

NO. 67351-3-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

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

Appellant,

v.

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

Respondents,

REPLY BRIEF OF APPELLANT

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I. SUMMARY OF REPLY

The first footnote on the first page of Respondents' Brief captures the trial court's error and the central fallacy of Wiese's argument. Faced with the inescapable reality that Kenco was his client, and is the real party in interest in this case, Wiese has now fabricated two new legal entities: "Kenco/Kang" and "Kenco/Sleeping Tiger." There is no factual or legal support for this contrivance. Kenco is one company, it hired Wiese to be its lawyer, and it is the proper plaintiff here. If the trial court's ruling stands, and this action is dismissed, there is no other person or entity to substitute that would be qualified to assert Kenco's claim for legal malpractice. This would result in the "protection [of Wiese] from the consequences of [his] own malpractice" which was emphasized in *Kommavongsa v. Haskell* as an outcome to be avoided at all costs. 149 Wn.2d 288, 311, 67 P.3d 1068 (2003).

II. REPLY

A. **Kenco, and only Kenco, is the real party in interest and the only proper plaintiff.**

Kenco has asked in brief after brief who, if not Kenco, is the "real party in interest" for purposes of filing a legal action against its attorney for malpractice committed during the course of the attorney's representation of Kenco in a commercial real estate transaction. (Br. of

Appellant, at 29; CP 758) Wiese has finally responded to Kenco's challenge by inserting a footnote that indicates "for clarity" that its brief refers to Kenco prior to the acquisition of its ownership by Sleeping Tiger as "Kenco/Kang" and after the acquisition as "Kenco/Sleeping Tiger."¹ (Br. of Resp't, at 1) The remainder of Wiese's brief treats Kenco as if it had been divided into two phantom legal entities, "Kenco/Kang" and "Kenco/Sleeping Tiger." The misrepresentation continues with Wiese's assertion that the "[o]wnership of the claim resides not with Kenco as owned by Sleeping Tiger, but with Kenco as owned by the Kangs" and culminates with Wiese's conclusion that "Kenco/Kang is the real party in interest here because they enjoyed the attorney-client relationship with Mr. Wiese and Inslee Best, not Kenco/Sleeping Tiger." (Br. of Resp't, at 15 and 34).

As a fundamental principle of corporation law, Kenco, a Washington limited liability company, is a legal entity whose existence is separate and distinct from the identity of its owners, regardless of whether

¹In support of this fallacy, Wiese cites only the Legal Services Agreement and the Wiese legal bills, both of which plainly undermine this argument. (Br. of Resp't, at 34) The Legal Services Agreement states: "THIS AGREEMENT describes the basis on which this law firm will provide legal services to KENCO ENTERPRISES NORTHWEST LLC and how it will be billed for those services." (CP 539)(all caps in original) The first page of the bills lists "Kenco Enterprise Northwest, LLC" under "CLIENT INFORMATION." (CP 494)(all caps in original)

the owner happens to be the Kangs, Sleeping Tiger or any other third party. *State v. Northwest Magnesite Co.*, 28 Wn.2d 1, 41, 182 P.2d 643, 663-64 (1947). Kenco cannot be segregated into two distinct entities whenever the majority of its ownership interest happens to change hands, and such a result certainly cannot be accomplished through a footnote. Kenco remains the same entity, for purposes of commencing malpractice litigation or otherwise, regardless of who owns its shares or membership interest at any particular point in time. *State v. Tacoma Railway and Power Company*, 61 Wn. 507, 513 (1911); *LaHue v. Keystone Inv. Co.*, 6 Wn. App. 765, 777, 496 P.2d 343, 350 (1972); *Zimmerman v. Kyte*, 53 Wn. App. 11, 18, 765 P.2d 905, 909 (1988); 12B W. Fletcher, *Private Corporations* § 5910 (1984).

