

FILED

MAR 14 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

OPENING BRIEF OF APPELLANTS

A. GRAHAM GREENLEE
Attorney for Appellants
WSBA NO. 890

3703 S. Edmunds St., No 195
Seattle, WA 98118
(206) 973-7877

FILED

MAR 14 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

OPENING BRIEF OF APPELLANTS

A. GRAHAM GREENLEE
Attorney for Appellants
WSBA NO. 890

3703 S. Edmunds St., No 195
Seattle, WA 98118
(206) 973-7877

TABLE OF AUTHORITIES

Table Of Washington Cases

Gustafson v. Gustafson,
54 Wn. App. 66, 772 P.2d 1031 (1989) 22

State v. Jordan,
146 Wn. App. 395, 190 P.3d 516 (2008) 27

Statutes

RCW 7.21.010 25

RCW 7.21.030 24

RCW 7.21.040 25

Court Rules

CR 60(b) 22

RPC 1.7 14

TABLE OF CONTENTS

I. ASSIGNMENT OF ERROR	1
1.1 Error	1
1.2 Issues Re Error	1
II. STATEMENT OF CASE	1
2.1 Facts	1
2.1.1 Motor Vehicle Accident	1
2.1.2..Examination Under Oath.	2
2.2 Pleadings/Procedure	2
III. ARGUMENT OF COUNSEL	14
3.1 Appointment of Former Counsel for American States was Improper Due to a Potential and/or Ongoing Conflict of Interest	14
3.2 Order of Contempt Should be Vacated Because the Order Upon Which it was Based was Reversed on Appeal	21
3.3 Order of Contempt Should be Vacated Because the Order as Punitive and Entered Without Due Process	23
IV. CONCLUSION	22
4.1 Summary of Argument	27
4.2 Relief Sought	28

I. ASSIGNMENT OF ERROR

1.1 **Error.** The trial court erred when it entered, on April 10, 2009, its order holding Kommavongsa and Nammathao's counsel in contempt and imposed punitive sanctions against him.¹

1.2 **Issues Re Error.** Did the trial court commit reversible error when it entered an order that held Kommavongsa and Nammathao's counsel in contempt and imposed punitive sanctions against him, when the order allegedly disobeyed required that he assist an attorney, whose interests were in conflict with his client, in her representation of that client; and the order, upon which the order appointing that attorney with interests adverse to his client was based, was reversed on appeal?

II. STATEMENT OF CASE

2.1 **Facts.**

2.1.1 **Motor Vehicle Accident.** This lawsuit arose from a motor vehicle accident which occurred on August 19, 1995. It occurred when Allstate insured, Khamchanh Soratsavong, fell asleep and rolled the motor vehicle that he was driving. His passengers, Sivilay Nammathao and Napha Nammathao, were both severely injured; and their injuries and damages exceeded both Khamchanh Soratsavong's liability limits and the limits of Khene Kommavongsa's UIM coverage with American States Insurance Company.²

¹ (Clerk's Papers at 168.) Also attached hereto as Exhibit "A".

² (Clerk's Papers at 10.)

2.1.2 **Examination Under Oath.** On or about December 20, 1995, American States Insurance Company was informed that UIM claims were going to be made on behalf of Sivily Nammathao and Napha Nammathao under the uninsured motorist coverage provisions of the policy that it had issued to Khene Kommavongsa.³ Initially questioning whether or not the policy it had issued to Khene Kommavongsa provided coverage to his adult daughter, Sivily Nammathao, and her daughter, Napha Nammathao, American States retained the services of the law firm Rettig, Osborne, Forgette, O'Donnell, Iller & Adamson, LLP to take an examination under oath of Khene Kommavongsa.⁴

Of particular concern for the purpose of this motion to vacate Order of Contempt is the last sentence of the second paragraph of the letter Michael O'Donnell sent to Greenle which read:

However, this is to inform you that **should this matter proceed to litigation of any nature**, that American States reserves the right to seek reimbursement for the cost it incurred in taking your client's examination under oath in Seattle as opposed to a location in Franklin County. (Emphasis added.)⁵

2.2 **Pleadings and Procedure.** American States filed its interpleader action on June 28, 2007.⁶ In paragraph 1.3 of its complaint, American States alleged that:

³ (Clerk's Papers at 134.)

⁴ (Clerk's Papers at 135.)

⁵ (Clerk's Papers at 135.)

⁶ (Clerk's Papers at 01-03.)

“Both Sivilay Nammathao and Napha Nammathao were entitled to UIM insurance coverage under Mr. Kommavongsa’s insurance policy.”

And in paragraph 2.4 of its complaint, American States alleged that:

“The claims of defendants exceed \$100,000 and plaintiff admits its obligations to pay the entire single limit of \$100,000. **This is a “sum certain” liability of the Plaintiff.**” (Emphasis added.)

Then in paragraph 2.5 of its complaint, American States alleged that:

“Upon information and belief **defendants had been unable to agree among themselves as to how the policy limits should be divided.**” (Emphasis added.)

And, in its prayer for relief, American States requested that it be granted judgment in the following particulars:

1. That it be permitted to interplead its underinsured limits of \$100,000 to the Clerk of this Court;
2. That the Court relieve it of all liability for such moneys;
3. That it be dismissed with prejudice from any and all liability on its underinsured coverage for this accident on the policy issued to Khene K. Kommavongsa;
4. **That the Court determine the true and lawful owner or owners of such moneys *without* Plaintiff's participation;**” (Emphasis added.)

On February 14, 2008, Kommavongsa and Nammathao filed their answer to the complaint;⁷ and then, after Kommavongsa and Nammathao filed the required Insurance Fair Conduct Act Claim Notification with the

⁷ (Clerk’s Papers at 04-06.)

office of the Insurance Commissioner and served that notification of American States and its counsel, on April 9, 2008 Kommavongsa and Nammathao filed their Amended Answer with a Counterclaim For Violation of Chapter 48.30 RCW and Insurer Bad Faith.⁸ In the prayer for their counterclaim, Kommavongsa and Nammathao asked for the following relief:⁹

4.1 **Insurer Fair Conduct Act.** That they be awarded damages in the form of interest from the date of American States examination of Khene Kommavongsa under oath to determine coverage and damages under the policy until the date of the tender of the policy proceeds into the registry of the court; together with reasonable attorneys fees and costs of litigation pursuant to RCW 48.30.015(1); and that those damages be trebled pursuant to RCW 48.30.015(2).

