

NO. 67351-3-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

KENCO ENTERPRISES NORTHWEST, LLC, a Washington limited liability company,

Appellant,

v.

BRETT N. WIESE and INSLEE BEST BOEZIE & RYDER, PS, a Washington professional service corporation,

Respondents,

BRIEF OF APPELLANT

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 OCT 12 PM 3:57



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I. INTRODUCTION

In this case a corporation's claim for legal malpractice was dismissed by the trial court in a summary judgment proceeding based on the court's incorrect assumption that the underlying cause of action had been *assigned*. A 2003 Washington Supreme Court decision, *Kommavongsa v. Haskell*, 149 Wn.2d 288, 67 P.3d 1068 (2003), which narrowly prohibits the assignment of some legal malpractice claims, was the basis for the court's decision. Even though the trial court characterized its decision to dismiss this case as nothing more than an extension of the *Kommavongsa* holding, the trial court's action was considerably broader in scope. The lower court's ruling invalidated an "assignment" which never occurred, ignored fundamental principles of corporation law, and foreclosed the corporation's ability to seek recovery for damages it sustained as a result of its attorney's malpractice.

The malpractice in question occurred when the attorney drafted a purchase and sale agreement for the sale of the corporation's hotel. Eighteen months following the closing of the sale, the corporation sued the purchaser to collect on a promissory note given for a portion of the purchase price. The purchaser justified its refusal to pay on the seller's breach of certain representations and warranties contained in the contract between the parties, claims which the client specifically instructed the

attorney to protect against. A trial resulted in a jury determination that the purchaser had proven its affirmative defenses and counterclaims relating to the warranties and representations but, as a result of obvious confusion, the jury was unable to agree on an appropriate measure of damages sustained by the purchaser. At the request of the trial judge, the parties thereafter agreed by stipulation to the elements of damages actually proven at trial. The judge, sitting in equity, reviewed and approved the damage calculations agreed to by the parties, made specific and comprehensive findings of facts and conclusions of law, and entered a substantial judgment against the corporate seller of the hotel. As a component of the settlement between the parties, ownership of the corporation was thereafter transferred to the purchaser of the hotel, which had valid business reasons for acquiring control over the corporation. None of the corporation's assets or liabilities was affected by the change in ownership, including any potential causes of action against its attorney for his negligent drafting of the purchase and sale agreement.

Obliquely finding that the change in the corporation's ownership was "sufficiently an inappropriate transaction to involve the *Kommavongsa* rule", the trial court in this malpractice action granted the lawyer's summary judgment motion. Even though the corporation's malpractice claim was neither assigned nor otherwise transferred, as

occurred in *Kommavongsa*, the court apparently concluded that the change in the identity of the corporation's shareholder effectively terminated the corporation's right to prosecute its malpractice claim against its attorney. Such a ruling cannot be reconciled with the corporation's existence as a legal entity separate and distinct from its shareholders, regardless of the shareholders' identity at any particular point in time.

Additionally, the trial court overtly, and without authority, extended the holding in *Kommavongsa* to a cause of action that "arose one step removed from the underlying litigation..." (RP 26) *Kommavongsa*, the seminal Washington authority on the assignment of legal malpractice claims, explicitly limited its narrow holding to claims where a party assigns a malpractice claim to an adversary in the same litigation that gave rise to the alleged legal malpractice. The negligence in this action, however, was committed by an attorney whose representation occurred during a real estate transaction consummated a year and a half before the litigation commenced. Indeed, the defendant attorney did not, and could not, represent his former client in the litigation.

Because the corporation, as the client, is the owner of the malpractice claim, under CR 17(a) only it can institute legal action as the "real party in interest." Although *Kommavongsa* allowed the case to proceed based on the substitution of the "real party plaintiff", such cannot

occur in this case because the real party plaintiff, the corporate client, has already commenced the litigation yet had it dismissed on summary judgment.¹ As a result, the corporation has been denied its fundamental right to assert its malpractice claim; moreover, the attorney has been insulated from the consequences of his own negligence even though there is no legal or policy basis that supports such protection.

II. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED

A. Assignments of Error

Assignment of Error No. 1 – The trial court erred when it held the action was barred as an illegal assignment of a legal malpractice claim when, in fact, no assignment occurred and the real party in interest is the plaintiff here.

Assignment of Error No. 2 – The trial court erred when it extended the narrow holding of *Kommavongsa v. Haskell* to prohibit the assignment of a legal malpractice claim to an adversary not “in the same litigation that gave rise to the alleged malpractice,” and where the three stated public policy concerns do not support an extension to the facts presented here.

B. Issues Presented

Issue 1 – Is a corporation the “real party in interest” in a legal malpractice action when that corporation was the only client of an attorney who allegedly breached the standard of care owed to the corporation, where the corporation brought suit in its own name to protect its corporate rights and is the only proper plaintiff in the action? (Assignment of Error No. 1)

¹ Through a Motion for Reconsideration, this dilemma was clearly presented to the lower court for guidance as to who, other than the corporation, had the right to commence an action for malpractice. Regrettably, no guidance was offered by the court. The trial court granted summary judgment even though CR 17(a) specifically provides that: “No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest.”

Issue 2 – Does an “assignment” of a legal malpractice claim occur when the owner of a limited liability company transfers his interest in the company to another company for legitimate business reasons? (Assignment of Error No. 1)

Issue 3 – Does the narrow prohibition on the assignability of legal malpractice actions that arise “in the same litigation that gave rise to the alleged malpractice,” as stated in *Kommavongsa v. Haskell*, operate to bar a legal malpractice action which did not arise in the same litigation that gave rise to the alleged malpractice? (Assignment of Error No. 2)

Issue 4 – Do the three public policy reasons for the narrow prohibition against the assignability of legal malpractice actions that arise “in the same litigation that gave rise to the alleged malpractice,” as stated in *Kommavongsa v. Haskell*, serve as a basis for an extension of that prohibition to cases that did not arise in the same litigation that gave rise to the alleged malpractice where the public policy concerns do not support an extension to the facts of the instant matter? (Assignment of Error No. 2)

III. STATEMENT OF THE CASE

A. Facts of the Case

1. The underlying transaction: purchase and sale of the Red Lion Hotel and the faulty Wiese-drafted “AS IS” ‘WHERE IS’/No Warranties” clause.