Kenco Enterprises Northwest, LLC—and only Kenco Enterprises Northwest, LLC—is the real party in interest and the proper plaintiff to assert this legal malpractice claim; it has done so by filing its Complaint in this case. Neither “Kenco/Kang” nor “Kenco/Sleeping Tiger” exists as a legally recognizable entity. They have been fabricated by Wiese in a desperate attempt to respond to Kenco’s challenge to designate the “real party in interest” for purposes of this litigation, if it is not Kenco.² This

²Consider the practical consequences if Wiese’s claim that “ownership of the claim resides not with Kenco as owned by Sleeping Tiger, but with

response underscores the absurdity of Wiese’s position and goes to the very heart of this appeal. Kenco, and only Kenco, is the real party in interest, and it is the proper plaintiff here.

B. Wiese ignores the narrow holding of *Kommavongsa v. Haskell*.

In its 50-page brief, Wiese never addresses the explicit restriction with which the Washington Supreme Court began its opinion in

Kommavongsa v. Haskell:

This case, which was certified for direct review by Division Three of the Court of Appeals, raises a narrow question of first impression in Washington: Whether a legal malpractice claim is assignable to an adversary in the same litigation that gave rise to the alleged legal malpractice. We answer that narrow question in the negative on grounds of public policy, leaving for another day the broader issue of whether legal malpractice claims may be assignable in other circumstances.

149 Wn.2d 288, 291, 67 P.3d 1068, 1070 (2003) (*emphasis added*). Even the trial court in this matter recognized that it was extending the holding of *Kommavongsa*: “...the defendant asks this Court to extend [the *Kommavongsa*] ruling not without limit, but certainly one step back from the ‘underlying litigation’. And that’s what I am prepared to do today.”

Kenco as owned by the Kangs” were true. If so, this malpractice action would be brought by the Kangs on behalf of a company they do not own or operate. The Kangs would have no standing. If their claim survived and they won, any payment on the judgment would either be to Kenco (and the Kangs would be unable to negotiate the instrument) or “Kenco/Kangs” (an entity that does not exist). The practical application of Wiese’s invention underscores its artifice.

(RP 26) The trial court alluded to the reasoning in *Kim v. O'Sullivan*, 133 Wn. App. 557, 137 P. 3d 61 (2006), that the transfer of ownership of Kenco was effectively an assignment and the bar should apply. (RP 26) Yet the trial court never addressed why, even if there was an assignment, the bar should apply when the assignment did not occur in the same litigation that gave rise to the malpractice. This is especially important because the policy considerations expressed in *Kommavongsa* apply only when the malpractice was committed in the same litigation. The trial court observed that the negligent drafting of the contract in the real estate transaction three years before the litigation does in some way “underlie” the litigation, but did not elaborate why such a tenuous connection would justify the drastic extension of *Kommavongsa* beyond its narrow holding. (RP 26) No such justification exists.

In both *Kommavongsa* and *Kim* the attorney’s malpractice occurred during the course of the litigation of a personal injury action. The losing party thereafter assigned his malpractice claim to his opponent in settlement of all claims in exchange for the assignment of the malpractice claim against the attorney who represented him. Thus, the narrow legal issue involved in *Kommavongsa* was “whether a legal malpractice claim is assignable to an adversary in the same litigation that gave rise to the alleged legal malpractice.” 149 Wn.2d at 291. Based on

the policy considerations advanced by the court—i.e. the shifting of legal position, conflicts of interest, and concerns about representing indigent defendants—the *Kommavongsa* court insisted on the existence of a direct connection between the negligent services and the litigation. It never considered restricting the free assignability of a claim when the services were rendered by another attorney in a transaction which preceded the trial. *Id.* In *Kommavongsa*, those negligent legal services were performed during the course of litigation itself, resulting in a decision which is limited in its application to the “same litigation.” By contrast, the negligent legal services in this case were performed during a real estate transaction years prior to the litigation. The litigation was handled by a different lawyer and firm and the malpractice issue was never raised at trial. There can be no dispute that, even if an assignment was completed, it had no relationship to Wiese’s negligent legal services.

Wiese argues that the *Kenco v. Sleeping Tiger* collection action is an essential portion of this malpractice action. (Br. of Resp’t, at 29-30) Although the consequences of Wiese’s malpractice were ultimately inflicted at the trial, the quality of Wiese’s services was simply never under consideration. The foundation of *Kommavongsa*’s limited holding, of course, was directed at the assignment of a claim for legal malpractice that occurred during the course of the litigation itself.