4.2 **Bad Faith/Consumer Protection Act.** That they be awarded bad faith damages, including interest and all attorneys fees and litigation costs they have or will incur in their pursuit of the payment of interest on the policy proceeds, and that those damages be trebled pursuant to RCW 19.86.090.

On May 7, 2008, American States filed its Answer to Defendants Counterclaim; that answer including a Third-Party Complaint alleging that Greenlee was guilty of malpractice and requesting that it be exonerated from any liability to pay interest on that basis.¹⁰ In particular, the third-party complaint prayed that:¹¹

⁸ (Clerk's Papers at 07-12.)

⁹ (Clerk's Papers at 12.)

¹⁰ (Clerk's Papers at 20-24.)

¹¹ (Clerk's Papers at 24.)

That the third party plaintiff be awarded judgment over and against the third-party defendant (Greenlee) in the amount, if any, awarded to the defendants and against plaintiff on defendants' counterclaim; ...

On May 12, 2008, Kommavongsa and Nammathao filed Defendants Answer To The Third-Party Complaint Of Plaintiff.¹² In their answer to the third-Party complaint, Defendants prayed, inter alia, that:¹³

1. That the third-party complaint of plaintiff American States be dismissed with prejudice; ...

To resolve the issue short of trial, Kommavongsa and Nammathao were forced to file a CR 12(b)(6) motion to strike the third-party complaint against their attorney,¹⁴ this motion being based on its failure to state a claim upon which relief could be granted. Although no formal order was ever entered, the CR 12(b)(6) motion was granted and the third-party complaint dismissed.

On July 9, 2008, American States filed its motion to disqualify the Defendants' counsel (Greenlee);¹⁵ the motion being based on American States' contention that Greenlee would be a necessary witness at the trial and that he was disqualified from continuing to represent Kommavongsa and Nammathao under RPC 3.7. When the motion came before the trial

¹² (Clerk's Papers at 13-19.)

¹³ (Clerk's Papers at 19.)

¹⁴ (Clerk's Papers at 23-58.)

¹⁵ (Clerk's Papers at 59-60.)

court for hearing, the trial court granted plaintiff's motion to disqualify Kommavongsa and Nammathao's counsel.¹⁶

Kommavongsa and Nammathao then filed a motion for reconsideration of the order disqualifying their counsel;¹⁷ which motion was denied without notice being given to Kommavongsa and Nammathao's counsel.¹⁸ The trial court then, on the same day, entered an order appointing Cheryl Adamson as the attorney for Khene Kommavongsa, the Guardian ad Litem of Sivilay Nammathao.¹⁹

Not knowing that the trial court had denied the motion for reconsideration, Kommavongsa and Nammathao's counsel went ahead and provided Adamson with a number of documents and pleadings in an effort to provide her with an understanding of the issues involved and the status of the case. These documents included copies of 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

¹⁶ (Clerk's Papers at 75-76.)

¹⁷ (Clerk's Papers at 77-83.)

¹⁸ (Clerk's Papers at 84.) ((Report of Proceeding; Volume I, pages *, *-*.))

¹⁹ (Clerk's Papers at 85.)

outstanding discovery requests and their objections to American States answers and responses to those discovery requests.²⁰

While waiting for the trial court to rule a ruling on Defendants' motion for reconsideration, their counsel initially, as conceded by Ms. Adamson in Defendants' Motion for Order to Show Cause/Affidavit,²¹ offered to provide her with copies of the pleadings and documents she could not obtain from American States' counsel. Rejecting his offer without so much as the courtesy of letting him know she did not consider it acceptable, Adamson chose instead to file a Motion for Order to Show Cause seeking to hold Kommavongsa and Nammathao's counsel in contempt;²² this being followed 2 days later by American States' counsel filing a like motion for the same purpose.²³ This lapse of 2 days may well have been attributable to Ms. Adamson being located in the same city as the courthouse,²⁴ while Mr. Morrison's office was located in Spokane.²⁵

Kommavongsa and Nammathao's counsel filed a response to the duplicate orders to show cause, in which he pointed out that they (both counsel) appeared to be working in concert since they both made improper

²⁰ (Clerk's Papers at 131.)

²¹ (Clerk's Papers at 132.)

²² (Clerk's Papers at 93-110.)

²³ (Clerk's Papers at 113-114.)

²⁴ See address on her pleading paper in Clerk's Papers at 93.

²⁵ See address on his pleading paper in Clerk's Papers at 113.

use of the order to show cause procedure;²⁶ and, also, that they had no factual basis for their motions; and further stated that he would be happy to provide Adamson with the documents she had claimed she was after in her motion except for discovery requests and medical records.²⁷ She had agreed to require pleadings filed with the court and while that limitation would not apply to discovery requests, she would receive those from American States' counsel. She should also be receiving all medical records from American States' counsel since had received releases signed by Kommavongsa and Nammathao authorizing him to obtain all of their medical records.

Because of the procedural improprieties in the motions, the trial court treated both motions as seeking a return date and set the matter over for a hearing on November 4, 2008;²⁸ at which point he gave an oral ruling requiring Defendants' counsel to provide Adamson everything in his file relating to Sivilay Nammathao but not that relating specifically to Napha Nammathao.

After his ruling, the trial court commented that it appeared to him that Ms. Adamson, and Defendants' former counsel should be working together on the case. However, when their former counsel said he would

²⁶ Both Adamson and Morrison merely noted (Adamson; CP-91) (Morrison; CP-115) their motions (Adamson; CP-93)(Morrison; CP-113) for hearing rather than first obtaining an order to show cause with a return date to serve on the contemtor.

²⁷ (Clerk's Papers at 117-120.) Also attached hereto as Exhibit "B".

²⁸ (Clerk's Papers at 121-122.)

be happy to so and asked Adamson if she would commit to pursuing the claim for interest against American States, she did not even bother to acknowledge his inquiry and, instead, sat mute and unresponsive at the counsel table.²⁹

Confirmation regarding who was running the show came when American States' counsel, not Adamson, actually drafted and presented, over his signature alone, the Order on Show Cause that was thereafter entered by the trial court;³⁰ handling that task even though they had filed separate motions each seeking to hold Defendants' counsel in contempt; and even though the trial court denied the relief sought by American States and limited itself to granting the relief sought by Adamson.

