No. 101920-3

Court of Appeals No. 82840-1
(Consolidated with Nos. 82840-0, 82842-8 & 82843-6)

SUPREME COURT
OF STATE OF WASHINGTON

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

Petitioners/Appellants,

v.

RICHARD M. WAKAZURU and KENNETH WAKAZURU, individuals,

Respondents.

PETITION FOR REVIEW

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INTRODUCTION

The trial court disqualified the Otas' entire legal team just weeks before trial, directing the Wakazurus to refer each of the Otas' three lawyers to the police/prosecutor for potential criminal investigation and to the WSBA disciplinary counsel. The court's basis for this undeniably harsh sanction was that one of the three attorneys called a non-party lay witness prior to his deposition who claimed that he felt bribed.

The appellate court reversed the disqualification for all three lawyers, where the trial court failed to consider lesser sanctions. For the two who did not make the calls, the appellate court reversed, holding that no findings support that either acted in bad faith. But the appellate court refused to remand to a new judge for trial.

This refusal conflicts with the well-established appearance of fairness doctrine, an issue of substantial public interest. This Court should accept review.

ISSUE PRESENTED FOR REVIEW

The trial court questioned Appellant/Petitioner Connie Ota's deposition testimony, disqualified the Otas' entire legal team weeks before trial, and referred the lawyers to the police/prosecutor and WSBA disciplinary counsel. The appellate court reversed the disqualifications as to all three lawyers, reversed the bad faith determination as to two, and denied reconsideration on March 20, 2023. ***Ota v. Wakazuru***, No. 82840-1-I (2023). Did the appellate court err in declining to reassign the matter to a new judge on remand to avoid an appearance of unfairness?

FACTS RELEVANT TO PETITION FOR REVIEW

The sole issue on appeal was the trial court's order disqualifying Appellants Michael S. (Stacey) and Connie Ota's (the "Otas") entire legal team (three attorneys from two different firms) just weeks before trial as a sanction for voicemails one attorney left for Respondents Rick and Ken Wakazuru's witness, Michael G. Ota (Stacey's father)

shortly before his deposition. As this occurred pretrial, the facts are necessarily taken from the Otas' allegations.

A. The Otas filed suit against their former business partners, the Wakazurus, claiming breach of their Partnership agreement and unjust enrichment.

Once close family friends, Stacey[1], Michael G., and the Wakazurus formed a partnership in 2006 to develop an RV dealership in Sumner, Washington. CP 2, 26, 54, 189-90. The Wakazurus, who owned Poulsbo RV, brought their knowledge and experience to the deal, and the Otas contributed a $5 million parcel ("the Property"), jointly owned two-thirds by Michael G. and one-third by his ex-wife, Ann Hemmings. CP 2, 94. The Wakazurus also contributed $1 million toward purchasing Hemmings' interest. CP 2, 94, 194-201. While this was documented in an unsecured promissory note, the parties and Michael G. all agreed that this was not a loan. CP 2-3, 94, 110, 178-

[1] The Otas use first names when necessary to avoid confusion, intending no disrespect.

80, 189-90, 203-08, 338. Rather, the Wakazurus contributed this $1 million to the partnership for a 20% ownership interest. *Id*.

The parties worked jointly to develop the Property. CP 3-4, 16-18, 95. The Otas handled the labor, including daily maintenance and development issues with the Army Corps of Engineers, the Environmental Protection Agency, and wetlands consultants. CP 3, 5, 16. They paid for maintenance and the Wakazurus paid taxes. CP 3, 424.

In 2008, Michael G. deeded the Property to Ota-family entity Generation V ("Gen V"), which held the Otas' 80% interest in the partnership. CP 94, 210-13, 292. But when Michael G. faced mounting financial difficulties in late 2011 and early 2012, he threatened to sell the Property outright, or to develop it himself, undermining the partnership. CP 96, 291. When the Otas informed the Wakazurus, the parties worked together, under the advice of the Wakazurus' attorneys, to persuade Michael G. to

quitclaim the Property to the Wakazurus through their LLC, R&K West Valley Highway Investments. CP 4, 95, 181-83, 215-63, 279-80. Following this conveyance, Stacey held the Ota family's 80% interest in the partnership. CP 4-5, 95, 383. Sadly, Michael G. moved to Arizona and became estranged from the Otas. CP 73, 96, 364-65.

In 2012, two different parties told Stacey they were interested in purchasing or partnering to develop the Property, but the Wakazurus were strongly opposed, preferring to continue the partnership. CP 4, 181-83. In 2015, Stacey learned that the Wakazurus were discussing a sale with one of the parties who approached Stacey in 2012. CP 5, 181-84, 442. Stacey continued to work the Property for two more years with Rick's assurances that they would take care of the Otas in any eventual sale. CP 5, 442, 447. But when the Wakazurus sold the Property in 2017 for about $6.5 million, they paid the Otas just $325,000. CP 5-6, 18, 442.

James Elliott, Poulsbo RV's former Chief Operating Officer (and Ken's son-in-law) oversaw the details of the Ota/Wakazuru partnership for 10 years before the Wakazurus sold the Property. CP 99, 176-86. Elliot testified unequivocally that the Wakazurus, through Poulsbo RV, intended to develop the Property into an RV dealership with the Otas. CP 177, 183-85. Elliot confirmed that the unsecured promissory note "was never a loan," but was a "financial instrument" to document the Wakazurus' investment in the Property. CP 178-80.[2]

Rick admitted in his deposition that the Wakazurus "never" intended for the Otas to repay the promissory note. CP 189. Rather, the parties agreed to "jointly develop the Sumner property as an RV dealership" with the Wakazurus contributing the $1 million "as part of that development."

[2] Directly contracting the evidence, the appellate court calls the Wakazurus' $1 million partnership buy-in a "loan[]," claiming they denied "ever agreeing to be in a business partnership." No. 82840-1-I at 2, 4.

CP 189-90. Michael G. even testified that this was not a loan, but a way to avoid excise tax. CP 51-53.

Elliot was aware that Michael G. deeded the Property to the Wakazurus in 2012, testifying that "nothing changed" regarding the plans to develop the Property. CP 181-84. That is, the Wakazurus' legal interest in the Property "didn't change anything" in terms of the partnership. CP 183-84. Elliot confirmed too that prior to this change in ownership structure, the Otas inquired about selling the Property, and the Wakazurus confirmed that they "still wanted to be involved in the property and develop it." CP 182-83.

Although Elliot was involved in the Property sale, he learned for the first time in the lawsuit that the Wakazurus had paid the Otas a small fraction of what they were entitled to. CP 184, 188. He was "pretty shocked," failing to understand why the Wakazurus paid them less than "their share." CP 185.

B. The trial court disqualified the Otas' legal team weeks before trial after one of the three lawyers left Stacey's father Michael G. Ota voicemails explaining the Otas' case theory shortly before his deposition.

The Otas filed suit in March 2020, alleging breach of the partnership agreement and unjust enrichment. CP 1-9. Their legal team was trial attorneys Ralph Palumbo and Lynn Engel, partners at Arete Law Group LLP, and Joshua Krebs, a partner at Van Ness Feldman LLP. CP 9, 272, 576. The Otas advised their legal team that they believed Michael G. had a financial interest in any recovery from the lawsuit, but also that a "long and bitter family rift" had left them estranged. CP 273, 734-37. Counsel opted not to contact Michael G., believing he would not speak to them. CP 273, 733-35.