C. Kenco was damaged by Wiese's negligence.

Over and over, Wiese argues that Kenco sustained “zero damages” from Wiese’s negligence because the jury awarded “zero dollars” as damages in Kenco’s lawsuit against Sleeping Tiger. (Br. of Resp’t, at 3, 7, 8, 11, 15, 21 24) Wiese even tells this Court that the “Stipulated Judgment is the only ‘proof’ of the current damage claim in the record.” (*Id.*, at 38) This assertion is inaccurate and can be demonstrably rebutted by the results of the trial.

1. Wiese cannot dispute that Kenco was damaged by the cancellation of its \$1,350,000 promissory note.

Wiese’s contention that Kenco sustained “zero damages” because the jury awarded “zero dollars” ignores the fact that Kenco was the plaintiff in the *Kenco v. Sleeping Tiger* action. Wiese admits that in the underlying real estate transaction, Sleeping Tiger delivered (as part of the purchase price for the Hotel) a \$1,350,000 promissory note to Kenco secured by a deed of trust. (*Id.* at 5) (CP 175) Wiese also admits that Sleeping Tiger defaulted on the \$1,350,000 note and that default was the basis for Kenco’s collection action against Sleeping Tiger. (*Id.*) But, Wiese fails to acknowledge that the jury’s verdict of “zero dollars” resulted in the cancellation of the promissory note. There is no question, in other words, that Kenco lost \$1,350,000 of the amount Sleeping Tiger

had agreed to pay for the Hotel, solely by virtue of the jury verdict. The notes' interest provisions (both normal and default interest) provide an additional \$390,375 in accrued interest that Kenco lost at trial.³

There is also no question that Kenco would have recovered \$1,350,000, plus accrued interest, in that collection action against Sleeping Tiger had Wiese properly and non-negligently drafted the sales agreement to protect Kenco against all misrepresentation and breach of warranty claims. The jury awarded “zero dollars” because it concluded the note was unenforceable due to the exact affirmative defenses and counterclaims against which Wiese was hired, but failed, to protect. To claim that Kenco was not damaged because the jury awarded “zero dollars” is to fundamentally misrepresent the basis of the litigation. The moment the jury came back with that verdict—prior to the entry of Judge Bradshaw’s judgment—Kenco had lost \$1,350,000, plus accrued interest, and was so damaged by Wiese’s negligence.

³The \$1,350,000 promissory note, which was an exhibit at trial in the *Kenco v. Sleeping Tiger* litigation, provides for a 5% interest rate and an 18% default rate. (CP 175) Sleeping Tiger paid the interest through May 2009; default interest began to accrue in January 2008. (CP 856-858) Regular interest at 5% from June 2009 to December 2009 is \$39,375. Default interest at 13% from January 2008 to December 2009 is \$351,000. Kenco thus lost the right to collect \$390,375 in accrued interest.

2. Wiese admits \$140,000 in damages to Kenco and does not dispute that attorney fees were awarded to Sleeping Tiger.

In addition to the \$1,350,000 lost by Kenco, plus at least \$390,375 in accrued interest, Wiese admits that the jury awarded \$140,000 in damages to Sleeping Tiger. (Br. of Resp't, at 9) Furthermore, Wiese does not dispute that, on February 12, 2010, the trial court awarded \$207,757 in legal fees and costs to be paid to Sleeping Tiger as the prevailing party in the note collection action.⁴ (CP 603-05; CP 617; CP 624-25; CP 653) Thus, well before the allegedly "collusive" stipulated judgment, Kenco had already sustained over \$1,990,000 in damages.

3. The additional \$3 million in damages was supported by evidence at trial and determined by Judge Bradshaw who sat in equity on Sleeping Tiger's rescission claim.

Wiese argues that the \$3 million judgment should be ignored by this Court because: (a) it was not supported by evidence at trial; and (b) it was the product of "collusion" by the parties. Both contentions are unsupported by the evidence.

- (a) Damages evidence was admitted in the *Kenco v. Sleeping Tiger* collection action.