Not waiting for the Order on Show Cause to actually be entered, Defendants' counsel commenced going through his file to prepare it to be copied and sent to Adamson. While in the process of doing so, he discovered that Ms. Adamson was a partner in the very law firm that had represented plaintiff American States when it took an examination under oath of Khene Kommavongsa to determine coverage. Mistakenly believing that the trial court would not have appointed Adamson if it had been aware of the conflict, Kommavongsa and Nammathao's counsel immediately filed a motion for reconsideration of the ruling requiring that he turn over the files to Adamson on the basis that "the law firm of which

²⁹ (Clerk's Papers at 131.)

³⁰ (Clerk's Papers at 154-156.)

Ms. Adamson was, and still is, a member, previously represented American States Insurance Company in this very matter.”³¹

In the course of the motion, Kommavongsa and Nammathao argued, what turned out to be prophetic, that:

Not only did a member of that law firm, which was apparently house counsel for American States, take an examination under oath of Khene Kommavongsa, but **the law firm was also involved in the actions later taken by American States afterwards which culminated in its failure to commence and interpleader action** and tender the policy proceeds into the registry of the court until some twelve years later. (Emphasis added.)³²

Although the motion for reconsideration of the appointment of Cheryl Adamson as the attorney to replace disqualified counsel was noted for hearing, without oral argument for 4:00 p.m. on November 21, 2008, that time and date came and went without the trial court ruling on that motion for reconsideration; leaving the issue in limbo.

During the wait for the trial court’s ruling on the motion for reconsideration, American States took the opportunity to file, on January 2, 2009, a motion to have the case pre-assigned to Judge Matheson.³³ Under local court rules, prior to the Preassignment each motion or show cause hearing should have gone to the Judge assigned to the motion calendar rather than back to Judge Matheson; a point later conceded by

³¹ (Clerk's Papers at 123.)

³² (Clerk's Papers at 128-129.)

³³ (Clerk's Papers at 146-148.)

Judge Matheson in the hearing on the presentation of the Order On Show Cause.³⁴

In the course of the January 13, 2009, hearing on the presentation of the Order on Show Cause, the trial court was informed that it had not ruled on Kommavongsa and Nammathao's motion for reconsideration, and the trial court acknowledged that the motion for reconsideration was indeed in the file and committed itself to ruling on it.³⁵

Although the court had left open the possibility that it might grant the motion for reconsideration,³⁶ no order ruling on the motion was ever entered; and on January 22, 2009, the trial court entered its Order on Show Cause requiring that Defendants' counsel turn over the file to Adamson notwithstanding the conflict of interest that existed due to her law firm having previously represented American States in connection with the very issue before the court.³⁷

On March 11, 2009, Adamson filed her Motion for Order to Show Cause;³⁸ the motion being set for hearing on March 27, 2009. When the matter came on for hearing, Appellants' counsel informed the trial court that Kommavongsa and Nammathao's motion for discretionary review of the order disqualifying him as counsel had been argued on the 18th; that

³⁴ (Report of Proceedings; Volume II, pages 5, 16-17.)

³⁵ (Report of Proceedings; Volume II, page 11 line 25 through page 15 line 5.)

³⁶ (Report of Proceedings; Volume II, page 15 lines 2-3.)

³⁷ (Clerk's Papers at 154-156.)

³⁸ (Clerk's Papers at 157-164.)

they had filed their reply on the 25th ; and that the ruling would be made shortly if it had not already been made. For that reason he asked that the hearing be continued for a week to see where things stood; because he felt that if the appeal was granted, then in all likelihood it would mean that he would be reinstated; whereas if it were denied, then his removal could only be reviewed on appeal from the final judgment and his removal would stand.³⁹

The trial court denied the request and instead imposed an immediate sanction of \$10,000 and future sanctions of \$500 per day.⁴⁰ The basis for the trial court's punitive sanctions was his view that Kommavongsa and Nammathao's counsel had been in contempt of court for at least seven months, and even a year or so, on his watch.⁴¹ This emotional state formed the basis for his imposition of sanctions even though the actual order appointing Adamson as counsel had only been entered seven months before,⁴² and even though he had yet to rule on the motion for reconsideration of his appointment of Adamson as counsel as he had previously committed to do.

On May 7, 2009, Kommavongsa and Nammathao filed their Notice of Discretionary Review from the Order of Contempt and the order

³⁹ (Report of Proceedings; Volume II, page 20 line 1 through 19.)

⁴⁰ (Clerk's Papers at 168.) Also attached hereto as Exhibit "A".

⁴¹ (Report of Proceedings; Volume II, page 24 line 11 through 18.)

⁴² (Clerk's Papers at 85.) Making it impossible for Kommavongsa and Nammathao's counsel to be in contempt for "even a year or so".

appointing Adamson as counsel.⁴³ On June 12, 2009, the Court of Appeals on its own motion, entered its ruling staying further proceedings in the trial court relating to the enforcement of the order removing Greenlee as counsel until the resolution of the appeal.

On December 10, 2009, in *Am. States Ins. v. Nammathao*, 153 Wn. App. 461, 220 P.3d 1283 (2009), the Court of Appeals entered its opinion reversing the entry of the order disqualifying (removing) Kommavongsa and Nammathao's counsel.

After the matter was remanded to the Benton County Superior Court for proceeding consistent with the decision of the Court of Appeals, Adamson filed a motion to be permitted to withdraw from her appointment as attorney for Khene Kommavongsa;⁴⁴ that motion being granted when on February 5, 2010, the trial court entered its order permitting her to do so.⁴⁵

In the interim, on January 15, 2010, American States counsel, no longer having Adamson to act as his proxy, acting solely for the benefit of American States, sent an inquiry to the Court of Appeals about lifting the stay of the appeal from the order punishing Kommavongsa and Nammathao's counsel for his alleged contempt. In response, on February 5, 2010, the Court Commissioner of the Court of Appeals lifted the stay;

⁴³ (Clerk's Papers at 166-175.)

