No. 101920-3

Court of Appeals No. 82840-1-I
(Consolidated with Nos. 82840-4-I, 82840-8-I & 82843-6-I)

SUPREME COURT
OF THE STATE OF WASHINGTON

MICHAEL S. OTA and CONNIE OTA, a married couple,

Appellants,

v.

RICHARD WAKAZURU AND KENNETH WAKAZURU,

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

IDENTITY OF ANSWERING PARTY

Respondents Richard and Ken Wakazuru ("Wakazurus") submit the following answer to Connie and Michael S. Ota's ("Otas") Petition for Review.

I. INTRODUCTION

The Court should deny the Otas' Petition for Review (the "Petition") because the Petition fails to raise grounds that would permit review under RAP 13.4(b). The Otas ask this Court to reverse the appellate court's decision not to assign a new judge to this matter on remand to the trial court, arguing that the decision conflicts with the appearance of fairness doctrine. As discussed below, the Otas' assertion is unsupported by the record or Washington law. Furthermore, the assigned trial judge has informed the parties she will be on leave beginning June 16, 2023, and will be retiring effective July 1, 2023.

II. STATEMENT OF THE CASE

A. The Ota's Claims and Allegations.

The Otas initiated this action in March 2020, represented by attorneys Ralph Palumbo ("Palumbo"), Lynn Engel and Joshua Krebs. The Otas allege in their complaint that, in 2006, Michael S. Ota ("Stacey"), the Wakazurus and Michael G. Ota ("Michael") entered into a partnership to develop real property in Sumner, Washington ("Property") for use as an RV dealership and to share in the profits.[1] (CP 2-3.)

The Otas assert claims against the Wakazurus alleging breach of an alleged oral partnership agreement, breach of fiduciary duty, breach of the duty of good faith and fair dealing, promissory estoppel, and unjust enrichment. (CP 6-9.) The Otas claim they are entitled to millions of dollars in damages. (*E.g.*, *id.*)

[1] Stacey and Connie are hereinafter referred to by their first name for sake of clarity only. No disrespect is intended.

B. Non-Party Michael G. Ota.

Michael is Stacey's father. Although the Otas allege Michael was originally one of four partners to the alleged partnership agreement, Michael is not and has never been a party to this lawsuit. (CP at 1-9.) Michael was not even aware of this lawsuit until the Wakazurus' counsel called him following the Otas' depositions in March 2021. (CP 46 at 12:8-18.)

On March 25, 2021, the Wakazurus served Michael in Arizona with a subpoena duces tecum for his deposition and the production of documents. (CP 60-61 at 68:20-69:1.) The Wakazurus scheduled his deposition for April 9, 2021. (CP 44.) After receiving notice of the Wakazurus' subpoena, the Otas and Palumbo made numerous efforts to talk to Michael before the Wakazurus could depose him.

For example, on April 6, 2021, three days before Michael's deposition, Palumbo left a lengthy voicemail. (CP 61-62 at 71:8-74:17.) Palumbo said he was calling at the Otas' request. (CP 61 at 71:8-11.) Palumbo told Michael the Otas

"have told us from the very beginning that if we can win this case, they feel an obligation to share some of the settlement or judgment with you…." (CP 61 at 71:17-21.) Palumbo told Michael that Palumbo and Engel "would really appreciate the opportunity to talk with you…." (*Id.* at 72:6-9.) Palumbo continued:

> I can assure you that given the fact that your son and—and his wife have said from the beginning they feel an obligation to share proceeds with you, I'm happy to talk with you about that and pin them down on that—on that commitment because my view of this is that the Wakazurus screwed the Ota family.

(CP 61 at 72:10-15.) Palumbo also told Michael that "we've been looking at how much money your family should have received and we think it's in the 3 to $5 million range, we're still working on that." (CP 61 at 72:19-21.) Palumbo's voicemail then proceeded to give Michael a summary of talking points concerning the Otas' theory of the case.[2] (CP 61-62 at 72:22-74:7.)

