

NO. 67351-3-1

COURT OF APPEALS STATE OF WASHINGTON
DIVISION I

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

Appellant,

v.

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

Respondents.

BRIEF OF RESPONDENTS

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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 DEC 23 AM 11: 25

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I. INTRODUCTION

Sleeping Tiger, LLC and Kenco Enterprises Northwest, LLC were adverse litigants in the underlying action that went to trial in December 2009, at the end of which the jury entered a verdict for \$0 against Kenco on Sleeping Tiger's claims. On July 7, 2010, Sleeping Tiger acquired Kenco.¹ The day before the acquisition, Kenco "stipulated" to a judgment against itself in Sleeping Tiger's favor for \$3 million on the same claims for which the jury had awarded \$0. That acquisition is central to the parties' contentions here.

This appeal presents a far simpler issue than plaintiff-appellant, Kenco/Sleeping Tiger, posits. The question is whether a party may assign a legal-malpractice claim because its lawyers dressed it up as something else. As a matter of law and public policy, the answer is no. *Kommavongsa v. Haskell*, 149 Wn.2d 288, 67 P.3d 1068 (2003). This court has held that lawyers' attempt to disguise an assignment that violates *Kommavongsa* still violates public policy. *Kim v. O'Sullivan*, 133 Wn. App. 557, 137 P.3d 61 (2006). The same is true here. This court should affirm summary judgment of dismissal of this action, because any other result would evade *Kommavongsa*.

¹ For clarity, this brief refers to Kenco prior to that acquisition as "Kenco/Kang" and after the acquisition as "Kenco/Sleeping Tiger."

The public policy of *Kommavongsa* applies squarely here. The *Kommavongsa* Court sought to prevent collusion and condemned “abrupt and shameless shifts in positions” that promote “the image that lawyers will take any position, depending upon where the money lies, and that litigation is a mere game and not a search for the truth.” *Kommavongsa*, 149 Wn.2d at 306 (citation omitted). If assignments of legal-malpractice claims were allowed, it would deter lawyers from representing judgment-proof defendants like the Kangs, who could assign their malpractice claim, “transmut[ing] a claim against a penniless adversary into a claim against the adversary’s wealthier lawyer based on the lawyer’s supposed negligence toward the adversary.” *Id.* at 304-05 (citation omitted). As the court in *Alcman Services Corp. v. Samuel H. Bullock, P.C.*, 925 F. Supp. 252, 254 (D. N.J. 1996), *aff’d*, 124 F.3d 185 (3d Cir. 1997) noted:

Centuries ago alchemists endeavored to transmute lead into gold. The plaintiff before us today, equally inspired and perhaps more creative, has attempted to transform its leaden judgment against an impecunious adversary into claims of gold against the adversaries well insured lawyer. Plaintiff’s black magic consisted of entering into a settlement with its adversary in which plaintiff agreed to stay execution of its judgment against the adversary in exchange for the adversary assigning to plaintiff the adversary’s legal malpractice claim against its lawyer. Alas, such a transmutation is as impossible in law as it is in chemistry.

Kenco/Sleeping Tiger brought this assigned legal-malpractice

claim as a device to collect a collusive stipulated judgment against the Kangs in the amount of \$3,014,708.12. That judgment contradicts a jury's verdict after a full trial that awarded Sleeping Tiger zero damages against Kenco/Kang; Sleeping Tiger was prohibited from presenting any evidence of damages at trial. Kenco/Sleeping Tiger's current argument that Mr. Wiese failed to properly draft the "as-is, where-is"/No Warranties addendum contradicts Kenco/Kang's earlier position in *Kenco v. Sleeping Tiger*, in which it successfully defended against Sleeping Tiger's claims.

II. ASSIGNMENTS OF ERROR

Assignments of Error

Defendants assign no error to the trial court's decision.

Issues Pertaining to Assignments of Error

Mr. Wiese and Inslee Best disagree with Kenco's Statement of Issues Pertaining to Assignments of Error and believe that this appeal presents a single issue, which is more properly stated as follows:

Whether the trial court correctly entered summary judgment dismissing a legal-malpractice claim, where:

1. Washington law prohibits assignment of legal-malpractice claims;
2. The jury awarded Sleeping Tiger "\$0" damages against Kenco;
3. Contrary to that verdict, Kenco, which had no assets, stipulated to a judgment in favor of Sleeping Tiger for \$3,014,708.12;

5. The stipulated judgment was conditioned on obtaining testimony from Kenco's former principals that Sleeping Tiger's "victory," in the form of the \$3 million stipulated judgment, was the result of negligence of its former attorney, Mr. Wiese; and
6. Except for the contrived malpractice claim against Mr. Wiese, Sleeping Tiger acquired no other asset of value from Kenco.

III. STATEMENT OF THE CASE

A. Kenco/Kang hired Mr. Wiese and Inslee Best.

This case arises out of the 2006 sale of the Red Lion Hotel ("Hotel") in Tukwila, by Kenco/Kang to Sleeping Tiger, and Kenco's later collection action against Sleeping Tiger. Jin and Dong Kang were sole owners of Kenco/Kang and hired Mr. Wiese to help with the sale of the Hotel. CP 118-19, 953, 1078. Mr. Wiese also represented Jin and Dong Kang on personal matters. CP 494-09.

William C. Summers and Joseph Brotherton owned Vanguard LLC ("Vanguard"). In August 2005, Vanguard expressed interest in purchasing the Hotel. CP 118-19, 132. Its first purchase attempt failed. CP 120. Vanguard and Kenco/Kang then entered into a second Purchase and Sale Agreement (PSA) dated March 30, 2006. CP 120-21, 146-60. On April 29, 2006, Vanguard assigned its interests in the PSA to Sleeping Tiger, which Mr. Summers and Mr. Brotherton also owned. CP 170-73.

Kenco/Kang and Sleeping Tiger agreed to extend closing to May 31, 2006 so that Sleeping Tiger could continue to review the property before closing. CP 170. The Hotel sold on May 31, 2006. CP 175-225. Sleeping Tiger agreed to pay the \$7,125,000 purchase price for the Hotel as follows: (1) \$2,015,915 cash at closing; (2) assumption of Kenco's \$2,399,295 Bank of the West note; (3) assumption of the \$1,372,114 Comerica Bank note; and (4) a \$1,350,000 promissory note delivered to Kenco/Kang (Kenco note) secured by a deed of trust. CP 205-25.

B. Kenco/Kang sued Sleeping Tiger on the Kenco note.

Sleeping Tiger defaulted on the Kenco note. Kenco/Kang sued Sleeping Tiger on January 8, 2008. CP 832-44. In its answer, Sleeping Tiger essentially admitted that it was in default. CP 848-49, 935-44. Sleeping Tiger counterclaimed against Kenco/Kang for fraud, negligent misrepresentation, and breach of warranty or contract, CP 938-42, and brought third-party claims against Jin and Dong Kang for fraud and negligent misrepresentation. CP 942. Kenco/Kang denied Sleeping Tiger's allegations, CP 946-49, and argued Sleeping Tiger's claims were barred because the Hotel was sold on an "as-is/where is" basis, and Sleeping Tiger had full access and opportunity to inspect the property. CP 951-62. That "as is/where is" clause, CP 159, states:

7. "AS IS" "WHERE IS"/No Warranties. Notwithstanding anything to the contrary in the Agreement, Buyer agrees

that the Property is being sold and conveyed to and accepted by Buyer in a strictly "AS IS" "WHERE IS" condition and basis, with all faults and defects. Seller makes no representation or warranties of any kind whatsoever, either express or implied, with respect to the Property and Buyer acknowledges that Seller has made no representations, warranties or agreements of any kind regarding the Property, express or implied. Buyer acknowledges that following Closing Seller shall have no liability or duty of any kind with respect to the Property, regardless of the basis for the claim, and Buyer shall indemnify, defend and hold harmless Seller from any and all claims, demands, damages and/or causes of action related to the Property. This Section shall survive Closing and not merge with the deed.

The Inspection Contingency of the PSA provides:

a. **Books, Records, Leases, Agreements.** Seller HAS MADE available for inspection by Buyer and its agents PRIOR TO BUYER EXECUTING THIS AGREEMENT all documents available to Seller relating to the ownership, operation, renovation or development of the Property, including without limitation, its physical condition; the presence of or absence of any hazardous substances; the contracts and leases affecting the property; **the potential financial performance of the Property**; the availability of government permits and approvals; and the feasibility of the Property for Buyer's intended purpose. The inspection contingencies stated in this Section 5 shall be deemed to be satisfied.