⁴⁴ (Clerk's Papers at 176-179.)

⁴⁵ (Clerk's Papers at 182-183.)

an on February 8, 2010, the Court of Appeals issued its Perfection Notice.⁴⁶

III. ARGUMENT OF COUNSEL

3.1 Appointment of Former Counsel for American States was Improper Due to a Potential and/or Ongoing Conflict of Interest. The trial court's appointment of Cheryl Adamson to represent Khene Kommavongsa, as Guardian ad Litem for Sivilay Nammathao, was improper because she was making a claim against plaintiff American States Insurance Company for interest due to its delay in commencing an interpleader action; and another member of her firm had given American States advice regarding what they should do with the policy proceeds.

RPC 1.7 precludes an attorney, including any member of the same law firm, from representing both sides in a lawsuit, providing that:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) **there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.**

As soon as he became aware that Cheryl Adamson was a partner in the law firm that had conducted the examination under oath of Khene

⁴⁶ (Clerk's Papers at 184-185.)

Kommavongsa when it was seeking a determination as to whether or not it would extend underinsured motorist coverage to Sivilay Nammathao, Kommavongsa and Nammathao's counsel sought to have her removed as his replacement.

Believing that the trial court could not possibly be aware of her law firm's past representation of American States when it appointed her, he filed a Motion for Reconsideration of Ruling on Show Cause Hearing Re Contempt in which he argued that:

Due to her law firm having previously represented plaintiff American States Insurance Company on the examination under oath which initiated this very matter, there exists an irresolvable conflict of interest between Ms. Adamson's current representation of defendant Sivilay Nammathao (in the person of Khene Kommavongsa). Not only did a member of that law firm, which was apparently house counsel for American States, take an examination under oath of Khene Kommavongsa, but **the law firm was also involved in the actions later taken by American States afterwards which culminated in its failure to commence and interpleader action and tender the policy proceeds into the registry of the court until some twelve years later.** (Emphasis added.)⁴⁷

Unfortunately, he was not aware that the trial court had actually known about her law firm's representation of American States for the examination under oath and did not consider it significant since the law firm had given Khene Kommavongsa a favorable ruling on the coverage issue. Even more unfortunately, American States' counsel and Ms. Adamson kept him in the dark about any further representation her law

⁴⁷ (Clerk's Papers at page 128 line 20 through page 129 line 2.)

firm had given American States subsequent to its opinion on the coverage issue and the trial court chose not to pursue whether or not there had been any further representation provided by her law firm.

Counsel for American States,⁴⁸ not Ms. Adamson as the trial court believed,⁴⁹ brought the representation on the coverage issue to the attention of the trial court while at the same time minimizing its significance.⁵⁰ Ms. Adamson claimed ignorance due to her law firm's file having been destroyed earlier; but insisted that she was going to have all the information (in the file?) anyway.⁵¹ However, she was immediately corrected on that statement by American States' counsel when he declared that he had:

“produced the whole claims file, **which would include Mr. O'Donnell's correspondence, with the exception of [the] attorney/client portion**, which would be the coverage opinion itself. There will be letters going out to other counsel that would explain some of the same things. So the whole file would be going to Ms. Adamson with the exception of when [what?] as attorney/client privilege materials. ... **I did withhold a few pieces of correspondence from Mike as well.** (Emphasis added.)⁵²

At this point American States' counsel is telling the trial court and Ms. Adamson that he has chosen to keep her from seeing, on the basis of

⁴⁸ (Report of Proceedings; Volume I, page 22 line 22 through page 23 line 13.)

⁴⁹ (Report of Proceedings; Volume II, page 11 lines 1 through 7.)

⁵⁰ (Report of Proceedings; Volume I, page 22 lines 22 through 25.)

⁵¹ (Report of Proceedings; Volume I, page 23 lines 15 through 23.)

⁵² (Report of Proceedings; Volume I, pages 24 lines 3 through page 24 line 10.)

the attorney-client privilege between her law firm and American States, certain documents and correspondence, but for the fortuitous destruction of the law firm's own file, of which Ms. Adamson would have already been in possession. How could this statement not trigger alarm in either the trial court or Ms. Adamson? He is telling both the trial court and Ms. Adamson that he is concealing information she would otherwise have from her and the trial court and it does not bother either one? One must ask; why not?

This issue was raised again in the hearing which took place on January 13, 2009. The court was again informed that Ms. Adamson's law firm had taken the EUO of Khene Kommavongsa, whom she was now claiming to represent; and that the attorney taking the EUO said he would be seeking the costs associated with having it done in Seattle in any future litigation arising out of the matter which would include the interpleader action.

The court was further advised that because the law firm had destroyed their file, whatever additional advice he (the attorney) gave to American states to pay or not to pay the policy proceeds into the registry of the court, it would be in their (her law firm's) interest to see that interest was not paid on the policy proceeds;⁵³ creating an ongoing conflict of interest her law firm and the plaintiff [defendant].⁵⁴

⁵³ If the law firm advised American States not to pay the policy proceeds into the registry of the court, then they and American States would not be able to claim the decision not to commence and interpleader action was anything other than their decision. If they had told American States to commence an interpleader

Ms. Adamson's response was to assert the outcome of their representation was to determine that coverage did apply for the claimants and resolution of that issue ended her law firm's role in the case; and that if anyone had cause to complain it was American States because she was now taking a position adverse to it.⁵⁵

The response from Kommavongsa and Nammathao's counsel was to point out that American States' counsel had just recently started representing American States and that Ms. Adamson's law firm had subsequently provided American States with additional representation; and that there was an issue regarding tendering the money into the registry of the court. And that although her law firm had destroyed its records, American States' counsel still had those records, having obtained them from American States (their claim file); but he was withholding certain records from Ms. Adamson's law firm on the basis of the attorney/client privilege. That the reason Kommavongsa and Nammathao had a complaint about her representation was they figured she had a conflict regarding being a willing advocate since she hadn't given any indication of that (interest in pursuing their claim for interest); and that American States had no objection to her representation of Sivilay Nammathao because she

action and tender the policy proceeds, then American States would be in an even worse situation because it would have gone against its own attorney's advice. Therefore, if Adamson was to protect her law firm and/or American States, she would need to arrive at a solution that would absolve American States from any obligation to pay interest.