The Wakazurus subpoenaed Michael G. on March 24, 2021, scheduling his deposition for April 9. CP 43, 734. On March 26, Connie left him the following voicemail:

> Hey, [Michael], it's Connie again. Just give me a call and see if I can get in touch with you this afternoon. I left Lori a message as well. I'm calling in regards to a matter in one of the parcels in Sumner that we believe you and all of us still have ownership in. So we thought that it would be wise to discuss with you and Lori. So if you could give us a call back that would be great. And it's Connie calling in regards to the parcel of land in Sumner that we believe you guys have an ownership interest in as well. …

CP 63-64. On the 27th, the Otas' adult sons flew to Arizona to speak with Michael G., concerned that the Wakazurus were taking advantage of the family rift. CP 274, 337-38, 734. Counsel were uninvolved, learning of this visit only after the fact. CP 734.

Michael G. agreed his grandsons could give his phone number to the Otas' attorneys, though he states only that he agreed to think about it. CP 339; No. 82840-1-I at 5. In either case, his wife later confirmed by text message his willingness to speak with them. CP 339, 343, 344.

Attorney Palumbo explained that following the subpoena, "the balance shifted in favor of making an effort

to speak with [Michael G.], consistent with the normal practice of interviewing third-party witnesses." CP 734. The legal team agreed Palumbo would call Michael G. CP 61, 273-74, 733-36. Before doing so, they confirmed Michael G.'s interest in Gen V in three years of tax filings, including K-1s issued to Michael G., and in an operating agreement. CP 273-74, 296-336, 592-660, 735-37. Palumbo expected Michael G. to acknowledge his interest. CP 737.

Palumbo left the following a voicemail for Michael G. on April 6 (excerpted in relevant part):

> I can tell you that Stacey and Connie 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 along the lines of the – the split in the Gen V, LLC. I have no idea what happened between you and your son and I'm sure there's nothing I can do to repair it, but if you would be willing to talk with me, I would really appreciate it.
>
> . . .
>
> And then the – my partner who's been working on all this, Lynn Engel, is intimately involved and she knows a lot of the details and we would – we would really appreciate the opportunity to talk with you and 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. They screwed you, they screwed Stacey, they screwed Dan – Connie, they screwed Dan, and they absolutely should not be permitted to get away with what they – what they did and we – 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.

But there's no question in my mind that they made a deal with all of you to have a partnership in which you would have – your family would have 80 percent, they would have 20 percent. They made payments on the property, which would be like capital contributions, so their percentage probably is a bit larger than 20 percent and we're still working on figuring out how much money your family put into it and how much money they did.

I'm absolutely confident that when you were convinced to voluntarily transfer the property to the Otas – or to the Wakazurus, they had made a commitment that they would hold the property and honor your family's share in the – in the property, which they didn't do. The closest we can tell the property at that point in time was worth about $5 million.

The debt on the promissory note, which was never a promissory note, was a million seven. So even if that was a legitimate promissory note, there was no way under any kind of legal proceeding that they – that

> they could have recovered more than 1.7 million, and instead, your family voluntarily gave them property worth $5 million and it – without your cooperation and – and Stacey and Connie encouraging you to do this, they never would have gotten the property. And even if you had to pay the million seven debt, you would have been a hell of a lot better off doing that and keeping a piece of property that was worth at least $5 million and I think probably more.
>
> So that's a very, you know, short view, contrary to what – what they claim. Gen V, LLC was formed, it filed tax returns, you signed a deed transferring the property to Gen V, LLC, which you would not have done but for the promises that the Wakazurus were making to you, he and Connie.

CP 61-62. When Michael G. did not return his call, Palumbo left two emails on April 7. CP 63-64, 735-36. The first reiterated his willingness to recover for Michael G. and for the Otas, and the second reiterated that it would be helpful to talk before the deposition. *Id*. Palumbo conveyed too that the grandchildren were thinking of flying back down, suggesting he call and tell them "not to bother." *Id*.

Michael G. testified that while the voicemails did not mention the content of his testimony, he understood them to constitute a bribe. CP 60-70. He stated repeatedly that

he believed attorney Palumbo was "untruthful" because he believes the Otas are "untruthful people." CP 71-72. He disparaged them repeatedly, calling them "crooked," "greedy," and "untruthful," and claiming that they, along with his attorneys and business associates, were working "behind [his] back," and taking advantage of him. CP 48-53, 59, 69, 72-73, 76-79, 82-83, 96, 151, 172-73.[3]

On April 16, the Wakazurus sought to dismiss the Complaint, disqualify counsel, or impose any other appropriate sanctions. CP 25-37. Although both sides requested oral argument, the trial court decided the matter on the pleadings. No. 82840-1-I at 8. The court disqualified all three attorneys, directing the Wakazurus' counsel Bryan Graff to refer the matter to the "police/prosecutors for potential criminal investigation" and to the "WSBA disciplinary counsel for further investigation." CP 574.

[3] Many contradictions in Michael G.'s deposition testimony are addressed at length in the opening brief. BA 24-28.

C. The appellate court reversed the disqualification as to all three lawyers on the Otas' trial team, reversed the bad-faith determination as to two, but remanded to the same judge, declining the Otas' motion to reassign the matter on remand.

The Otas and each of their three disqualified attorneys sought discretionary review, which the appellate court accepted. No. 82840-1-I at 9. The appellate court reversed the disqualification for each attorney. *Id*. at 19, 24, 26. As to Engel and Krebs, the court reversed on two grounds: (1) "no findings support either acted in bad faith"; and (2) the trial court failed to consider whether lesser sanctions would suffice before imposing the harsh sanction of disqualification. *Id*. at 23-24. The court affirmed the bad faith finding as to Palumbo, but reversed nonetheless, holding that the trial court failed to consider lesser sanctions. *Id*. at 19, 25.

The appellate opinion noted the following:

> The trial court declined to hold a sanctions hearing even though both parties requested one (*Id*. at 8);

> The sanctions order did not differentiate between Palumbo, who left the voicemails, and Engel and Krebs who did not (*Id*. at 23-24);
>
> Directing the Wakazurus' counsel to refer the disqualified attorneys to the police, prosecutor and WSBA was "very unusual," particularly without conducting "a hearing of any kind …." (*Id*. at 8, 13-14).
>
> The findings focused "entirely on Palumbo's actions alone." (*Id*. at 23).
>
> For the first time on reconsideration the trial court clarified its sanctions order pertained to Engel and Krebs too, but it entered no additional findings. (*Id*.)

The court denied the Otas' request to reassign this matter to a new judge on remand, holding that imposing sanctions does not establish bias or perceived bias:

> The Otas request this court reassign this matter to a different judge on remand. However, the Otas have not established prejudice sufficient to justify reassignment. 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). Imposing sanctions is not enough to rise to the level of bias or perceived bias. We deny the Ota's request to reassign this matter to a different judge on remand.

Id. at 25. That is the court's entire analysis. *Id*.

REASONS THIS COURT SHOULD ACCEPT REVIEW

A. The appellate decision conflicts with numerous decisions from this Court and the appellate courts. RAP 2.3(b)(1) & (2).

1. Litigants are entitled to a judge who appears fair, determined by an objective-reasonable-person standard.

"It is fundamental to our system of justice that judges be fair and unbiased." ***Chicago v. Wash. State Human Rights Com***., 87 Wn.2d 802, 807, 557 P.2d 307 (1976) (citing ***Bach v. Sarich***, 74 Wn.2d 575, 582, 445 P.2d 648 (1968); ***In re Borchert***, 57 Wn.2d 719, 722-23, 359 P.2d 789 (1961); ***State ex rel. McFerran v. Justice Court of Evangeline Star***, 32 Wn.2d 544, 549-50, 202 P.2d 927 (1949)). "'The principle of impartiality, disinterestedness, and fairness on the part of the judge is as old as the history of courts ….'" ***Chicago***, 87 Wn.2d at 807 (quoting ***State ex rel. Barnard v. Board of Educ.***, 19 Wash. 8, 17, 52 P. 317 (1898)).