This is a legal malpractice action in which Kenco Enterprises Northwest, LLC (hereinafter “Kenco”), a Washington limited liability company, has sued its former attorney, Brett Wiese, and his firm Inslee, Best, Doezie & Ryder, P.S. (hereinafter collectively referred to as “Wiese”) for professional negligence arising out of Wiese’s representation of Kenco in a commercial real estate transaction. That transaction

involved the purchase and sale of the Red Lion Hotel in Tukwila, Washington. Kenco (then owned by Dong Kang) was the seller, and Sleeping Tiger, LLC (jointly owned by William Summers and Joseph Brotherton) was the purchaser.² (CP 650; CP 610) Kenco hired Mr. Wiese and his firm, Inslee Best, to represent it in the transaction. (CP 650; CP 539) Kenco is the only client identified in the legal services agreement between Kenco and Inslee Best. (CP 650; CP 539)

The sale included three elements: (1) the real property; (2) the improvements to the real property, including the hotel buildings and their fixtures; and (3) the hotel business and associated assets, including personal property. (CP 651) A standard form Commercial Brokers Association Purchase and Sale Agreement (“PSA”), as modified by Wiese, defined “Property” in the opening paragraph as:

...the commercial real estate and all improvements thereon (collectively, the “Property”) commonly known as 11244 Tukwila International Boulevard. Consisting of two parcels totaling approximately 5.83 acres in the City of Tukwila, King County, Washington, legally described on attached Exhibit A.

² The trial court partially granted Wiese’s motion to strike portions of the declarations of Jin Kang, Ken Karlberg, and William Summers. The trial court’s order explicitly did not strike any portion of the declarations. Rather, the court interlineated the phrase “did not consider” the portions of the declarations that Wiese thought objectionable. (CP 805) Accordingly, no portions of the declarations were stricken and all are properly before this Court.

(CP 146)(emphasis in original) Thus, the defined term “Property” meant the real property on which the hotel sat and the hotel buildings (“improvements”) built thereon; the term “Property” did not include the business itself. Paragraph 12 of the PSA, “Seller’s Representations and Warranties,” stated:

Seller represents and warrants to Buyer that, to the best of Seller’s *ACTUAL* knowledge, each of the following is true as of the date hereof and shall be true as of closing: ... (b) All books, records, leases, agreements and other items delivered to Buyer pursuant to this Agreement are accurate and complete *AND PREPARED ON A CASH BASIS OF ACCOUNTING*; (c) The Property and the business conducted thereon comply with all applicable laws, regulations, codes and ordinances...

(CP 151)(italics and capitalization in original; underline added) Thus, the PSA contemplated that the “Property” and the “business” were separate assets being conveyed in the sale.

Kenco specifically instructed Wiese to draft protections into the contract that would eliminate its exposure to post-closing liability for any representations or warranties made by Kenco during the due diligence process, including any information regarding the hotel business related to its historical financial performance. (CP 651; CP 611) Wiese drafted an Addendum to the PSA that included an “AS IS’ ‘WHERE IS’/No Warranties” clause which stated that the “Property” was being sold with

no representations or warranties. (CP 159) This clause, however, was silent as to the “business.” (*Id.*) The sale transaction was closed on May 31, 2006. (CP 610-11; CP 652) The sale included three payment components: a cash payment; Sleeping Tiger’s agreement to take title subject to two existing bank loans to Kenco which were secured by the real estate (although Sleeping Tiger did not assume any liability for the loans); and a promissory note from Sleeping Tiger to Kenco in the amount of \$1,350,000. (*Id.*)

2. The litigation resulting from Wiese’s negligence:
Kenco v. Sleeping Tiger.

Sleeping Tiger, after becoming concerned that Kenco’s representations about the historical operating performance of the hotel business—as evidenced by profit and loss statements delivered by Kenco—were not accurate, withheld a portion of the payments due on the note and asked Kenco to renegotiate its terms. (CP 652; CP 612-13) When a deal could not be made, on January 8, 2008, Kenco sued Sleeping Tiger for breach of contract in order to collect the payments due on the note. (CP 652; CP 832) David Nold of Nold & Associates—not Mr. Wiese or any other lawyer at Inslee Best—filed the Complaint on behalf of Kenco. (CP 652; CP 832) In fact, Wiese was prohibited from representing Kenco in any such litigation involving Sleeping Tiger due to

Inslee Best's prior representation of Sleeping Tiger's principals in prior actions.³ (CP 614; CP 542-43) In the *Kenco v. Sleeping Tiger* action, Sleeping Tiger asserted affirmative defenses and counterclaims based on misrepresentation, fraud, and breach of the representations and warranties contained in the PSA. (CP 935; CP 615)

Kenco brought a motion for the issuance of a pre-judgment writ of attachment. The trial court denied the motion, holding that Kenco could not prove a substantial probability of success based on the "'AS IS' 'WHERE IS'/No Warranties" clause. The Honorable Dean Lum presided over the attachment hearing during which he wondered aloud about who drafted the PSA, stating that it was as "clear as mud." (CP 563)

An important issue in the litigation was whether the "'AS IS' 'WHERE IS'/No Warranties" clause, drafted by Wiese on instructions from Kenco, protected Kenco from Sleeping Tiger's affirmative defenses and counterclaims. (CP 563) Kenco's position in the *Kenco v. Sleeping Tiger* trial was that, pursuant to the "'AS IS' 'WHERE IS'" clause, Kenco had not made any warranties or representations on which Sleeping Tiger could rely. (CP 652) Mr. Wiese, testifying as a witness at trial, stated that he drafted the "'AS IS' 'WHERE IS'" clause in the Addendum for the

³The parties signed a conflict of interest waiver allowing Mr. Wiese to represent Kenco in the sale of its hotel, but prohibiting him or Inslee Best from representing Kenco in any dispute resulting from the transaction. (CP 614; CP 542-43)

specific purpose of assuring that his client had no liability whatsoever following closing with respect to any representations or warranties made in connection with the sale. In describing the negotiations, Mr. Wiese testified that:

It was always the understanding that this was going to be an “as is, where is no representations, no warranties” type of deal. I was doing my best to protect my client’s [Kenco’s] interest. They were looking to have this deal finished, concluded...

(CP 570) Mr. Wiese was asked at trial to describe what he told the buyer (Bill Summers of Sleeping Tiger) about the reason for inserting the “AS IS’ ‘WHERE IS’/No Warranties” provision. Mr. Wiese testified:

The fact that we [Kenco] wanted this deal done, over, complete. We didn’t want him coming back with any issues whatsoever. We wanted to make sure that at closing that was the end of it...