CP 149 (emphasis added).

Mr. Wiese testified at trial on Kenco/Kang's behalf that the "as is/where is" addendum to the PSA provided that Kenco/Kang "makes no representations or warranties of any kind whatsoever either express or implied with respect to the Property." CP 123. The addendum provided

that the Property is defined in the PSA. CP 160, ¶ 9. The Hotel's books and records are personal property and included in that definition. CP 151, ¶ 14.a. Mr. Wiese testified that the PSA provided, "Buyer acknowledges that there should be no liability of any kind with respect to the property regardless of the basis of the claim." CP 124. Ultimately, according to Mr. Wiese, "[it] was intended and negotiated with Mr. Summers at length so he knew that, hey, when this deal is closed we're done. There is no coming back." *Id.* Kenco/Kang argued at trial that its "as-is" provision of the addendum controlled if there was any ambiguity between PSA representations and warranties in Paragraph 12 and the "as-is" addendum. CP 159, ¶¶ 7-8, 959-60. That section of the addendum states, "Conflicting Terms. The terms and conditions of this Addendum shall control in all instances and supersede and replace any inconsistent or conflicting terms of the Agreement," CP 159, and further, that

[a]s to the financials, Summers acknowledged in multiple writings that he did an "exhaustive review" of the financials. He admits that no documents were withheld from him. He and Mr. Brotherton are lawyers and Brotherton has an accounting background. For them to selectively review documents and claim that they did not know enough to look at other documents is unreasonable.

CP 960.

C. After a full trial of *Kenco v. Sleeping Tiger*, the jury found that Sleeping Tiger's damages were "\$0."

Kenco v. Sleeping Tiger was tried in December 2009. The jury

found Sleeping Tiger had defaulted on the note but that Sleeping Tiger proved its affirmative defense, counterclaim, and third-party claim for fraud, negligent misrepresentation and breach of warranty or contract against Jin and Dong Kang and Kenco/Kang. CP 964-66.

Before and during trial, the trial court had ordered, as a discovery sanction, that Sleeping Tiger could not present proof of damages, because its discovery responses did not disclose its damages. CP 969-1002. Sleeping Tiger unsuccessfully moved for reconsideration. CP 1004-31.

In answer to the question on the verdict form that asked what, if any, amount of damages Sleeping Tiger suffered as a result of Kenco/Kang's conduct, the jury answered, "\$ 0." *Id.*

Kenco/Sleeping Tiger argues that the verdict was "a result of obvious confusion" and that the jury was "unable to agree on an appropriate measure of damages." App. Br. at 2. Yet, when the parties took full opportunity to question the Lead Juror as to the basis for the verdict, she answered, "So as is discussed in the jury room, what we wanted – what the intent was – and there was confusion about how we should fill out that form with the numbers – is we wanted zero on both sides, plus the 140 to go back to Sleeping Tiger." CP 594. There was no confusion on the jury's part as to its determination. The Lead Juror testified, "[W]e wanted zero on both sides." *Id.* The sole "confusion" was

how to express that on the verdict form, because the jury had been informed Sleeping Tiger and Kenco had already stipulated to an award of \$140,000 from Kenco to Sleeping Tiger. *Id.* This is “the 140” to which the Lead Juror referred. *Id.* Thus, the only question the jurors had was whether that was separate from their determination and therefore to be excluded on the form stating their determination. *Id.* The record does not support Kenco/Sleeping Tiger’s assertion that the verdict of \$0 was a result of jurors’ “confusion” or inability to agree. App. Br. at 13. Its assertion that, “[a]fter off-the-record conversations with the Presiding [sic] 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,” App. Br. at 14, is based on matters that were stricken from the record. CP 805; § V.H.1., *infra.*

D. After losing on its counterclaims at trial, Sleeping Tiger arranged a Stipulated Judgment that contradicted the jury’s verdict and assigned the present legal-malpractice claim to Sleeping Tiger.

After the jury returned its verdict but before judgment was entered, Kenco/Kang’s trial attorney, David A. Nold, withdrew from further representation of Kenco for non-payment of fees. CP 1042-43, 619, ¶ 56. None of the parties submitted a form of judgment to be entered on the jury’s verdict. Instead, at a brief hearing on May 7, 2010, attorneys for the parties informed the court that they were negotiating a settlement. *Id.*

Attorneys Kenneth Hart and Gregory Miller of Carney Badley Spellman appeared at that point as attorneys for Kenco and the Kangs. CP 1045-56.

On June 25, 2010, more than five months after the jury's verdict, Kenco and Sleeping Tiger entered into an Assignment Agreement. CP 1058-61. It provided that the Kangs would assign their legal-malpractice claims to Kenco and transfer their interest in Kenco to Sleeping Tiger, conditioned upon the entry of the Judgment Summary Findings of Fact, and Conclusions of Law. *Id.* at CP 1059-60, ¶¶ 1, 2, 4, 5. That same day, Kenco and Sleeping Tiger entered into a Settlement Agreement. CP 1063-67. It released any claims against the Kangs provided that they: (1) enter into the Assignment Agreement; (2) stipulate to the Judgment Summary, Findings of Fact and Conclusions of Law; (3) provide needed testimony for claims against Mr. Wiese and Inslee Best; (4) disclose all known Kenco assets and liabilities, CP 1065, ¶¶ a.-b.; (5) represent that the damages in the Judgment Summary are supported by substantial evidence in the record, CP 1066, ¶ 6.c.; and (6) represent that Kenco directed Mr. Wiese to include the Hotel's past financial performance in the "as-is" addendum. *Id.* The Judgment Summary awarded Kenco \$3,014,708 in damages to Sleeping Tiger contrary to the jury's verdict. CP 1069-76.

E. Contrary to the jury's verdict, Kenco/Kang stipulated to a judgment against it in the amount of \$3,014,708.12.

On July 6, 2010, Kenco/Kang's new counsel stipulated to

judgment against it for \$3,014,708.12. CP 1069-76. They also stipulated to findings of fact and conclusions of law reciting that evidence sufficient to support such an award had been admitted at trial. *Id.* That recitation conflicted with the trial court's order precluding such evidence based on discovery sanctions and/or the jury's determination that the award should be "zero on both sides." CP 594, 969-1002. The following day, having lost at trial, Sleeping Tiger took ownership of Kenco. CP 1078. Kenco/Kang had no assets, but Sleeping Tiger acquired it to assert a claim in Kenco's name against its former business lawyer, Mr. Wiese. CP 1065, ¶ 6, a.-b. Dong Kang transferred 100 percent of the interests in the company to Sleeping Tiger. CP 1078. On March 4, 2011, Kenco/Sleeping Tiger stated under oath in discovery responses that Kenco's only assets when Sleeping Tiger acquired it were its claims against Inslee Best and Mr. Wiese. CP 104, 114, 1081. Only when opposing Mr. Wiese's and Inslee Best's summary judgment motion, on May 19, 2011, did Kenco/Sleeping Tiger change its discovery responses, now alleging additional "assets" and "liabilities," including Kenco/Kang's banking relationships with Bank of the West and Comerica and Mr. Nold's request for payment of \$23,000 in legal fees. CP 607-08.

F. Kenco/Sleeping Tiger sued Mr. Wiese and Inslee Best.

On October 22, 2010, Kenco/Sleeping Tiger sued Mr. Wiese and

Inslee Best for legal malpractice. CP 1-7. Kenco/Sleeping Tiger alleged that Mr. Wiese and Inslee Best were negligent in “failing to draft the Purchase & Sale Agreement so as to protect Kenco/Sleeping Tiger against the purchaser’s claims,” CP 6, ¶ 3.4; that Sleeping Tiger “proved that the warranties and representations were not excluded from the Purchase & Sale Agreement by Wiese’s Addendum, and that it reasonably relied on the accuracy and completeness of financial statements provided” *Id.* at ¶ 3.5; and that the alleged negligence of Mr. Wiese and Inslee Best caused Kenco/Sleeping Tiger damages, “including those relating to the voiding of the Seller’s Note, the imposition of Judgment against it and the legal fees and costs it was required to pay.” CP 7, ¶ 3.6. Kenco/Sleeping Tiger seeks \$1,350,000 plus interest on its voided promissory note, the \$3,014,708 stipulated judgment amount, and \$225,000 in legal fees. CP 57.