Washington law requires more. A judge must not only be impartial, they must appear impartial:

> Our system of jurisprudence also demands that in addition to impartiality, disinterestedness, and fairness on the part of the judge, there must be no question or suspicion as to the integrity and fairness of the system, *i.e*., "justice must satisfy the appearance of justice."

Chicago, 87 Wn.2d at 808 (quoting ***Offutt v. United States***, 348 U.S. 11, 14, 99 L. Ed. 11, 75 S. Ct. 11 (1954)). Washington courts have recognized the appearance of fairness doctrine in far too many cases to count. As just a few examples:

> "'Next in importance to the duty of rendering a righteous judgment, is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge.'" ***Barnard***, 19 Wash. at 18 (quoting ***People v. Suffolk Common Pleas***, 18 Wend. 550, 552 (NY 1836)).
>
> "It is incumbent upon members of the judiciary to avoid even a cause for suspicion of irregularity in the discharge of their duties." ***Diimmel v. Campbell***, 68 Wn.2d 697, 699, 414 P.2d 1022 (1966).
>
> "The [Code of Judicial Conduct] recognizes that where a trial judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating."

> ***Sherman v. State***, 128 Wn.2d 164, 205, 905 P.2d 355 (1995).
>
> "The appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice." ***Chicago***, 87 Wn.2d at 809 (quoting ***State v. Madry***, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972) (citing the then recently-enacted ABA Code of Judicial Conduct)).[4]

Likewise, there is no shortage of cases providing the standard for determining whether a proceeding satisfies the appearance of fairness doctrine:

> "Basically, the critical concern in determining whether a proceeding satisfies the appearance of fairness doctrine is how it would appear to a reasonably prudent and disinterested person." ***Chicago***, 87 Wn.2d at 810 (*citing* ***Swift v. Island County***, 87 Wn.2d 348, 361, 552 P.2d 175 (1976); ***State v. Buntain***, 11 Wn. App. 101, 108, 521 P. 752 (1974)).
>
> "The critical concern in determining whether a proceeding appears to be fair is how it would appear to a reasonably prudent and disinterested person." ***Brister v. Council of Tacoma***, 27 Wn. App. 474, 486-87, 619 P.2d 982 (1980).

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[4] This Court adopted the CJC in October 1973, effective on January 1, 1974, superseding the Code of Judicial Ethics that had been effective since January 1951. ***Tatham v. Rogers***, 170 Wn. App. 76, 93-94, 283 P.3d 583 (2012).

> "A judicial proceeding satisfies the appearance of fairness doctrine only if a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing." ***Tatham***, 170 Wn. App. at 96 (citing ***State v. Bilal***, 77 Wn. App. 720, 722, 893 P.2d 674 (1995)).

Of the many cases addressing the appearance of fairness doctrine, the appellate decision relies exclusively on ***GMAC v. Everett Chevrolet, Inc.***, which reiterates the above-discussed principles, but does not apply them, instead reversing and remanding to a new judge simply because doing so would provide a "fresh perspective." No. 82840-1-I at 25 (citing 179 Wn. App. at 154). There, GMAC provided financing to Evergreen Chevrolet in exchange for a security interest in its equipment, inventory, and proceeds. 179 Wn. App. at 131. GMAC terminated Evergreen Chevrolet's financing, demanded full payment, and sought replevin. *Id*. at 132. The trial court denied GMAC's request for replevin and the appellate court accepted discretionary review and reversed. *Id*. When on remand the trial court denied GMAC's motion for summary

judgment dismissal of Evergreen Chevrolet's bad faith counterclaims, the appellate court again granted discretionary review, and again reversed, that time remanding to a new judge. *Id*. at 133, 154.

GMAC acknowledges all the same legal principles addressed above. *Id*. at 153-54. But the appellate court elected not to address GMAC's evidence of perceived bias, declining to decide whether the trial court violated the appearance of fairness doctrine. *Id*. at 154. It instead remanded to a different judge on the basis that doing so would serve "a just and expeditious resolution of this case" and provide a "fresh perspective." *Id*. If any case calls out for a "fresh perspective," this is it.

2. No reasonably prudent disinterested person would think that a trial before the same judge appears fair.

The appellate court's entire analysis is that "[i]mposing sanctions is not enough to rise to the level of

perceived bias." No. 82840-1-I at 25. The Otas never argued it was.

The trial court did not just impose sanctions – it disqualified all three members of the Otas' legal team weeks before trial, a sanction widely recognized as being "a drastic remedy that exacts a harsh penalty from the parties as well as punishing counsel [to] be imposed only when absolutely necessary." ***In re Firestorm 1991***, 129 Wn.2d 130, 140, 916 P.2d 411 (1996) (citations omitted). It did so without holding a hearing, although all parties asked for one. No. 82840-1-I at 8.

The court failed to consider whether lesser sanctions would suffice, a reversible error as to all three lawyers. *Id*. at 22-25. Its findings focused entirely on attorney Palumbo's conduct, but on reconsideration it clarified the disqualification included attorneys Engel and Krebs without any additional findings. *Id*. at 23-24. That is, "no findings support either acted in bad faith." *Id*. at 24.

And the trial court did not stop at disqualification. It directed the Wakazurus' counsel to refer each disqualified attorney to the WSBA disciplinary counsel and the "police/prosecutors for potential criminal investigation." CP 574; *id*. at 8, 13-14. The appellate court noted this was "very unusual," particularly where the court did not conduct "a hearing of any kind …." No. 82840-1-I at 13-14. Just this "very unusual" referral raises a serious appearance of bias or prejudice that is compounded by the trial court's utter failure to even mention attorneys Engel and Krebs when disqualifying – and referring – them.

The trial court's findings create an additional appearance of bias or prejudice in that the court apparently questioned Connie's testimony in a key issue in the case. CP 572-73 FF 4. The Wakazurus have argued throughout this case that the Otas' allegations are inconsistent with their stated belief that Michael G. still has some interest in the Property at issue in the Ota/Wakazuru partnership. BR

8, 13, 33. Picking up on this thread, the trial court stated that it has "some difficulty understanding Connie Ota's voicemail to Michael G.," in which she mentioned the Ota family's interest in the Property. CP 63-64; CP 572-73 FF 4. The Wakazurus characterize this finding as the trial court's recognition of the "inconsistency between the Otas' allegations and their later claimed belief that Mike [G] continued to have an interest in the Property." BR 13; *see also* BR 33 (both citing CP 572-73 FF 4). This is effectively an admission that the trial court prejudged this issue in the Wakazurus' favor.

But the appellate court does not even address this troubling finding in the context of reassignment. No. 82840-1-I at 25. And when addressing it, the appellate court held that it is "arguable whether the court's difficulty in understanding was an expression of skepticism or a genuine question of confusion." *Id*. at 13. That is, the appellate court acknowledged the trial court may have

already expressed "skepticism" about a key component of the Otas' case. *Id*.

Finally, the appellate opinion never even mentions the "critical concern" in determining whether a proceeding appears fair: "how it would appear to a reasonably prudent and disinterested person." ***Chicago***, 178 Wn.2d at 810; ***Tatham***, 170 Wn. App. at 96; ***Brister***, 27 Wn. App. at 486-87. For all the reasons addressed above, a reasonably prudent disinterested person would certainly question whether any proceeding before the same judge would appear fair.

