3400
Seattle, Washington 98101-3034
Telephone: (206) 464-4224 | Facsimile: (206) 583-0359
graff@ryanlaw.com | pierce@ryanlaw.com |
lubetkin@ryanlaw.com
Attorneys for Respondents

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I. INTRODUCTION

Attorney Ralph Palumbo ("Palumbo") attempted to influence the testimony of a non-party witness, Michael G. Ota, prior to his deposition with a substantial financial inducement. The trial court correctly found Palumbo acted in bad faith. Division I of the Court of Appeals properly held the trial court's finding of bad faith as to Palumbo was supported by substantial evidence.

While Palumbo argues the Court of Appeals' decision "darkly stained the storied 45 plus year career of a distinguished trial lawyer," it was Palumbo's misconduct that left a stain, not any court decision upholding the determination of his bad faith.

This Court should deny Ralph Palumbo's Petition for Review By the Washington Supreme Court (hereinafter, the "Palumbo Pet."). None of the considerations governing acceptance of review under RAP 13.4(b) are met here.

II. STATEMENT OF THE CASE

A. Claims and Allegations.

Palumbo's clients, Michael S. Ota ("Stacey") and Connie Ota ("Connie," together the "Otas") filed this lawsuit in March 2020.[1] The Otas allege that, in 2006, Stacey, Respondents Kenneth and Richard Wakazuru ("Wakazurus") and Michael G. Ota ("Michael") entered into an oral partnership to develop real property in Sumner, Washington for use as an RV dealership and to share in the profits. (CP 2-3.) The Otas further allege that, following a 2012 transaction, Stacey, Connie and the Wakazurus agreed that Michael was "no longer participating in the Partnership" and that Stacey (alone) held the Otas' interest such that "80% of any profits derived from the Property and/or any other business conducted thereon would go to Plaintiff Stacey Ota, and the remaining 20% to the Wakazuru Defendants."[2] (CP 4-5.)

[1] Stacey and Connie are referred to by their first name for sake of clarity only. No disrespect is intended.
[2] The 2012 transaction is discussed in Section II.D. *infra*.

The Otas assert claims against the Wakazurus alleging breach of the alleged partnership agreement, breach of fiduciary duty, breach of the duty of good faith and fair dealing, promissory estoppel, and unjust enrichment. (CP 6-9.) The Otas claim they are entitled to millions of dollars in damages. (*E.g.*, *id.*)

B. Non-Party Michael G. Ota.

While the Otas allege Michael was originally one of four partners to the alleged partnership agreement, Michael is not and has never been a party to this lawsuit. (CP at 1-9.) The Otas are the only plaintiffs. (*Id.*) Michael was not even aware of this lawsuit until the Wakazurus' counsel called him following the Otas' depositions in March 2021. (CP 46 at 12:8-18.)

On March 25, 2021, the Wakazurus served Michael in Arizona with a subpoena duces tecum for his deposition and the production of documents. (CP 60-61 at 68:20-69:1.) The Wakazurus scheduled his deposition for April 9, 2021. (CP 44.) After receiving notice of the Wakazurus' subpoena to Michael,

the Otas and Palumbo made a series of efforts to get Michael to speak with Palumbo before the Wakazurus could depose him.

1. Unannounced Visit from Michael's Grandchildren.

On March 27, 2021, just two days after Michael was served with the Wakazurus' subpoena, his adult grandchildren (the Otas' children) Michael Susumu Ota and Zachary Ota, flew (during the global COVID-19 pandemic) from Washington to Michael's home in Arizona. (CP 337.) They urged him to talk to Palumbo. (CP 50 at 25:7-27:20.) Michael had not seen or spoken to his grandchildren in years, hardly recognized them, and characterized the event as a "trying experience." (*Id.*) After their unannounced visit to his Arizona home on March 27, 2021, Michael's grandchildren continued to call and leave voicemails urging him to discuss the lawsuit with Palumbo. (CP 50 at 27:10-20.)

2. Voicemail from Connie.

After Michael received the Wakazurus' subpoena, Connie also placed calls to Michael in the days leading up to his

deposition scheduled for April 9, 2021. (CP 60-61 at 68:20-69:1.) Michael did not speak with Connie and let her calls go to voicemail. (CP 61 at 69:8-12.)