1. **Mr. Wiese and Inslee Best moved for summary judgment of dismissal of this action.**
 - a. **Mr. Wiese and Inslee Best moved for summary judgment because Kenco/Sleeping Tiger did not timely disclose an expert.**

Mr. Wiese and Inslee Best’s first motion for summary judgment, based on Kenco/Sleeping Tiger’s failure to disclose any expert on the attorney’s standard of care, was heard May 13, 2011. CP 24-30, 531. The

court denied this motion without prejudice, granted Kenco/Sleeping Tiger a continuance of the motion, and ordered Kenco/Sleeping Tiger to serve its expert report by June 11, 2011. CP 532-33. Kenco/Sleeping Tiger's motion for CR 11 sanctions against Mr. Wiese and Inslee Best for filing this motion was denied. CP 457-66, 531.

b. Mr. Wiese and Inslee Best moved for summary judgment because Kenco/Sleeping Tiger's claims were an illegal assignment of a legal-malpractice claim.

Mr. Wiese and Inslee Best brought a second summary judgment motion that was granted on June 3, 2011. CP 69-88, 747-49. Mr. Wiese and Inslee Best moved to strike certain portions of the May 18, 2011 declarations of William C. Summers, Jin Kang and Ken Karlberg offered in opposition to summary judgment. CP 665-79, 691-704. The trial court granted the motion to strike. CP 804-05. 14 of 57 paragraphs of Mr. Summers's declaration, 10 of 17 paragraphs of Mr. Karlberg's declaration, and three of 29 paragraphs of Jin Kang's declaration were not considered by the trial court on summary judgment. *Id.*

Kenco/Sleeping Tiger moved for reconsideration, arguing that it never assigned its legal-malpractice action and that Kenco is the real party in interest because it is a Washington limited-liability company with an existence separate from its owners. Kenco/Sleeping Tiger asked that the trial court identify the real party in interest if it did not consider

Kenco/Sleeping Tiger the real party in interest. CP 750-59. The motion was denied. CP 812-13. This appeal followed.

IV. SUMMARY OF ARGUMENT

Kommavongsa precludes a party from pursuing an assigned claim for legal malpractice on public policy grounds. *Kim v. O'Sullivan* bars an attempt to evade *Kommavongsa* by dressing up the assignment as something else. Accordingly, Kenco could not assign a claim for legal malpractice. In a transparent attempt to avoid the prohibition, Sleeping Tiger contrived an arrangement whereby Kenco and its principals, the financially-compromised Kangs, would stipulate to a collusive \$3,014,708.12 judgment against their company, Kenco, then transfer ownership of Kenco to its adversary, Sleeping Tiger, which would then assert, via Kenco, a claim against Kenco's former business attorney, claiming the \$3 million judgment was the result of the attorney's malpractice. In exchange, the Kangs were rewarded with a release from personal liability to Sleeping Tiger. The transfer of ownership of Kenco produces the same result as an outright assignment of Kenco's "claim" and is a patent attempt to avoid the proscription announced in *Kommavongsa*.

The very basis for the rule announced in *Kommavongsa* is demonstrated here. Kenco/Sleeping Tiger relies on its contrived

“judgment” against the asset-less Kenco to allege a \$3 million “loss” to its now-subsiary, Kenco, even though (i) a jury awarded Sleeping Tiger zero damages on its claims against Kenco/Kang, and (ii) Kenco is judgment-proof. This is an abrupt and shameless shift in position.

Kenco/Sleeping Tiger now claims that the “as-is, where-is”/No Warranties addendum was not drafted properly. Kenco/Kang argued the opposite in *Kenco v. Sleeping Tiger*. The policy considerations adopted in *Kommavongsa* seek to protect attorneys from clients like the Kangs whose compromised financial position prompts them to agree to a contrived judgment and to assign an equally contrived legal-malpractice claim in exchange for a covenant not to execute.

This court should not entertain Kenco/Sleeping Tiger’s baseless attempts to deny that this legal-malpractice claim (1) arose in *Kenco v. Sleeping Tiger* and (2) was assigned to an adversary in the underlying action. Kenco/Sleeping Tiger’s argument that the claim was not assigned, but is merely one asset of a company whose ownership changed, is in essence an attempt to evade *Kommavongsa* and the public policy on which it is based. Sleeping Tiger now owns Kenco, which therefore is not the real party in interest. Ownership of the claim resides not with Kenco as owned by Sleeping Tiger, but with Kenco as owned by the Kangs.

Finally, as a matter of law, a legal malpractice claim cannot

survive here, where only a stipulated judgment supports its damages.

V. ARGUMENT

This court should affirm the trial court's June 3, 2011 order dismissing this action because *Kommavongsa* and public policy bar Kenco/Kang's assignment of its legal-malpractice claim.

A. Standard of review is de novo, but this court may affirm on any ground that the record supports.

This court engages in the same inquiry as the trial court when reviewing a summary judgment order. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law. CR 56(c). However, "[a] trial court's decision will be affirmed on appeal if it is sustainable on any theory within the pleadings and the proof." Tegland, 2A *Wash. Prac.*, Rules Practice RAP 2.5 (6th ed. 2010); see also *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 493, 933 P.2d 1036 (2007). This court ordinarily may not reverse a trial court on a theory not raised before that court. *State v. Peterson*, 29 Wn. App. 655, 663, 630 P.2d 480 (1981).

B. *Kommavongsa* bars this legal-malpractice claim as against public policy because it was illegally assigned.

The Washington Supreme Court barred the assignment of legal malpractice claims as against public policy. *Kommavongsa v. Haskell*, 149 Wn.2d 288, 67 P.3d 1068 (2003). The *Kommavongsa* Court prohibited the assignment of legal malpractice claims finding legitimate the public policy concerns of other jurisdictions, namely:

(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 the 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.**

Id. at 309 (emphasis added). Citing *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338, 344-45 (Ind. 1991) and *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313 (Tex.Ct.App.1994), the *Kommavongsa* Court held that allowing assignments in this context would render

plaintiffs' lawyers in Washington duty-bound to explore the possibility that the defendants' attorneys erred in the course of representing the defendants-where there is no other means of compensating their clients. This would place defense attorneys in a conflict of interest with their clients. Defense attorneys placed in that situation would be duty-bound to send their clients to independent counsel to assess the situation-who among them would dare to do otherwise, even if they did not believe they had committed malpractice? How long would it be before a sizable number of attorneys would become reluctant, even unwilling to undertake representation of defendants with inadequate insurance and minimal assets – when to do so would place them, their malpractice insurers and their assets within the reach of plaintiffs who otherwise might have an uncollectible judgment.

Id. at 301. The *Kommavongsa* Court did not intend to “protect lawyers from the consequences of their own legal malpractice”; the decision permits assignment of judgments or proceeds from legal-malpractice suits to the adversary in the underlying case after it has ended. *Id.* at 311.

The public policy underscored by the Washington Supreme Court in *Kommavongsa* was applied in the context of a purported execution levy in *MP Medical, Inc. v. Wegman*, 151 Wn. App. 409, 213 P.3d 931 (2009). In *MP Medical, Inc.*, an adversary obtained a writ of execution and sought to purchase its adversaries' rights to pursue its own appeal. This court determined that the trial court erred by failing to exercise its supervisory authority over its own process to prevent one party from destroying the opposing party's cause of action by becoming the owner of the cause of

action under review. 151 Wn. App. at 417.

Here, after a jury issued a verdict of zero damages against Kenco/Kang, Sleeping Tiger doggedly pursued Kenco and its principals, the Kangs, for a settlement. CP 965, 1064, ¶ 3. Sleeping Tiger then obtained the agreement whereby (a) Kenco/Kang assigned its claim against its business attorney, Mr. Wiese, to Sleeping Tiger; (b) Sleeping Tiger released its claims against the Kangs; (c) conditioned upon the entry of the Stipulated Judgment. CP 1059-60, 1065. Contrary to their position in *Kenco v. Sleeping Tiger*, the Kangs agreed in the Settlement Agreement that “substantial evidence” at trial supported the Judgment Summary. CP 123-24, 832-44, 946-62, 1066, ¶ 6.c. Shamelessly shifting their position again, the Kangs agreed to provide testimony that they instructed that Wiese’s “as-is” addendum include the Hotel’s past financial performance. CP 1066. There is no evidence that predates the Settlement Agreement that the Kangs instructed Wiese’s “as-is” addendum to include the Hotel’s past financial performance. This is a theory that first arose in Sleeping Tiger’s Settlement and Assignment Agreements. CP 1058-61, 1063-67.