This Court should accept review and order this matter reassigned to a new judge for trial.

B. The public's confidence in the administration of justice is an issue of substantial public interest this Court should address. RAP 13.4(b)(4).

As addressed above, the "'appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence

of bias or prejudice.'" ***Chicago***, 87 Wn. 2d at 809 (quoting ***Madry***, 8 Wn. App. at 70). It is for this reason that the law requires more than "'an impartial judge; it also requires that the judge appear to be impartial.'" *Id*.

It is notable too that when a trial judge requests the prosecutor or city attorney to bring an action to impose a punitive sanction for contempt of court (to punish a past contempt and uphold the court's authority) the judge "shall be disqualified from presiding at the trial." RCW 7.21.010(1), (2) & .040(2)(c). Why then would a judge be allowed to preside over a trial after taking the "very unusual" step of referring three lawyers to the WSBA and to the "police/prosecutors" for potential criminal investigation? No. 82840-1-I at 13-14; CP 574. Allowing the trial court to do so undermines public confidence in our judicial system. This Court should accept review, reverse, and order reassignment to a new judge for trial.

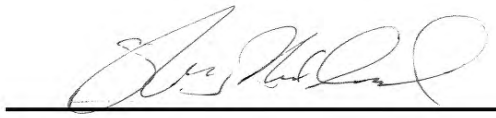
CONCLUSION

This Court should accept review.

The undersigned hereby certifies under RAP 18.17(2)(b) that this document contains 4461 words.

RESPECTFULLY SUBMITTED this 19th day of April 2023.

MASTERS LAW GROUP, P.L.L.C.



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APPENDIX
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APPENDIX A

Ota v. Wakazuru, No. 82840-1-I

Unpublished Opinion

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL S. OTA and CONNIE OTA, a married couple, Appellants, v. RICHARD M. WAKAZURU and KENNETH WAKAZURU, Respondents.	No. 82840-1-I DIVISION ONE UNPUBLISHED OPINION

COBURN, J. — This matter comes before us under discretionary review after the trial court found appellants' counsel engaged in bad faith by attempting to influence a witness with a financial incentive prior to his deposition with the respondents. Though substantial evidence supports the trial court's finding of bad faith as to the counsel who engaged in the relevant acts, the trial court imposed the drastic sanction of disqualifying all three of appellants' counsel without a record of having considered lesser sanctions. Accordingly, we reverse the order disqualifying all three attorneys and remand for the trial court to consider possible lesser sanctions as to the counsel the trial court found acted in bad faith.

FACTS

In March 2020, Michael S. Ota (Stacey)[1] and Connie Ota (Connie), a married couple (collectively the Otas), filed a complaint[2] against Richard Wakazuru and Kenneth Wakazuru (collectively the Wakazurus). The Otas' attorneys were Ralph Palumbo, Lynn Engel, and Joshua Krebs. At issue in the underlying case is whether Stacey and the Wakazurus had entered into a business partnership to develop real property into an RV dealership with Stacey receiving 80 percent interest in the business and the Wakazurus receiving 20 percent.

According to the Otas, in 2006, Stacey, his father Michael G. Ota (Michael), and the Wakazurus discussed potentially developing real property in Sumner, Washington into an RV dealership. The Wakazurus already owned an RV business. The property was owned by Michael and his ex-wife. The Wakazurus loaned $1 million to Michael and Stacey who signed a promissory note so that Michael could purchase his ex-wife's interest in the property and possess the full title.

The Otas claim that the Wakazurus gave the loan in exchange for 20 percent interest in a partnership between them and Stacey and Michael to work together to develop the property as an RV dealership and share in any profits

[1] We refer to the parties by their first or middle names for clarity because some parties share the same first and last names.

[2] The complaint alleges breach of agreement, breach of fiduciary duty, breach of good faith and fair dealing, promissory estoppel, and unjust enrichment.

derived therefrom. Stacey claims at that time he held approximately 82 percent of the remaining 80 percent interest.

In 2008, Michael, who held title to the property, executed a deed to Generation V, LLC (Gen V). In June 2012, Stacey and Michael entered into a forbearance agreement acknowledging they were in default on the promissory note and agreeing to provide a first lien deed of trust on the property as security and delaying collection on the note to end of August. In September, Michael executed a quitclaim deed to R & K West Valley Highway Investments LLC[3] in lieu of foreclosure and believed he was giving up any interest he had in the property. Michael moved to Arizona and did not speak with Stacey or Connie for about a decade. The two admittedly have been estranged. Gen V[4] dissolved in 2012.

The Otas claim Stacey in coordination with the Wakazurus had convinced Michael to convey the property to avoid exposing it to Michael's financial obligations and destroy the partnership's development plans. The Otas claim that after this 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. The Otas claim they continued day-to-day maintenance of the property as well as significant issues relating to regulatory and wetlands issues.

[3] The Wakazurus assigned their interest in the property to R & K West Valley Highway Investments, LLC.

[4] Appellants concede they are not able to locate an executed copy of the Gen V Operating Agreement. Only an unsigned, undated draft operating agreement is in the record.

The Wakazurus, who deny ever agreeing to be in a business partnership with Stacey, sold the property in September 2017 for about $6.5 million and paid Stacey a total of $125,000 for "his efforts on the Property, and in recognition of the longstanding family relationships of certain of the parties." The Otas filed their lawsuit in March 2020.

On March 25, 2021, the Wakazurus served Michael with a subpoena duces tecum for his deposition and the production of documents. They scheduled his deposition for April 9, 2021. Following the subpoena, Connie called Michael prior to his deposition, but he did not answer. On March 26, Connie left the following voicemail:

> Hey, [Michael], it's Connie again. Just give me a call and see if I can get in touch with you this afternoon. I left Lori a message as well. I'm calling in regards to a matter in one of the parcels in Sumner that we believe you and all of us still have ownership in. So we thought that it would be wise to discuss with you and Lori. So if you could give us a call back that would be great. And it's Connie calling in regards to the parcel of land in Sumner that we believe you guys have an ownership interest in as well.

Prior to the subpoena, Connie and Stacey had never indicated to Michael that they believed he still had an ownership interest in the Sumner property.

On March 27, the Otas' children flew to Arizona to see their grandfather, Michael, and his wife Lori Ota (Lori) and urged Michael to talk to the Otas' attorney, Palumbo. Michael had not seen his grandchildren in over 10 years. According to Michael's grandson, Susumu Ota (Susumu), Michael agreed that the Otas' attorneys could call Michael. Michael's recollection differed. He said his grandchildren flew to Arizona to see him unannounced and wanted Michael to talk to Palumbo. However, according to Michael, "[W]e just said we didn't want

to get involved. Bridges have been burned and I actually never want to speak to my son again. That's how contentious everything was." But Michael also testified that he told his grandsons he would "think about" talking to Palumbo.

After the visit, Michael's grandchildren continued to call and leave voicemails for him requesting that he discuss the lawsuit with Palumbo.

On April 1, Susumu exchanged text messages with Lori, Michael's wife, who wrote, "if the attorneys want to call that's fine" and that Michael "is willing to hear from the attorneys. And we can go from there."[5] Palumbo called Michael and left a voicemail identifying himself as the Otas' attorney and that he wanted to talk to Michael. This was the first in about four voicemails Palumbo left for Michael.