In one voicemail on March 26, 2021, Connie told Michael that she was "calling in regards to a matter in one of the parcels in Sumner that we believe you and all of us still have ownership in" and that the Otas thought "it would be wise to discuss with you and Lori."[3] (CP 63-64 at 80:22-81:15.) At no prior time had Stacey or Connie indicated to Michael they believed he still had any ownership in the Property. (CP 64 at 81:23-82:8.) Connie's statement that Otas believed Michael still had ownership in the Property is inconsistent with the Otas' own allegations. (CP 4-5.) And while Palumbo argues here that "the Otas had both testified they felt obligated to share a portion of any recovery" with Michael, such a statement nowhere appears in Connie's or Stacey's depositions. (*See* Palumbo Pet. at 23. *Cf.* CP 279:17-283:5, 289:10-15, 290:4-11.)

[3] Lori Ota is Michael's wife.

3. Voicemails from Palumbo.

On April 6, 2021, three days before Michael's deposition, Palumbo left him a lengthy voicemail. (CP 61-62 at 71:8-74:17.) Palumbo said he was calling at the Otas' request. (CP 61 at 71:8-11.) Palumbo told Michael the Otas "have told us from the very beginning that if we can win this case, they feel an obligation to share some of the settlement or judgment with you…." (CP 61 at 71:17-21.) Palumbo told Michael that Palumbo and Engel "would really appreciate the opportunity to talk with you…." (*Id.* at 72:6-9.) Palumbo continued:

> I can assure you that given the fact that your son and—and his wife have said from the beginning they feel an obligation to share proceeds with you, I'm happy to talk with you about that and pin them down on that—on that commitment because my view of this is that the Wakazurus screwed the Ota family.

(CP 61 at 72:10-15.) Palumbo told Michael that "we've been looking at how much money your family should have received and we think it's in the 3 to $5 million range, we're still working on that." (CP 61 at 72:19-21.) Palumbo's voicemail then provided Michael with a summary of talking points concerning

the Otas' theory of the case.[4] (CP 61-62 at 72:22-74:7.)

The next day, April 7, 2021, two days prior to Michael's deposition, Palumbo again called and left another voicemail urging Michael to return his calls. (CP 63 at 79:1-25.) Palumbo told him "I think that we can work out something that's to your benefit." (*Id.*) Palumbo also told Michael: "we are very -- very willing to try to collect money on your -- on your behalf as well as [the Otas']." (*Id*.)

In yet another voicemail later that day, Palumbo told Michael that Michael's grandkids were considering flying to Arizona again to try and talk to Michael the day before his deposition. (CP 64 at 83:2-17.) Palumbo stated: "I just talked to your grandson who was thinking about flying down tomorrow morning to try to catch you and I hate to have them do that, but

[4] The full text of Palumbo's voicemail to Michael on April 6, 2021, is transcribed on CP 61-62 at 71:8-74:7. As the Court of Appeals recognized, Palumbo's voicemails suggest he was not interested in finding out what Michael's position was, but rather telling Michael what it should be in order for the Otas to win their case and share settlement or judgment proceeds with Michael. (Palumbo Pet., Ex. 1 at 25.)

at the same time I really would like to talk to you before the deposition on Friday." (*Id.*) Palumbo continued, "it'd really be I think helpful, certainly helpful for me and I think helpful for you and Lori if we talked before Friday [*i.e.*, the date of Michael's deposition]." (*Id.*)

4. Michael Understood Palumbo was Seeking to Influence his Testimony.

Michael understood the Otas' and Palumbo's contacts to be efforts to influence his testimony in the Otas' favor.

> Q. So if I understand correctly, you hadn't spoken with Connie and Stacey Ota for about a decade prior to you getting our subpoena on March 25th?
>
> A. Correct.
>
> Q. Yet after you get our subpoena on March 25th, you received three or four telephone calls from Connie Ota, the same number of calls from her attorney Mr. Palumbo, and a visit to your door by your grandkids?
>
> A. Yes. I was a little disturbed when Ralph called indicating that if we would play along, there would be some money in it for us. And I thought, what the hell are you trying to do, bribe us or—pay us to come to your side? You know, I – I don't like that.

(CP 61 at 70:10-24; *see also* CP 62-63 at 75:21-77:5-6.) Michael also understood that Palumbo's lengthy voicemail on April 6, 2021, was intended to convey to him the talking points that

Connie, Stacey and Palumbo wanted Michael to testify to and, if he testified accordingly, Michael would be financially rewarded. (CP 63-65 at 77:12-78:18, 80:1-18, 84:14-85:2.)