The trial court is bound by the jury verdict that awarded Sleeping Tiger zero damages at trial and could not increase the award by any amount, much less by \$3 million, except under RCW 4.76.030. CP 965. That statute provides that the trial court may increase the jury’s award

only if, on a motion for new trial, the court should “find the damages awarded by a jury to be so excessive or inadequate as unmistakably to indicate that the amount thereof must have been the result of passion or prejudice[.]” RCW 4.76.030. In preparing their “Findings and Judgment” by stipulation, Kenco/Kang and Sleeping Tiger did not even pretend to comply with this statutory requirement, for the obvious reason that they could not do so. A more than \$3 million increase in the jury’s award, especially when the jury found zero damages, is allowed only where the award **on its face** is so deficient that the court concludes it could have been **only** the result of passion or prejudice. *Id.* By stipulating to a judgment against it for more than \$3 million in phantom damages, Kenco/Kang’s principals and Sleeping Tiger stipulated to a judgment that violates the legal standard for such a court-ordered increase in the jury’s award.

1. **The *Kommavongsa* Court sought to prevent the collusion that this assignment, covenant not to execute, and stipulated judgment typify.**

The evidence shows that an opportunity and incentive for collusion in stipulating to damages is present here despite Kenco/Sleeping Tiger’s circular argument that there was no collusion because “[t]his litigation did not give rise to the malpractice” and Judge Bradshaw approved the findings on damages. App. Br. at 38. The Kangs, whose trial counsel

withdrew after verdict because of non-payment, faced negotiations with Sleeping Tiger, where they ultimately stipulated to a collusive judgment in contravention of the policy considerations of *Kommavongsa*. CP 619, 653, ¶ 22, 1058-78. The Kangs and Kenco/Kang agreed to execute an Assignment and Settlement Agreement with Sleeping Tiger that required the Kangs to: (1) provide testimony to support any future claims of Kenco against Inslee Best or Mr. Wiese, CP 1059, ¶ 3, 1065, ¶ h; (2) represent that they instructed Mr. Wiese to draft an “as is, where is” clause to apply to the Hotel’s “past financial performance;” CP 1066, ¶ d; (3) represent that the Judgment Summary damages are supported by evidence at trial, CP 1066, ¶ 6.c.; and (4) agree that if the Judgment Summary is not entered, the Settlement and Assignment Agreements are null and void. CP 1059.

In return, Sleeping Tiger released the Kangs from any liability arising from *Kenco v. Sleeping Tiger*, promised Sleeping Tiger’s best efforts to release them from their personal guarantees on the Comerica and Bank of the West guarantees, and agreed to dismiss its adversarial proceedings against Jin Kang in bankruptcy court. CP 1064, ¶¶ 1-3.

Kenco/Sleeping Tiger alleges damages here in the amount of the paper judgment that it forced the Kangs to stipulate to in exchange for a release of Sleeping Tiger’s claims against it. CP 7, 57, 1059-60, 1065-66.

This is exactly the arrangement that violates the public policy adopted in *Kommavongsa*: “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.” *Kommavongsa*, 149 Wn.2d at 309.

Kenco/Sleeping Tiger argues that Judge Bradshaw’s findings on damages eliminated any potential collusion, citing the Judgment Summary as support. App. Br. at 38. But there is no evidence that Judge Bradshaw knew of the terms of the Settlement Agreement or Assignment, notably those terms that required the Kangs to stipulate to the Judgment Summary, Findings of Fact and Conclusions of Law. Judge Bradshaw entered those pleadings without a hearing. No transcript exists to show whether Judge Bradshaw appreciated the collusive aspects of this settlement.

2. The mechanics of trying this case would magnify the least attractive aspects of the legal system.

Commenting on the “trial within a trial” and the inevitable shift in positions, the *Zuniga* court said:

For the law to countenance this abrupt and shameless shift of positions would give prominence (and substance) to the image 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. *See Picadilly, Inc. v. Raikos*,

582 N.E.2d 338, 344-45 (Ind. 1991). It is one thing for lawyers in our adversary system to represent clients with whom they personally disagree; it is something quite different for lawyers (and clients) to switch positions concerning the same incident simply because an assignment and the law of proximate cause have given them a financial interest in switching.

Kommavongsa, 149 Wn.2d at 306 (citing *Zuniga*, 878 S.W.2d at 318).

Because Kenco/Sleeping Tiger alleges that Mr. Wiese's conduct resulted in the stipulated damages in *Kenco v. Sleeping Tiger*, the entire course of events in that action is relevant to this action. CP 56-57. Here, Kenco/Sleeping Tiger bears the burden of proving a proposition directly contrary to the proposition Kenco/Kang successfully proved in *Kenco v. Sleeping Tiger*. CP 1-7.

In this case, the trial within a trial would consist of the presentation of the evidence and argument presented in *Kenco v. Sleeping Tiger*. In *Kenco v. Sleeping Tiger*, Kenco/Kang and the Kangs bore the burden of proving that Sleeping Tiger was liable for its non-payment on the note. CP 123-24, 832-44, 946-52. Kenco/Kang took a very clear position to meet this burden. *Id.* Every pleading filed, every witness called, including Mr. Wiese and Jin and Dong Kang, every argument made on Kenco/Kang's behalf was designed to lead the trier of fact to the conclusion that Kenco/Kang had a strong, legitimate claim against Sleeping Tiger and Sleeping Tiger was liable to Kenco/Kang for its

default on the note. *Id.*, CP 117-44, 1001-02, 1025-27.

Kenco/Kang similarly defended against Sleeping Tiger's counterclaims that alleged fraud, negligent misrepresentation, breach of warranty or contract against Kenco/Kang. CP 610-33, 935-49.

Kenco/Sleeping Tiger seeks damages for a voided Seller's Note. CP 7, ¶¶ 3.6, 4.1. The jury found that Sleeping Tiger breached its promissory note but awarded zero damages for that breach. CP 964-66. In consideration for settlement, the Kangs agreed to judgment where \$196,000 in damages were awarded to Sleeping Tiger for "interest ... on the voided promissory note." CP 1069, ¶ 3.a. This is an "abrupt and shameless shift in position" from the Kangs' earlier position that Sleeping Tiger defaulted on the Kenco/Kang note. CP 832-44.

Kenco/Kang also argued in *Kenco v. Sleeping Tiger* that the "as is, where is" addendum supported its collection action on its promissory note and defeated Sleeping Tiger's counterclaims. CP 951-62. Now, Kenco/Sleeping Tiger takes the opposite position, that the "as is, where is" addendum did not protect it from Sleeping Tiger's counterclaims and resulted in a voided promissory note. App. Br. at 39, CP 1-7. The Settlement Agreement created this contradiction because it requires Jin Kang to represent that he requested Mr. Wiese to draft the "as is, where is" addendum to include the Hotel's past financial performance. CP 1066,

¶ 6.d. Mr. Wiese testified in Kenco/Kang's defense at trial that the hotel's books and records are "personal property", included in the definition of Property in the PSA and subject to the "as-is" addendum. CP 123-24, 151, 159, 959-60. Washington's prohibition on assignments of legal-malpractice claims is meant to avoid precisely such abrupt and shameless shifts in positions.

Kenco's change in position would be obvious to all of the *Kenco v. Sleeping Tiger* jurors. They would rightly leave the courtroom with less regard for the law and the legal profession than when they entered.

3. Such assignments would deter lawyers from representing judgment-proof defendants.

The *Kommavongsa* Court cited with approval *Alcman Services Corp. v. Samuel H. Bullock, P.C.*, 925 F. Supp. 252 (D. N.J. 1996), *aff'd*, 124 F.3d 185 (3d Cir. 1997).² The *Alcman* court stated:

A party should not be permitted to transmute a claim against a penniless adversary into a claim against the adversary's wealthier lawyer based on the lawyer's supposed negligence towards the adversary. A legal malpractice action is not a commodity to be sold to a bidder who has never even had a relationship with the lawyer.

Id. at 259 (citing *Chaffee v. Smith*, 98 Nev. 222, 645 P.2d 966 (1982)).

