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No. 95861-1

SUPREME COURT  
OF THE STATE OF WASHINGTON

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In re the Estate of:  
TAYLOR GRIFFITH

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KENNETH GRIFFITH and JACKIE GRIFFITH,  
Petitioners,

v.

BRADLEY J. MOORE,  
in his capacity as Personal Representative,  
Respondent,

MICHAEL B. KING; CARNEY BADLEY SPELLMAN, P.S., et al.,  
Petitioners.

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RESPONDENT MOORE'S  
ANSWER TO PETITION FOR REVIEW

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BYRNES KELLER CROMWELL LLP  
Keith D. Petrak, WSBA No. 19159  
38th Floor  
1000 Second Avenue  
Seattle, WA 98104  
(206) 622-2000

*Attorneys for Respondent Bradley J. Moore*

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## I. INTRODUCTION

Petitioners' King and Beatty (hired by Travelers ostensibly to defend two of its insureds; hereinafter collectively "Petitioners" or "Travelers' Retained Counsel")<sup>1</sup> now claim that they appeared for but then took actions adverse to the personal representative of the Estate of Taylor Griffith (Mr. Moore), then withdrew and switched sides to become directly adverse to Mr. Moore, by "mistake" because they are not trusts and estates lawyers. Even if the Court accepts this latest assertion at face value, the trial court acted well within its discretion in entering a disqualification order preventing Petitioners from taking further actions prejudicial to the Estate's interests. There is no exception in RPC 1.9 for attorneys who represent a client inadvertently. And if, when Travelers' Retained Counsel appeared as counsel for the Estate, they did not understand well-settled law that their client was the Estate's recently appointed personal representative (Respondent Moore), they should have.<sup>2</sup> Indeed, as counsel appointed by Travelers to defend the Estate, it was their

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<sup>1</sup> Mr. King and Ms. Beatty are both talented attorneys who without question have served well hundreds if not thousands of clients in the courts of Washington. But the trial court was well within its rights to review and critique their roles in regard to who they represented in these matters. That their professional roles in these matters are at issue is not any form of personal charge against them.

<sup>2</sup> Mr. King cited this law and authority to the trial court in his briefing regarding disqualification. CP 554. He professed no prior unawareness of it at that time.

job to know that. And upon appearing for the Estate, if Travelers' Retained Counsel were not focused on defending its interests as defined by Mr. Moore, they should have been.

Mr. Moore's protests when Travelers' Retained Counsel acted contrary to the Estate's interests do not negate the legal relationship between them. Under the Travelers' policy, Mr. Moore had no right to select or discharge counsel, and Travelers controlled the defense. Mr. Moore's only protections were his rights under the policy, and Travelers' and counsel's obligations under *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 388-89, 715 P.2d 1133 (1986). All he could do in that context, as counsel took action in favor of Travelers and its other insured (his co-defendants, the Griffith parents), and against what Mr. Moore viewed as the Estate's interests, was to challenge their role as his counsel. But doing so did not change the role they accepted when they first appeared as his attorneys and took on the legal obligation not to act adversely to the Estate's interest as defined by Mr. Moore.

The trial court acted well within its discretion in disqualifying the Petitioners as counsel, and the Court of Appeals' decision affirming the trial court's disqualification order follows well-settled law governing the professional obligations of insurer-appointed counsel to their clients, as

defined in *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d at 388-89. This Court should deny review.

## II. RESTATEMENT OF FACTS

Rather than repeat the detailed factual summary in the Court of Appeals' opinion and the Harris Creditors' brief, or their arguments, Mr. Moore incorporates the Harris Creditors' factual summary and arguments by this reference, and thus only highlights certain critical facts.

This appeal has its genesis in an accident in August 2014, in which Taylor Griffith's car hit that of Steven Harris and his wife head on. Taylor and Mr. Harris were killed, and Mrs. Harris was severely injured. When Travelers Insurance, Taylor's insurance company, refused to disclose limits, negotiate or settle in the face of clear liability, the Harrises sued Taylor's estate ("Estate"), and his parents for negligent entrustment and under the family car and agency principles. CP 982-87 ("*Harris* Litigation Compl.>").