(CP 570) Mr. Wiese, in describing his interpretation of the provision he drafted, later testified:

So it says no representations or warranties of any kind regarding the property. Buyer acknowledges that there shall be no liability of any kind with respect to the property regardless of basis for the claim. So this was intended and negotiated with Mr. Summers at length, so he knew that, hey, when this deal is closed, we’re done. There’s no coming back.

(CP 571)

At the beginning of the trial, the trial judge, Honorable Timothy Bradshaw, granted Kenco's motion *in limine* which restricted Sleeping Tiger's ability to introduce certain damages testimony as to Sleeping Tiger's overpayment for the property based on the deficient financial statements delivered by Kenco during due diligence. (CP 623-25; CP 614; CP 969; CP 986) Kenco's motion was predicated on Sleeping Tiger's alleged failure to update its discovery responses. (CP 623-25; CP 615; CP 969) Significant evidence on damages was nevertheless allowed at trial. (CP 622-24) As stated by Sleeping Tiger's trial counsel, Kenneth Karlberg:

For instance, Sleeping Tiger introduced evidence of the applicable capitalization rate, the amount of the overstatement of net income by Kenco, and even the mathematical formula for recalculating the proper purchase price based on actual net income. The only component of damages disallowed by Judge Bradshaw was the ultimate conclusion, *i.e.*, what the fair purchase price would have been if not for Kenco's failure to disclose all operating expenses.

(CP 623-24) The evidence admitted at trial included testimony from Jin Kang, Gerry Adams (Sleeping Tiger's CPA witness), William Summers, John Taffin (Sleeping Tiger's hotel expert) and others on the damages sustained by Sleeping Tiger, including the overpayment of the hotel's purchase price. (CP 627-28) Although Judge Bradshaw ultimately

permitted Sleeping Tiger to introduce—and Sleeping Tiger did introduce—significant testimony and evidence as to all elements of its damages, the presentation was somewhat disjointed and over repeated objections from Mr. Nold. (CP 615) This had the effect of making it difficult for the jury, in an already complicated commercial case, to understand and assess the damages sustained by Sleeping Tiger, especially those damages related to the purchase price adjustment which was based on the actual operating results of the hotel. (*Id.*) Judge Bradshaw, however, was also sitting in equity with respect to Sleeping Tiger’s requested remedy for rescission and accordingly evaluated the credibility of the witnesses and their testimony relative to damages. (CP 626)

After a two-week trial, the jury signed a confusing and internally inconsistent Special Verdict Form that contained a number of cross-outs and insertions by the jury. (CP 964; CP 621; CP 615-16) As set forth in the Verdict, the jury found that Sleeping Tiger had failed to pay its promissory note to Kenco as agreed, but determined that Sleeping Tiger’s liability on the note was effectively extinguished because it had proven its affirmative defenses of negligent misrepresentation, fraud and breach of warranties. (CP 965-66; CP 592) Although the jury found that Sleeping Tiger had also established all its counterclaims against Kenco (and the Kangs personally), it inexplicably awarded no damages to Sleeping Tiger.

(CP 965-66) The jury did, however, extinguish Sleeping Tiger’s liability on the \$1,350,000 promissory note delivered to Kenco, including default interest. The Presiding Juror explained on the record to Sleeping Tiger: **“you are off the hook for the 1.35,”** meaning Kenco lost that amount. (CP 594)

In further questioning of the jury, Judge Bradshaw was asked by a juror whether the Special Verdict Form “made clear the jury’s intent regarding the stipulated amount of \$140,000.” (CP 594) It did not. (CP 964) When asked for clarification, the Presiding Juror stated “the overpayment of \$140,000 was to be returned to Mr. Summers and Sleeping Tiger.” (*Id.*) That is, the jury found that Sleeping Tiger had made an overpayment of \$140,000 and Kenco was to pay that back.

Juror questioning both on and off the record revealed significant confusion, mistakes and potential bias. The jurors delivered their verdict on the Friday evening before Christmas and they were obviously anxious to go home. (CP 621) When asked how the \$140,000 mistake occurred, the Presiding Juror testified: “we were running out of time;” “we made our last-minute changes;” “it was an oversight;” “there was a stipulation that the \$140,000 would be returned to Sleeping Tiger in the jury instructions;” and “there was confusion about how we should fill out that form with the numbers...” (CP 594-95) After off-the-record conversations with the

Presiding Juror and other jurors, Mr. Karlberg was left with the clear impression that bias related to the relative wealth and ethnicity of the parties played a role in how the jury made its decision; accordingly, his client Sleeping Tiger would have an additional basis for a new trial on damages or a motion for *additur*. (CP 622)

3. Post-trial negotiations and transfer of Kenco to Sleeping Tiger.

Sleeping Tiger, believing that the jury verdict did not accurately reflect the damages proven at trial, was internally inconsistent, and may have been attributable to bias, immediately communicated to Kenco that it: (1) intended to move for a new trial on damages, which it would seek to resolve through a summary judgment motion based on the evidence presented at trial; (2) it would file a motion for *additur* (based on perceived jury bias and/or the improper exclusion of testimony relating to damages); and (3) if the motions proved unsuccessful, it would appeal the court's orders and the jury verdict.⁴ (CP 623; CP 653; CP 616-17)

Sleeping Tiger thereafter filed a motion for attorney fees. On February 12, 2010, the trial court, finding that Sleeping Tiger was the prevailing party, awarded legal fees and costs to be jointly paid by Kenco

⁴ Due to Kenco's outstanding legal fees, after the verdict Mr. Nold withdrew from the representation of Kenco, which caused substantial delay in resolving the post-judgment issues, negotiating a settlement, and bringing the verdict to judgment. (CP 1042; Summers Decl., at 8; Karlberg Decl. at 5-6)

and the Kangs in the amount of \$207,757. (CP 653; CP 617; CP 624-25; CP 603-05) Faced with this ruling and the prospect of a new trial, *additur*, or an appeal, Kenco, based on the advice of new counsel, agreed to submit to Judge Bradshaw proposed findings of fact, conclusions of law and a judgment against Kenco in the amount of \$3,014,708. (CP 625-26; CP 653; CP 617-18)

Judge Bradshaw did not simply accede to the parties' request to sign a stipulated judgment. At a status hearing on May 7, 2010, counsel for Sleeping Tiger, Ken Karlberg, stated his concerns regarding the evidentiary rulings on damages, the inconsistencies in the verdict, juror confusion regarding the Verdict Form, and discussions with jurors that indicated potential juror bias. (CP 1049-50) Judge Bradshaw cautioned the parties:

...we have a jury verdict, so we can't pretend we don't and simply now use that as an advisory mechanism. We have a jury verdict. We have a trial on taxpayer's money and time and it was vigorously fought and it is valid...