⁵⁴ (Report of Proceedings; Volume II, pages 5 line 17 through page 6 line 13.)

⁵⁵ (Report of Proceedings; Volume II, pages 8 line 15 through page 9 line 15.)

(Adamson) had not given any indication of any willingness to pursue the claim for interest.⁵⁶

The trial court dismissed counsel's argument with the response that:

But she disclosed this prior representation in this case, and we addressed it on the record sometime ago, and I haven't heard anything new on that. So there is nothing there that I, you know, that I think it's not perfect, but I think **I'm comfortable with it**, and I've already made the determination that she could stay on this case.⁵⁷ (Emphasis added.)

How can the trial court be comfortable with it, when it was told by American States' counsel that he was withholding evidence from Ms. Adamson from her own law firm's file which could prove that it had provided American States with representation as to how it should handle payment of the policy proceeds.

This is especially concerning because, while we do not know the exact contents of the "**few pieces of correspondence from Mike**"⁵⁸⁵⁹ that American States' counsel felt compelled to withhold from Ms. Adamson, documents that would have been in her possession but for the fortuitous happenstance of her law firm destroying their file, we do know that they

⁵⁶ (Report of Proceedings; Volume II, pages 9 line 20 through page 10 line 20.)

⁵⁷ (Report of Proceedings; Volume II, pages 11 line 1 through line 7.)

⁵⁸ Referring to Michael O'Donnell from Cheryl Adamson's law firm.

⁵⁹ (Statement found at Report of Proceedings; Volume I, pages 24 lines 9 through line 10.)

had to be so damaging to American States' position that he was withholding them irrespective of how bad it made him look.

That Adamson's law firm, at any time and in any way advised American States on what to do with the policy proceeds,⁶⁰ placed her in direct conflict with the interests of her alleged client, Sivilay Nammathao.

Once her law firm advised American States what to do with the policy proceeds, either to pay it into the registry of the court or not pay it into the registry of the court, then a conflict had to exist. As noted previously, if the law firm advised American States not to pay the policy proceeds into the registry of the court,⁶¹ then they and American States would be responsible for American States' failure to commence an interpleader action. If they told American States to interplead the policy proceeds and American States refused or delayed in doing so, then American States would be responsible for that refusal or delay.

Therefore, in order to protect her law firm and/or American States, Adamson would have to work to insure that she reached a solution that would absolve American States from any obligation to pay interest.

The appointment of Cheryl Adamson to represent Sivilay Nammathao was a gross miscarriage of justice, a miscarriage of justice which was compounded by the trial court's failure to reconsider that appointment and then imposing punitive sanctions on Sivilay

⁶⁰ Which it did on at least one occasion and probably more based on American States' counsel withholding the "few letters from Mike".

⁶¹ As it did on at least one occasion.

Nammathao's former counsel for not cooperating with her without his bothering to rule on the motion for reconsideration. This is especially so since it was only the existence of her interests being in conflict with those of her purported client that was behind that failure to cooperate.⁶² This miscarriage of justice should and must be corrected by this Court vacating and setting aside the Order Of Contempt.

3.2. Order of Contempt Should be Vacated Because the Order Upon Which it was Based was Reversed on Appeal. This court should act in lieu and the trial court in vacating the order of contempt due to the order giving rise to it having been reversed on appeal.

The Superior Court Civil Rule addressing this issue is CR 60 entitled "Relief from Judgment or Order", which provides that:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.

...

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

...

(6) The judgment has been satisfied, released, or

⁶² See Report of Proceedings; Volume II, page 22 line 13 through page 23 line 16; and see CP-132 (This being the posture of the case, it is difficult to believe that there is no one else in all of Benton County that has knowledge comparable to that of Ms. Adamson who could and would be happy to pursue these claims; especially someone who might approach these claims from the perspective of a plaintiff's attorney.); and see CP-133 (Because of the potential if not actual conflict of interest, 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.)

discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(11) Any other reason justifying relief from the operation of the judgment. (Emphasis added.)

The Order of Contempt which Defendants Kommavongsa and Nammathao as this court to vacate was premised on the purported failure of their counsel to comply with the provisions of the Order on Show Cause requiring that he turn over their file to an attorney (Adamson) whose lawfirm had previously represented plaintiff American States in connection with their underinsured motorist claims. That order on show cause, in turn, was based on the trial court's order appointing Adamson to represent Khene Kommavongsa (as Guardian ad Litem of Sivilay Nammathao); which, in turn, followed its entry of a prior order disqualifying (and removing) Greenlee on the purported basis that he was disqualified under RPC 3.7 as he would be a necessary witness at trial.

However, the order disqualifying and removing Greenlee as their attorney was reversed by the Court of Appeals in *Am. States Ins. v. Nammathao*, 153 Wn. App. 461, 220 P.3d 1283 (2009); and, therefore, under CR 60(b)(6) the Order of Contempt should be vacated and set aside. See *Gustafson v. Gustafson*, 54 Wn. App. 66, 772 P.2d 1031 (1989); where the Court of Appeals held that when a defendant stipulates to the dismissal of its claims against third parties in reliance on a judgment in its favor, the reversal of the judgment can make application of the dismissal inequitable and justify its vacation under CR 60(b)(6).

The *Gustafson* court further declared that the standard of review was whether or not the trial court abused its discretion in vacating the order of dismissal; and it held that it had not because the reversal of the summary judgment made it inequitable to enforce the order of dismissal when the entry of that order was premised on entry of that summary judgment.

On the facts before us, it would not only be inequitable, it would defy logic to permit American States to reap the benefits of Adamson's unwanted representation of Khene Kommavongsa, where Kommavongsa never asked for; never agreed to, and was never consulted about Adamson's representation of him in this lawsuit. Kommavongsa had no input whatsoever about the tactics she engaged in and would never have agreed to her cooperating and working in concert with Morrison when those tactics could or would, in any way whatsoever, benefit American States or advance its interests.

Most importantly, now that Adamson has been removed and the attorney they actually chose to represent them has been reinstated, neither Kommavongsa or Nammathao has any interest in pursuing enforcement of the Order of Contempt when that pursuit could only impede their attorney's prosecution of their claims of interest against American States. Therefore, it is no longer equitable that the contempt order should have prospective application and it should be vacated by this court.