Wiese's sole basis for the first premise is that no damages testimony was offered due to a pre-trial order limiting the testimony on

⁴ Wiese left the \$207,757 award out of its recitation of facts to this Court. (Br. of Resp't, at 7-12)

damages that could be offered at trial, including the testimony of the damages witnesses, Gerald Adams and John Taffin. (Br. of Resp't, at 8) Wiese would have this Court believe that the trial court simply granted Kenco's motion to exclude testimony on damages and all testimony regarding damages was in fact excluded. The record reveals a more complicated resolution than Wiese suggests, including several hearings on the matter, which culminated in the Court directing Kenco's counsel to file a declaration of his objections to the ruling. (CP 988-990; CP 1024) Although the motion *in limine* was initially granted in some part, as the trial progressed, significant evidence on damages was admitted during the course of the trial. (CP 622-24) Both Gerald Adams and John Taffin were permitted to testify at length regarding damages. (CP 1023-1025) Sleeping Tiger introduced evidence of the applicable capitalization rate, the amount of the overstatement of net income by Kenco, and even the mathematical formula for recalculating the proper purchase price based on actual net income. (CP 623-24) The only component of damages actually disallowed by Judge Bradshaw was the ultimate conclusion, *i.e.*, what the fair purchase price would have been if not for Kenco's failure to disclose all operating expenses. (CP 623-24) The introduction of damages evidence was independently confirmed by Judge Bradshaw's specific

findings that the testimony at trial “established by a preponderance of the evidence” each and every element of damages. (CP 1071)

- (b) Any alleged “collusion” is overcome by the agreement of both parties to submit to whatever damages Judge Bradshaw found and by the fact that the jury’s award was deficient on its face.

Neither the court in *Kommavongsa* nor *Kim* was sitting in equity as Judge Bradshaw was on Sleeping Tiger’s claim for rescission. The contractual nature of the collection action, and the detailed findings of fact and conclusions of law that ultimately resulted, distinguish this malpractice action from those cases. Any concern regarding potential collusion in this case is cured by the role of an independent judge, sitting in equity, who issued a judgment after a two-week trial. Wiese paints the image that Sleeping Tiger arm-twisted Kenco into an agreement but, importantly, the parties’ request was for the court to “pass independent judgment” and use “its own kind of level scrutiny as to whether these additional elements of damages were adequately supported in the record.” (CP 1049-1050). The parties were bound to whatever damages the judge found. Judge Bradshaw did not simply accede to the parties’ request to sign a stipulated judgment; he was undeniably aware of his unique role. Judge Bradshaw stated:

Now, as you’ve already anticipated validly, there are post-verdict proper mechanisms given proper evidence within the Court’s discretion. One is a motion for additur. Second

is equitable power this Court has under these particular claims, or at least partial of the claims...

In support of that, whether the remedy is found in equity or the additur, I would request from the parties, or at least the movement here, proposed findings of fact that as best as possible track with the testimony taken at trial.

(CP 1051-52) As instructed by Judge Bradshaw, the parties presented a detailed Judgment Summary with proposed Findings of Fact and Conclusions of Law that were meticulously supported by the evidence produced at trial. The court reviewed the Findings, Conclusions, and Judgment—including the independently supported damages in the amount of \$3,014,708—and signed and entered an order on July 5, 2010.

(CP 1069)

Wiese argues that the Findings, Conclusions and Judgment “did not even pretend to comply with RCW 4.76.030” which requires a finding that a jury verdict was “so excessive or so inadequate as unmistakably to indicate that the amount of the verdict must have been the result of passion or prejudice.” (Br. of Resp’t, at 20) Wiese’s conclusory argument is that the difference between zero and \$3 million is so large that the judgment cannot meet this standard. In fact, Judge Bradshaw explicitly complied with RCW 4.76.030 and with a firm basis. The verdict was deficient and incomprehensible on its face. The jury was asked if Sleeping Tiger had established its affirmative defense and counterclaim for negligent

misrepresentation, and the jury answered: “Yes.” (CP 965) The jury was asked if Sleeping Tiger had established its affirmative defense and counterclaim for fraud, and the jury answered: “Yes.” (CP 965) The jury was asked if Sleeping Tiger had established that Kenco breached contractual warranties, and the jury answered: “Yes.” (CP 966) Despite the fact that liability was established and evidence of significant damages was offered at trial, the jury nonetheless awarded no damages to Sleeping Tiger. (CP 966) This is an inadequate award on its face. Judge Bradshaw considered RCW 4.76.030 in his judgment summary:

