No. 101920-3

Court of Appeals No. 82840-1
(Consolidated with Nos. 82840-0, 82842-8 & 82843-6)

SUPREME COURT
OF STATE OF WASHINGTON

RALPH PALUMBO,

Petitioner,

v.

RICHARD M. WAKAZURU and KENNETH WAKAZURU, individuals,

Respondents.

ANSWER OF PETITIONER MICHAEL AND CONNIE OTA IN PALUMBO PETITION FOR REVIEW

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ARGUMENT

Petitioners Michael and Connie Ota timely filed a Petition for Review on April 19, 2023. They agree with Ralph Palumbo's Petition for Review for the reasons addressed below.

A. The appellate decision conflicts with numerous appellate decisions applying *de novo* review to a trial court's bad-faith determination. RAP 13.4(b)(2).

The appellate court incorrectly applied substantial-evidence review to the trial court's determination that the Otas' attorneys acted in bad faith. See ***Ota v. Wakazuru***, 2023 Wn. App. LEXIS 264, at *13-16 (Feb. 13, 2023) ("***Ota***"). This presents a conflict with numerous appellate decisions holding that whether the facts found amount to bad faith is a legal question reviewed *de novo*. RAP 13.4(b)(2). This Court should accept review and reverse.

Whether conduct amounts to bad faith is a mixed question of law and fact. ***Adams v. Dep't of Corr.***, 189 Wn. App. 925, 939, 361 P.3d 749 (2015); ***Faulkner v.***

Dep't of Corr., 183 Wn. App. 93, 101-02, 332 P.3d 1136 (2014). The question requires the courts to apply to the facts the definition of bad faith, a "legal precept." ***Faulkner***, 183 Wn. App. at 101-02. Where, as here, the facts are uncontested,[1] the courts "apply de novo review to ascertain whether the facts amount to bad faith." 183 Wn.2d at 102 (*citing* ***Francis v. Dep't of Corr.***, 178 Wn. App. 42, 51-52, 313 P.3d 457 (2013), *rev. denied*, 180 Wn.2d 1016 (2014)).

The appellate court failed to address these controlling cases, holding that "the court's finding of bad faith is inherently a factual finding," and applying substantial-evidence review to the trial court's bad faith determination. ***Ota***, at *13-16, *19-25. This not only deprived the Otas of the most favorable standard of review, but also creates a conflict with ***Adams***, ***Faulkner***, and

[1] Palumbo PFR at 21; Ota Reply at 6-8.

Francis, *supra*. RAP 13.4(b)(2). This Court should accept review and reverse.

B. The appellate decision conflicts with this Court's decision *In re Firestorm* in holding that improper conduct is alone sufficient for bad faith regardless of motive or intent. RAP 13.4(b)(1).

The appellate holding that bad faith means nothing more than improper conduct conflicts with this Court's decision in ***Firestorm***, *infra*, reversing the disqualification of counsel and holding that their improper conduct was reasonable under the circumstances. RAP 13.4(b)(1). This Court should accept review and reverse.

The trial court ruled that the Wakazurus could "demonstrate bad faith by inappropriate and improper conduct." CP 573-74 FF 8 (citing ***Andren v. Dake***, 14 Wn. App. 296, 321, 472 P.3d 1013 (2020)). As the Otas explained on appeal, ***Andren*** is inapposite, as it addresses bad faith in the context of awarding attorney fees for misconduct at trial, a comparatively minor sanction that is

not subject to a ***Burnet*** or ***Fisons*** analysis. BA 36-37; Reply 25-26 (both citing ***Mayer v. Sto Undus.***, 156 Wn.2d 677, 688-90, 132 P.3d 115 (2006) (holding that monetary sanctions are not "severe" so do not warrant an extensive injury); ***Burnet v. Spokane Ambulance***, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997); ***Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.***, 122 Wn.2d 299, 355-56, 858 P.2d 1054 (1993). The Wakazurus answered only that ***Andren*** is "good law …." BR 43-44. This misses the point: ***Andren*** is inapposite. ***Andren*** does not apply *here* because disqualifying counsel – one of the most drastic sanctions available – is subject to a ***Fisons*** analysis, as the appellate court correctly held. ***Ota***, at *25-33. Thus, it is not sufficient to find merely that counsel committed improper conduct.

Applying ***Andren*** to this matter creates a conflict with ***In re Firestorm***, which is controlling, as the appellate court correctly held. *See Id*. (citing 129 Wn.2d 130, 916 P.2d 411

(1996)). There, this Court ruled that the attorneys engaged in misconduct by violating CR 26(b)(5) governing the discovery of experts. 129 Wn.2d at 143-45. But this Court held too that their motive and intent was reasonable under the circumstances, reversing the disqualification sanction. *Id*. That is, their rule violation, while plainly "inappropriate and improper" – was not alone sufficient to warrant disqualification because their actions were reasonable under the circumstances. *Compare* ***Firestorm***, 129 Wn.2d at 143-45 *with* ***Andren***, 14 Wn. App. at 321.

The appellate decision largely bypasses this issue, holding – without explanation – that the "Otas fail to distinguish ***Andren***." ***Ota***, at *20. Setting aside that ***Andren*** is easily distinguished as addressed above, the appellate decision ignores ***Firestorm***'s analysis of motive and intent as components of bad faith in this context: imposing the severe sanction of disqualification under the court's inherent authority. That is, the appellate decision on

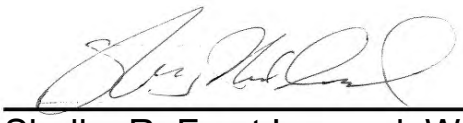
one hand holds that ***Firestorm*** controls, and on the other fails to follow it.

This Court should accept review to remedy this conflict with ***Firestorm*** (and misapplication of ***Andren***).

I certify that this Joinder contains **787** words in compliance with RAP 18.17.

DATED this 19th day of May 2023.

MASTERS LAW GROUP, P.L.L.C.



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