(CP 1051-52) However, Judge Bradshaw did acknowledge that he was sitting in equity over significant elements of the trial and, having been present for all testimony and privy to the content of the excluded evidence, could serve as the ultimate finder of fact:

Now, as you've already anticipated validly, there are post-verdict proper mechanisms given proper evidence within

the Court's discretion. One is a motion for additur. Second is equitable power this Court has under these particular claims, or at least partial of the claims...

In support of that, whether the remedy is found in equity or the additur, I would request from the parties, or at least the movement here, proposed findings of fact that as best as possible track with the testimony taken at trial.

(CP 1051-52)

The parties agreed to have Judge Bradshaw act as the final arbiter and to accept whatever determination the court made regarding the nature and extent of damages proved during the course of the two-week trial.

(CP 617) As summarized by Mr. Karlberg, because Judge Bradshaw was sitting in equity:

He did not sit as the simple gatekeeper of evidence or in an advisory role. It was this very unique circumstance that actually caused the parties to agree that if Judge Bradshaw struck any element or amount or category of damages in the proposed judgment summary, the proposed settlement would be unaffected. Or in other words, the parties agreed in advance not to condition settlement on Judge Bradshaw's acceptance and approval of every category of damages. Collectively, the parties deferred to his substantive evaluation of the evidence and damages.

(CP 626)

Consistent with Judge Bradshaw's instructions, the parties presented a detailed Judgment Summary with proposed Findings of Fact and Conclusions of Law that were meticulously supported by the evidence produced at trial. The court reviewed the Findings, Conclusions, and

Judgment—including the independently supported damages in the amount of \$3,014,708—and signed and entered an order on July 5, 2010.

(CP 1069) The judgment, however, by agreement of the parties was not entered against the Kangs personally.

As part of a post-judgment settlement, on July 7, 2010, Dong Kang transferred his 100 percent ownership interest in Kenco to Sleeping Tiger.⁵ (CP 1078) Sleeping Tiger acquired ownership of Kenco based on various business considerations unrelated to Kenco’s potential malpractice claim against Wiese. First, by owning Kenco, Sleeping Tiger established a direct banking relationship with the two commercial banks that held the outstanding loans to Kenco, their borrower, which were secured by Sleeping Tiger’s real property. (CP 618) This relationship was critically important for Sleeping Tiger to fulfill its contractual obligation under the settlement agreement to exercise its best efforts to extricate the Kangs from their personal guarantees of the bank loans. (*Id.*; CP 654; CP 624) Second, because the sale of the real estate from Kenco to Sleeping Tiger technically constituted a violation of the “due on sale” clauses contained

⁵ In the summary judgment hearing in this malpractice case, Wiese emphasized that, as part of the settlement, the Kangs also assigned any claims they may have individually had against Wiese. (RP 12-13) Sleeping Tiger required this at the time because it was not privy to the Service Agreement between Kenco and Wiese, and it could not verify whether Wiese was representing the Kangs individually. (CP 797-98) Of course, because Kenco was Wiese’s only client, the Kangs had no personal claims against Wiese. As a result, the “assignment” of any claim by the Kangs was an assignment of nothing and is immaterial to this action.

in the banks' deeds of trust, Sleeping Tiger's ownership of Kenco enabled Sleeping Tiger to assert that, in substance, nothing had changed as a result of the transfer. (CP 618) Third, in the event the banks commenced foreclosure proceedings as a result of the violation of the "due on sale" clause—which both banks have now done—Sleeping Tiger could "cure" the default by simply re-conveying the real estate back to Kenco, its wholly-owned subsidiary. (*Id.*) Sleeping Tiger also took ownership of Kenco subject to its existing and contingent liabilities. These liabilities include a claim for \$23,000 in outstanding legal fees asserted by its former attorney, David Nold, who has indicated that he will commence litigation to collect the amount outstanding. (CP 619)

Thus, despite the broad assertions by Wiese that the "'AS IS' 'WHERE IS'/No Warranties" clause protected Kenco from exposure to post-closing liability, the trial resulted in, *inter alia*, the cancellation of the promissory note payable to Kenco in the amount of \$1,350,000 (plus interest), an award of \$207,757 in legal fees against Kenco, and a \$3,014,708 judgment against Kenco, including legal fees and costs. (CP 1069; CP 618-17) Kenco, under new ownership, then filed the instant malpractice action against Wiese.

B. Procedural Posture

Kenco filed this legal malpractice action against Wiese on October 22, 2010. (CP 1) Wiese filed a motion for summary judgment claiming that the action was barred by the narrow holding in *Kommavongsa v. Haskell*. (CP 76) The trial court, the Honorable Judge Suzanne Barnett presiding, granted the motion stating that, even though “this claim did not arise in the underlying litigation” as required in *Kommavongsa*, it would “extend that ruling” and grant the motion. (RP 26) In its oral ruling, the trial court failed to address the fact that no assignment of a malpractice claim occurred in this case (rather the ownership of Kenco was transferred from Mr. Kang to Sleeping Tiger) and that Kenco was, and is, the only real party in interest with standing to file a malpractice claim against Wiese. (RP 24-29) Kenco filed a Notice of Appeal and moved the trial court for reconsideration on that basis. (CP 807; CP 750) The motion for reconsideration was denied without comment by the trial court. (CP 812) Kenco timely filed an amended Notice of Appeal. (CP 815)

IV. ARGUMENT

A. The Standard of Review is *De Novo*

In reviewing the granting or denial of a motion for summary judgment, the appellate court engages in the same inquiry as the trial

court. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

The burden is on the moving party to establish its right to summary judgment as a matter of law. CR 56; *Kahn v. Salerno*, 90 Wn. App. 110, 117, 951 P.2d 321 (1998). Summary judgment shall be granted only if the evidence, when viewed in the light most favorable to the non-moving party, demonstrates there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966, 969 (1963). In considering a summary judgment motion all facts and reasonable inferences therefrom must be construed in the light most favorable to the non-moving party. *Kahn v. Salerno*, supra, 90 Wn. App. at 117.