This Court, sitting in equity over Sleeping Tiger’s rescission claim, evaluated the testimony of all lay and expert witnesses, reviewed all trial exhibits submitted by the parties with respect to Sleeping Tiger’s claims for damages, and agrees with the parties that substantial evidence was introduced in support of the categories of damages set forth above and the respective amounts for each category. This Court further reviewed the Special Verdict, and having heard the explanations provided by the Jury foreman under oath for the jury’s findings, agrees that Sleeping Tiger has a good faith basis to move for *additur* or, in the alternative, motion for new trial on damages pursuant to CR 59(a)(5),(6),(7) and (9) and RCW 4.76.030.

(CP 1071) Wiese’s claim of collusion is without merit. If any question exists, then it is a genuine issue of material fact and inappropriate for summary judgment determination.

D. Kenco has not shifted its position.

1. Kenco's position here is consistent with its position in the transaction and the *Sleeping Tiger v. Kenco* litigation.

Kenco has not engaged in a “shameless shift” of its position. (Br. of Resp’t, at 3) Kenco argues now, and has always argued, that it intended to make no representations in the transaction, including any relating to the accuracy of its financial statements. Wiese cites his own testimony which validates Kenco’s argument that it intended to disclaim any representations. (*Id.*, at 6, *citing* CP 123) The fact that Wiese failed to accomplish this goal does not mean that Kenco has shifted its position; it merely means that Kenco’s lawyer failed to fulfill his duty.

Wiese claims that there is no evidence that predates the Settlement Agreement that the Kangs instructed Wiese’s “as is, where is” addendum to include a disclaimer as to the warranties relating to the hotel’s past financial performance. (*Id.*, at 19) Wiese’s own testimony, however, predates the Settlement Agreement and confirms that the Kangs, in fact, instructed Wiese to ensure that the “as is, where is” addendum covered all aspects of the transaction, including the hotel’s financial performance. (CP 570-571)

Wiese later claims that the Settlement Agreement created a contradiction because it required “Kenco/Kang to represent that he

requested that Mr. Wiese draft the “as is, where is” addendum to include the hotel’s past financial performance.” (Br. of Resp’t, at 24) Again, Kenco is not contradicting itself. Kenco’s claim is that it instructed Wiese to protect it and Wiese failed.

2. A true “shameless shift” would look demonstrably different than Kenco’s position here.

The *Kommavongsa* Court was concerned with a “shameless shift” like the following example: a driver hits a pedestrian; the pedestrian sues the driver claiming that the driver was negligent; the pedestrian wins; the driver assigns to the pedestrian a malpractice claim against the driver’s lawyer (an assignment in the same litigation that gives rise to the malpractice); the pedestrian then sues the lawyer but now claims the driver was not negligent and instead claims that the lawyer was negligent in failing to properly defend driver. This is the stuff of a shameless shift. Here, Kenco sought protection in the contract and so instructed Wiese. Wiese claimed he protected Kenco, so Kenco argued this at trial (with Wiese’s sworn testimony as evidence). Kenco lost the trial and is now suing Wiese for failing to protect Kenco. There is no contradiction here. There is no shift of positions, shameless or otherwise.

3. Wiese's negligent drafting is not a position. It is a fact irrespective of any alleged assignment of a claim.

Wiese argues that “Kenco/Kang” argued in *Kenco v. Sleeping Tiger* that “the ‘as is, where is’ addendum supported its collection action on its promissory note and defeated Sleeping Tiger’s counterclaims.” (Br. of Resp’t, at 24) But now, the argument goes, “Kenco/Sleeping Tiger” takes the “opposite position, that the ‘as is, where is’ addendum did not protect it from Sleeping Tiger’s counterclaims and resulted in a voided promissory note.” (*Id.*)

The “position” is not a position at all, it is fact. The “as is, where is” clause *did not* protect Kenco from the counterclaims and *it did* result in a voided promissory note. The very jury verdict that Wiese brandishes throughout its brief is proof of this fact. When the jury awarded “zero dollars” to Kenco on its central claim—the breach of the promissory note—the jury voided the promissory note and all obligations on the note ceased. (CP 964-966) This is not a “position” taken by Kenco. Wiese was instructed by its corporate client to protect Kenco from exposure to post-closing liability. Kenco believed Wiese and made those arguments at trial. After Kenco painfully learned at trial that Wiese was wrong and Kenco was not protected, Kenco filed this malpractice action claiming that Wiese did not protect it. Stating the fact of a lawyer’s negligence is

standard for any victim of legal malpractice, regardless of any alleged assignment of the claim. No matter who owns Kenco, it would rightfully make the same allegations in this malpractice action.