[2] The full text of Palumbo's voicemail to Michael on April 6, 2021, is transcribed on CP 61-62 at 71:8-74:7.

The next day, April 7, 2021, two days prior to Michael's deposition, Palumbo again called and left another voicemail urging Michael to return his calls. (CP 63 at 79:1-25.) Palumbo told him "I think that we can work out something that's to your benefit." (*Id.*) Palumbo also told Michael: "we are very -- very willing to try to collect money on your -- on your behalf as well as [the Otas']." (*Id*.)

In yet another voicemail later that day, Palumbo told Michael that Michael's grandkids were considering flying to Arizona for a second time to try and talk to Michael the day before his deposition.[3] (CP 64 at 83:2-17.) Palumbo stated: "I just talked to your grandson who was thinking about flying down tomorrow morning to try to catch you and I hate to have them do that, but at the same time I really would like to talk to you before the deposition on Friday." (*Id.*) Palumbo continued, "it'd really be I think helpful, certainly helpful for me and I think helpful for

[3] Shortly after the Wakazurus subpoenaed Michael for deposition, Michael's grandchildren had flown to Arizona to urge Michael to speak with Palumbo.

you and Lori if we talked before Friday [*i.e.*, the date of Michael's deposition]." (*Id.*)

At deposition, Michael testified he understood the Otas and Palumbo were attempting to influence his testimony in the Otas' favor.

> Q. So if I understand correctly, you hadn't spoken with Connie and Stacey Ota for about a decade prior to you getting our subpoena on March 25th?
>
> A. Correct.
>
> Q. Yet after you get our subpoena on March 25th, you received three or four telephone calls from Connie Ota, the same number of calls from her attorney Mr. Palumbo, and a visit to your door by your grandkids?
>
> A. Yes. I was a little disturbed when Ralph called indicating that if we would play along, there would be some money in it for us. And I thought, what the hell are you trying to do, bribe us or—pay us to come to your side? You know, I – I don't like that.

(CP 61 at 70:10-24; *see also* CP 62-63 at 75:21-77:5-6.) Michael also understood that Palumbo's lengthy voicemail on April 6, 2021, was intended to convey to him the talking points the Otas and their attorneys wanted Michael to testify to, and that if Michael testified accordingly, he would be financially rewarded. (CP 63-65 at 77:12-78:18, 80:1-18, 84:14-85:2.)

C. The Trial Court Imposes Sanctions.

After learning of Palumbo's voicemails and deposing Michael on April 9, 2021, the Wakazurus filed a Motion for Sanctions, accompanied by supporting evidence. (CP at 25-91.) The Wakazurus' Motion for Sanctions documented the Otas' and Palumbo's attempts to influence Michael's testimony and moved the trial court to impose appropriate sanctions, including (1) dismissal of the Otas' complaint, (2) disqualification of the Otas' counsel, and (3) such other sanctions as the trial court deemed appropriate. (CP 25-91.)

On April 30, 2021, the trial court entered its Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions. (CP 571-74.) The trial court recognized the inconsistency between the Otas' allegations and their later claimed belief that Michael continued to have an interest in the Property. (CP 572-73.)

> Prior to his deposition being noted by defendants for April 7, 2021, the record indicates that plaintiffs had not communicated to [Michael] an intent to "share proceeds" of this lawsuit, and the Court has

> some difficulty understanding Connie Ota's voicemail to [Michael] shortly before his scheduled deposition that the [Otas] believed [Michael] owned an interest in real property involved in this lawsuit given the allegations in [the Otas'] complaint.