B. An Overview of the Law Applicable to the Assignability of Claims for Legal Malpractice

A claim for legal malpractice constitutes intangible personal property, sometimes referred to as a “chose in action.” Although common law prohibited the assignment of tort claims for personal injuries, many states, including Washington, generally permit the assignment of such causes of action. RCW 4.20.046(1). Starting, however, with the seminal California case of *Goodley v. Wank & Wank, Inc.*, 133 Cal. Rptr. 83 (1976), courts in a number of states have either restricted or barred completely the assignment of a cause of action for legal malpractice based

on public policy considerations. The anti-assignment cases are usually based on the inappropriateness of interfering with the sanctity of the uniquely personal and confidential relationship existing between an attorney and his or her client. See, e.g., *Picadilly, Inc. v. Raikos*, 582 N. E. 2d 338 (Ind. 1991); *Coffey v. Jefferson County Board of Education*, 756 S. W. 2d 155 (Ky. Ct. App. 1988); *Wagener v. McDonald*, 509 N.W. 2d 188 (Minn. Ct. App. 1993). But many jurisdictions, recognizing that a claim for legal malpractice is fundamentally a claim for economic harm, have refused to prevent a client from realizing the value of a malpractice claim in the most efficient manner possible, including allowing its assignment to a third party who has the time, energy and resources to prosecute the claim. *Thurston v. Continental Casualty Co.*, 567 A. 2d 922 (Me. 1989); *Hedlund Manufacturing Co., Inc. v. Wieser, Stapler & Spivak*, 517 Pa. 522, 539 A. 2d 357 (1988).⁶

A number of states, including Washington, have prohibited the assignment of a legal malpractice claim only to an adversary in the same litigation in which the malpractice arose. *Kommavongsa*, 149 Wn.2d 288.

⁶ The cases considering the assignability of legal malpractice claims are discussed in an comprehensive law review article which criticizes restriction of the free assignment of such claims. Quinn, Michael Sean, *On the Assignment of Legal Malpractice Claims*, 37 S. Tex. L. Rev. 1204 (1996). This article is cited with approval in *Kommavongsa*'s dissenting opinion. *Kommavongsa*, 149 Wn.2d at 321.

The only other Washington decision to consider the issue, *Kim v. O'Sullivan*, 133 Wn. App. 557, 137 P. 3d 61 (2006), clarified that the holding in *Kommavongsa* could not be circumvented through the assignment of the proceeds from the malpractice action as opposed to the cause of action itself. Both *Kommavongsa* and *Kim*, however, clearly limited the application of the so-called *Kommavongsa* rule to cases in which the assignor could replace the assignee as the real party in interest. *Kim* concluded that:

Kommavongsa did not dismiss the assignor's malpractice lawsuit altogether, instead remanding to the trial court so that the assignor could, if he chose, be substituted as the real party in interest and "so that the legal malpractice claim may proceed in normal course as between the proper parties thereto." *Kommavongsa*, 149 Wn.2d at 291. The court did not intend for its ruling to be applied so as to "protect lawyers from the consequences of their own malpractice." *Kommavongsa*, 149 Wn.2d at 311.

Id. at 562.

Kommavongsa was a 6-3 split decision which included a vigorous dissent filed by Justices Ireland, Bridge and Chambers. Although the dissent criticized certain of the policy arguments advanced in the majority opinion, it especially questioned *Kommavongsa* as having adopted special protections for the legal profession which interfered with the client's ability to transfer property as the client deemed to be in his or her own best interest. The dissent stated:

The majority adopts this rule protecting our own, members of the bar, from such suits based on public policy grounds which are in fact *not* exclusive to the legal profession. The confidentiality and fiduciary aspects cited by the majority apply as well to many professionals including physicians, accountants, psychiatrists, psychologists, counselors, clergy, bankers, brokers, and investment consultants. None of these are privy to the special immunity against assigned claims granted here to lawyers.

Kommavongsa, 149 Wn.2d at 318

C. **The trial court erred when it held the action was barred as an illegal assignment of a legal malpractice claim when, in fact, no assignment occurred and the real party in interest, Kenco, is the plaintiff here. (Assignment of Error No. 1)**

1. *Kommavongsa* does not apply because no claim for legal malpractice (or anything else) was assigned or otherwise transferred.

The assignability of a cause of action for legal malpractice is restricted or prohibited in certain states; an assignment, by definition, involves the passing of title or ownership from one person to another. Therefore, it is axiomatic that, in the absence of a transfer of a cause of action for legal malpractice, the policies and principles discussed in *Kommavongsa* (as well as similar cases) are simply inapplicable. Yet, in this case the trial court dismissed Kenco's malpractice claim even though the cause of action against Wiese remained its property and only Kenco had standing to assert in this claim in court. The cause of action, Kenco's property, was never assigned by Kenco to any third party.

The lower court, by virtue of its extension of the principles discussed in *Kommavongsa*, effectively ruled that a change in control of a corporation's ownership somehow resulted in the tainting of the corporation's cause of action for malpractice against its attorney, to such an extent that the corporation has been denied access to the courts to recover the damages it sustained as a result of its attorney's negligence. There is simply no precedent in Washington or any other jurisdiction to support the court's radical extension of an immunity that was intended to be narrow. In fact, *Kommavongsa* and *Kim* (along with the hundreds of cases recently collected for analysis in 64 A. L. R. 6th 473 (2011)) all share as a common characteristic the actual assignment of a legal malpractice claim from one person to another; conversely, the identification of the corporation's owners at any particular point in time has never been found to be a consideration in limiting the corporation's ability to prosecute a claim for legal malpractice. Thus, the trial court's ruling in this case is not simply an inadvisable extension of *Kommavongsa*; it is a decision devoid of supporting legal authority in Washington or any other state.

2. Wiese owed a duty to Kenco, Kenco is the real party in interest, and Kenco sued in its own name, as it must under Washington law.

Kenco hired Wiese, and Kenco sued Wiese for negligently drafting a purchase and sale agreement. Kenco is accordingly the real party, and

the only party, in interest in this legal malpractice action. Yet the trial court dismissed that claim solely because the ownership of Kenco changed. This was error.