C. The Trial Court Imposes Sanctions.

After receiving copies of the voicemails and deposing Michael, the Wakazurus prepared and filed a Motion for Sanctions, accompanied by supporting evidence. (CP at 25-91.) On April 30, 2021, the trial court entered Findings of Fact, Conclusions of Law, and an Order on Defendants' Motion for Sanctions. (CP 571-74.) The trial court recognized the inconsistency between the Otas' allegations and their later claimed belief that Michael continued to have an interest in the Property. (CP 572-73.)

> Prior to his deposition being noted by defendants for April 7, 2021, the record indicates that plaintiffs had not communicated to [Michael] an intent to "share proceeds" of this lawsuit, and the Court has some difficulty understanding Connie Ota's voicemail to [Michael] shortly before his scheduled deposition that the [Otas] believed [Michael] owned an interest in real property involved in this lawsuit given the allegations in [the Otas'] complaint.

(*Id.*) The trial court further stated the actions by Palumbo "seriously concern the Court and need to be referred to appropriate authorities." (CP 573.) The trial court made an express finding of bad faith, writing:

> Here, serious and apparently factually based allegations are made that plaintiffs' counsel attempted to influence the judicial process by inducing [Michael] to testify favorably for plaintiffs and was told of a potential share of any settlement or judgment. The amount mentioned could be viewed as a substantial financial incentive. The Court also notes the direct contacts by [Connie] and [Michael's] grandchildren to persuade [Michael] to speak with [Palumbo]. The Court believes that a showing of bad faith has been made.

(CP 574.)

D. Michael has no Interest in the Sumner Property and no Interest in the Lawsuit.

Since the time the Otas' and Palumbo's misconduct was exposed, they have tried to rationalize the substantial financial incentive they offered Michael by arguing he has an interest in the Sumner property and a financial interest in this case. The documentary and testimonial evidence, however, confirms the falsity of these post hoc rationalizations.

Michael has had no interest in the Sumner property since

September 5, 2012, when he executed a Quit Claim Deed (In Lieu of Foreclosure) and conveyed the property to R & K West Valley Highway Investments LLC ("R&K"), a Washington limited liability company the Wakazurus owned. (CP 1139-44.)

As documented in a Forbearance Agreement dated June 25, 2012, Michael formerly held fee simple title to the property. (CP 215.) Michael and Stacey were in default of a $1 million Promissory Note, which the Wakazurus assigned to R&K. (*Id.*; CP 226-31; CP 233.) Stacey, Michael and R&K entered into the Forbearance Agreement on June 25, 2012. (CP 215-63.) During his deposition, Stacey admitted he entered into and signed the Forbearance Agreement. (CP 495-96 at 108:15-109:7.) Connie also consented to the terms and conditions of the Forbearance Agreement in an Acknowledgment and Consent of Spouse, which she admits she executed. (CP 221; CP 542-544 at 140:19-145:18.)

Under the Forbearance Agreement, R&K agreed to forbear from collecting monies due under the Promissory Note

until August 31, 2012, at which time Michael and Stacey agreed that "all principal, accrued interest, and other charges due thereunder shall be paid in full." (CP 215.)

Neither Michael nor Stacey made any payments due by August 31, 2012. (CP 436-37 at 148:25-150:19; CP 484 at 63:7-12.) Accordingly, upon the default of and pursuant to the terms of the Forbearance Agreement, Stacey and Michael executed a Deed in Lieu of Foreclosure. (CP 1125-37.) Michael also executed a Quit Claim Deed (In Lieu of Foreclosure), through which he conveyed title to the property to R&K absolutely and free of any right of redemption or other right or interest. (CP 1139-44.)