(*Id.*) The trial court further stated the actions by the Otas' attorneys "seriously concern the Court and need to be referred to appropriate authorities." (CP 573.) The trial court made an express finding of bad faith, writing:

> Here, serious and apparently factually based allegations are made that plaintiffs' counsel attempted to influence the judicial process by inducing [Michael] to testify favorably for plaintiffs and was told of a potential share of any settlement or judgment. The amount mentioned could be viewed as a substantial financial incentive. The Court also notes the direct contacts by [Connie] and [Michael's] grandchildren to persuade [Michael] to speak with [Palumbo]. The Court believes that a showing of bad faith has been made.

(CP 574.)

The trial court ordered the disqualification of the Otas' attorneys and directed the Wakazurus' counsel to refer the matter to appropriate authorities. (*Id*.) The trial court also stayed the lawsuit. (CP 574.)

D. The Court of Appeals Proceedings.

The Otas and their attorneys filed Motions for Discretionary Review to the Court of Appeals, which granted discretionary review on November 3, 2021. The Court of Appeals entered an Unpublished Opinion in this matter on February 13, 2023.

The Court of Appeals reversed the disqualification order, concluding the trial court was required to consider lesser sanctions on the record. (Petition, Appx. A at 1.) The Court of Appeals held, however, that substantial evidence supported the trial court's finding of bad faith as to Palumbo. (*Id*.) It agreed with the trial court that Palumbo's statements in his voicemails to Michael can be viewed as a substantial financial incentive for Michael to testify in a manner favorable to the Otas. (*Id*. at 15-19.)

The Court of Appeals also held that the trial court applied the correct legal standard in its finding of bad faith and considered the entire record in doing so. (*Id*. at 15-16.) It stated:

> Appellants appear to believe that the determination of whether the conduct constituted bad faith turns on whether the Otas reasonably believed that Michael had an interest in the lawsuit. The Otas misconstrue the trial court's concern. The concern is not whether counsel had a basis to support its legal theory or the decision to reach out to Michael prior to his deposition. The concern expressed by the trial court is what was conveyed to Michael, how it was conveyed, and when it was conveyed.

(*Id*. at 16-17.)

The Court of Appeals denied the Otas' request for reassignment to another judge upon remand, recognizing that the Otas failed to present proof of actual or perceived bias on the part of the trial judge. (*Id*.) It found that "[i]mposing sanctions is not enough to rise to the level of bias or perceived bias" (*Id*.)

III. ARGUMENT

A. The Court of Appeals' opinion is consistent with Washington law.

The Court of Appeals' opinion denying reassignment to a new judge on remand is consistent with Washington law. The remedy of reassignment on remand has "limited availability" in Washington courts. *See*, *e.g*., *State v. McEnroe*, 181 Wn.2d 375,

387, 333 P.3d 402 (2014). To establish prejudice sufficient to justify reassignment to a new judge, a party must "submit proof of actual or perceived bias to support an appearance of partiality claim." *GMAC v. Everett Chevrolet, Inc.*, 179 Wn. App. 126, 154, 317 P.3d 1074 (2014). "Participation in the decision-making process by a person who is potentially interested or biased is the evil which the appearance of fairness doctrine seeks to prevent." *City of Hoquiam v. Pub. Emp. Rels. Comm'n of State of Wash.*, 97 Wn.2d 481, 488, 646 P.2d 129 (1982). As the Court of Appeals properly found, there is simply no evidence of bias or even the appearance of bias in this case.

Under Washington law, an appearance of fairness claim requires evidence of a judge's "actual or potential bias." *State v. Gamble*, 168 Wn.2d 161, 187-88, 225 P.3d 973 (2010) (citing *State v. Chamberlin*, 161 Wn.2d 30, 37, 162 P.3d 389 (2007)). This case has no such indicia of any bias by the respected and experienced trial court judge. The Otas argue that imposition of the sanction of disqualification creates an appearance of bias

