

FILED

JUN 08 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 28078-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

AMERICAN STATES INSURANCE COMPANY
Respondent,

v.

PHOUKEO NAMMATHAO, individually and as Guardian Ad Litem of NAPHA
T. NAMMATHAO, a minor, KHENE K. KOMMAVONGSA, as Guardian Ad
Litem of SIVILAY NAMMATHAO, an incompetent,
Appellants.

FROM THE SUPERIOR COURT FOR BENTON COUNTY
HONORABLE CRAIG J. MATHESON, JUDGE

REPLY BRIEF OF APPELLANTS

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I. RESPONSE TO MOTION TO DISMISS

American States has filed its motion to dismiss this appeal based on its assertion that Kommavongsa and Nammathao failed to designate, as part of the Clerk's Papers, the Order from which they appeal. In support of its motion, American States cites RAP 9.6.(b) declaring that it requires that this appeal must be dismissed.

Initially, it should be noted that the appellate courts of the State of Washington are loathe to decide cases which come before it on technical issues rather than the merits of the appeal. See *Eagle Pacific Ins. Co. v. Christensen Motor Yacht Corp.*, 85 Wn. App. 695, 710, 934 P.2d 715 (1997), where Division II of the Court of Appeals noted that:

The rules of appellate procedure, however, are to be "liberally interpreted to promote justice and facilitate the decision of cases on the merits." RAP 1.2(a). When justice requires, appellate courts "may waive or alter the provisions of any of these rules." RAP 1.2 (c).

Moreover, that American States cites RAP 9.6.(b) in support of its motion demonstrates that American States counsel did not even bother to read it. In particular, in addressing the contents of the Clerk's Papers on appeal, RAP 9.6.(b) provides that:

(b) Designation and contents. (1) The clerk's papers shall include, at a minimum:

(A) the notice of appeal or the notice for discretionary

review;

...

(C) any written order or ruling **not attached to the notice of appeal**, of which a party seeks review; ...

Because the Order of Contempt is attached to the notice of appeal,¹ American States' motion to dismiss is without merit; and must be denied.

II. RESTATEMENT OF CASE

In an effort to attribute, to Kommavongsa and Nammathao's counsel, knowledge of what transpired at the hearing at which Cheryl Adamson was appointed to represent Khene Kommavongsa, the guardian ad litem of Sivilay Nammathao, American States implies that counsel was either directed to, or at least invited to, appear at that hearing. Nothing could be further from the truth.

What purpose would be served by his appearing at the hearing when the trial court had already made it abundantly clear that he no longer had any role to play in the case. The trial court would not permit Kommavongsa and Nammathao's counsel to argue their motion to disqualify American States' counsel because the court had disqualified him and he was not in a position to argue it;² and had informed him it would

¹ (Clerk's Papers at 166-175.) The notice for discretionary review was treated as a notice of appeal as a matter of right.

² (Report of Proceedings; Volume I, page 18 line 14 through 19.)

not permit him to argue for a continuance because it had disqualified him "as of now".³ Exactly what role did American States and Ms. Adamson expect their counsel to play; especially since they were already objecting to him even pursuing the appeal from his disqualification.⁴

The trial court further made it clear that it was not interested in considering the needs of his clients when it refused their counsel's request that it could make some accommodation for them in setting the date for hearing to appoint substitute counsel;⁵ instead setting the hearing to take place only 6 days later;⁶ after first suggesting it would need to be set several weeks in the future.⁷

And while American States is correct in stating that the trial court summarily denied Kommavongsa and Nammathao's motion for reconsideration of the disqualification their counsel, it fails to mention that no one, not the trial court or either counsel, ever bothered to inform Kommavongsa and Nammathao's former counsel notice of the denial of their motion.

³ (Report of Proceedings; Volume I, page 14 line 25 through page 15 line 3.)

⁴ (Report of Proceedings; Volume III, page 5 lines 9 through 13.)

⁵ (Report of Proceedings; Volume I, page 20 lines 4 through 5.)