The *Kommavongsa* Court also found the policy considerations in *Zuniga*, 878 S.W.2d at 316-17 persuasive: The *Zuniga* court observed:

² The *Kommavongsa* Court, 149 Wn.2d at 307, adopted public policy from the federal district court of New Jersey, in addition to that of Indiana, Texas and Kentucky.

[m]ost legal malpractice assignments seem to be driven by forces other than the ordinary commercial market. In most of the reported cases, the motive for assignment was the plaintiff's inability to collect a judgment from an insolvent, uninsured (or underinsured) defendant. In several instances, the malpractice plaintiff was the original plaintiff who, unable to collect against the original defendant, obtained the malpractice action in hopes of satisfying the underlying judgment.

....

.... To allow such assignments would serve two principal goals: enabling the defendant-client to extricate himself from liability, and funding the original plaintiff's judgment. But to allow assignments would exact high costs: the plaintiff would be able to drive a wedge between the defense attorney and his client by creating a conflict of interest; in time, it would become increasingly risky to represent the underinsured, judgment-proof defendant; and the malpractice case would cause a reversal of the positions taken by each set of lawyers and clients, which would embarrass and demean the legal profession.

Id. at 316-17 (citations and footnotes omitted).

Kenco/Sleeping Tiger argues that since it has not sued Mr. Nold, the attorney who represented Kenco/Kang in *Kenco v. Sleeping Tiger*, this policy consideration does not apply. App. Br. at 40. First, Mr. Nold withdrew on January 22, 2010 after non-payment of his fees. CP 1042-43. Then, on February 12, 2010, an order requiring the Kangs to pay \$178,049.90 was entered. CP 617, ¶ 44. Jin Kang was relieved of an adversary in Sleeping Tiger in his bankruptcy proceedings when he entered into the Settlement Agreement. CP 1064, ¶ 3. The Kangs were

judgment-proof and forced to settle with Sleeping Tiger in consideration for the assignment of Kenco, their “valueless” asset but for the present cause of action. CP 1081, 1058-76. Kenco/Sleeping Tiger’s argument that this policy consideration does not apply ignores that a judgment against Mr. Wiese likewise will chill a lawyer’s willingness to defend clients like the Kangs, whose compromised financial position prompted them to agree to judgment and assign their business and their legal malpractice claim to Sleeping Tiger.

C. Washington, and most jurisdictions, bar assignment of legal malpractice claims as against public policy.

The reasoning of the majority of jurisdictions for denying the assignment of legal malpractice claims is well set out in Mallen & Smith, *Legal Malpractice* § 7.12 (2011).

A fundamental policy reason for not allowing an assignment is the undesirable risk of tempering an attorney’s zeal by the concern that a present or prospective adversary may become the holder of the client’s alleged legal malpractice cause of action. As a prospective judgment creditor, the client’s adversary may view the attorney as a source of collection. Moreover, just as adverse parties have sued their opponent’s lawyer for malicious prosecution, some seek an assignment against their former adversary’s counsel for retaliation. The danger is that the attorney’s independent judgment in representing the client will suffer from diminished loyalty, dedication, and zeal because of concern about an adversary later suing as an assignee.

Another policy concern is the risk of eroding the confidences within the attorney-client relationship.

Although the risk of an attorney disclosing confidences necessary to the defense exists in any legal malpractice action ... allowing an assignment could result in restraining some clients from full disclosure if they knew they might offer a claim against their lawyers as part of the consideration to discharge liability. A corollary of that concern is that a non-client has no concern for whether prosecution of a malpractice claim injures the defendant's former client.

Id. at 837-8 (internal citations omitted).

Rather than follow *Kommavongsa*, Kenco/Sleeping Tiger relies on the dissent in *Kommavongsa* for the proposition that the *Kommavongsa* Court adopted special protections for the legal profession that interfered with clients' ability to transfer property. App. Br. at 22, 23. *Kommavongsa* considered and rejected as a minority opinion the statement in *Hedlund Mfg. Co., Inc. v. Wieser, Stapler & Spivak*, 517 Pa. 522, 539 A.2d 357 (1988) that legal malpractice "claims are property, and as such are freely assignable." *Kommavongsa*, 149 Wn.2d at 317. The *Kommavongsa* Court prohibited assignments of legal-malpractice claims regardless of whether such a claim sounds in tort or contract. *Id.* at 295, n.1. Similarly, the Connecticut Supreme Court held,

rather than strain to fit each legal malpractice claim into a category often determined by counsel based on concerns not relevant to the inquiry at hand, we think the better approach is to resolve the issue uniformly on the basis of public policy.

Gurski v. Rosenblum & Filan, LLC, 885 A.2d 163 (Conn. 2005); *see also*

Picadilly, 582 N.E.2d at 341.

Kenco/Sleeping Tiger completely ignores that the majority prohibited such assignments based on public policy. In fact, Kenco/Sleeping Tiger's discussion of *Kommavongsa*'s application to other professions along its reliance on the policy considerations from Indiana and the federal district in New Jersey shows the adoption of the majority rule in *Kommavongsa* is sweeping, not limited, as Kenco/Sleeping Tiger argues. *Kommavongsa*, 149 Wn.2d at 307. Kenco/Sleeping Tiger ignores the *Kommavongsa* Court's observation that 18 of 25 states that have examined this issue have prohibited such assignments in their entirety. *Id.* at 296 n.2.

Alternatively, Kenco/Sleeping Tiger argues that *Kommavongsa* should not apply here because the parties were not adversaries in the underlying litigation. App. Br. at 21, 32, 34. Sleeping Tiger and Kenco were adversaries in the underlying litigation. Even if they were not, the *Kommavongsa* Court simply did not limit its holding as Kenco/Sleeping Tiger argues. As acknowledged by the dissent in *Kommavongsa*, *Picadilly v. Raikos*, 582 N.E.2d 338, 340 (1991) is the centerpiece of the public-policy argument advanced by the majority. *Kommavongsa*, 149 Wn.2d at 319-20. With that, the Indiana court of appeals held that "no legal malpractice claims may be assigned, regardless of whether they are

assigned to an adversary” because the assignment of legal malpractice claims are against public policy. *Rosby Corp. v. Townsend, Yosha, Cline & Price*, 800 N.E.2d 661, 667 (Ind. Ct. App.2003) (citing *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338, 339 (Ind.1991)). The apparent lack of an adversarial relationship does not enable an assignment. *Kiley v. Jennings, Strouss & Salmon*, 187 Ariz. 136, 927 P.2d 796 (Ct. App. Div. 1, 1996)

Kenco/Sleeping Tiger’s argument that *Kenco v. Sleeping Tiger* did not give rise to this legal-malpractice claim contradicts its complaint and claim for damages. CP 1-7, App. Br. at 34. This assertion is factually wrong and is not supported by any legal authority.

D. Kenco/Kang illegally assigned its malpractice claims.

Kenco/Sleeping Tiger argues *Kommavongsa* does not bar its legal-malpractice claim here because a change in the corporation’s ownership has not affected its ownership of its legal-malpractice claim. App. Br. at 24, § C. 1. However, after *Kommavongsa*, this court rejected an attempt to evade *Kommavongsa*’s holding where parties attempted an assignment of a legal malpractice claim through other means. In *Kim v. O’Sullivan*, 133 Wn. App. 557, 561, 137 P.3d 61 (2006), plaintiff and defendant entered into a settlement agreement in which defendant agreed to bring a legal-malpractice claim and assign the proceeds from that claim to plaintiff, the adverse party. Citing *Kommavongsa*, the *Kim* Court held that the

settlement violated public policy. *Id.* at 563. Kim argued that he satisfied *Kommavongsa* because he assigned only the proceeds rather than the claim itself. *Id.* at 562. The *Kim* court disagreed, holding that the client must be the real party in interest when the malpractice suit is litigated. *Id.* at 563. The settlement between the adverse litigants, Reina and Kim, gave Reina control of the malpractice suit, and only Reina would benefit from it. *Id.* Discussing Kim’s attempt to circumvent the public policy against assignments, this court characterized the assignment of proceeds as one “made merely to circumvent the public policy barring assignments” because the assignee retained control of the litigation. *Kim v. O’Sullivan*, 133 Wn. App. at 563 (citing *Gurski v. Rosenblum & Filan, LLC*, 276 Conn. 257, 885 A.2d 163, 178 (2005)). *See also Weiss v. Leatherberry*, 863 So.2d 368, 372 (Fla. Dist. Ct. App. 2003). The *Kim* court followed the rule and rationale of *Kommavongsa* and barred “Kim’s suit in its present posture because the assignment of proceeds that underpins it is in reality an assignment of the claim.” *Id.*

Kenco/Sleeping Tiger’s “corporate ownership” argument exalts form over substance; as in *Kim*, it is in reality an assignment of the claim.” Kenco/Sleeping Tiger argues that because Sleeping Tiger acquired 100 percent of Kenco, a limited-liability company, Kenco is merely “under new management” and may now pursue its legal-malpractice claim as

before. App. Br. at § C. 3. That argument fails because this legal-malpractice action would not exist without (1) the lawyer-created stipulated judgment that defied the jury's verdict, and (2) the lawyer-created transfer of the judgment-proof Kenco to Sleeping Tiger. CP 1058-78. These contrivances illuminate the policy concerns on which the *Kommavongsa* rule rests. *Kommavongsa* bars this action, because regardless of the entities transferring the claim, it is in substance an assignment of a legal-malpractice claim.