E. Public policy does not support dismissal.

Wiese claims that “if assignments of legal-malpractice claims were allowed, it would deter lawyers from representing judgment proof defendants...” (Br. of Resp’t, at 2) This would be true if and only if the assignment occurred in the same litigation that gave rise to the malpractice, as occurred in both *Kommavongsa* and *Kim*. Wiese relies on Mallen and Smith’s *Legal Malpractice* treatise which states “a fundamental policy reason for not allowing an assignment is the undesirable risk of tempering an attorney’s zeal by the concern that a present or prospective adversary may become the holder of the client’s alleged legal malpractice action.” (Br. of Resp’t, at 27, *citing* Mallen and Smith, *Legal Malpractice* § 7.12 (2011)) Here there was no such risk because Sleeping Tiger and Mr. Wiese were not present or prospective adversaries, but were instead on the other side of the transaction consummated years prior. Neither Wiese nor the trial court articulated why allowing an assignment of a malpractice claim related to an earlier transaction would somehow chill the representation by different lawyers in later litigation. Of course, it would not.

F. Respondent's brief misrepresents important facts.

Wiese misrepresents several important facts in its brief. First, Wiese repeatedly declares that the Kangs were “financially compromised,” yet Wiese never provides a single citation to the record to support this contention. (Br. of Resp’t, at 14, 15, 27) There is no evidence that the Kangs were financially compromised. On the contrary, at closing of the hotel sale, Kenco (which was then wholly owned by the Kangs): received a cash payment of \$2,015,915; it was relieved of the obligation of paying over \$3.7 million in debt; and it began receiving over \$5,000 per month payments which continued until shortly before the trial commenced. (CP 205-25) The only evidence in the record confirms that the Kangs had access to large sums of money.

Wiese claims that no assets were transferred to Sleeping Tiger when it took ownership of Kenco, yet Supplemental Answers to Interrogatories (answered many months before the close of discovery) discuss detailed assets that Sleeping Tiger obtained when it assumed control of Kenco including the ability to directly negotiate with banks. (CP 607-608)

Wiese claims that “the hotel books and records are personal property” and were included in the definition of “Property” in the PSA (thus allegedly exculpating Wiese from his negligence). (Br. of Resp’t, at

7) In fact, the definition of “Property” in the PSA does not include personal property. (CP 147) “Personal property” is separately defined on a completely different page. (CP 151) This left Kenco vulnerable to Sleeping Tiger’s counterclaims in litigation and is why Kenco’s collection action was defeated.

Finally, Wiese suggests that Sleeping Tiger “lost at trial” and that Kenco had “successfully defended against Sleeping Tiger’s claims.” (Br. of Resp’t, at 1 and 3) As summarized above, Sleeping Tiger decisively prevailed at trial.

G. Wiese cites inapplicable authority and statutes while misrepresenting the holding of applicable law.

Fundamentally, Wiese’s position is based on the application of two different theories, neither of which is valid or has any legal support. First, Wiese contends that Kenco assigned a claim for legal malpractice which is invalid under the so-called “*Kommavongsa* rule.” In reality, Kenco never assigned or otherwise transferred anything to anyone; therefore, *Kommavongsa* does not apply to this case. The second invalid theory is that the change in Kenco’s ownership from the Kangs to Sleeping Tiger should be treated as if Kenco’s malpractice claim somehow was “assigned” to Sleeping Tiger. Based on fundamental principles of corporation law, the corporation’s assets, including any potential legal

claims against a third party, are unaffected by any change in the names of its owners. In its Brief, Kenco implored Wiese to provide precedent for the application of *Kommavongsa* in the absence of an assignment and the notion that a prohibited assignment can potentially occur by virtue of a change in a corporation's owners. Significantly, Wiese has been unable to provide even a single decision from any jurisdiction to support either of its arguments. This is because none exists.