On April 6, three days before Michael's deposition, Palumbo left Michael a voicemail that said the following in relevant part:

> I can tell you that Stacey and Connie 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 along the lines of the – the split in the Gen V, LLC. I have no idea what happened between you and your son and I'm sure there's nothing I can do to repair it, but if you would be willing to talk with me, I would really appreciate it. . . .
>
> And then the – my partner who's been working on all this, Lynn Engel, is intimately involved and she knows a lot of the details and we would – we would really appreciate the opportunity to talk with you and 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. They screwed you, they screwed Stacey, they screwed Dan – Connie,

[5] Screenshots of the text messages was submitted as exhibits to Susumu's declaration in support of the Otas' opposition to the motion for sanctions and was considered by the trial court.

> they screwed Dan, and they absolutely should not be permitted to get away with what they – what they did and we – 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.
>
> But there's no question in my mind that they made a deal with all of you to have a partnership in which you would have – your family would have 80 percent, they would have 20 percent. They made payments on the property, which would be like capital contributions, so their percentage probably is a bit larger than 20 percent and we're still working on figuring out how much money your family put into it and how much money they did.
>
> I'm absolutely confident that when you were convinced to voluntarily transfer the property to the Otas – or to the Wakazurus, they had made a commitment that they would hold the property and honor your family's share in the – in the property, which they didn't do. The closest we can tell the property at that point in time was worth about $5 million.
>
> The debt on the promissory note, which was never a promissory note, was a million seven. So even if that was a legitimate promissory note, there was no way under any kind of legal proceeding that they – that they could have recovered more than 1.7 million, and instead, your family voluntarily gave them property worth $5 million and it – without your cooperation and – and Stacey and Connie encouraging you to do this, they never would have gotten the property. And even if you had to pay the million seven debt, you would have been a hell of a lot better off doing that and keeping a piece of property that was worth at least $5 million and I think probably more.
>
> So that's a very, you know, short view, contrary to what – what they claim. Gen V, LLC was formed, it filed tax returns, you signed a deed transferring the property to Gen V, LLC, which you would not have done but for the promises that the Wakazurus were making to you, he and Connie.

The next day, two days before Michael's deposition, Lori received text messages from Susumu, and Michael received multiple voicemails from Palumbo.[6] Susumu followed up with a text message to Lori trying to schedule a conference call with the attorneys, but Lori wrote, "I'm really sorry but there is

[6] It is not apparent from the record the chronological order of the text messages as compared to the voicemails from Palumbo on April 7, 2021.

nothing I can do. What your family did to him is just unforgivable and that's a fact we have accepted to live with" and that there was nothing else she could do at that point. That same day, Palumbo called Michael and left a voicemail stating, "I think that we can work out something that's to your benefit. I know this is a difficult relationship you have with your son and Connie, but we are very – very willing to try to collect money on your – on your behalf as well as [the Otas']." Palumbo followed up the same day with another voicemail telling Michael that his grandsons were thinking about again flying down the next day to talk before the deposition. He stated, ". . . I just wanted to let you know that they're thinking about it so you could call them and say not to bother, but it'd really be I think helpful, certainly helpful for me and I think helpful for you and Lori if we talked before Friday."

Michael had Lori call Palumbo. Lori was very angry and told Palumbo to stop calling and they did not want to talk to them, and she told him that they did not want the grandkids to fly down again.

Michael testified at his deposition, which was held April 9, that he understood Palumbo's voicemails to be "shady" and a "pay for play" scheme, i.e., to constitute a bribe. He also testified that, although the voicemails do not mention the specific desired content of his testimony, he believed the voicemails were intended to convey to him the talking points the Otas and their attorneys wanted him to testify to, and if he did, he would be financially rewarded.

On April 16, the Wakazurus filed a motion for sanctions and provided a transcription of Michael's deposition, which included the transcription of

Palumbo's voicemails. They requested the trial court dismiss the Otas' complaint, disqualify the Otas' counsel, and other sanctions the court deemed appropriate. The Otas opposed the motion, contending that the Wakazurus had "not submitted any evidence that Plaintiffs intended to influence Michael G.'s testimony or made any suggestion or request about the content of Michael G.'s testimony." All parties requested oral argument. The court did not grant the requests for oral argument and entered its ruling based on the pleadings.

On April 30, the court entered its findings of facts, conclusions of law, and order on defendants' motion for sanctions. The court found that the voicemails appeared to show Palumbo communicated the intent to share proceeds of this lawsuit with Michael if the Otas prevailed, and that Palumbo assured Michael that he would "pin" the Otas on such a commitment. The court also made a finding of bad faith:

> 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 plaintiff [Connie] and [Michael]'s grandchildren to persuade [Michael] to speak with Mr. Palumbo. The Court believes that a showing of bad faith has been made.

The court ordered that the Otas' counsel be disqualified from the case and ordered defense counsel to make a referral to the WSBA disciplinary counsel and to police/prosecutors for further investigation. The court stayed the lawsuit stating it would review the status of these referrals and any ensuing

investigations at the end of September 2021. At the time the court entered its order, the trial had been scheduled for June 7.

The Otas and Palumbo filed a motion for reconsideration and clarification. In addition to Palumbo denying he acted improperly, he also asked the court to clarify whether it was disqualifying only him based on the court's language in the order using "counsel" in the singular, or whether the court was disqualifying co-counsel Engel and Krebs as well. Wakazuru responded to the motion asking the court to disqualify all three attorneys because Krebs' declaration in support of the motion for reconsideration stated that he listened to the voicemails Palumbo left for Michael and they were "consistent" with what the three attorneys agreed should have been communicated. The trial court denied the motion for reconsideration and clarified that its previous sanctions order disqualified plaintiffs' counsel, which encompassed Palumbo, Engel, and Krebs.

The Otas and each of the disqualified attorneys filed motions for discretionary review. This court consolidated the motions. A commissioner of this court granted discretionary review.

DISCUSSION

Standard of Review

The parties agree that the trial court's ultimate decision to impose the sanction of disqualification is reviewed for abuse of discretion. Hedger v. Groeschell, 199 Wn. App. 8, 14, 397 P.3d 154 (2017). "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable

grounds or untenable reasons." In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

However, the parties disagree over the standard applied to reviewing the underlying factual basis of the trial court's decision to sanction. The appellants contend that this court's review is de novo because the trial court based its decision solely on the written record, which the appellate court is as well positioned to review and render a decision on. The respondents contend that the trial court's findings should be reviewed for substantial evidence. Under the circumstances of this case, we agree with the respondents. "We review a trial court's challenged findings of fact for substantial evidence." Andren v. Dake, 14 Wn. App. 2d 296, 306, 472 P.3d 1013 (2020).

We recognize that where "the record at trial consists entirely of written documents and the trial court therefore was not required to 'assess the credibility or competency of witnesses, and to weigh the evidence, nor reconcile conflicting evidence,' the appellate court reviews de novo." Dolan v. King County, 172 Wn. 2d 299, 310, 258 P.3d 20 (2011) (internal quotation marks omitted) (quoting Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243, 252, 884 P.2d 592 (1994); see also Robinson v. Am. Legion Dep't of Wash., Inc., 11 Wn. App. 2d 274, 286 n.4, 452 P.3d 1254 (2019).

However, even when the superior court judge rests its ruling entirely on written submissions, the substantial evidence standard of review is appropriate when the matter turns on credibility determinations and a factual finding of bad faith. In re Marriage of Rideout, 150 Wn. 2d 337, 351, 77 P.3d 1174 (2003).