Kenco/Sleeping Tiger relies on 64 A.L.R.6th 473 (2011) to argue that an assignment did not occur and that the trial court's ruling is an inadvisable extension of *Kommavongsa*. App. Br. at 24. Cases that support the corporate assignment of legal-malpractice claims are limited to their facts and inapplicable here. *Id.* at § 18, *Richter v. Analex Corp.*, 940 F. Supp. 353, 356-58 (D. D.C.1996) (assignment permitted because no policy concerns implicated because claim sold to uninterested party and purely pecuniary harm at issue.); *Thurston v. Continental Cas. Co.*, 567 A.2d 922, 923 (Me.1989) (assignment permitted under the specific facts of the case where defendant in the underlying action assigned plaintiff a claim against the defendant's insurer and the insurer's attorney for failure to defend or settle; the court reasoned that the policy concern about creating a commercial market for claims was inapplicable because "this

assignee has an intimate connection with the underlying lawsuit.”); *Cowan Liebowitz & Latman, P.C. v. Kaplan*, 902 So. 2d 755, 761 Blue Sky L. Rep. (CCH) ¶ 74537 (Fla. 2005) (*Cowan* was the first and only case in which the Florida State Supreme Court permitted a limited exception to the general prohibition on legal malpractice assignments, and their holding was confined to the specific facts and circumstances of that case.); *Learning Curve Intern., Inc. v. Seyfarth Shaw, LLP*, 392 Ill. App. 3d 1068, 331 Ill. Dec. 843, 911 N.E.2d 1073, (1st Dist. 2009), appeal denied, 234 Ill. 2d 523, 336 Ill. Dec. 483, 920 N.E.2d 1073 (2009) (assignment of legal-malpractice claim to Learning Curve’s former shareholders, who suffered the loss due to the alleged malpractice, was transferred with other assets and obligations and therefore was found to not violate Illinois public policy.); *Chang v. Chang*, 237 A.D.2d 235, 655 N.Y.S.2d 22 (1st Dep’t 1997) (assignment of legal malpractice claims allowed by state statute General Obligations Law §13-101); *American Hemisphere Marine Agencies, Inc. v. Kreis*, 40 Misc. 2d 1090, 244 N.Y.S.2d 602, 603 (Sup.Ct. N.Y. Cty. 1963) (“plaintiff and its assignor are interrelated corporations, and plaintiff was involved in the transactions alleged from the very beginning. In such circumstance, the assignment was not in the purview of Section 275 of the Penal Law”; assignments between related entities are not champertous); *Collins v. Fitzwater*, 277 Or. 401, 560 P.2d 1074 (1977)

(overruled on another other grounds, *Lancaster v. Royal Ins. Co. of America*, 302 Or. 62, 726 P.2d 371 (1986) (no violation of public policy in assignment of legal-malpractice claims by a nonculpable lay corporate director seeking indemnity against a culpable corporate attorney-director).

Kenco/Sleeping Tiger's reliance on 64 A.L.R.6th 473 (2011) supports dismissal of this action based on public policy. See 64 A.L.R.6th 473 (2011) § 19, *Curtis v. Kellogg & Andelson*, 73 Cal. App. 4th 492, 86 Cal. Rptr. 2d 536 (2d Dist. 1999) (public policy barred assignment of a corporation's legal malpractice claim to the sole shareholder); *Can Do, Inc. Pension & Profit Sharing Plan & Successor Plans v. Manier, Herod, Hollabaugh & Smith*, 922 S.W.2d 865 (Tenn. 1996) (public policy prohibited assignment of legal-malpractice claim).

E. Kenco/Kang was the real party in interest.

Kim v. O'Sullivan, 133 Wn. App. at 563, prohibits any evasion of *Kommavongsa* ruling that the client must be the real party in interest when the legal malpractice suit is litigated. Kenco/Kang is the real party in interest here because they enjoyed the attorney-client relationship with Mr. Wiese and Inslee Best, not Kenco/Sleeping Tiger. CP 539-40, 494-509.

Kenco/Sleeping Tiger relies on *Zimmerman v. Kyte*, 53 Wn. App. 11, 18, 765 P.2d 905, 909 (1988), to argue that the Kangs as

“shareholders” could not have sued Mr. Wiese and Inslee Best for malpractice and it is Kenco who is the real party in interest. App. Br. at 28. *Zimmerman* actually undermines Kenco/Sleeping Tiger’s argument. In *Zimmerman*, the Plaza Drug Corp. and the Zimmermans, Plaza’s two shareholders, sued Kyte. During the proceedings the Zimmermans named themselves as sole plaintiffs. The Secretary of State later administratively dissolved Plaza. Kyte later moved to dismiss the Zimmermans’ claims, arguing that only Plaza possessed the cause of action against her. The court allowed the Zimmermans to proceed, in part because when Plaza was administratively dissolved, the corporation immediately ceased to exist, and all its assets flowed automatically to the Zimmermans as shareholders. *Id.* at 19.

Regardless of Kenco’s status as a limited-liability company, it cannot be disputed that Kenco/Kang assigned its legal-malpractice claim to Sleeping Tiger. CP 1058-61, 1063-67. Even as a matter of corporate law, on which Kenco/Sleeping Tiger relies, this transaction was an **assignment** of Kenco/Kang to Sleeping Tiger because more than 50 percent of the shareholders/members changed. WAC 458-61A-101. Dong Kang assigned 100 Units of his ownership interests in Kenco, 100 percent of its shares, to Sleeping Tiger. CP 1078.

Kenco/Sleeping Tiger argues that this transaction is not a disguised

assignment of a legal-malpractice claim because other assets and liabilities were transferred at the time of assignment. App. Br. at 30. However, Kenco was required to disclose all its assets and liabilities in the June 25, 2010 Settlement Agreement, before this action was filed. CP 1065 ¶ 6, a.-b. Despite this, Kenco/Sleeping Tiger did not disclose any other asset or liability apart from its malpractice claim until its opposition to summary judgment – even though it supplemented discovery once and denied any other asset or liability. CP 104, 114, 1081, 607-08. Kenco/Sleeping Tiger now baldly asserts that its “acquired ... direct relationship with the banks and any ‘due on sale’ clause violation claims” have value, even though Sleeping Tiger never would have acquired Kenco without the stipulated judgment and legal-malpractice claim. Even if they do, the legal provisions of the settlement remain enforceable. *Davis v. Scott*, 320 S.W. 3d 87, 91 (Ky. 2009) (provision in settlement agreement that assigned legal-malpractice claim invalid, but remaining provisions enforceable).

F. Kenco/Sleeping Tiger is not a successor in interest to the owner of this legal-malpractice claim.

If this court agrees that Kenco/Sleeping Tiger is the real party interest, and the claim was not “assigned,” this claim is still barred because Kenco/Sleeping Tiger is not a direct continuation of its predecessor, Kenco/Kang, and its legal-malpractice claim cannot survive.

Summit Account & Computer Serv., Inc. v. RJH of Florida, Inc., 690

N.E.2d 723 (Ind. Ct. App. 1998).³ In *Summit*, the Indiana Court of Appeals allowed a legal-malpractice action to be “assigned to a successor corporation where the corporation was a direct continuation of its predecessor where the same individual acted as “the sole shareholder, director and officer’ for all three corporations ... and the corporations conducted business of the same nature from the same place.” *Id.* at 728. Accordingly, they ruled that liability will not be cut off where there is only a change in name of a corporation. *Id.* Here, the transfer of Kenco/Kang was not a direct continuation of the operation, and ownership where the shareholders, directors and officers changed from the Kangs to Sleeping Tiger and this fact is not in dispute; therefore, the claim cannot follow. CP 1078. *See Municipal Tax Liens, Inc. v. Alexander*, 893 N.E.2d 733 (2008) (inapplicable here where there is no issue of material fact that Kenco/Sleeping Tiger is not a direct continuation of Kenco/Kang and the only asset assigned was the legal malpractice claim).