In the Deed in Lieu of Foreclosure Agreement dated September 5, 2012, Stacey and Michael, as "Borrowers," both represented and warranted:

- The Wakazurus loaned $1 million to Michael and Stacey.[5]
- Michael and Stacey were in default of the Promissory Note and R&K had declared all

[5] (CP 1125, ¶ A.)

amounts owed under the Promissory Note immediately due and payable.[6]

- All applicable notice provisions had been complied with or waived by Michael and Stacey, all applicable grace periods had expired or were waived by Michael and Stacey, and all indebtedness under the Promissory Note was immediately due and payable.[7]

- Stacey had no right, title, or interest in the property, whether as his separate community estate, and that to the best of his knowledge, information and belief, Michael held title to the property as his separate estate.[8]

- Michael held title to the property as his separate estate in fee simple, absolutely.[9]

- Michael and Stacey, as "Borrowers" acknowledged and agreed that "they have no defenses, set offs or claims based upon any events or transactions occurring or failing prior to the date of this Agreement, or the exercise by Lender of its other rights and remedies under the Promissory Note or Deed of Trust (subject to the above non-recourse provisions), and to the extent Borrowers have any such defenses, set offs, or claims, Borrowers hereby forever waive, release and relinquish the same.[10]

Connie also consented to these terms. (CP 221; *see also* CP 217 at ¶ 5.)

Accordingly, pursuant to the Deed in Lieu of Foreclosure

[6] (*Id.*, ¶ C.)
[7] (*Id.*, ¶ E.)
[8] (CP 1126, ¶ (3)a.)
[9] (*Id.*, ¶ (3)b.)
[10] (CP 1127, ¶ (3)g.)

Agreement and the Quit Claim Deed (In Lieu of Foreclosure), Michael conveyed title to the property to R&K absolutely and free of any right of redemption or other right or interest. (CP 1126; CP 1139-44.) Michael admits unequivocally that he did so. (CP 68 at 97:6-98:11.)

> Q. And through this quitclaim deed in lieu of foreclosure, is it the case that you conveyed the Sumner property in full to R&K West Valley Highway Investments, LLC.
>
> A. Yes.
>
> Q. There's no dispute about that either, right?
>
> A. No.
>
> Q. You understood that as of September 5, 2012, you were giving up any interest that you had in the Sumner property?
>
> A. Correct.
>
> MR. PALUMBO: Objection to form.
>
> Q. (BY MR. GRAFF) And you've had no interest in the Sumner property since that time?
>
> A. Correct.
>
> MR. PALUMBO: Same objection.
>
> Q. Again, no dispute about any of that?
>
> MR. PALUMBO: Same objection.
>
> A. No.

(CP 68 at 97:17-98:11.)

Further, in an Estoppel Affidavit which Michael also admits he signed, Michael declared that the conveyance "is

intended to be and is an absolute conveyance of the title to the [property]….” (CP 1146-49; CP 68 at 98:16-99:5.)

During his deposition, Michael further confirmed he was never part of any partnership agreement with Stacey and the Wakazurus.

> Q. (BY MR. GRAFF) So if Stacey alleges that he had some sort of an agreement with the Wakazurus relating to the Sumner property, you were not a part of it?
>
> MR. PALUMBO: Objection to form.
>
> A. Correct.
>
> Q. (BY MR. GRAFF) Do you remember having any meetings with the Wakazurus in which you discussed entering into some sort of an agreement with them concerning the Sumner property?
>
> A. Never.
>
> Q. How about -- I just asked you about meetings. What about written communications? Do you remember any written communications or negotiations with the Wakazurus relating to the Sumner property?
>
> A. No, I don’t.

(CP 55 at 45:6-21.)

> Q. … As I understand your testimony, you never reached an agreement with Stacey Ota and the Wakazurus concerning the Sumner property. Is that a true statement?
>
> MR. PALUMBO: Objection to form.
>
> MR. GRAFF: What’s your form objection, Counsel?
>
> MR. PALUMBO: Leading.

MR. GRAFF: That's your objection?

Q. MR. GRAFF: Okay. You can go ahead and answer that question, Mr. Ota.

A. We had no discussions, verbal or written, regarding profit sharing or anything.

Q. And no agreement with the Wakazurus?

MR. PALUMBO: Same objection.

A. No agreement.

(CP 55 at 46:15-47:5.)

The Otas and Palumbo argue that Michael has an interest in the lawsuit through an interest in Generation V, LLC, a defunct Washington limited liability company. But Generation V, LLC dissolved years ago in 2012. (CP 356, 455.) And even if Michael continued to have an interest in Generation V, LLC, Generation V, LLC has no interest in this case. (CP 1-9.) The Otas are the only plaintiffs. (*Id.*) Only the Otas sued the Wakazurus claiming (falsely) that they—the Otas alone—were entitled to millions of dollars in damages. (*Id.*) The Otas did not bring this lawsuit derivatively, or on behalf of Michael, Generation V, LLC, or anyone else, but only for themselves. (*Id.*)

E. Court of Appeals Proceedings.

The Otas and their attorneys filed Motions for

Discretionary Review on July 16 and July 19, 2021, respectively. The Court of Appeals consolidated the Otas' and their attorneys' motions and granted discretionary review on November 3, 2021.