because it is harsh and that the referral of the Otas' attorneys for investigation is "very unusual." (Petition at 21-22.) But the extreme misconduct of a lawyer attempting to interfere with a witness's testimony warrants investigation by appropriate authorities and requires disqualification. *See In re Simmons*, 110 Wn.2d 925, 932, 757 P.2d 519 (1988) (recognizing in disciplinary context that disbarment is generally appropriate when an attorney "intentionally tampers with a witness and causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceeding") (quoting ABA Standard 6.31(a), at 18); *Ramirez v. T&H Lemont, Inc.*, 845 F.3d 772, 782 (7th Cir. 2016) (stating "witness tampering is among the most grave abuses of the judicial process, and as such warrants a substantial sanction"); *Ramsey v. Broy*, No. 08-CV-0290, 2010 WL 1251199, at *4 (S.D. Ill. Mar. 24, 2010) (stating "tampering by the parties deserves the harshest sanction that the Court can deliver given the seriousness of the matter and in order to protect

the judicial process"). The Otas identify no authority supporting the assertion that a sanction creates an appearance of bias merely because it is appropriately severe. The trial court's sanction order was quite measured and did not dismiss the Otas' complaint, as the Wakazurus requested and as would have been justified. (CP 25-91, 571-74.)

The Otas cite the trial court's finding that it had "some difficulty understanding" Connie's voicemail to Michael, in light of the Otas' allegation in their complaint, to argue the trial court prejudged whether Michael held an interest in the alleged partnership. (Petition at 23.) As the Court of Appeals accurately observed in its opinion:

> [T]he Otas claimed in their complaint that after the forbearance transaction, Michael was "no longer participating in the Partnership," leaving Stacey with all 80 percent interest in any profits derived from the property and the Wakazurus holding the remaining 20 percent, and … it was not until the day after the Wakazurus served a subpoena on Michael that Connie communicated to Michael that she and Stacey believed Michael "still" had ownership in one of the parcels in Sumner.
>
> Insofar as the court's comment as to its own observation may constitute a finding of fact, it is

> supported by the record as to why the court had "some difficulty understanding" Connie's voicemail given the Otas' complaint. It is arguable whether the court's difficulty in understanding was an expression of skepticism or a genuine question of confusion.

(Petition, Appx. A at 13.)

The trial court's well-supported findings show the trial court carefully weighed the evidence. (CP 571-74.) Moreover, "even where a trial judge has expressed a strong opinion as to the matter appealed, reassignment is generally not available as an appellate remedy if an appellate opinion offers sufficient guidance to effectively limit trial court discretion on remand." *State v. Markovich*, 19 Wn. App. 2d 157, 175, 492 P.3d 206 (2021) (internal citation omitted). Here, the Court of Appeals' opinion directs the trial court to apply the principles of *In re Firestorm 1991*, 129 Wn.2d 130, 916 P.2d 411 (1996) and *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993) and consider lesser sanctions on the record, providing clear guidance. (Petition, Appx. A at 26.)

B. The Petition does not Raise an Issue of Substantial Public Importance.

The Otas' Petition does not raise an issue of substantial public importance for the purposes of RAP 13.4(b). There is no appearance of bias or unfairness. The contempt of court statute the Otas cite to argue the trial judge should not be allowed to continue to preside over this matter, RCW 7.21, *et. seq.*, is not relevant or applicable here. Furthermore, Otas' flawed arguments will be rendered moot by the trial court judge's impending retirement in any event. The Court should deny the Otas' Petition for Review.

IV. CONCLUSION

The Court of Appeals properly determined that reassignment of this matter on remand was not appropriate or warranted. The Otas Petition fails to raise grounds that would permit review by this Court under RAP 13.4(b). The Court should deny review.

This document contains 2,629 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 19th day of May, 2023.

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on the 19th day of May, 2023, I caused foregoing document to be filed and served on the following via the Courts' Electronic Filing Portal:

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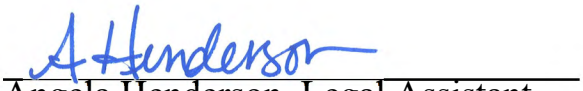

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