3.3 Order of Contempt Should be Vacated Because the Order was Punitive and Entered Without Due Process. The final reason the

Order of Contempt should be vacated and set aside is that it was improvidently entered. The basis upon which Adamson sought the Order of Contempt was RCW 7.21.030;⁶³ that statute providing that:

(1) The court may initiate a proceeding to impose a remedial sanction on its own motion or on the motion of a person aggrieved by a contempt of court in the proceeding to which the contempt is related. **Except as provided in RCW 7.21.050, the court, after notice and hearing, may impose a remedial sanction authorized by this chapter.**

(2) If the court finds that the person has failed or refused to perform an act that is yet within the person's power to perform, **the court may find the person in contempt of court and impose one or more of the following remedial sanctions:**

...

(b) **A forfeiture not to exceed two thousand dollars for each day the contempt of court continues.** (Emphasis added.)

(3) The court may, in addition to the remedial sanctions set forth in subsection (2) of this section, order a person found in contempt of court to pay a party for any losses suffered by the party as a result of the contempt and any costs incurred in connection with the contempt proceeding, including reasonable attorney's fees.

The trial court, however, believing that their counsel was in contempt, for at least seven months and even a year or so on his watch,⁶⁴ went well beyond the remedial provisions set forth in RCW 7.21.030, and imposed punitive sanctions of \$10,000.00 which it required to be paid

⁶³ (Clerk's Papers at 157-164.)

⁶⁴ (Report of Proceedings; Volume II, page 24 line 16 through 18.) This would mean that he was in contempt for at least five months prior to Adamson even being appointed to replace him as counsel.

within 30 days.⁶⁵ That the sanctions were punitive rather than remedial is evident from the definitions set forth in RCW 7.21.010; those definitions providing in subsections (2) and (3):

(2) "**Punitive sanction**" means **a sanction imposed to punish a past contempt of court** for the purpose of upholding the authority of the court.

(3) "**Remedial sanction**" means **a sanction imposed for the purpose of coercing performance** when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform. (Emphasis added.)

Because the \$10,000.00 sanction was imposed, not for the purpose of coercing their counsel into providing Adamson with their file but for the purpose of punishing him for having failed to do so before that date, it was punitive and not remedial in nature.

However, a punitive sanction can only be imposed pursuant to RCW 7.21.040; and that statute limits circumstances under which such sanctions can be imposed; and specifies the procedures that are to be followed in order to do so. See RCW 7.21.040 which reads, in pertinent part, as follows:

(1) Except as otherwise provided in RCW 7.21.050, **a punitive sanction for contempt of court may be imposed only pursuant to this section.**

(2)(a) **An action to impose a punitive sanction for contempt of court shall be commenced by a complaint or information filed by the prosecuting attorney or city attorney charging a person with contempt of court and reciting the punitive**

⁶⁵ (Clerk's Papers at 168.) Also attached hereto as Exhibit "A".

sanction sought to be imposed.

(b) If there is probable cause to believe that a contempt has been committed, the prosecuting attorney or city attorney may file the information or complaint on his or her own initiative or at the request of a person aggrieved by the contempt.

(c) A request that the prosecuting attorney or the city attorney commence an action under this section may be made by a judge presiding in an action or proceeding to which a contempt relates. If required for the administration of justice, the judge making the request may appoint a special counsel to prosecute an action to impose a punitive sanction for contempt of court.

... .

(4) A punitive sanction may be imposed for past conduct that was a contempt of court even though similar present conduct is a continuing contempt of court.

(5) If the defendant is found guilty of contempt of court under this section, the court may impose for each separate contempt of court a fine of not more than five thousand dollars⁶⁶ or imprisonment for not more than one year, or both. (Emphasis added.)

As this matter came before the court on a motion for an order to show cause rather than by information or complaint filed by the prosecutor, it was beyond the authority of the trial court to impose a punitive sanction.

Furthermore, if the court does desire to impose a punitive sanction, then it must accord the contemtor with due process rights including not

⁶⁶ The trial court's sanction was therefore excessive even if the law had been followed and it had been imposed under the correct statute.

only the filing of the charges by the prosecutor, but also the assistance of counsel, the privilege against self-incrimination, and **proof beyond a reasonable doubt and trial by a jury**. See *State v. Jordan*, 146 Wn. App. 395, 190 P.3d 516 (2008). Here, as the procedures were not followed and their counsel was not accorded any of those rights.

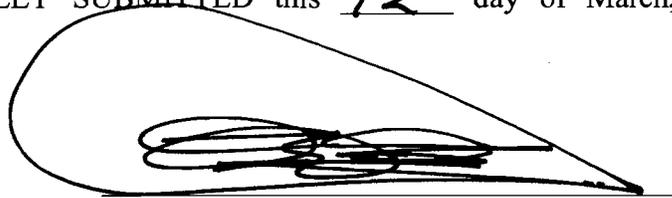
The Order of Contempt being entered in contradiction to and without consideration of the limitations and restrictions set forth in RCW 7.21.030 and RCW 7.21.040, it should and must be vacated and set aside.

IV. RELIEF SOUGHT

4.1 Summary of Argument. This Court should reverse the entry of the Order of Contempt imposing punitive sanctions against its counsel because it was a miscarriage of justice for the trial court to appoint Cheryl Adamson to be their attorney because she had a conflict of interest adverse to them due to her law firm having previously advised American States regarding the very matter at issue in the case; because the order disqualifying their counsel, which led to the appointment of Cheryl Adamson as their attorney, was reversed on appeal and it would no longer be equitable to, nor do they have any desire to, enforce the Order of Contempt and it would impede their counsel in the representation of their interests; and because the Order of Contempt was sought under remedial provisions of RCW 7.21.030, but the sanctions were punitive in nature, and imposed without any consideration of the limitations and restrictions set forth in and RCW 7.21.040.

4.2 **Vacation of Order of Contempt.** This court should grant Kommavongsa and Nammathao's appeal and reverse the trial court and vacate and set aside the Order of Contempt it entered on April 10, 2009.

RESPECTFULLY SUBMITTED this 12th day of March, 2011.

A large, stylized handwritten signature in black ink, appearing to be 'A. Graham Greenlee', is written over a horizontal line. The signature is highly cursive and loops back to the left.