1. The out-of-state cases cited by Wiese support Kenco's position.

Wiese cites seven out-of-state decisions regarding the assignment of a legal malpractice claim involving a corporation and admits that the "decisions support the corporate assignment of a malpractice claim." (Br. of Resp't, at 32-34) Wiese then cites an inapplicable California decision that barred a shareholder's malpractice action when the shareholder purchased the chose in action in bankruptcy, but the right to sue was with the trustee, not the debtor. *Curtis v. Kellog & Andelson*, 73 Cal. App. 4th 492, 86 Cal.Rptr. 2d 536 (2d Dist 1999). Wiese's next citation is a Tennessee decision which likewise prohibited a malpractice action when an individual filed for bankruptcy and the bankruptcy trustee transferred the chose in action to a corporation owned by the individual. *Can do. Inc., Pension and Profit Sharing Plan & Successor Plans v. Manier, Herod, Hollabaugh and Smith*, 922 S.W.2d 865 (Tenn. 1996). Here, obviously,

the claim was brought by the corporation who was the client, not a shareholder, and there was no transfer or assignment in a bankruptcy action. These decisions are inapposite.

Wiese finally cites two decisions from Indiana (Br. of Resp't, at 36-37), which are perhaps the most instructive because the Washington Supreme Court has viewed Indiana decisions on these issues with approval. *Kommavongsa*, 149 Wn.2d 288, 307. In Wiese's first Indiana citation, *Summit Account & Computer Serv. Inc. v. RJH of Florida, Inc.*, the Indiana Court of Appeals allowed an assignment between two corporations, ruling that "liability will not be cut off when there is only a change in name of a corporation." 690 N.E.2d 723 (Ind. Ct. App. 1998) Here, even Kenco's name did not change. Liability should similarly "not be cut off" by the bar. In Wiese's second Indiana citation, *Mun. Tax Liens, Inc. v. Alexander*, the Indiana Court of Appeals held the legal malpractice assignment bar "did not bar a legal malpractice claim that was assigned to a successor corporation where that corporation was a direct continuation of its predecessor." 893 N.E.2d 733, 734 (Ind. Ct. App. 2008), citing, *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338 (Ind.1991) and *Summit Account & Computer Serv., Inc. v. RJH of Florida, Inc.*, 690 N.E.2d 723 (*internal citations and brackets removed*). Here, Kenco is not a predecessor corporation, it is the same corporation. Even if

“Kenco/Sleeping Tiger” existed, however, there is no doubt that it would be the predecessor corporation to “Kenco/Kang” and the public policy basis upon which the Washington courts have relied would not serve to bar this legal malpractice action.

2. A shareholder cannot sue on a wrong sustained by the corporation.

In its Opening Brief, Kenco cited *Zimmerman v. Kyte* for the proposition that “[a] shareholder who owns all or practically all of a corporation’s stock is not entitled to sue as an individual because the shareholder cannot employ the corporate form to his advantage in the business world and then choose to ignore its separate entity when he gets to the courthouse.” 53 Wn. App. 11, 18, 765 P.2d 905, 909 (1988), quoting, 12 B. W. Fletcher, *Private Corporations* § 5910 (1984) (*internal quotations omitted*). Wiese argues that, because the corporation in *Zimmerman* was administratively dissolved, the court allowed the Zimmermans to proceed individually. (Br. of Resp’t, at 35) It is true that when a corporation is dissolved, any remaining assets flow to the shareholders. RCW 23B.14.050(1)(d). Here, there was no dissolution, administrative or otherwise, of Kenco. It is the same corporation now that it was when it hired Wiese, and it maintains its rights under CR 17(a) to prosecute its negligence claim as the real party in interest.