The Court of Appeals issued its opinion on February 13, 2023. It reversed the trial court's order of disqualification, holding the trial court was required to consider lesser sanctions on the record. (Palumbo Pet., Ex. 1 at 26.) It also held that substantial evidence supported the trial court's finding of bad faith as to Palumbo. (*Id*.) The Court of Appeals agreed with the trial court that Palumbo's statements in his voicemails to Michael can be viewed as a substantial financial incentive for Michael to testify in a manner favorable to the Otas. (*Id*. at 15-19.)

The Court of Appeals further held that the trial court applied the correct legal standard in its finding of bad faith and considered the entire record in doing so. (*Id*. at 15-16.) It stated:

> Appellants appear to believe that the determination of whether the conduct constituted bad faith turns on whether the Otas reasonably believed that Michael had an interest in the lawsuit. The Otas misconstrue the trial court's concern. The concern is not whether counsel had a basis to support its legal theory or the decision to reach out to Michael

> prior to his deposition. The concern expressed by the trial court is what was conveyed to Michael, how it was conveyed, and when it was conveyed.

(*Id*. at 16-17.) From the Court of Appeals' February 13, 2023 opinion, Palumbo petitions for this Court's review.

III. ARGUMENT

None of the limited circumstances warranting this Court's review of a Court of Appeals' decision exist here. *See* RAP 13.4(b). Contrary to Palumbo's arguments, the Court of Appeals' opinion is not in conflict with this Court's holding in *In re Firestorm*, 129 Wn.2d 130, 916 P.2d 411 (1996). Accordingly, review is not appropriate under RAP 13.4(b)(1).

The Court of Appeals' opinion is also not in conflict with published Court of Appeals' decisions, including *Andren v. Dake*, 14 Wn. App. 2d 296, 472 P.3d 1013 (2020), *Adams v. Dep't of Corr.*, 189 Wn. App. 925, 361 P.3d 749 (2015), *Faulkner v. Dep't of Corr.*, 183 Wn. App. 93, 332 P.3d 1136 (2014), and *Francis v. Dep't of Corr.*, 178 Wn. App. 42, 313 P.3d 457 (2013). Review is not appropriate under RAP 13.4(b)(2).

Finally, Palumbo makes no argument that any significant question of constitutional law is involved, or that any substantial public interest would be served by this Court's review. Accordingly, review is not appropriate under RAP 13.4(b)(3)-(4). This Court should deny Palumbo's Petition for Review.

A. The Court of Appeals' Opinion is not in Conflict with *Firestorm*.

Palumbo argues the Court of Appeals' opinion is in conflict with *In re Firestorm*, 129 Wn.2d 130, 916 P.2d 411 (1996). More specifically, Palumbo first argues that the Court of Appeals failed to consider facts relating to Palumbo's motive or intent, which he argues is required by *In re Firestorm*. (Palumbo Pet. at 25-27.) Palumbo ignores, however, that the Court of Appeals expressly considered facts concerning his motive or intent. (*See, e.g.*, Palumbo Pet., Ex. 1 at 16-19, 25.) As just one example, the Court of Appeals wrote:

> Appellants argue that nothing in the record supports Palumbo trying to "influence" Michael's testimony because they were simply reiterating what the Otas' [sic] presented to be true. It is true that nothing in the record suggested that prior to Michael's

> deposition, Palumbo knew that Michael denied ever having agreed verbally or in writing to a profit-sharing agreement with the Wakazurus. At the same time, Palumbo's voicemails suggested that he was not interested in finding out what Michael's position was, but instead suggested what it should be in order for the Otas to win their case and share their settlement or judgment with Michael.

(*Id.* at 25.)

Palumbo's assertion that the Court of Appeals failed to consider Palumbo's motive and intent is simply false. The Court of Appeals considered Palumbo's multiple statements to Mike in context with all the other evidence, and it properly held that "substantial evidence supports the [trial] court's finding that '[t]he amount mentioned could be viewed as a substantial financial incentive' for Michael to testify at the deposition consistent with Palumbo's version of events." (*Id.* at 19.) The fact that the trial court and Court of Appeals did not agree with Palumbo's professed pure motives and intentions does not mean they failed to consider what Palumbo intended.