G. A legal-malpractice claim cannot survive where only a stipulated judgment supports damages.

A claim for legal malpractice requires proof of damage to the client, and the measure of those damages is the amount of loss actually sustained as a proximate result of the attorney’s conduct. *Kim*, 133 Wn.

³ The public policy of Indiana in barring the assignment of legal-malpractice claims is “legitimate and persuasive.” *Kommavongsa*, 149 Wn.2d 288, 307.

App. at 564 (citation omitted). “A stipulated judgment cannot properly serve as an indication of the actual damages, if any there were, as a result of the alleged legal malpractice.” *Id.* at 565 (quoting *Kommavongsa*, 149 Wn.2d at 308). Kenco/Sleeping Tiger claims damages here in the amount of the stipulated judgment, including damages for the voided seller’s note. CP 57. The stipulated judgment is the only “proof” of the current damage claim in the record. And even that “proof” contradicts the jury’s verdict that issued zero damages on the note. CP 965. The Kangs were judgment-proof before stipulating to damages that contradicted the jury’s verdict and the stipulated judgment cannot support Kenco/Sleeping Tiger’s damage claim..

H. Kenco/Sleeping Tiger’s Opening Brief repeatedly violates RAP 10.3.

Kenco/Sleeping Tiger’s opening brief repeatedly misstates the facts, fails to cite to the record to support its factual assertions, and improperly asserts argument in its Statement of the Case. Kenco/Sleeping Tiger also relies on evidence that the trial court ordered excluded; it has not assigned error to that order. Kenco/Sleeping Tiger thereby violates RAPs 10.3(a)(5) and 10.3(g), which provide:

(a) Brief of Appellant or Petitioner. The brief of the appellant or petitioner should contain under appropriate headings and in the order here indicated:

...

(5) *Statement of the Case.* A fair statement of the facts and procedure relevant to the issues presented for review, **without argument**. Reference to the record must be included **for each factual statement**.

...

(g) *Special Provision for Assignments of Error.* A separate assignment of error for each instruction which a party contends was improperly given or refused must be included with reference to each instruction or proposed instruction by number. ... The appellate court will only review claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

RAP 10.3 (emphasis added).

Parties must cite the record to support factual statements in an appeal brief. *Hurlbert v. Gordon*, 64 Wn. App. 386, 399, 824 P.2d 1238 (1992). This court will not consider such statements that lack supporting citations to the record. *Housing Auth. of Grant County v. Newbigging*, 105 Wn. App. 178, 184, 19 P.3d 1081 (2001) (citation omitted). The Statement of the Case must be “[a] fair statement of the facts ..., without argument.” RAP 10.3(a)(5).

RAP 10.3(g) requires separate assignments of error for each challenged finding. The remedy for violation is sanctions, including refusal to consider the claimed errors. *Thomas v. French*, 99 Wn.2d 95, 100, 659 P.2d 1097 (1983). Kenco/Sleeping Tiger failed to assign error to the trial court’s order striking portions of declarations submitted in

opposition to Mr. Wiese and Inslee Best's motion for summary judgment. Had Kenco/Sleeping Tiger assigned error, this court would review it for an abuse of discretion. *Eagle Group, Inc. v. Pullen*, 114 Wn. App. 409, 416, 58 P.3d 292 (2002), *rev. denied*, 149 Wn.2d 1020 (1996). Despite this failure, Kenco/Sleeping Tiger improperly relies on these portions of the record in its Statement of the Case. The following assertions in Kenco/Sleeping Tiger's Statement of the Case violate the RAPs; after each, Mr. Wiese and Inslee Best correct the record:

a. This action "aris[es] out of Wiese's representation of Kenco in a commercial real estate transaction." App. Br. at 5. Kenco/Sleeping Tiger fails to cite the record to support this assertion, which is both improperly argumentative and inaccurate. RAP 10.3(a)(5), (g). Kenco/Sleeping Tiger alleges damages based on the stipulated judgment in *Kenco v. Sleeping Tiger*. CP 7, ¶ 3.6. Kenco/Sleeping Tiger's complaint refers to *Kenco v. Sleeping Tiger* in 19 of 39 paragraphs. CP 1-7. This case would not exist but for *Kenco v. Sleeping Tiger*.

b. "Kenco hired Mr. Wiese and his firm, Inslee Best, to represent him in the transaction. (CP 650; CP 539) Kenco is the only client identified in the legal services agreement." App. Br. at 6. This statement is inaccurate and begs a central legal issue. Jin Kang is a

personal guarantor on the legal services agreement. CP 540. Jin Kang and Dong Kang were the only owners of Kenco/Kang. CP 1058-61. Mr. Wiese also performed personal legal services for Jin Kang and Dong Kang. CP 494-509.

c. “Kenco specifically instructed Wiese to draft protections into the contract that would eliminate its exposure to post-closing liability for any representations or warranties, including any information regarding the hotel business related to its historical financial performance. ... This clause, however, was silent as to the ‘business.’” App. Br. at 7. This statement is argumentative, misstates the record, and is not properly before this court because the trial court struck it and no assignment of error was issued to the trial court’s order. CP 122-25, 129, 805.

d. “Sleeping Tiger, after becoming concerned that Kenco’s representations about the historical operating performance of the hotel business ... withheld a portion of the payments due on the note and asked Kenco to renegotiate its terms.” App. Br. at 8. Kenco/Sleeping Tiger again cites evidence that the trial court struck and has not assigned error to that ruling. CP 805. Kenco/Sleeping Tiger fails to accurately cite to the record and engages in argument. The jury awarded Sleeping Tiger “\$0” damages. CP 964-66. The Hotel’s books and records were “property” according to the PSA, were excluded from the PSA’s representations and

warranties and subject to the “as-is” addendum. CP 123, 124, 151, 159. Sleeping Tiger exhaustively reviewed all financials, admitted no documents were withheld, its two owners are lawyers, one of whom has an accounting background. CP 960.

e. “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.” App. Br. at 9. Kenco/Sleeping Tiger fails to cite the record to support this assertion. If Kenco/Sleeping Tiger believes it possesses new facts that help its case, it must follow the strict motion practice of RAP 9.11(a).

f. “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 523-624) 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.

App. Br. at 11. Kenco/Sleeping Tiger cites evidence that the trial court struck, CP 805, and fails to cite the record accurately. Sleeping Tiger was precluded from offering proof of damages. CP 969-1002, 1004-31.

g. “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.” App. Br. at 12. Kenco/Sleeping Tiger again cites evidence the trial court struck, CP 805, fails to cite the record accurately, engages in argument, and improperly discusses the jury’s thought processes, which “‘inhere in the verdict’ and cannot be used to impeach a jury verdict.” *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 272, 796 P.2d 737 (1990)).

h. “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.” App. Br. at 12. Kenco/Sleeping Tiger improperly cites evidence that the trial court struck, CP 805, and engages in argument. The stipulated Judgment Summary, Findings of Fact, and Conclusions of Law were entered without a hearing, and there was no transcript of Judge

Bradshaw's position on its substance.

i. "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." App. Br. at 12. Kenco/Sleeping Tiger improperly cites evidence that the trial court struck, CP 805, engages in argument, and improperly discusses matters that inhere in the verdict. *Richards*, 59 Wn. App. at 272.

j. "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." App. Br. at 13. Kenco/Sleeping Tiger misstates and fails to cite the record, engages in argument, and improperly discusses matters that inhere in the verdict. *Richards*, 59 Wn. App. at 272. The presiding juror testified about the bottom line result intended by the jury and said that

the change was on the form [crossing out of \$1,350,000 because] [...] [b]asically we were not confident in how the staging went and how the math was going to apply. **We didn't want either side to have an advantage. We basically wanted it to come out a net zero.** So you were off the hook for the 1.35. You weren't being awarded damages is what it amounts to."