3. WAC 458-61A-103 is an inapplicable excise tax regulation.

Wiese now cites out of desperation an administrative regulation promulgated under Washington’s Excise Tax Code in support of its contention that, “as a matter of corporate law,” an assignment occurred “because more than 50 percent of the shareholders/members changed.” (Br. of Resp’t, at 35) WAC 458-61A-103 states that a transfer of a controlling interest in a corporation can result in a taxable transfer of its real estate for purposes of Washington’s real estate excise tax. The provision has nothing to do with corporation law. The regulation says nothing about assignments—the word “assignment” does not even appear—and is strictly a tax provision that does not address any impact on the rights of the corporation due to a change in the identity of the corporation’s owners. Wiese’s reach to such an inapplicable regulation underscores the paucity of authority for its position.

H. The trial court did not “strike” any evidence from the record.

Wiese asserts that Kenco has violated RAP 10.3 because Kenco cited to portions of declarations that were not considered by the trial court. (Br. of Resp’t, at 38-49) At the trial court, Wiese moved to strike numerous paragraphs of three declarations, and offered a proposed order striking those paragraphs. The trial court’s order states that the motion was granted “in part” and the court physically drew a line through Wiese’s

suggested language “order stricken,” and instead interlineated the phrase “did not consider” for all three declarations. (CP 805) That is, the trial court denied the “strike” portion of Wiese motion and rejected the “stricken” language (instead opting not to consider particular paragraphs, but leaving them in the record). Yet Wiese tells this Court at least 15 times that Kenco cited evidence that the trial court “struck.” (Br. of Resp’t, at 38-49) For all of Wiese’s bluster, the trial court did not strike any portions of the record; it merely chose not to consider them. Those portions of the record can and should be considered by this Court.⁵

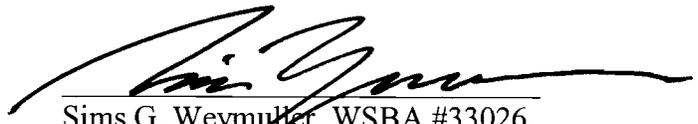
⁵ Wiese, for the first time, now claims several times that Kenco improperly discussed issues that inhere in the jury verdict, citing *Richards v. Overlake*, 59 Wn. App. 266, 272, 796 P.2d 737 (1990). (Br. of Resp’t, at 43-49) In *Richards*, a verdict was not overturned because the jury had not heard extrinsic evidence from a juror and, if they did, the evidence did not have an impact on the outcome. 59 Wn. App. at 270-272. Here, the testimony on the juror confusion is offered to demonstrate that a motion for a new trial on damages would likely have been granted due to the deficient verdict, when liability and damages were shown but some calculations of final damages were excluded. Moreover, juror misconduct does not “inhere in the verdict” where a juror makes racially based statements, as was the case here. *City of Seattle v. Jackson*, 70 Wn.2d 733, 738–39, 425 P.2d 385 (1967).

III. CONCLUSION

Because Kenco never assigned or otherwise transferred its claim for legal malpractice, neither *Kommavongsa, Kim* nor or any of the other authority provide precedent for the dismissal of Kenco's claim. The absence of such an assignment required Wiese to concoct the "Kenco/Kang" and "Kenco/Sleeping Tiger" fabrication without support in fact or law. *Kommavongsa's* limited holding is inapplicable because the legal malpractice was committed by another attorney in an unrelated commercial real estate transaction, not "in the same litigation that gave rise to the alleged legal malpractice." No policy reason exists to extend *Kommavongsa* beyond the scope of its limited holding. Only Kenco may assert this claim for legal malpractice against its attorney and only Kenco is the real party in interest. No other qualified person or entity could be substituted to prosecute Kenco's claim, thus protecting Wiese from its own malpractice. The trial court's dismissal left Kenco without redress for its damages. It should accordingly be reversed.

RESPECTFULLY SUBMITTED this 23rd day of January 2012.

JOHNSON FLORA, PLLC



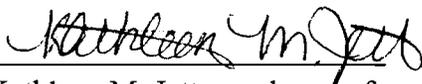
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CERTIFICATE OF SERVICE

I, Kathleen M. Jett, certify that on January 23, 2012, I sent for office service a true and correct copy of Reply Brief of Appellant by legal messenger for delivery on January 23, 2012, to the following attorneys of record:

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Dated this 23rd day of January 2012.



Kathleen M. Jett, employee of
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