Palumbo next argues that *Firestorm* required the Court of Appeals to review the trial court's finding of bad faith *de novo*,

rather than for substantial evidence. (Palumbo Pet. at 23-24.) The Court of Appeals appropriately applied the substantial evidence standard of review, recognizing the matter turned on credibility determinations and a factual finding of bad faith. (Palumbo Pet., Ex. 1 at 10-11 (citing *In re Marriage of Rideout*, 150 Wn.2d 337, 351, 77 P.3d 1174 (2003) and *Robinson v. Am. Legion Dep't of Wash., Inc.*, 11 Wn. App. 2d 274, 286, 452 P.3d 1254 (2019).)

Firestorm is not inconsistent. Rather, in *Firestorm*, the Court stated "[s]ince this case involves the application of a court rule to a set of particular facts, this is a question of law, and will be reviewed de novo on appeal." *In re Firestorm 1991*, 129 Wn.2d at 135. In this case, unlike in *Firestorm*, the trial court did not fail to make factual findings and the Court of Appeals was not applying a court rule to a set of particular facts. Rather, as the Court of Appeals recognized, the trial court made a credibility determination in rejecting Palumbo's denial that he was attempting to influence Mike's testimony. (Palumbo Pet., Ex. 1 at 11.)

The Court of Appeals properly applied substantial evidence review consistent with this Court's decision in *In re Marriage of Rideout*, 150 Wn.2d at 350-51. The Court of Appeals' opinion is not in conflict with *Firestorm*. Review is not warranted under RAP 13.4(b)(1).

B. The Court of Appeals' Opinion is not in Conflict with the Inmate Public Records Act cases relied upon by Palumbo.

Palumbo next relies upon three inapposite cases addressing bad faith in the context of RCW 42.56.565(1) to argue the Court of Appeals failed to review the trial court's bad faith determination *de novo*.[11] (Palumbo Pet. at 20-22.) The Court of Appeals' opinion is not in conflict with these inapplicable inmate Public Records Act ("PRA") cases.

As this Court recognized in *Hoffman v. Kittitas Cnty.*, 194 Wn.2d 217, 226, 449 P.3d 277 (2019), RCW 42.56.565(1) "prohibits courts from awarding PRA penalties to correctional

[11] *Adams v. Wash. Dep't of Corr.*, 189 Wn. App. 925, 361 P.3d 749 (2015); *Faulkner v. Wash. Dep't of Corr.*, 183 Wn. App. 93, 332 P.3d 1136 (2014); *Francis v. Wash. Dep't of Corr.*, 178 Wn. App. 42, 313 P.3d 457 (2013).

facility inmates 'unless the court finds that the agency acted in bad faith' in its violation of the PRA." This case, of course, neither involves the PRA, nor RCW 42.56.565(1). In *Hoffman*, the Court rejected the appellant's request for *de novo* review and noted that "[w]e have not yet had occasion to review the Court of Appeals' inmate PRA holdings, and this noninmate case is not the appropriate vehicle for doing so[,]" as "[t]hey interpret RCW 42.56.565, a statute that is inapplicable here." *Hoffman*, 449 P.3d at 226-27. The same is true here.

In addition, Palumbo's unsupported assertion that the facts at issue in the case are uncontested is false.[12] (Palumbo Pet. at 21.) As the Court of Appeals recognized in this context of attempting to influence a witness's testimony with a substantial financial incentive, the trial court's "finding of bad faith is inherently a factual finding and, by rejecting appellant's general denial of attempting to influence Michael, the trial court made a

[12] Palumbo's assertion that "[n]or is it contested what Palumbo said in the voicemails was established by the evidence and true" is also a false statement. (Palumbo Pet. at 22.) Palumbo's stated theory of the case that he conveyed to Mike is very much contested.

credibility determination." (Palumbo Pet., Ex. 1 at 11.) The Court of Appeals' statement in Faulkner that "[w]hen underlying facts are uncontested, we apply de novo review to ascertain whether the facts amount to bad faith" is inapplicable here. *See Faulkner*, 183 Wn. App. at 102. Moreover, the issue of bad faith in the PRA context of RCW 42.56.565(1) is readily distinguishable. While it is easy to envision a violation of the PRA occurring in good faith by oversight or simple negligence, it cannot be said that a factual finding that Palumbo attempted to influence a witness's testimony with a financial incentive does not constitute bad faith.