A. Graham Greenlee
Attorney for Appellants
WSBA NO. 890

JOSIE DELVIN
BENTON COUNTY CLERK

APR 10 2009

FILED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF BENTON

AMERICAN STATES
INSURANCE COMPANY, on
behalf of its insured, KHENE K.
KOMMAVONGSA,

Plaintiff,

v.

PHOUKEO NAMMATHAO,
individually and as Guardian Ad
Litem of NAPHA T.
NAMMATHAO, a minor; KHENE
K. KOMMAVONGSA, as Guardian
Ad Litem for SIVILAY
NAMMATHAO,

Defendants.

NO. 07-2-01481-8

ORDER OF CONTEMPT

COPY

THIS MATTER came before the Court on Khene K. Kommavongsa's Motion and Affidavit for Order to Show Cause why attorney A. Graham Greenlee should not be held in contempt and sanctioned for violating the Court's order directing him to produce all contact information available to him for Khene Kommavongsa, Sivilay Nammathao and Napha Nammathao, including their last known addresses and phone number(s), as well as the name, address and phone number of individual(s) Mr. Greenlee has used to

Order of Contempt

Page 1 of 3

C:\stfiles\Nammathao\Order of Contempt.wpd

RETTIG OSBORNE FORGETTE, LLP
6725 W. CLEARWATER AVENUE
KENNEWICK, WASHINGTON 99336
TELEPHONE (509) 783-6154

Confirmed

Exhibit "A"

COPY w/

original signature

1 facilitate communications with the Defendants; directing him to copy his
2 entire file, without redaction or deletion except for communications
3 exclusively between Mr. Greenlee and Napha Nammathao, and mail it to
4 Cheryl Adamson; and directing Mr. Greenlee to send each of his former
5 clients a letter advising them to contact Cheryl Adamson. The parties
6 appeared, through their respective counsel, and attorney Graham Greenlee
7 appeared to represent his interests. Based on the oral argument of counsel for
8 the parties and Mr. Greenlee, and the pleadings filed in this action, the Court
9 finds:

10 1. On January 16, 2009, this Court entered its Order on Show Cause
11 Hearing, directing A. Graham Greenlee to provide contact information for
12 defendants and a copy of his file to Cheryl R.G. Adamson. In addition, Mr.
13 Greenlee was ordered to send a letter to each of his former clients advising
14 them to contact Ms. Adamson.

15 2. To date, Mr. Greenlee has not provided any information or
16 documentation to Mr. Adamson, nor has Ms. Adamson been contacted by
17 Khene Kommavongsa or Napha Nammathao, or by anyone on their behalf.

18 3. Mr. Greenlee's failure to comply with this Court's order was
19 without substantial justification.

20 4. Mr. Greenlee is in contempt of this Court's January 16, 2009,
21 Order on Show Cause Hearing.

22 5. Sanctions are appropriately imposed on Mr. Greenlee.

23 Based on the above findings, IT IS ORDERED:

24 1. Khene K. Kommavongsa's motion is granted.

25 2. A. Graham Greenlee is directed to pay the sum of Ten Thousand
26 Dollars (\$10,000.00) into the registry of the court within 30 days of the date
27

28 Order of Contempt

Page 2 of 3

C:\stfiles\Nammathao\Order of Contempt.wpd

RETTIG OSBORNE FORGETTE, LLP
6725 W. CLEARWATER AVENUE
KENNEWICK, WASHINGTON 99336
TELEPHONE (509) 783-6154

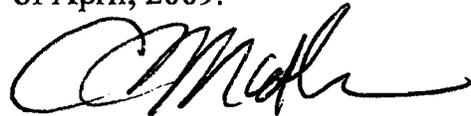
Exhibit "A"

1 of this Order.

2 3. A. Graham Greenlee is further directed to pay, into the registry of
3 the court, the sum of Five Hundred Dollars (\$500.00) per day following entry
4 of this order, for each day he does not provide to Cheryl R.G. Adamson all
5 contact information available to him for Khene Kommavongsa, Sivilay
6 Nammathao and Napha Nammathao, including their last known addresses and
7 phone number(s), as well as the name, address and phone number of
8 individual(s) he has used to facilitate communications with the Defendants;
9 and his entire file, without redaction or deletion except for communications
10 exclusively between he and Napha Nammathao.

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

DONE THIS 10 day of April, 2009.


HONORABLE CRAIG MATHESON

Presented by:
RETTIG OSBORNE FORGETTE, LLP

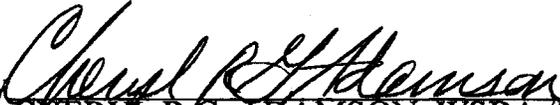
By 
CHERYL R.G. ADAMSON, WSBA #19799
Attorneys for Khene K. Kommavongsa, as
Guardian ad Litem for Sivilay Nammathao

Exhibit "A"

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR BENTON COUNTY

AMERICAN STATES INSURANCE)
COMPANY, on behalf of its insured)
KHENE K. KOMMAVONGSA,)
)
Plaintiff,)
)
vs.)
)
PHOUKEO NAMMATHAO, individually)
and as Guardian Ad Litem of NAPHA)
T. NAMMATHAO, a minor, KHENE K.)
KOMMAVONGSA, as Guardian Ad Litem)
Sivilay Nammathao, an incompetent,)
)
Defendants.)

NO. 07-2-01481-8
RESPONSE OF GREENLEE TO
MOTIONS FOR ORDERS TO
CAUSE
(Date: 10-23-08 / Time: 8:30 am)

Comes now A. Graham Greenlee and submits the following in response to the motions of Ronald G. Morrison and Cheryl R. G. Adamson for orders to show cause.

First I would note that although both attorneys are well aware that I reside in Seattle, they have chosen to note their motions for hearing at 8:30 a.m. rather than the normal 1:30 p.m. Because it takes approximately 3½ hours to drive from Seattle to Kennewick, with the allotment of an additional hour to take into consideration unforeseen delays, I would need to leave Seattle by 4:00 a.m. to insure my attendance at the hearing. Therefore, I believe the hearing was set at this early hour to prevent or, at a minimum, discourage my attendance at

RESPONSE OF GREENLEE TO MOTIONS
FOR ORDERS TO CAUSE - 1

Exhibit "B"

A. GRAHAM GREENLEE
LAW OFFICES, PLLC
3703 S. EDMUNDS ST., NO. 195
SEATTLE, WASHINGTON 98118

1 that hearing. Unfortunately, their mission has been accomplished as this written submission
2 will be the limit of my response to their motions.