Travelers then elected to retain one attorney, Michael Jaeger of the Lewis Brisbois firm, to appear and defend all defendants. CP 988-89. In what will be revealed as a constant theme of Travelers' defense of the Estate, no one discussed joint representation or potential conflicts with the Estate, or sought (much less obtained) a conflict waiver at that time. Nor could they, since neither Travelers nor Mr. Jaeger sought to have Taylor's parents, or anyone else, appointed as personal representative of the Estate *for fifteen*

*months* after Taylor died, much less within 40 days of his death.<sup>3</sup> Thus, by virtue of Travelers' inaction, there was no one to consider independently what rights the Estate had against the Griffiths, or to waive conflicts of interest or otherwise consent to joint representation.<sup>4</sup> Nor could Mr. Jaeger have advised the Estate (had there been someone to advise) about its potential rights against the Griffiths (given his joint representation of the Griffiths).

The Estate existed as a rudderless insured/client and docile victim of Travelers' defensive strategy – to protect the Griffith parents and itself at the Estate's expense – until November 2015, when the Harris Creditors took it upon themselves to commence a probate proceeding requesting the appointment of a Personal Representative for the Estate shortly before their motion for partial summary judgment of liability and certain damages against the Estate and the Griffiths was to be heard. *See In re Estate of Griffith*, King County Superior Court, Case No. 15-4-06640-1 SEA (“*Probate Litigation*”). CP 1620-39. In addition to potential claims by the Estate against the

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<sup>3</sup> Also, due to Travelers' inaction, the Griffiths lost statutory priority to be named as personal representative. *See* RCW 11.28.120(7) (time limit for priority appointment is 40 days from death); *Koloff v. Chicago, Milwaukee & Puget Sound Ry. Co.*, 71 Wash. 543, 548, 129 P. 398 (1913) (next of kin waive right to administer estate if they fail to petition for appointment within 40-day statutory period); *In re Yarbrough's Estate*, 126 Wash. 85, 86, 216 P. 889 (1923) (same; even a widow stands in same position as a stranger for late appointment).

<sup>4</sup> As Mr. King later pointed out, Travelers had the right – and thus the obligation to competently – control the defense. CP 2570.

Griffiths, by then there were also multiple grounds for possible bad faith claims against Travelers by the Estate *and* the Griffiths. After notice to the Griffiths and a contested hearing, Brad J. Moore, an experienced personal injury attorney with extensive experience in bad faith and Consumer Protection Act claims on behalf of policyholders and insureds (among other things), was appointed as the Estate's Personal Representative on December 8, 2015. CP 380-82 ¶¶ 2-7, 1639, 1658-59, 1787-88 ¶¶ 3-5.

Mr. Jaeger appeared on behalf of Mr. Moore as the Estate's personal representative on December 16, 2015. CP 2254-56. Travelers then added Petitioners and their respective firms to the defense team; Ms. Beatty associated with Mr. Jaeger "on behalf of [the Griffiths] and the Estate of Taylor Griffith (deceased)" and Mr. King joined in Mr. Jaeger's appearance, associating as "counsel for Defendants." CP 2273-75, 2336-38. Yet again, despite now three separate firms ostensibly charged with defending the Estate and purporting to jointly represent it with the Griffiths, none discussed joint representation or conflicts of interest with the Estate, even though a personal representative had been appointed to make such decisions for the Estate.

Indeed, early on when Ms. Beatty took action he felt was not in the Estate's best interests, Mr. Moore protested that she was not authorized to represent the Estate. However, as the Travelers' policy did not afford the insured the right to select counsel, Mr. Moore had no choice but to accept Mr.



Jaeger and Travelers' Retained Counsel as his attorneys, and could not discharge them. CP 646-47 ¶¶ 2-4, 2598-99. Instead, Travelers' Retained Counsel simply ignored the court's binding order appointing Mr. Moore as personal representative (no one asked that the order be stayed pending a ruling on a motion for revision), and took various actions for the benefit of Travelers and/or the Griffiths that Mr. Moore felt were against the Estate's interests, and in some cases were contrary to his direct instructions:

- Mr. Jaeger brought the motion for revision asking that Mr. Moore be removed as personal representative against Mr. Moore's direct instruction not to do so, and ignored Mr. Moore's directive to withdraw the motion once it was filed. CP 382-85 ¶¶ 8-14, 392-400 (Exs. A-G).
- Without first consulting with Mr. Moore, Travelers' attorneys appeared at the summary judgment hearing and objected to liability and allocation of fault to the Griffiths. CP 385-86 ¶¶ 15-16, 401-02 (Ex. H), 2319 at 24:19-25:1.
- When the *Harris* court denied the Harris Creditors' summary judgment motion against the Griffiths, the Harris Creditors requested reconsideration. CP 2296-99. Mr. Moore was forced to file a *pro se* joinder in the reconsideration motion on behalf of the Estate, as none of his attorneys (whose other clients, the

of the Estate, as none of his attorneys (whose other clients, the Griffiths, opposed reconsideration) would do so. CP 2307-09.