C. The Court of Appeals' Opinion is Not in Conflict with *Andren*.

Finally, Palumbo tries to downplay the seriousness of his misconduct, apparently arguing it was merely "objectionable" or "inappropriate and improper," but not sanctionable bad faith. (Palumbo Pet. at 27-28.) In this way, Palumbo claims the Court of Appeals' opinion is "at odds" with *Andren v. Dake*, 14 Wn. App. 2d 296, 472 P.3d 1013 (2020). Palumbo is wrong. *Andren* does not hold that sanctionable bad faith conduct requires

"rampant" or "continuing violations" of trial court rulings, or prior warnings by a trial court. As the Court of Appeals recognized:

> "Attempts to influence a witness to change his testimony or to absent himself from a trial or other official proceeding, necessarily have as their purpose and it is their natural tendency to obstruct justice. They are offenses against the very object and purpose for which courts are established."

(Palumbo Pet., Ex. 1 at 24-25.) Palumbo engaged in egregious misconduct striking at the core of our justice system. Palumbo's conduct clearly constitutes sanctionable bad faith, and he needed no warning not to attempt to interfere with a witness's testimony with a financial bribe.

The Court of Appeals' opinion is not in conflict with *Andren*. Review is not warranted by this Court under RAP 13.4(b)(2).

IV. CONCLUSION

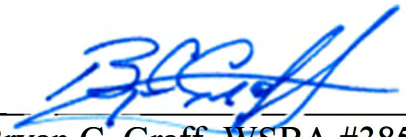
The Court should deny Ralph Palumbo's Petition for Review by the Washington Supreme Court. None of the considerations governing acceptance of review under

RAP 13.4(b) support this Court's discretionary review in this case.

This document contains 4,605 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 19th day of May, 2023.

RYAN, SWANSON & CLEVELAND, PLLC

By 

Bryan C. Graff, WSBA #38553
Britenae M. C. Pierce, WSBA #34032
Helen M. Lubetkin, WSBA #55498
1201 Third Avenue, Suite 3400
Seattle, Washington 98101-3034
Telephone: (206) 464-4224
Facsimile: (206) 583-0359
graff@ryanlaw.com
pierce@ryanlaw.com
lubetkin@ryanlaw.com

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on the 19th day of May, 2023, I caused foregoing document to be filed and served on the following via the Courts' Electronic Filing Portal:

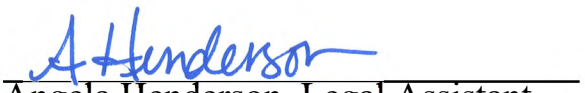
Counsel for Michael and Connie Ota
Kenneth W. Masters, WSBA No. 22278
Shelby R. Frost Lemmel, WSBA No. 33099
Masters Law Group, PLLC
241 Madison Avenue North, Bainbridge Island, WA 98110
ken@appeal-law.com
shelby@appeal-law.com

Counsel for Ralph Palumbo
Bradley S. Keller, WSBA No. 10665
Byrnes Keller Cromwell LLP
1000 Second Avenue, 38th Floor, Seattle, WA 98104
bkeller@byrneskeller.com

Counsel for Joshua D. Krebs
Jeffrey T. Kestle, WSBA No. 29648
Lori W. Hurl, WSBA No. 40647
Nicole T. Morrow, WSBA No. 51546
Forsberg & Umlauf, P.S.
901 Fifth Avenue, Suite 1400, Seattle, WA 98164
JKestle@FoUm.law
lhurl@foum.law
NMorrow@FoUm.law

Counsel for Lynn Engel
Malaika M. Eaton, WSBA No. 32837
Ai-Li Chione-Martinson, WSBA No. 53359
McNaul Ebel Nawrot & Helgren PLLC
600 University Street, Suite 2700, Seattle, WA 98101
meaton@mcnaul.com
achiongmartinson@mcnaul.com

DATED this 19th day of May, 2023, at Seattle, Washington.



Angela Henderson, Legal Assistant
henderson@ryanlaw.com

RYAN, SWANSON & CLEVELAND PLLC

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