This court has applied such a standard even in a non-family case scenario. Robinson, 11 Wn. App. 2d at 286 (applying substantial evidence review to a written record while recognizing that whether a person acted in good faith is an inherently factual issue).

"'When jurisdiction is . . . conferred on a court or judicial officer all the means to carry it into effect are also given.'" State v. S.H., 102 Wn. App. 468, 473, 8 P.3d 1058 (2000) (second alteration in original) (quoting RCW 2.28.150). In turn, in such situations, "'[d]ecisions either denying or granting sanctions . . . are *generally* reviewed for abuse of discretion.'" Id. (emphasis added) (second alteration in original) (quoting Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 338, 858 P.2d 1054 (1993)). We cannot envision a scenario where an appellate court is in a better position than a trial court to consider in the first instance the factual scenario and circumstances underlying a decision to sanction a party's counsel. In the instant case, the court's finding of bad faith is inherently a factual finding and, by rejecting appellant's general denial of attempting to influence Michael, the trial court made a credibility determination.

Finally, "[t]here is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence." Andren, 14 Wn. App. 2d at 306 (quoting State v. Merrill, 183 Wn. App. 749, 755, 335 P.3d 444 (2014)). Substantial evidence is defined as a "quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." Sunnyside Valley Irrig. Dist. v. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003) (citing Wenatchee Sportsmen Ass'n v.

Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000)). "If the standard is satisfied, a reviewing court will not substitute its judgment for that of the trial court even though it might have resolved a factual dispute differently." Sunnyside Valley Irrig., 149 Wn.2d at 879-80. "The label applied to a finding or conclusion is not determinative; we 'will treat it for what it really is.'" Nguyen v. City of Seattle, 179 Wn. App. 155, 163, 317 P.3d 518 (2014) (quoting Para–Med. Leasing, Inc. v. Hangen, 48 Wn. App. 389, 397, 739 P.2d 717 (1987)).

Challenged Findings of Fact

The appellants challenge multiple findings of fact. First, they challenge finding of fact 4, which provides the following:

> [Michael] is plaintiff [Stacey's] father, and plaintiff [Connie's] father in law. Prior to [Michael's] deposition being noted, the parties seem to agree that plaintiffs had not made any efforts to contact [Michael] for many years. [Michael] apparently knew nothing about this lawsuit, despite the fact that plaintiffs alleged he was one of four partners to their alleged partnership, until defense counsel called him in March 2021 following the plaintiffs' depositions. Prior to his deposition being noted by defendants for April 7, 2021,[7] 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's] voicemail to [Michael] shortly before his scheduled deposition that the plaintiffs believed [Michael] owned an interest in real property involved in this lawsuit given the allegations in Plaintiffs' [sic] complaint.

Specifically, they contend that the court erred in finding that the court had "'some difficulty understanding' why the Otas believed [Michael] has an interest in real property involved in the underlying lawsuit." Appellants question the court's determination that Connie's voicemail was suspect despite it being consistent

[7] The deposition was actually held on April 9, 2021.

with earlier depositions given by Stacey and Connie that Michael was part of the partnership and that agreeing to the forbearance agreement was a way to protect everyone's interest, including Michael's. Whether the Otas' have consistently maintained that the reason Stacey convinced his father to enter into such an agreement in order to protect Michael's interest does not change the fact that 1) the 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 2) 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. We note that while any lack of clarity may have been resolved by a holding a hearing, this court will not substitute its judgment for that of the trial court in this situation. Sunnyside, 149 Wn.2d at 879-80.

Appellants next challenge finding of fact 7, arguing the court erred in finding that "'actions by plaintiffs' counsel seriously concern the Court and need to be referred to appropriate authorities." While we note it is very unusual to

include such directives in a court order imposing sanctions, particularly when a trial court has not conducted a hearing of any kind, this is not a finding of fact and the appellants do not challenge the court's authority to request defense counsel to make referrals to WSBA or police/ prosecutors for further investigation. We need not address it any further.

Appellants also challenge finding of fact 8, contending that the "court erred in finding that it need only consider 'bad faith' to disqualify the Otas' entire legal team and that bad faith requires nothing more than 'inappropriate and improper conduct.'" However, finding of fact 8 provides the following:

> The Court has the inherent authority to "enforce order in the proceedings before it" and to "provide for the orderly conduct of proceedings before it." State v. S.H., 102 Wn. App. 468, 473, 8 P.3d 1058 (2000) (citing RCW 2.28.010(2)-(3)). The Court may, under its inherent authority to control litigation, fashion and impose appropriate sanctions. In re Firestorm, 129 Wn.2d 130, 139, 916 P .2d 411 (1996). In articulating sanctions under its inherent authority, this Court must make a finding of bad faith. Hedger v. Groeschell, 199 Wn. App. 8, 14, 397 P.3d 154 (2017) (citing S.H., 102 Wn. App. at 475). A party may demonstrate bad faith by inappropriate and improper conduct. Andren v. Dake, 14 Wn. App 2d 296, 321, 472 P.3d 1013 (2020) (citing S.H., 102 Wn. App. at 475).

The court merely provided case law to support its findings; it itself is not a finding of fact.

Appellants next challenge finding of fact 10, which states, "The Court has the authority and a duty to see to the ethical conduct of lawyers in proceedings before it and, upon proper grounds, can disqualify an attorney. Hahn v. Boeing

Co., 95 Wn.2d 28, 34, 621 P.2d 1263 (1980). Proper grounds are present here. This is an accurate statement of the law. We address below the appellants challenge of other findings related to bad faith.

Bad Faith

Appellants contend that the trial court applied the wrong legal standard of bad faith and substantial evidence does not support the court's finding of bad faith. We disagree that the trial court imposed the incorrect legal principles in this situation and disagree that there are no sufficient facts to justify the trial court's finding of bad faith.

The trial court cited Andren, which explicitly stated, "[A] trial court's inherent authority to sanction litigation conduct is properly invoked upon a finding of bad faith." Andren, 14 Wn. App. 2d at 321 (citing S.H., 102 Wn. App. at 475). Further, it added,

> "The court's inherent power to sanction is "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Sanctions may be appropriate if an act affects "the integrity of the court and, [if] left unchecked, would encourage future abuses."

Andren, 14 Wn. App. 2d at 321 (alteration in original) (internal quotation marks omitted) (quoting S.H., 102 Wn. App. at 475). The Otas fail to distinguish Andren.

Appellants also cite to Biggs v. Vail, 124 Wn.2d 193, 197, 876 P.2d 448 (1994); Skimming v. Boxer, 119 Wn. App. 748, 754, 82 P.3d 707 (2004); and MacDonald v. Korum Ford, 80 Wn. App. 877, 884, 912 P.2d 1052 (1996) to argue that the trial court did not consider the proper objective standard, and that

it only ruled that bad faith means nothing more than "inappropriate and improper conduct." In the context of considering CR 11 sanctions, those cases discuss that courts should employ an objective standard in evaluating an attorney's conduct.

Contrary to the Otas' argument, the record establishes that the trial court did not base its ruling only on Michael's subjective belief rather than an objective inquiry. While the trial court mentioned Michael's subjective understanding of the voicemails, the court expressly enumerated and considered the whole record in making its determination, including objective evidence—the statements contained in Palumbo's voicemails and the text messages.

The next inquiry is whether substantial evidence supports the finding that Palumbo's statements to Michael established bad faith.

Appellants assert that Palumbo's calls were consistent with standard practice. They argue it was reasonable for them to believe that Michael had an interest in Gen V and thus an interest in the lawsuit, that the Otas intended to honor that interest if they prevailed, and that Michael agreed to receive their phone call.