⁶ (Report of Proceedings; Volume I, page 20 lines 6 through 8.)

⁷ (Report of Proceedings; Volume I, page 19 line 23 page 20 line 2.)

Also, American States' assertion that Kommavongsa and Nammathao's counsel in any way thwarted Ms. Adamson's efforts to contact her client and obtain information about the case prior to his learning that her law firm had represented American States in taking an examination under oath of Khene Kommavongsa, is false. Indeed, when it became apparent, through the passage of time rather than having received a copy of the order, that the trial court would not be granting his motion for reconsideration, on September 26, 2008, their counsel sent Ms. Adamson a number of documents to provide her with a working knowledge of the status of the lawsuit. These documents included the Motion For Reconsideration Of Order Disqualifying Attorney For Defendants; the Defendant's Motion To Continue Trial Date; the Defendants' Motion To Disqualify Counsel for Plaintiff American States Insurance Company; the Defendants' CR 12(b) Motion To Strike The Third Party Complaint Of Plaintiff; and the July 5, 2008 letter addressed to Edward Shea, the Discovery Master, regarding Defendants position regarding their discovery requests and American States answers and responses to those discovery requests.⁸

⁸ (Clerk's Papers at 131.)

Furthermore, the trial court, in its Order On Show Cause Hearing, specifically found that their counsel had not interfered with either Ms. Adamson's or American States' counsel's efforts to contact his former clients.⁹

Prior to the discovery of the conflict that Ms. Adamson had, due to her law firm's prior representation of American States, Kommavongsa and Nammathao's counsel had expressed his willingness to cooperate with Ms. Adamson and provide her with the information she was seeking.¹⁰ Furthermore, the only direction he had received from the court prior to the November 4, 2008 hearing was to provide American States' counsel with the addresses of his clients, as was done, within three days,¹¹ during the November 4th hearing he made every effort to make sure he knew exactly what was expected of him in terms of cooperation.¹²

Once he discovered that Ms. Adamson's law firm had represented American States when the EUO was taken of Khene Kommavongsa, what

⁹ (Clerk's Papers at 154.)

¹⁰ See Response Of Greenlee To Motions For Orders To Cause; page 2 lines 19-23; (Clerk's Papers at 118.)

¹¹ (Report of Proceedings; Volume I; page 18 lines 9-13.)

¹² (Report of Proceedings; Volume III, page 10 line 7 through page 18 line 23.)

he had perceived, as Ms. Adamson's reluctance to pursue her client's claim for interest,¹³ suddenly made sense.

After Kommavongsa and Nammathao's counsel learned, while in the process of preparing the file for copying to send to Ms. Adamson, that she was a partner in the law firm that performed the EUO of Khene Kommavongsa, he immediately filed a motion for reconsideration of the Order On Show Cause Hearing insofar as it required that he provide Ms. Adamson with contact information for the client and that he turn over the file to her.¹⁴

In particular, the motion for reconsideration requested:

1. **Relief Sought.** Respondent, A. Graham Greenlee, requests that the court reconsider its ruling of November 4, 2008, on the show cause hearing resulting from the contempt proceedings brought by the attorneys representing American States Insurance Company and Khene Kommavongsa and Sivilay Nammathao; and that it **set aside any requirement that he provide the attorney now representing Khene Kommavongsa and Sivilay Nammathao with a copy of the UIM claims file and contact information for Khene Kommavongsa and Napha Nammathao.** (Emphasis Added)¹⁵

And the motion for reconsideration further stated:

Because of the potential if not actual conflict of interest,

¹³ (Report of Proceedings; Volume III, page 19 line 21 through page 20 line 7.)

¹⁴ (Clerk's Papers at 123.)

¹⁵ (Clerk's Papers at 123.)