- On the first day of trial, again contrary to Mr. Moore's directions and the Estate's interests, Travelers' appointed attorneys filed a brief in opposition to application of the family car doctrine to the Griffiths. CP 2339-47.
- Upon seeing that counsel were unprepared to defend the case against the Estate and fearing a runaway jury verdict, Mr. Moore proposed to arbitrate damages issues before former Washington Supreme Court Justice Ireland. CP 386-89 ¶¶ 17-21, 403 (Ex. I), 2354, 2357. Travelers' Retained Counsel objected and asked that the arbitration be stayed.

Mr. Moore directed them to withdraw the objection, pointed out the conflicting interests between the Estate and the Griffiths, and stated that they were not authorized to make representations for the Estate and could no longer jointly represent the Estate and the Griffiths. CP 2572-73, 2600-02. Even then, with the potential conflicts that counsel *should* have discussed with their clients at the outset of the engagement now manifest, counsel did not withdraw the objection to arbitration. Instead, Travelers' Retained Counsel withdrew as counsel for the Estate, again confirming that up to that point they *had* been representing the Estate (if they did not represent the

Estate, there was no need to seek the trial court's authorization to withdraw as its counsel).<sup>5</sup> CP 648 ¶ 6. And their conduct adverse to the Estate continued, with no waiver:

- As they sought leave to withdraw (but without getting the consent of their soon-to-be former client), Travelers' Retained Counsel moved – successfully – to stay the arbitration, over Mr. Moore's objection. CP 2358-79, 2388-93, 2498-502, 2615-16.
- Since the Griffiths had been nonsuited, and having withdrawn as counsel for the Estate, Travelers' Retained Counsel realized that they had no role in the case to pursue a stay of the arbitration. Thus, they asked that the Griffiths be allowed to intervene in the *Harris* Litigation – rejoining the case from which they had just been nonsuited – to pursue the Motion to Stay Arbitration that Travelers' Retained Counsel had filed as they withdrew from the case. CP 2394-472.
- Finally, realizing that the record on which the Motion for Revision would be decided was limited to that submitted in

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<sup>5</sup> Indeed, Travelers' Retained Counsel moved to quash the Harris Creditors' objection to their withdrawal, *insisting* that they be allowed to withdraw as counsel for the Estate. CP 2557-85.

regard to the original petition, Travelers' Retained Counsel filed a new lawsuit against Mr. Moore and the Estate under TEDRA, as a ruse to supplement the record in support of having Mr. Moore removed as personal representative. *See In re Estate of Griffith*, King County Superior Court, Case No. 16-4-00622-9 SEA ("TEDRA Petition"). CP 796-818.<sup>6</sup>

The actions of Travelers' Retained Counsel – in the defense as controlled and directed by Travelers – prejudiced the Estate and Mr. Moore in a number of ways. They opposed application of the Family Car Doctrine against the Griffiths, despite the benefit that would accrue to the Estate of that application. They challenged and impeded Mr. Moore's decision as the personal representative for the Estate to seek the shelter of arbitration, rather than face a jury without the benefit of material witnesses. They imposed on the Estate the burden and expense of an entirely separate legal proceeding under TEDRA challenging Mr. Moore's status, even though there was already pending a Motion for Revision, to improperly supplement the record that would otherwise be limited to the evidence before the commissioner. Even the Motion for Revision was brought without Mr. Moore's consent and pursued over his objection by

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<sup>6</sup> The *Harris* Litigation, *Probate* Litigation and TEDRA Petition were eventually consolidated.

another attorney hired by Travelers (Mr. Jaeger), who like Petitioners was also representing Mr. Moore at the same time. Mr. Moore has been forced to invest his own time addressing these matters, and has borne significant expense retaining counsel to fend off these challenges by attorneys who ostensibly represented him in the same or related matters.