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.

Appellants contend that Palumbo "never even mentioned [Michael's] potential testimony, much less suggested that he should testify in any certain way" or "suggest that [Michael's] interest in any lawsuit proceeds depended on his deposition testimony, but simply stated the Otas' intent to honor his interest." Appellants challenge finding of fact 9, which provides:

> 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 plaintiff [Connie] and [Michael's] grandchildren to persuade [Michael] to speak with [Palumbo]. The Court believes that a showing of bad faith has been made.

Specifically, appellants challenge the court's language, "The amount mentioned could be viewed as a substantial financial incentive."

The trial court's presentation of Palumbo's statements must be viewed in context and not in isolation. The trial court noted the multiple statements of concern. Palumbo told Michael he thinks the lawsuit could be worth around 3 to 5 million dollars. In the messages left for Michael, the court noted the following statements by Palumbo:

> (1) "I think that we can work out something that's to your benefit"; (2) "we are very – very willing to try to collect money on your – on your behalf as well as theirs"; (3) and "it'd be really be helpful for me and I think helpful for you and Lori [Michael's wife] if we talked before Friday [the date of Michael's deposition]."

Additionally, Palumbo said, "I can tell you that Stacey and Connie 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. . ." This statement communicated to Michael that his chance of receiving money is dependent on the Otas winning their case against the Wakazurus.

As the trial court noted, these statements were made in the context of Palumbo sharing with Michael the Otas' theory of why they should win the case that involved how Palumbo viewed Michael's own interactions with the Wakazurus. Palumbo said, 1) "[The Wakazurus] made a deal with all of you to have a partnership in which you would have – your family would have 80 percent, they would have 20 percent", 2) "when you were convinced to voluntarily transfer the property to the Otas – or to the Wakazurus, they had made a commitment that they would hold the property and honor your family's share in the – in the property, which they didn't do", and 3) "Gen V, LLC was formed, it filed tax returns, you signed a deed transferring the property to Gen V, LLC, which you would not have done but for the promises that the Wakazurus were making to you, he and Connie."

The trial court further alluded to how unexpected this contact was. Michael had no recollection of ever talking to Stacey and the Wakazurus to develop the property as an RV dealership. Michael denied ever discussing verbally or in writing a profit-sharing arrangement. The trial court also emphasized the peculiar timing of this contact. Appellants failed to provide any

explanation as to why it was urgent to let Michael know before the deposition that if the Otas obtained a judgment or settlement, Michael would get a share.

In context, substantial evidence supports the court's finding that "[t]he amount mentioned could be viewed as a substantial financial incentive" for Michael to testify at the deposition consistent with Palumbo's version of events.

Substantial evidence supports the trial court's finding of bad faith as to Palumbo.

Disqualification

Appellants next contend that the trial court erred by not considering lesser sanctions before disqualifying all three counsel. We agree.

A trial court has "the authority and duty to see to the ethical conduct of attorneys in proceedings before it" and, on proper grounds, has the power to disqualify counsel. Hahn, 95 Wn.2d at 34. "'[A] trial court's inherent authority to sanction litigation conduct is properly invoked upon a finding of bad faith.'" Andren, 14 Wn. App. 2d at 321 (quoting S.H., 102 Wn. App. at 475). However, "[d]isqualification of counsel is a drastic remedy that exacts a harsh penalty from the parties as well as punishing counsel; therefore, it should be imposed only when absolutely necessary." Matter of Firestorm 1991, 129 Wn.2d 130, 140, 916 P.2d 411 (1996) (citing MMR/Wallace Power & Indus., Inc. v. Thames Assocs., 764 F. Supp. 712, 718 (D.Conn.1991)).

In Firestorm, our Supreme Court concluded that the trial court erred in imposing the sanction of disqualification under CR 26 when an attorney engaged in ex parte contact with an opposing party's expert witness. 129 Wn.2d at 140. It

reasoned that the facts did not support disqualification because the expert did not have access to privileged information—he was not an integral employee of the company involved in litigation, and he was not privy to litigation strategy. Id. at 141.

The Firestorm court applied a Fisons analysis. Id. at 142 (citing Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d at 355-56). It explained that the Fisons court set forth principles trial courts should follow in fashioning appropriate sanctions under CR 26:

> First, *the least severe sanction that will be adequate to serve the purpose of the particular sanction should be imposed.* The sanction must not be so minimal, however, that it undermines the purpose of discovery. The sanction should insure that the wrongdoer does not profit from the wrong. The wrongdoer's lack of intent to violate the rules and the other party's failure to mitigate may be considered by the trial court in fashioning sanctions.
>
> The purposes of sanctions orders are to deter, to punish, to compensate and to educate.

Firestorm, 129 Wn. at 142 (emphasis added) (citing Fisons, 122 Wn.2d at 355-56)). The court noted that discovery sanctions in general are meant to prevent attorney misconduct, and to the extent possible, individual parties should not be penalized for their attorneys' misconduct in the discovery process. Id. at 143. The Firestorm court held that the trial court failed to follow the guidelines set forth by Fisons, and the record did not reveal whether the court considered any other sanctions before disqualifying counsel—it noted that the court made no findings either way on this issue. Id. But the Supreme Court determined that after considering sanctions in light of the facts of that case, disqualification was not the least severe sanction adequate to serve the purpose of sanctions in that case.

Id. at 145. It accordingly reversed the trial court's order of disqualification and ordered reinstatement of counsel. Id. It ordered that on remand, the trial court must fashion an appropriate remedy consistent with the principles and guidelines set forth in the opinion. Id.

This court followed suit in Foss, adopting the principles of Firestorm and Fisons. Foss Mar. Co. v. Brandewiede, 190 Wn. App. 186, 189, 359 P.3d 905 (2015). In Foss, the trial court disqualified counsel based on an attorney's access to privileged information through discovery under CR 26(b). Foss, 190 Wn. App. at 189. We determined the trial court failed to consider on the record the principles and guidelines set forth in Firestorm and Fisons regarding (1) prejudice, (2) counsel's fault, (3) counsel's knowledge of privileged information, and (4) possible lesser sanctions. Id. In regard to the fourth factor, we noted that the "harsh sanction of disqualification of counsel should be imposed only if it is the least severe sanction adequate to address misconduct in the form of improper access to privileged information." Id. at 197. We further explained that "[n]o one factor predominates or has greater importance than others" and "[a]t a minimum, the record must permit us to evaluate the trial court's consideration of those four factors." Id.

Although the context in which the court disqualified counsel in Firestorm and Foss were different than the basis for disqualification in the instant case, we see no reason why the underlying principles and guidelines that relate to the severity of the sanction—disqualification of counsel—would not similarly apply

here.[8] While the instant case does not involve a discovery violation under CR 26 and does not involve concerns about obtaining privileged information, it does concern the integrity of the court and, if left unchecked, would encourage future abuses.