Ms. Adamson should be removed as the attorney for Khene Kommavongsa and Sivilay Nammathao; and she should be replaced with someone interested in pursuing the interest claims against American States. (Emphasis Added)¹⁶

Furthermore, while American States is correct about the trial court's *oral* directive, during the November 4th hearing, that he provide Ms. Adamson with contact information for Khene Kommavongsa, it should be noted that the trial court did not give a date by which the file had to be in Ms. Adamson's possession, rather he said that it had to be copied by the following day and then mailed to her.

American States further fails to acknowledge that unless and until an oral ruling is reduced to a written order and entered by the court it is not binding on the court or counsel. See *Lasell v. Beck*, 34 Wn.2d 211, 212, 208 P.2d 139 (1949); the court declaring that:

An oral decision given from the bench is not a final order and is not binding on the court or counsel. The court always has the right to change its mind until the formal order is signed and entered.

It is important for this court to be aware of American States effort to mislead it as to when the trial court actually denied Kommavongsa and Nammathao's timely motion for reconsideration following the oral ruling by the court in the November 4th hearing. While American States

¹⁶ (Clerk's Papers at 133.)

concedes that the motion for reconsideration was filed, it not only fails mention that no formal order incorporating the trial court's decision, it attempts to create the impression the motion for reconsideration was immediately denied by citing to page 3 of Volume II of the Report of Proceedings. That colloquy had to do with the motion for reconsideration that dealt with the order disqualifying counsel. That this miscite is deliberate is made abundantly clear from a later discussion that occurred during the hearing.¹⁷

The colloquy was initiated by American States' counsel with an erroneous statement that to motion for reconsideration that had been referred to was the one filed addressing the order disqualifying Kommavongsa and Nammathao's counsel. After their counsel informed the court that it was filed after the November 4th hearing, Ms. Adamson inquired as to the date and found her copy of that motion; and her discovery, in turn, lead to the trial court finding the correct motion for reconsideration in the file; at which point he promised that he would review and rule on that motion. This precludes any possibility that American States' reference to the earlier discussion on page 3 of the prior motion for reconsideration was inadvertent.

On January 16, 2009, the Order On Show Cause Hearing was entered without any modification of its terms to comport with its actual date of entry.¹⁸

¹⁷ (Report of Proceedings; Volume II, page 12 line 6 through page 15 line 5.)

¹⁸ (Clerk's Papers at 121.)

Thereafter, Ms. Adamson filed a motion asking that Kommavongsa and Nammathao's counsel be held in contempt.¹⁹ At the hearing, Kommavongsa and Nammathao's counsel once again expressed his reservations concerning cooperating with an attorney who had previously represented American States on the same matter, declaring that:

And the other thing is that I would be a lot more willing to cooperate with Miss Adamson if she had not been from the same law firm that performed the EUO, in other words, she was representing American States. And now she turns around and is supposed to be representing the claimant. It doesn't make any sense to me. Maybe I'm old fashioned, but I don't feel you can represent both sides in what is in essence --

And so with that in mind I'm reluctant to cooperate with her, because I don't think she has the interests of the defendants at heart. I think she is protecting American States. You have a situation where in discovery all sorts of information is being withheld with regards to what occurred with American States and their representation by this law firm subsequent to the EUO. And so I am very much disturbed by the fact that she, rather than some other attorney, that in the whole of the Tri-Cities there's not some plaintiff's counsel quite capable of making an evaluation of this matter and have some knowledge of insurance law that would enable him to be just as capable as Miss Adamson in making this sort of determination whether or not to proceed with this litigation. There is no interest in this litigation so far as it relates to proceeding against American States that is conducted in this period of time, as far as I can ascertain, has not committed [submitted] any discovery whatsoever to American States, has not even asked of their file in this matter, which would include references to what her law firm did. They would have it, even though they claim they destroyed their file. So that is the reason for my reluctance to

¹⁹ (Clerk's Papers at 157.)

cooperate with Miss Adamson.²⁰

This entreaty fell on deaf ears and the trial court imposed a punitive sanction of an immediate \$10,000 to be paid into the registry of the court within 30 days and \$500 per day thereafter.²¹

Thereafter, Kommavongsa and Nammathao's counsel filed the Notice For Discretionary Review of the Order Of Contempt; and, in addition, sought review of the Order Appointing Counsel (Ms. Adamson); and the Order on Show Cause Hearing.²²

III. ARGUMENT OF COUNSEL

American States argues that the trial court's refusal to grant Kommavongsa and Nammathao's request to disqualify Cheryl Adamson as the attorney appointed to represent Khene Kommavongsa, as Guardian ad Litem for Sivilay Nammathao, was whether or not there was an abuse of discretion. There was such an abuse.