The record is replete with objective evidence of conduct on the part of counsel establishing that they not only represented Mr. Moore, but understood that he was the client. For example, after associating with Mr. Jaeger's appearance on behalf of Mr. Moore and receiving numerous emails from Mr. Moore challenging their actions, Travelers' Retained Counsel did not correct their appearances or otherwise act in a fashion suggesting their appearances were in error. To the contrary, they reaffirmed their role as counsel for the Estate, and thus Mr. Moore, on the second day of trial, after the Griffiths – their only other clients – were nonsuited. CP 2355-56. Had Travelers' Retained Counsel only represented the Griffiths, at that point they would have had no right to continue as trial counsel. Even though Mr. Moore had earlier protested that Ms. Beatty was not authorized to represent the Estate, both she and Mr. King – presumably under the auspices of Travelers' right to control the defense – affirmed to the trial court that they represented the Estate. CP 1104-10. This reaffirmed Mr. Moore's understanding that Travelers – as was its right under the policy to select counsel – had appointed

them to represent him, as the Estate's personal representative. CP 647 ¶ 5. Finally, counsel's subsequent request for leave to withdraw as the Estate's counsel citing conflicts arising from Mr. Moore's directives as its personal representative – unnecessary if they did not represent Mr. Moore as the personal representative – further confirms their role as his counsel.

Further, in various emails predating the motion that led to Petitioner's disqualification, Mr. King stated repeatedly that the Estate was his client in discussing conflicts that arose due to Mr. Moore's directives as personal representative of the Estate:

[To Mr. Moore] .... The defense of the estate and the parents is being conducted pursuant to a liability insurance policy under which the insurer has the right to conduct that defense, and your directions and actions – ordering lawyers to take actions to the detriment of their clients, co-defendants in the same lawsuit as the estate – constitute an interference with that defense.<sup>7</sup>

These actions have made it impossible for me to continue as counsel for the estate, as long as you remain as its PR.

CP 604 (1/7/16 email).

[To Harris Creditors' counsel] Good Lord .... I was confronted by one client insured who was presuming to give directions that constituted an order to prejudice my other clients, who ALSO are being provided a defense under the same contract of insurance.

CP 605 (1/20/16 email).

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<sup>7</sup> In so stating, Mr. King conceded that Travelers was directing the defense.

The core of the problem with Mr. Moore was his presuming to tell lawyers to breach their duties owed to other clients. That directly imperils them, and could rebound to the prejudice of the Estate, as well. But as Mr. Moore was evidently determined to proceed down that path, and had gone off and hired his own counsel, to boot, I [King] withdrew as counsel for the Estate.

CP 607 (1/20/16 email).

On the heels of the TEDRA Petition, the Harris Creditors (joined by the Estate) asked the trial court to compel counsel's authority to act in the various matters pursuant to RCW 2.44.020 and .030, given the prior joint representation of clients with potentially conflicting interests and related constraints imposed under RPCs 1.7 and 1.9. Petitioners' contentions to disavow their appearances and representations to the trial court have morphed over time. For example, they first contended that their appearances, briefs, trial arguments and statements to the trial court that they represented the Estate were only statements of their "capacity and willingness to represent a legitimate and qualified [personal representative] for the Estate, should one be appointed ...." CP 553:3-5, 556:2-5. Another variation was that they were based on the notion that their other clients, the Griffiths, were "de facto executors" of the Estate. CP 555:20-556:1. Of course, no such nuanced roles were reflected in any pleadings or oral statements to the trial court, and the trial court was within its discretion to disregard and reject them. All doubts must be

reserved in favor of disqualification, as the attorneys' "conduct should not be weighed with hairsplitting nicety." *Kurbitz v. Kurbitz*, 77 Wn.2d 943, 946, 468 P.2d 673 (1970).

Travelers' Retained Counsel also argued – contrary to their appearances and statements to the trial court – that they *did not* actually represent the Estate, but told the trial court that they did so in order to continue to represent the *Griffiths'* interests in the damages trial against the Estate, even though the Griffiths were no longer parties. CP 556-57, 567 ¶ 8. *See* RPC 3.3 (mandating candor to tribunal). They have admitted that in truth, from the time they were assigned to the case, their "sole mission" was to force Mr. Moore's removal as personal representative. CP 552:24-553:3. They tried to justify what were at best misleading statements as to who they represented on their belief "that the Estate was threatened with harm," and they were acting to "protect the Estate" by utilizing self-help while "they waited for the court to decide whether to remove Moore as personal representative." Appellants' Court of Appeals Br. 37. Travelers' Retained Counsel's duty of candor to the trial court precluded making false statements about who they represent, whatever they believed about potential harm to the Estate. If their "sole mission" was to remove Mr. Moore and install the Griffiths in his place, then they should have been forthcoming about their role with both Mr. Moore and



the trial court. And they should *not* have appeared as counsel for the Estate, of which Mr. Moore had already been appointed as personal representative, but rather only as counsel for the Griffiths who they sought to install in Mr. Moore's stead.