Four elements must be met to prove legal malpractice: (1) an attorney-client relationship giving rise to the duty of care owed by a lawyer; (2) breach of that duty of care; (3) damage to the client as a result of the breach; and (4) proximate cause. *Bullard v. Bailey*, 91 Wn. App. 750, 754, 959 P.2d 1122, 1125 (1998). “Once the attorney client relationship is established the remaining elements are the same as for other negligence actions.” *Id.* Wiese represented Kenco, and only Kenco, in the subject real estate transaction. Only Kenco was Wiese’s client under the Service Agreement executed on June 17, 2005. (CP 540). Wiese does not and cannot dispute that his client was Kenco, and that he owed Kenco a duty of care.⁷ Wiese’s duty was to protect Kenco from any post-closing claims from the buyer regarding misrepresentations or breaches of warranties. (CP 651) Wiese drafted the “AS IS/WHERE IS” clause in the PSA which ultimately failed to protect Kenco in the litigation that followed the transaction. Kenco alleged in this malpractice action that Wiese’s failure was a breach of the standard of care and that Wiese’s breach resulted in substantial damages. (CP 6)

⁷ Indeed, Wiese has admitted that “Kenco owned Red Lion Hotel...and hired Mr. Wiese to help with the sale of the hotel.” (CP 70)

Kenco was formed under Washington's Limited Liability Company Act, RCW 25.15, *et seq.*

The limited liability company (LLC) is a relatively new, hybrid form of business entity that combines the liability shield of a corporation with the federal tax classification of a partnership. A creature of state law, each LLC is organized under an LLC statute that creates the company, gives it a legal existence separate from its owners (called "members"), shields those members from partner-like vicarious liability, governs the company's operations, and controls how and when the company comes to an end.

Carter G. Bishop and Daniel S. Kleinberger, *Limited Liability Companies Tax and Business Law* §1.01 (2005). A limited liability company formed in Washington "has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs."

RCW 25.15.030(2). However, "[a] member has no interest in specific limited liability company property." RCW 25.15.245(1). Thus, similar to a Washington corporation, a Washington LLC is a legal entity with an existence separate and apart from its owners. As long ago explained in *State v. Northwest Magnesite Co.*, 28 Wn.2d 1, 41, 182 P.2d 643, 663-64 (1947):

The principle upon which we proceed is that a corporation exists as an organization distinct from the personality of its shareholders. This separate organization, with its distinctive privileges and liabilities, is a legal fact, and not a fiction to be disregarded when convenient. The concentration of its ownership in the hands of one or two

principal shareholders does not, *ipso jure*, dispel those corporate characteristics of the organization.

Fletcher on Corporations nicely summarizes the independent nature of a corporation as follows:

It is generally accepted that the corporation is an entity distinct from its shareholders with rights and liabilities not the same as theirs individually and severally. The corporation and its directors and officers are similarly not the same personality. It is a practical convenience to consider the corporation as a legal personality capable of making and executing contracts, possessing and owning real and personal property in its own name, suing and being sued as a person distinct from its owners, and carrying on business in much the same manner as a natural person acting through agents of its own selection.

Fletcher Cyclopedia on the Law of Corporations, (2006 Rev. Ed.), §25.

Washington has long recognized that a corporation is an entity distinct from the identity of its shareholders, directors and officers. “A corporation is an entity, an existence, irrespective of the persons who own all its stock. The fact that one person owns all the stock does not make him and the corporation one and the same person.” *State v. Tacoma Railway and Power Company*, 61 Wn. 507, 513 (1911). “Ordinarily, a corporation must sue in its own name to protect its corporate rights.” *LaHue v. Keystone Inv. Co.*, 6 Wn. App. 765, 777, 496 P.2d 343, 350 (1972). “A shareholder who owns all or practically all of a corporation's stock is not entitled to sue as an individual because the shareholder cannot employ the corporate form to his advantage in the business world and then

choose to ignore its separate entity when he gets to the courthouse.”

Zimmerman v. KYTE, 53 Wn. App. 11, 18, 765 P.2d 905, 909 (1988), quoting 12B W. Fletcher, *Private Corporations* § 5910 (1984)(*internal quotations omitted*).

CR 17(a) provides that “[e]very action shall be prosecuted in the name of the real party in interest.” The real party in interest is the party “who possesses the right sought to be enforced.” *Sprague v. Sysco Corp.*, 97 Wn. App. 169, 180, n. 2, 982 P.2d 1202, 1208 (1999), citing 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1552 (2d ed.1990). The trial court’s dismissal of the action in this case was predicated on its faulty conclusion that Kenco is not the real party in interest; the trial court thus disregarded Kenco as a corporate entity in abrogation of Washington law. Because it is a “legal fact” that Kenco is an entity with a personality “separate and apart from its owners,” the attorney-client relationship was between Mr. Wiese and Kenco. Wiese, in turn, owed a duty of care to Kenco, and only to Kenco as his client. The corresponding breach of that duty by Mr. Wiese, and resulting damages, gave rise to the cause of action held by Kenco alone. As the client, Kenco is the entity that possesses the right sought to be enforced—here the right of a client to sue its former lawyer for malpractice—and is accordingly the real party in interest in this matter.

To protect its rights under Washington law Kenco must sue, and has sued, in its own name. Despite the fundamental principles of Washington corporate law summarized above, the trial court dismissed Kenco's legal malpractice claim against Wiese in error.

If Kenco is not the real party in interest and the proper plaintiff to sue for malpractice, who is? Kenco asked this question of the trial court in its Motion for Reconsideration. (CP 758) Unfortunately, the trial court ignored the question. (CP 812-13) Wiese's summary judgment motion suggested that the former owners of Kenco, the Kangs, may be the real parties in interest. Such a result would contravene Washington law because only a corporate entity has a right to institute a cause of action seeking the recovery of the damages it sustained as a result of the malpractice of its attorney. A shareholder like Mr. Kang would be barred from bringing this suit because, as a shareholder, he had no interest in the corporation's assets or property. Only Kenco can sue Wiese and only Kenco has, regardless of the identity of Kenco's owners at any particular point in time.

3. Kenco did not assign a legal malpractice claim to Sleeping Tiger; ownership of the company—with all assets and liabilities—was transferred to Sleeping Tiger, making any bar on assignment of legal malpractice actions inapplicable.

Wiese has argued that the transfer of Kenco to Sleeping Tiger was

a transaction made not for legitimate business reasons, but merely to “disguise the assignment,” thereby “dressing it up as something else...” (CP 80-82) In reality, Sleeping Tiger acquired ownership of Kenco based on various business considerations unrelated to Kenco’s potential malpractice claim against Wiese. As a result of the transfer, Sleeping Tiger established a direct banking relationship with the two banks that held outstanding Kenco loans secured by Sleeping Tiger’s hotel property; the transfer also provided Sleeping Tiger with valuable defenses in the event the banks declared a default based on the violation of the “due on sale” clause contained in their deeds of trust. (CP 618) Likewise, Sleeping Tiger took ownership of Kenco subject to its existing and contingent liabilities, including a claim for outstanding legal fees which has been asserted by its former attorney. (CP 619) Thus, the settlement agreement included a *bona fide* transfer of a company’s ownership in which Sleeping Tiger took the good with the bad.⁸

In its ruling on Wiese’s summary judgment motion, the trial court stated that “Kenco was of limited means, and planning to ride on the coattails of this agreement, it avoided a substantial liability by making this