CP 594 (emphasis added).

k. When asked how the \$140,000 mistake occurred, the Presiding Juror testified: “we were running out of time,” “we made our last-minute changes.” App. Br. at 13. This again inheres in the verdict. *Richards*, 59 Wn. App. at 272. It was the jury’s verdict, and its undoing, that form the basis of the present legal-malpractice claim. In response to Judge Bradshaw’s question about the jury’s intent concerning the stipulated \$140,000, the presiding juror responded, “[t]he overpayment of \$140,000 was to be returned to Mr. Summers and Sleeping Tiger” and the special verdict form had no place to indicate this. CP 594.

l. “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*.” App. Br. at 14. Kenco/Sleeping Tiger improperly cites evidence that the trial court struck, CP 805, engages in argument, and improperly discusses matters that inhere in the verdict. *Richards*, 59 Wn. App. at 272.

m. “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.

App. Br. at 16. Kenco/Sleeping Tiger improperly cites evidence that the trial court struck, CP 805, fails to cite the record adequately, engages in argument, and improperly discusses matters that inhere in the verdict. *Richards*, 59 Wn. App. at 272.

n. "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." App. Br. at 16. Kenco/Sleeping Tiger again fails to cite the record and again engages in argument. The record did not "meticulously support" the stipulated judgment, because Sleeping Tiger was precluded from presenting proof of damages. CP 969-1002, 1004-31.

o. "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." App. Br. at 16, 17. Kenco/Sleeping Tiger again fails to cite the record and engages in argument. The record did not "meticulously support" the stipulated judgment, because Sleeping Tiger was precluded from presenting proof of damages. CP 969-1002, 1004-31. The jury

found Sleeping Tiger defaulted on the note had prevailed on its affirmative defense, counterclaim and third-party claims against Jin and Dong Kang and Kenco/Kang and that Sleeping Tiger had sustained “\$0” in damages as a result of Kenco/Kang’s conduct. CP 964-66.

p. “In the summary judgment hearing in this malpractice case, Mr. Wiese emphasized that, as part of the settlement, the Kangs also assigned any claims they may have individually had against Mr. Wiese. (RP 12-13) Sleeping Tiger required this at the time because it was not privy to the Service Agreement between Kenco and Mr. Wiese, and it could not verify whether Mr. Wiese was representing the Kangs individually. (CP 797-98) Of course, because Kenco was Mr. Wiese’s only client, the Kangs had no personal claims against Mr. Wiese. As a result, the ‘assignment’ of any claim by the Kangs was an assignment of nothing and is immaterial to this action.” App. Br. at 17, n.5. Kenco/Sleeping Tiger again improperly cites to evidence that the trial court struck, CP 805, fails to cite the record adequately, and again engages in argument. CP 1058-67.

q. “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.” App. Br. at 17. Kenco/Sleeping Tiger again cites evidence the trial court struck, CP 805, misstates the record, CP 1058-78, and engages in argument. Kenco/Kang was required in the Settlement Agreement to disclose its assets and liability in June 2010. CP 1065, ¶¶ a-b. In March 2011, Kenco/Sleeping Tiger represented that when it acquired Kenco, its only asset was this legal-malpractice claim. CP 104, 108, 114.

r. “[B]ecause the sale of real estate from Kenco to Sleeping Tiger technically constituted a violation of the “due on sale” clauses contained in the banks’ deed 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.” App. Br. at 17, 18. Kenco/Sleeping Tiger again cites evidence the trial court struck, CP 805, misstates the record, CP 1058-67, and engages in argument. Sleeping Tiger assumed the bank note upon their purchase of the Hotel; now, as Kenco/Sleeping Tiger, it argues that its acquisition of Kenco changes its obligation on the note, even though the jury found no damages as to the note obligation. CP 96, 170-71, 952, 964-66.

s. “[I]n the event the banks commenced foreclosure proceedings as a result of the violation of the “due on sale” clause—which both banks now have done—Sleeping Tiger could “cure” the default by simply re-conveying the real estate back to Kenco, its wholly owned subsidiary. App. Br. at 18. Kenco/Sleeping Tiger again cites evidence the trial court struck, CP 805.

t. “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 outstanding amount.” App. Br. at 18. Kenco/Sleeping Tiger again cites evidence the trial court struck, CP 805, and engages in argument.

u. “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.” App. Br. at 18. Kenco/Sleeping Tiger again cites evidence the trial court struck, CP 805, misstates the record, and engages in argument. Moreover, the stipulated judgment contradicts the jury’s verdict. CP 964-66, 1069-76.

VI. CONCLUSION

The *Kommavongsa* Court barred the assignment of legal-malpractice claims as against public policy. This court in *Kim v. O'Sullivan* rejected an attempt to evade *Kommavongsa's* holding where parties attempted an assignment of a legal-malpractice claim through other means. This is precisely what Kenco/Sleeping Tiger seeks to accomplish here. This court should affirm the trial court's summary judgment order to limit the potential for collusion in stipulating to damages, and to maintain the integrity of the practice of law so that lawyers do not fear protecting the defense of judgment-proof defendants. Washington law prohibits legal-malpractice claims whose damages arise from a stipulated judgment; here, Kenco/Sleeping Tiger's entire damage claim rests on just such a stipulated judgment, not on actual proof of actual damages.

Respectfully submitted this 23rd day of December, 2011.

LEE SMART, P.S., INC.

By: 

Jeffrey P. Downer, WSBA No. 12625
Mary DePaolo Haddad, WSBA No. 30604
Of Attorneys for Respondents

APPENDIX A

RCW 4.76.030 - Increase or reduction of verdict as alternative to new trial.

If the trial court shall, upon a motion for new trial, find the damages awarded by a jury to be so excessive or inadequate as unmistakably to indicate that the amount thereof must have been the result of passion or prejudice, the trial court may order a new trial or may enter an order providing for a new trial unless the party adversely affected shall consent to a reduction or increase of such verdict, and if such party shall file such consent and the opposite party shall thereafter appeal from the judgment entered, the party who shall have filed such consent shall not be bound thereby, but upon such appeal the court of appeals or the supreme court shall, without the necessity of a formal cross-appeal, review de novo the action of the trial court in requiring such reduction or increase, and there shall be a presumption that the amount of damages awarded by the verdict of the jury was correct and such amount shall prevail, unless the court of appeals or the supreme court shall find from the record that the damages awarded in such verdict by the jury were so excessive or so inadequate as unmistakably to indicate that the amount of the verdict must have been the result of passion or prejudice.

RCW 43.07.390 - Real estate excise tax enforcement — Disclosure of transfer of controlling interest, real property.

(1)(a) The secretary of state must adopt rules requiring any entity that is required to file an annual report with the secretary of state, including entities under Titles 23, 23B, 24, and 25 RCW, to disclose: (i) Any transfer of the controlling interest in the entity; and (ii) the granting of any option to acquire an interest in the entity if the exercise of the option would result in a sale as defined in RCW 82.45.010(2).

(b) The disclosure requirement in this subsection only applies to entities owning an interest in real property located in this state.

(2) This information must be made available to the department of revenue upon request for the purposes of tracking the transfer of the controlling interest in entities owning real property and to determine when the real estate excise tax is applicable in such cases.

(3) For the purposes of this section, "controlling interest" has the same meaning as provided in RCW 82.45.033.

APPENDIX B

WAC 458-61A-101 - Taxability of the transfer or acquisition of the controlling interest of an entity with an interest in real property located in this state.

(1) Introduction. The transfer of a controlling interest in an entity that has an interest in real property in this state is considered a taxable sale of the entity's real property for purposes of the real estate excise tax under chapter 82.45 RCW. This rule explains the application of the tax on those transfers.

(2) Definitions. For the purposes of this chapter, the following definitions apply unless the context requires otherwise.

(a) "Controlling interest" means:

(i) In the case of a corporation, either fifty percent or more of the total combined voting power of all classes of stock of the corporation entitled to vote, or fifty percent of the capital, profits, or beneficial interest in the voting stock of the corporation; and

(ii) In the case of a partnership, association, trust, or other entity, fifty percent or more of the capital, profits, or beneficial interest in such partnership, association, trust, or other entity.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington, that on December 23, 2011, in the manner indicated below, I caused service of the foregoing on each and every attorney of record herein via ABC Legal Messenger:

Mr. Sims G. Weymuller
Mr. Donovan Flora
Johnson • Flora, PLLC
2505 Second Avenue, Ste. 500
Seattle, WA 98121

EXECUTED this 23rd day of December, 2011, at Seattle, WA.



Susan M. Munn, Legal Assistant