Because we recognize that disqualification of counsel should be imposed only when absolutely necessary as it is a drastic remedy that exacts a harsh penalty from the parties as well as punishing counsel, when a trial court disqualifies counsel it must consider lesser sanctions in order to determine that disqualification is absolutely necessary. Appellants argue that the sanction of disqualification was far too severe because it forced the Otas to hire an entirely new legal team and recreate years of work at considerable time and expense weeks before trial.[9]

Following the applicable principles and guidelines from Fisons and Firestorm, the court should impose the least severe sanction that would be adequate to serve the purpose of the particular sanction. The sanction should ensure that the wrongdoer does not profit from the wrong. The wrongdoer's lack

[8] The Otas also cite to Burnet v. Spokane Ambulance, 131 Wn.2d 484, 933 P.2d 1036 (1997) (fashioning a three-part test based on Fisons that the court must consider on the record before imposing severe discovery sanctions under CR 37(b)). Under Burnet, before a trial court imposes a severe sanction, it should consider on the record (1) whether a lesser sanction would probably suffice, (2) whether the violation was willful of deliberate, and (3) whether the violation substantially prejudice the opposing party. Id. The Burnet analysis applies when severe sanctions are imposed for discovery violations and when a trial court excludes untimely evidence submitted in response to summary judgment motions. Keck v. Collins, 184 Wn.2d 358, 369, 357 P.3d 1080 (2015).

[9] The trial court stayed the matter until at least September 30, 2021. The case remains stayed pending this appeal.

of intent to violate the rules and the other party's failure to mitigate may be considered by the trial court in fashioning sanctions.

Though the court entered written findings and conclusions identifying specific grounds it relied on as it related to Palumbo's actions, it made no mention of whether it considered lesser sanctions. Because there was no oral argument below, the record does not permit us to otherwise evaluate whether the trial court considered lesser sanctions. See Foss, 190 Wn. App. at 197 (holding that at a minimum, the record must permit us to evaluate the trial court's consideration of the factors outlined in Firestorm and Fisons).

Additionally, we note that the court's findings focused entirely on Palumbo's actions alone. It was only after the appellants submitted a motion for reconsideration and clarification the Wakazurus argued and the trial court clarified that disqualification of counsel should also apply to Krebs and Engel based on a declaration from Krebs. In his declaration in support of opposition to the motion for sanctions, Krebs stated, "I have listened to Ralph Palumbo's voicemail messages to Michael G. I believe Ralph Palumbo's messages are consistent with what he, Lynn Engel and I agreed we should communicate." The court did not enter any findings related to Krebs or Engel in its initial findings, nor did the court make additional findings when it clarified that the disqualification of counsel included Krebs and Engel.

Krebs testified that the purpose of calling Michael "was first to explain the facts of [the Otas'] case and offer to provide him with any documents that might refresh his memory so that he could testify truthfully and accurately." However,

Palumbo's voicemails did not just generally discuss the Otas' case, or share the fact that he generally believed that Michael also had an interest in the case, or offer to provide specific documents to refresh Michael's memory. Palumbo's voicemails went much further.

The record is unclear on how Krebs' admission that Palumbo's messages were "consistent" with what the three attorneys agreed should be communicated sufficiently imputes Palumbo's conduct to Krebs and Engel. Specifically, the record is unclear on why Palumbo's statements and timing of those statements support imposing the most severe sanction of disqualifying Krebs and Engel. We reverse the order disqualifying Krebs and Engle because no findings support either acted in bad faith.

Appellants argue that, even if the voicemails were improper, the Wakazurus were not prejudiced because they did not "profit" from the alleged "wrong." Specifically, they argue there was no prejudice because the Otas did not gain an advantage from the alleged misconduct. Certainly, in certain scenarios, a trial court could consider the fact that a party benefited from bad faith conduct when determining sanctions, which would suggest that the opposite is true as well. But that does not mean that a court should not impose any sanctions. The purposes of sanctions are to deter, punish, compensate and educate. Fisons, 122 Wn.2d at 356. "[A]ttempts to influence a witness to change his testimony or to absent himself from a trial or other official proceeding, necessarily have as their purpose and it is their natural tendency to obstruct

justice. They are offenses against the very object and purpose for which courts are established." State v. Stroh, 91 Wn.2d 580-582, 588 P.2d 1182 (1979).

Appellants argue that nothing in the record supports Palumbo trying to "influence" Michael's testimony because they were simply reiterating what the Otas' presented to be true. It is true that nothing in the record suggested that prior to Michael's deposition, Palumbo knew that Michael denied ever having agreed verbally or in writing to a profit-sharing agreement with the Wakazurus. At the same time, Palumbo's voicemails suggested that he was not interested in finding out what Michael's position was, but instead suggested what it should be in order for the Otas to win their case and share their settlement or judgment with Michael.

However, despite substantial evidence supporting the finding of bad faith as to Palumbo, because the trial court did not expressly consider possible lesser sanctions, we also reverse the trial court's disqualification order as to Palumbo.

Reassignment

The Otas request this court reassign this matter to a different judge on remand. However, the Otas have not established prejudice sufficient to justify reassignment. 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). Imposing sanctions is not enough to rise to the level of bias or perceived bias. We deny the Ota's request to reassign this matter to a different judge on remand.

CONCLUSION

Substantial evidence supports a finding of bad faith only as to Palumbo. Even with that finding, we conclude the trial court's order of disqualification does not satisfy the applicable principles and guidelines of Fisons and Firestorm. We therefore reverse the trial court's order of disqualification as to all three counsel. On remand, any order of disqualification will require, at minimum, the consideration and analysis of possible lesser sanctions as to Palumbo.[10]

Coburn, J.

WE CONCUR:

Díaz, J.

Smith, A.C.J.

[10] Because we reverse the order of disqualification, we need not consider the Wakazurus' request for attorney fees under RAP 18.1(a).

APPENDIX B

Ota v. Wakazuru, No. 82840-1-I

Order Denying Motion for Reconsideration

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

MICHAEL S. OTA and CONNIE OTA, a married couple, Appellants, v. RICHARD M. WAKAZURU and KENNETH WAKAZURU, Respondents.	No. 82840-1-I (consolidated with 82841-0-I, 82842-8-I, 82843-6-I) ORDER DENYING MOTION FOR RECONSIDERATION

The appellants, Michael and Connie Ota, Joshua Krebs, and joinder Lynn Engel all having filed a motion for reconsideration herein, and a majority of the panel having determined the motion should be denied; now, therefore, it is hereby

ORDERED the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:

Coburn, J.

APPENDIX C

RCW 7.21.010, Definitions

RCW 7.21.010 Definitions. The definitions in this section apply throughout this chapter:

(1) "Contempt of court" means intentional:

(a) Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to impair its authority, or to interrupt the due course of a trial or other judicial proceedings;

(b) Disobedience of any lawful judgment, decree, order, or process of the court;

(c) Refusal as a witness to appear, be sworn, or, without lawful authority, to answer a question; or

(d) Refusal, without lawful authority, to produce a record, document, or other object.

(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. [1989 c 373 § 1.]

APPENDIX D

RCW 7.21.040, Punitive Sanctions – Fines

RCW 7.21.040 Punitive sanctions—Fines. (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 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.

A judge making a request pursuant to this subsection shall be disqualified from presiding at the trial.

(d) If the alleged contempt involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial of the contempt unless the person charged consents to the judge presiding at the trial.

(3) The court may hold a hearing on a motion for a remedial sanction jointly with a trial on an information or complaint seeking a punitive sanction.

(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 dollars or imprisonment for up to three hundred sixty-four days, or both. [2011 c 96 § 3; 2009 c 37 § 1; 1989 c 373 § 4.]

Findings—Intent—2011 c 96: See note following RCW 9A.20.021.

CERTIFICATE OF SERVICE

I certify that I caused to be filed and served a copy of the foregoing **PETITION FOR REVIEW** on the 19th day of April 2023 as follows:

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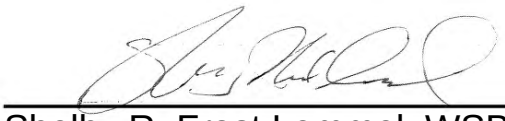

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