American States then argues that the trial court disqualified Kommavongsa and Nammathao's counsel because he would be a witness at trial. This statement is false. Even a cursory review of the August 22nd hearing removing him as their counsel; and the August 28th hearing

²⁰ (Report of Proceedings; Volume II, page 22 line 13 through page 23 line 16.)

²¹ (Clerk's Papers at 168-170.)

appointing Ms. Adamson to replace him, reveal that his role as a potential witness was not given the slightest consideration by the trial court; instead it acknowledges that it removed him because:

THE COURT: All right. OK. Well, I'm going to grant the motion to disqualify Mr. Greenlee in this case. The file's just replete with delinquent activity. And there's apparent conflict of interest between the parties he represents and perhaps with himself now with this question about interest. And so I'm going to remove him from all defendants.²³

And the trial court further declared that:

And I have reviewed the motion to reconsider and am going to deny the motion to reconsider, because the reasons I gave last week were that we have an accident victim in a vegetative state, and this money's been sitting out for 13 years. I couldn't get a reasonable explanation from Mr. Greenlee last week for that, and I just think that circumstances demand different counsel.²⁴

Never, not once, in the course of any of the hearings that took place relating to the removal and contempt proceedings against Kommavongsa and Nammathao's counsel, did the trial court even so much as suggest that it acted because of the possibility that he might be a witness at trial. American States makes no citation to the record to support its assertion that their counsel was removed because he would be a "likely and

²² (Clerk's Papers at 166-175.)

²³ (Report of Proceedings; Volume I, page 14 lines 9 through 15.)

²⁴ (Report of Proceedings; Volume I, page 22 lines 7 through 13.)

necessary" witness at trial; and the reason for that failure is it has no support in the record.

Next American States asserts that Kommavongsa and Nammathao's counsel was held in contempt only after full and repeated airings of his "unsubstantiated arguments and innuendos". The problem with this assertion is that American States' counsel knows full well that those arguments and innuendos are accurate; it's just that he feels free to make the that statement because he believes no mention can be made of evidence that reveals the truth belies that statement.

That evidence, produced in the course of discovery, albeit subsequent to the entry of the subject orders, consists of an American States' adjuster's log note in which he advises another adjuster that the attorney who performed the EUO of Khene Kommavongsa suggested to him that he "sit on the \$100,000 until the atty. responds."²⁵

This log note was dated February 25, 1998, some 16 months after the EUO of Khene Kommavongsa; and not only does it prove that Ms. Adamson's law firm advised American States on the very issue that was before the trial court when it proceeded to appoint her to represent Khene

²⁵ If American States, in any way, questions the accuracy of this representation of its contents, then Kommavongsa and Nammathao ask the court to grant them leave to produce the log note which was item 35 of their ER 904 submission.

Kommavongsa, but it also explains what was in the "few pieces of correspondence from Mike [O'Donnell]" that American States' counsel felt compelled to withhold from Ms. Adamson as well as why he was withholding the same.²⁶

When American States' counsel withheld that correspondence (and other items from the law firm's file) from Ms. Adamson and the trial court, it amounted to fraud.²⁷ See *Perkins v. Marsh*, 179 Wash. 362, 364, 37 P.2d 689 (1934); the court noting that:

It is true that, in the absence of a duty to speak, silence as to a material fact does not of itself constitute fraud. *Farmers State Bank of Newport v. Lamon*, 132 Wn. 369, 231 P. 952, 42 A.L.R. 1072. However, **the concealment by one party to a transaction of a material fact within his own knowledge, which it is his duty to disclose, is actual fraud.** If appellants intentionally concealed some fact known to them which it was material for respondents to know, that constituted a fraudulent concealment; that is, **the concealment of a fact which one is bound to disclose is the equivalent of an indirect representation that such fact does not exist, and differs from a direct false statement only in the mode by which it is made.** (Emphasis Added)

Even if American States' counsel can formulate some argument by which he can somehow justify withholding from Ms. Adamson, the very

²⁶ (Report of Proceedings; Volume I, pages 24 line 3 through page 24 line 10.)