⁸ When considering a motion for summary judgment, the trial court must construe all facts and reasonable inferences based thereon in the light most favorable to the nonmoving party. *Kahn v. Salerno*, 90 Wn. App. 110, 117, 951 P.2d 321 (1998). Any determination that the transfer of Kenco was not for legitimate business purposes, and inclusive of assets and liabilities, rests on a genuine issue of material fact that must be interpreted in Kenco’s favor.

assignment.” (RP 27). This statement reflects a central misapprehension of the facts of the case, as well as Washington law as discussed above. Kenco avoided no “substantial liability.” Kenco suffered the cancellation of its promissory note in the amount of \$1,350,000, plus interest, and the entry of a \$3,014,708 judgment against it, including legal fees and costs. The trial court went on to state that “one of the Kangs was the sole owner of the corporation, obtaining a benefit, though not a direct benefit to the individual” when Mr. Kang transferred ownership of Kenco to Sleeping Tiger. (RP 27) Again, the owners of the corporation, Mr. Kang, suffered no liability; it was only the corporation, Kenco, that suffered the liability, and only Kenco filed the instant action.

D. The trial court erred when it extended the narrow holding of *Kommavongsa v. Haskell* to prohibit the assignment of a legal malpractice claim to an adversary not “in the same litigation that gave rise to the alleged malpractice” and where the three stated public policy concerns do not support an extension to the facts presented here. (Assignment of Error No. 2)

1. The “narrow” holding in *Kommavongsa v. Haskell* is limited to restricting the assignability of legal malpractice claims to an adversary “in the same litigation that gave rise to the alleged legal malpractice.”

Even if it could be reasonably argued that an “assignment” occurred, Washington law does not bar the instant action. The Supreme

Court of Washington began its opinion in *Kommavongsa v. Haskell* by explicitly limiting its ruling to circumstances not present here:

This case, which was certified for direct review by Division Three of the Court of Appeals, raises a narrow question of first impression in Washington: Whether a legal malpractice claim is assignable to an adversary in the same litigation that gave rise to the alleged legal malpractice. We answer that narrow question in the negative on grounds of public policy, leaving for another day the broader issue of whether legal malpractice claims may be assignable in other circumstances.

149 Wn.2d 288, 291, 67 P.3d 1068, 1070 (2003)(emphasis added). The *Kommavongsa* Court considered several decisions by courts in other states, exploring four cases in detail. Each of these four cases involved an assignment that occurred in the same litigation that gave rise to the alleged malpractice by the attorneys involved in the proceedings: *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338 (Ind. 1991) (a party may not assign a legal malpractice claim to someone who was his adversary in the underlying litigation); *Coffey v. Jefferson County Board of Education*, 756 S.W.2d 155 (Ky. App. 1988) (a claim for legal malpractice may not be assigned by the defendant in a wrongful death action to the plaintiff in the same action); *Alcman Services Corp. v. Samuel H. Bullock, P.C.*, 925 F. Supp. 252 (N.J.D.C.1996), *aff'd*, 124 F.3d 185 (1997) (prohibited the assignment of claim for legal malpractice where the assignment was to an adversary in the same underlying litigation that gave rise to the claim of malpractice);

Zuniga v. Groce, Locke & Hebdon, 878 S.W.2d 313, 318 (Tex. App. 1994) (an assignment of a legal malpractice action arising from the same litigation is invalid). After discussing the policy reasons supporting its limited restriction, the *Kommavongsa* Court reiterated its narrow holding:

Whether there might be an advantage, or at least an absence of undue harm in permitting the assignment of legal malpractice claims in other circumstances, where the concerns that give rise to this opinion do not exist, we do not need to decide, and do not decide today.

149 Wn.2d, at 311 (emphasis added).

The Court's restricted holding in *Kommavongsa* regarding the assignability of a specific type of legal malpractice action circumscribed a small portion of the otherwise broad recognition under Washington law that an individual who is assigned a cause of action becomes the real party in interest who, under CR 17(a), may bring an action in his own name. *Department of Labor and Industries v. Wendt*, 47 Wn. App. 427, 735 P.2d 1334 (1987). Thus, the bar on assignment of legal malpractice claims may only be applied where parties assign such claims "in the same litigation that gave rise to the alleged legal malpractice." *Kommavongsa*, 149 Wn.2d at 291.

Here, the *Kenco v. Sleeping Tiger* litigation, which was filed in January 2008 and which was conducted by a different attorney and law firm (David Nold), did not give rise to the malpractice. Rather, Wiese's

negligent drafting of the PSA occurred in August 2005 (and repeated in May 2006) in the real estate transaction involving the sale of Kenco's hotel to Sleeping Tiger. The transactional malpractice is separate and distinct from the litigation between the parties dealing principally with the collection of the note due to Kenco. Indeed, Mr. Wiese was barred from participating in the litigation by the conflict waiver he signed years before.

At the hearing below, the trial court recognized that "this claim did not arise in the underlying litigation" yet went on to state "[b]ut, this claim does underlie the litigation. Without this claim, without the actions or omissions of the attorney in the initial business transaction, Sleeping Tiger would not have had or asserted counterclaims or cross-claims." (RP 26) The trial court summarized its ruling by stating: "...the defendant asks this Court to extend [the *Kommavongsa*] ruling not without limit, but certainly one step back from the 'underlying litigation'. And that's what I am prepared to do today." (RP 26) Of course, a lawyer's negligence in a transaction that thereafter results in litigation will always "underlie" that litigation. Such is the nature of legal malpractice actions that result in litigation against a client. This circular logic, and the crisp division between the underlying negligence and the later litigation with other counsel, is far afield from the basis for the prohibition articulated in *Kommavongsa*.

In its summary judgment motion, Wiese cited *Kim v. O'Sullivan*, 133 Wn. App. 557, 137 P.3d 61, 64 (2006), and argued that parties may not “recharacterize what is in truth an assignment of a legal-malpractice action to evade *Kommavongsa*’s clear prohibition on such assignments.” (CP 79). In *Kim*, the client, Mr. Kim, assigned his legal malpractice action against his attorney as part of a settlement agreement with his adversary in the underlying action, Mr. Reina. In specific response to the *Kommavongsa* decision, the parties modified the settlement agreement to provide Mr. Reina only with the right to control the malpractice litigation and to receive any proceeds produced by the lawsuit. 133 Wn. App. at 563. This Court, applying the principles established in *Kommavongsa*, held that the assignment of proceeds was an attempt to circumvent the limited *Kommavongsa* rule and that Mr. Reina was not the real party in interest. *Id.* *Kim* is distinguishable for the same reasons that *Kommavongsa* is: Kenco is the real party in interest here and always has been. In *Kim*, there was no corporate entity to disregard. This Court recognized in *Kim* that the correct remedy under *Kommavongsa*, if the plaintiff is not the real party in interest, was to remand the action to allow the real party in interest to be substituted.⁹ 133 Wn. App. at 563-564, citing *Kommavongsa*, 149 Wn.2d 288.