Of course, none of the foregoing squares with Petitioners' latest claim that they did not understand or realize that Mr. Moore, as the duly appointed personal representative of the Estate, was their client. Nor would a lack of understanding of well-settled law avoid the application of RPC 1.9.

Based on the briefing submitted in conjunction with that motion, the trial court disqualified Travelers' Retained Counsel as counsel under RPC 1.9(a) and the Court of Appeals affirmed. CP 781-85.

### **III. ARGUMENT**

Mr. Moore incorporates by this reference the arguments of the Harris Creditors why Petitioners' arguments for review fail, and why review should be denied. But the absurdity of Petitioners' contentions bears particular comment.

In brief, Travelers' Retained Counsel argue that RPC 1.9 does not apply to them, notwithstanding that they appeared on the personal representative's behalf and represented to the trial court that they represented the Estate after the Griffiths were nonsuited, because (1) they

did not understand long standing and well-settled law that as the personal representative Mr. Moore was their client, and (2) Mr. Moore – who had no choice in counsel and no ability to discharge them – disclaimed their authority to act as his attorneys when in violation of *Tank*, they took action contrary to the Estate’s interest. If this were so, then an insurance company could exercise its right under its liability policy to appoint counsel, who could – while ostensibly appearing for the insured without the insured’s permission and without getting conflict waivers – act contrary to the insured’s expressed interests in order to protect another client and/or the insurance company. Indeed, Travelers’ Retained Counsel later acknowledged that their real mission as counsel was to have Mr. Moore – their client by law – *removed* as personal representative, which task they initially undertook cloaked as his ostensible attorneys. The insurer-retained counsel could then withdraw and take action overtly adverse to the insured in the same case. Counsel could then argue that he or she did not understand or was mistaken about to whom they owed their duty of loyalty, leaving the insured no remedy under RPC 1.9(a) to have retained counsel disqualified for switching sides and acting contrary to the insured’s interests.

That simply cannot be, and is not, the law, for the reasons stated in the response of the Harris Creditors. This Court should deny review of the

Court of Appeals' decision affirming the trial court's disqualification of  
Travelers' Retained Counsel.

DATED this 18th day of July, 2018.

BYRNES KELLER CROMWELL LLP

By 

Keith D. Petrak, WSBA #19159  
1000 Second Avenue, 38th Floor  
Seattle, WA 98104

Telephone: (206) 622-2000

Facsimile: (206) 622-2522

kpetrak@byrneskeller.com

*Attorneys for Respondent Brad Moore*

**CERTIFICATE OF SERVICE**

The undersigned attorney certifies that on the 18th day of July, 2018, a true copy of the foregoing was served on each and every attorney of record herein via email:

William Spencer  
Murray Dunham & Murray  
200 West Thomas Street, #350  
Seattle, WA 98119  
William@murraydunham.com

David Beninger  
The Luvera Law Firm  
701 5th Avenue, #6700  
Seattle, WA 98104  
david@luveralawfirm.com

Michael King  
Carney Badley Spellman, P.S.  
701 Fifth Avenue, Suite 3600  
Seattle, WA 98104  
king@carneylaw.com

Jacquelyn Beatty  
Karr Tuttle Campbell  
701 Fifth Avenue, Suite 3300  
Seattle, WA 98104  
jbeatty@karrtuttle.com

Howard Goodfriend  
Smith Goodfriend, P.S.  
1619 8th Avenue North  
Seattle, WA 98109-3007  
howard@washingtonappeals.com

Peter Jarvis  
Holland & Knight  
2300 US Bancorp Tower  
111 SW Fifth Avenue  
Portland, OR 97204  
Peter.jarvis@hkclaw.com

Ann Wilson  
The Law Offices of Ann T. Wilson  
1420 Fifth Avenue, Suite 3000  
Seattle, WA 98101  
ann@atwlegal.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED in Seattle, Washington, this 18th day of July, 2018.

  
\_\_\_\_\_  
Keith D. Petrak

**BYRNES KELLER CROMWELL LLP**

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