²⁷ And American States' counsel failure to reveal what was in the documents and correspondence should not be excused on the basis that Ms. Adamson and the trial court were under a duty to inquire as to their nature when he notified them that he was withholding the materials.

documents she would already have in her possession but for the happenstance of her law firm having previously destroyed their file, that justification evaporated when the trial court, believing Ms. Adamson's claim that her law firm's representation was limited to taking the EUO, proceeded with her appointment while declaring that:

I'm going to go ahead and sign this and just ask you if you **identify any further conflicts to notify the Court and we can appoint someone else.**²⁸ (Emphasis Added)

Knowing that the appointment was conditioned on her law firm having limited its representation to the EUO, American States' counsel then fell under a duty to disclose the letters he had withheld from Ms. Adamson and the court that showed they had provided American States with advice on the very issue before the court; and when he failed to do so he fell well short of exhibiting the candor towards the tribunal²⁹ required of Plaintiff's counsel as "an officer of the court."

Finally, as to the assertion that Ms. Adamson's integrity has been questioned when she is not present to defend herself, Kommavongsa and Nammathao's counsel would inform the court that she had ample opportunity to defend herself by being open and forthright when he

²⁸ (Report of Proceedings; Volume I, page 25 lines 12 through 14.)

²⁹ See RPC 3.3(a)(2).

requested, on January 22, 2010, that she provide him with the entire file generated during the course of her appointment as Khene Kommavongsa counsel, including any and all communications of any nature whatsoever with anyone in connection with the case. She refused to do so and instead, immediately filed a motion to withdraw as counsel.³⁰

While American States may be correct that absent extraordinary circumstances, an order that is merely erroneous should be obeyed, such is not the case here where the opposition to the order comes only because the person appointed to represent the "disqualified" attorney's client, is an attorney from the very law firm who conducted an EUO of that client on the very matter that is at issue before the trial court.

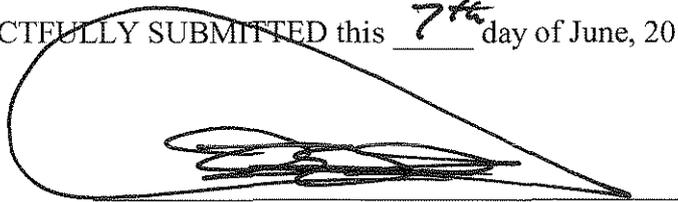
Something is seriously amiss when the trial court can be informed that American States' counsel is concealing documents and correspondence from the person it is appointing to represent an incompetent person; and that person previously represented American States on the same matter and she, but for the fortunate circumstance of having destroyed her law firm's file, would already have been in possession of those documents and correspondence.

³⁰ (Clerk's Papers at 176-179.)

How could anyone not stop to think of what would be happening if the file had not been destroyed. That they did not speak more to their concern over what they wanted to happen rather than concern about what was actually happening in front of them at that very moment.

The appointment of Cheryl Adamson as the attorney for Khene Kommavongsa was a gross abuse of discretion; and Kommavongsa and Nammathao's counsel should not be punished for his opposition to that miscarriage of justice; and the Order of Contempt should be vacated and set aside.

RESPECTFULLY SUBMITTED this 7th day of June, 2011.

A large, stylized handwritten signature in black ink, appearing to read 'A. Graham Greenlee', is written over a horizontal line.

A. Graham Greenlee
Attorney for Appellants
WSBA NO. 890