⁹ In *Kim*, however, dismissal was justified because the real party in interest could not

Neither *Kommavongsa* nor *Kim* resulted in their respective malpractice claims dying an unnatural death because of the assignment of a cause in action to their adversaries in the underlying litigation. Rather, both cases demonstrate that the proper procedure is for the case to be remanded back to the trial court to allow the assignor to replace the assignee as the proper party plaintiff. Both cases stress that such a remand and substitution is necessary in order to avoid the *Kommavongsa* rule being “applied so as to protect lawyers from the consequences of their own malpractice.” *Kommavongsa*, 149 Wn.2d at 311; *Kim*, 113 Wn. App. at 562. This process, in fact, is specifically mandated by CR 17(a) which provides that no action can be dismissed “until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest.” Nevertheless, the trial court in this case elected to grant summary judgment in favor of Wiese despite Kenco’s urgings in its Motion for Reconsideration for the court to identify the real party in interest in this case if it was not Kenco. (CP 758-59)

Thus, the so-called *Kommavongsa* rule actually states that the real party in interest must be substituted in order for the legal malpractice

prove damages, circumstances quite different than those found here (where Kenco lost a promissory note worth \$1,350,000 and has a \$3,014,708 against it). 133 Wn. App. at 563-564.

action to proceed to trial. There is simply no support in *Kommavongsa* or *Kim* for dismissal of the malpractice action against Wiese; at the very least the trial court should have determined the real party in interest and allowed for substitution. This points, however, to the central flaw in the trial court's decision. There is no other real party in interest. To rule otherwise, as the trial court did in this case, is to leave Kenco with a wrong that cannot be remedied through litigation and to "protect lawyers from the consequences of their own legal malpractice" which *Kommavongsa* explicitly sought to avoid. 149 Wn.2d at 311.

2. The public policy concerns that supported the holding in *Kommavongsa v. Haskell* do not apply to the instant action.

After considering various decisions from other states, and the supporting public policy concerns raised in those decisions, the *Kommavongsa* Court explicitly stated the public policy considerations upon which it relied:

- (1) that permitting the assignment of legal malpractice claims to an adversary in the same litigation that gave rise to the legal malpractice claim ought to be prohibited because of the opportunity and incentive for collusion in stipulating to damages in exchange for a covenant not to execute judgment in the underlying litigation; (2) because the "trial within a trial" that necessarily characterizes most legal malpractice claims arising from the same litigation that gave rise to the malpractice claim would lead to abrupt and shameless shift of positions that would give prominence (and substance) to the perception that lawyers

will take any position, depending upon where the money lies, and that litigation is a mere game and not a search for truth, thereby demeaning the legal profession; and (3) because to permit such assignments would make lawyers hesitant to accept the defense of defendants who are judgment-proof or nearly so, and who are uninsured or underinsured.

149 Wn. 2d at 307 (emphasis added). None of these public policy concerns applies here and the trial court's extension of the *Kommagonsa* holding is unsupported by the rationale articulated by the Supreme Court.

The first concern—that an opportunity and incentive for collusion in stipulating to damages may arise—is predicated on a factual scenario not present here: the assignment of legal malpractice claims to an adversary in the same litigation that gave rise to the legal malpractice. This litigation did not give rise to the malpractice, thus there could be no collusion by the parties against the defendant lawyer. Moreover, any potential “collusion” here is mitigated by Judge Bradshaw’s detailed findings on damages made at his specific request after sitting in equity and hearing extensive evidence during a two-week trial. (CP 325-32) Judge Bradshaw’s Judgment Summary, Findings of Fact and Conclusions of Law lay out in considerable detail the evidentiary and legal support for the multi-million dollar judgment entered against Kenco. Any concern regarding collusion in this case is negated by the role of an independent judge, sitting in equity, who issued a judgment after a two-week trial.

The “trial within a trial” concern is similarly inapplicable because Kenco is the real party in interest and the malpractice occurred in a transaction which preceded the commencement of the litigation by eighteen months. The “trial within the trial” that typically occurs in a legal malpractice action would not occur here. Instead, the process in this action could more accurately be described as a “transaction within the trial” wherein the contract-drafting acts and omissions of Mr. Wiese, who did not represent Kenco in the litigation, would be reviewed and compared to the standard of care required of attorneys in similar circumstances. The *Kommavongsa* Court was concerned about an “abrupt and shameless shift of positions” among the parties. No such shift has occurred here. Kenco’s position in the transaction was that it did not want to make any warranties or representations that could create an exposure to post-closing liability, and it specifically instructed Wiese to draft a contract that protected it in that regard. This position did not change in the ensuing litigation, nor did it change in this action. Kenco (because it is the real party in interest) can maintain, and has maintained, a consistent position throughout.

The final public policy concern—that allowing the assignment of legal malpractice claims to an adversary in the same litigation that gave rise to the legal malpractice would make lawyers hesitant to accept the defense of defendants who are judgment-proof or nearly so, or who are

uninsured or underinsured—is not raised here. The litigation attorney (in this case Mr. Nold) bore no risk that Kenco would assign a legal malpractice claim against him because he was not the lawyer who negligently drafted the PSA in the earlier transaction. The *Kommavongsa* restriction would continue to shield him and other lawyers who represent judgment-proof, uninsured defendants. The policy does not apply here.

V. CONCLUSION

The trial court dismissed this action in error; Kenco is now left without any remedy for its loss, and its former lawyer is protected from the consequences of his malpractice. Accordingly, Kenco asks this Court to reverse the trial court's ruling and remand the case for trial.

RESPECTFULLY SUBMITTED this 12th day of October 2011.

JOHNSON FLORA, PLLC

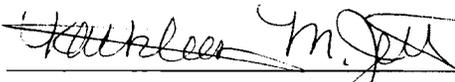

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I, Kathleen M. Jett, certify that on October 12, 2011, I sent out for service a true and correct copy of the following pleading: *Brief of Appellant* on the attorneys of record and in the manner indicated below:

Via Legal Messenger

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DATED this 12th day of October 2011.

By 
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