3 1. Procedural Deficiencies. It would appear that both Morrison and Adamson are
4 working in concert even though Adamson supposedly represents Sivilay Nammathao whose
5 interests would be in conflict with Morrison's client American States. Not only have they
6 noted their motions for the same date and time, they have also followed the same format; that
7 being a motion for order to show cause; and those motions advanced without either one
8 bothering to actually provide the required order to show cause with a properly noted return
9 date. It is difficult to believe that they would both follow the same flawed procedure unless
10 they were in communication, and acting in concert, with each other.

11 2. Interference with Representation. Adamson claims that I am interfering with
12 her representation of Sivilay Nammathao. She speculates that I am doing so on the basis of
13 the inability of her legal secretary to obtain the telephone number for Khene Kommavongsa
14 from the sister of Sivilay Nammathao on or about October 2, 2008. I have not had any
15 contact or communications with Lee Xavjachack, and any assertion that I am interfering with
16 Adamson's representation by telling her not to communicate or cooperate with their office is
17 bogus. Furthermore, I have never told Khene Kommavongsa not to cooperate with or
18 communicate with their office. Any assertion to the contrary is bogus.

19 3. Contents of File. As she noted, I offered to provide Adamson with copies of
20 the pleadings and documents she could not obtain from Morrison. She claims that she offered
21 to limit her request to only those items not filed with the court. If she is willing to accept just
22 the correspondence and other items not involving discovery requests or the medical records,
23 then I would be happy to provide her with that information.

24 4. Notice for Discretionary Review. Both Adamson and Morrison suggest that I
25 am somehow in violation of the court order disqualifying me as the attorney for Khene
26 Kommavongsa and Napha Nammathao as a result of my having filed a Notice for

1 Discretionary Review of that order. This does not make any sense. To forbid me from
2 representing the defendants on the appeal from the order disqualifying me as their trial
3 counsel would, in effect, preclude any appellate review of that order.

4 That the trial attorney has the right to continue his representation of the client on the
5 appeal from the order disqualifying him from representing that client at trial is shown by the
6 holding in *State v. Schmitt*, 124 Wn. App. 662, 102 P.3D 856 (2004). (The Kitsap County
7 Prosecutor and his deputy were able to represent their office on the appeal from an order
8 granting the defendant's motion to disqualify the deputy prosecuting attorney and
9 disqualifying the entire prosecuting attorney's office based on the deputy's personal
10 involvement with the prosecution.) See also *Sherman v. State*, 128 Wn.2d 164, 905 P.2d 355
11 (1995) the Office of the Attorney General entitled to represent the defendants on appeal from
12 an order disqualifying that Office from representing the defendants in the trial court.

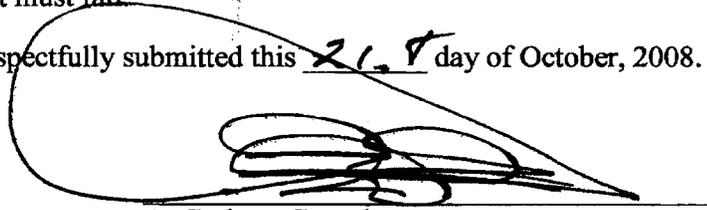
13 And finally, see *Johnson v. Trueblood*, 629 F.2d 302 (3rd Cir. 1980) where it was held
14 that an attorney, who had his status as counsel pro hac vice revoked by order entered without
15 any prior notice, although technically not a party of record could appeal such an order because
16 the attorney was a party to the order in the most elementary sense. The court in *Johnson v.*
17 *Trueblood* went on to note that the clients were entitled to assert their attorney's rights
18 because their interests were inherently interrelated in that the order deprived the clients of the
19 attorney of their choice.

20 5. Complaints of Morrison. Morrison, without any evidence to support his
21 allegations, claims *it is his belief* that I am somehow preventing him from contacting or
22 communicating with Napha Nammathao. Based on *his belief* he asks that I be held in
23 contempt and ordered to tell Napha Nammathao that she has to talk to him or retain other
24 counsel. His position is without merit. See *In re Marriage of James*, 79 Wn. App. 436, 440,
25 903 P.2d 470 (1995). (The Court of Appeals holding that the moving party has the burden of
26 proving contempt by a preponderance of the evidence; and that this showing must include

1 evidence from which the trial court can find that the offending party has acted in bad faith or
2 engaged in intentional misconduct.) See also *State v. Boren*, 44 Wn.2d 69, 73, 265 P.2d 254
3 (1954)(Contempt must be proven by a preponderance of the evidence which requires evidence
4 of a credible character and mere suspicions will not suffice.)

5 By limiting his allegations to *it is his belief* that I interfered with or obstructed his
6 attempts at contact or communications with Napha Nammathao, Morrison admits his failure
7 to produce credible evidence that I acted in bad faith or engaged in intentional misconduct.
8 Therefore, his claims of contempt must fail.

9 Respectfully submitted this 21st day of October, 2008.



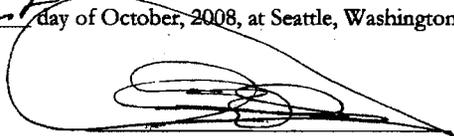
10
11
12 A. Graham Greenlee
13 Attorney For _____
14 WSBA NO. 890

14 CERTIFICATE OF MAILING

15 UNDER PENALTY OF PERJURY under the laws of the State of
16 Washington, the undersigned hereby certifies as follows:

17 That on this day I sent a true and correct copy of the document, to which this
18 certificate is affixed, to all parties, persons and/or entities by law entitled thereto, by
19 delivering prepaid overnight envelopes containing the same, bearing the names and
20 addresses of all such parties, persons and/or entities, to Federal Express for
21 overnight delivery.

22 ATTESTED to on this 21st day of October, 2008, at Seattle, Washington.



23
24
25 A. Graham Greenlee
26