

No. 28078-1

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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

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

v.

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

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**RESPONSE BRIEF**

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**STATUTES:**

## **I. INTRODUCTION**

Appellant, Mr. A. Graham Greenlee, was properly held in contempt of court for his refusal to obey multiple valid court orders requiring the disclosure of information and documentation to court appointed counsel for the Defendant, Sivilay Nammathao. Given multiple opportunities to discontinue his contemptuous conduct Mr. Greenlee steadfastly refused to comply with the trial court's orders. Eventually he was found in contempt of court and appropriately sanctioned. He attempts through this appeal to avoid the consequences of his behavior.

## **II. ISSUE ON APPEAL**

The issue on appeal is not as stated by Appellant. Rather the correct issue on appeal is whether an attorney who disagrees with, and appeals a lower court ruling, is free to ignore, without consequence, a trial court's rulings made subsequent to the appealed Order while the trial court retains jurisdiction.

## **III. STATEMENT OF CASE**

1. Mr. Greenlee was disqualified as Defendants' counsel on August 22, 2008. CP 75-76. On that date, and in his presence, Judge Matheson advised Mr. Greenlee of the hearing at which substituted counsel would be appointed. Verbatim Report of Proceedings (hereinafter VROP), Volume I (Hearings of August 22, 2008 and August 28, 2008), pp. 19-21.

2. On August 28, 2008 Mr. Greenlee did not appear but did file a Motion for Reconsideration of the earlier Order of Disqualification. That motion was summarily denied as allowed under Benton County local rules. VROP, Volume I, page 22, line 3-13. Ms. Adamson was appointed as substituted counsel for Defendant, Sivilay Nammathao, on August 28, 2008. CP 85.

3. Ms. Adamson's attempts to contact her new client were thwarted by Mr. Greenlee and her efforts to obtain information about the case and/or a copy of the file from Mr. Greenlee did not produce a meaningful response. By October Ms. Adamson's patience had been exhausted and she filed a Motion to Show Cause why Mr. Greenlee should not be held in contempt for failing to cooperate with her so that she could properly represent her client. CP 93-112.

4. Plaintiff joined in the Motion to Show Cause. CP 113-114.

5. The hearing on this motion was held before Judge Matheson on November 4, 2008 at which time Mr. Greenlee was not found in contempt but was specifically ordered to immediately advise his clients to contact Ms. Adamson, to provide contact information on his clients to Ms. Adamson by November 5, 2008 and to provide a complete copy of his file to Ms. Adamson by November 7, 2008. CP 123. VROP Volume III (Hearing of November 4, 2008), pp. 5-15.

6. Mr. Greenlee filed a Motion for Reconsideration of the court's ruling on November 12, 2008, CP 123-145, and that motion was denied by the court. VROP; Volume II ( Hearings of January 13, 2009 and March 27, 2009) , page 3.

7. Since Mr. Greenlee continued to refuse to cooperate with Ms. Adamson or to provide the information and documentation he had been ordered to produce the Order to Show Cause was noted for presentment on January 13, 2009. CP 186 -190.

8. Mr. Greenlee filed his objection to the entry of the Order. CP 149.

9. At the hearing on January 13, 2009 Mr. Greenlee again was ordered to produce the information and documentation for Ms. Adamson. VROP, Volume II, page 11 and CP 154-156.

10. When Mr. Greenlee continued to prevent Ms. Adamson from meaningful contact with her client and continued his refusal to provide her with the information and documentation he had been ordered to produce since November of 2008 she eventually filed another Motion to Show Cause in March 2009. CP 157-164.

11. Having heard all of Mr. Greenlee's arguments and excuses on multiple occasions since October of 2008 Judge Matheson again verbally

ordered him to produce the information and documentation to Ms. Adamson.

VROP, Volume II, page 25-26. .

12. Mr. Greenlee filed his Notice for Discretionary Review on May 7, 2009. CP 166.

13. The Court of Appeals accepted the present review on June 3, 2009 .

14. Ms. Adamson withdrew as counsel for Sivilay Nammathao on February 5, 2010. CP 191-192.

#### IV. MOTION TO DISMISS

Plaintiff initially moves to dismiss this appeal based upon the Appellant's failure to designate, as part of the Clerk's Papers, the Order from which he appeals. Appellant was given additional time to supplement his Designation of Clerk's Paper (see letter in this appeal from Renee S. Townsley dated March 4, 2011) and still Appellant has failed to designate the correct and original Order from which he appeals. The Order of Contempt from which Appellant seeks relief has not been properly been made a part of the record as required by RAP 9.6 (b) and accordingly this appeal should be dismissed.

#### V. RESPONDENT'S ARGUMENT

Should Respondent's Motion to Dismiss be denied then the following response is offered to the Appellant's Opening Brief.

**A. The standard of review for the trial court's Order is abuse of discretion.**

The standard of review for Judge Matheson's Order denying the Defendants' request to disqualify Ms. Adamson as their counsel is an abuse of discretion. *PUD No. 1 of Klickitat County v. International Insurance Company* 124 Wn. 2d 789, 881 P. 2d 1020 (1994). Likewise, a trial court ruling on contempt sanctions is reviewed under the same abuse of discretion standard. *State v. Skuza*, 156 Wn. App. 886, 889, 235 P. 3d 842 (2010) and

*Holiday v. City of Moses Lake*, 157 Wn. App. 347, 355, 236 P. 3d 981 (2010). Under an abuse of discretion standard the trial court's decision must be upheld unless it is manifestly unreasonable or rests on untenable grounds or reasons. *State v. Chichester* 141 Wn. App. 446, 170 P. 3d 583 (2007). The trial court's order was neither unreasonable nor did it rest on untenable grounds. Mr. Greenlee was disqualified as counsel for the Defendants because the counterclaim he made on his clients' behalf for interest on the principal amount tendered into court, as well as the bad faith allegation in the counterclaim, made him a likely and necessary witness at trial.

**B. The trial court had the authority to order Mr. Greenlee to provide certain information and documents and subsequently to order sanctions for his contemptuous conduct.**

Contrary to his assertion, Mr. Greenlee's contempt did not arise from his opposition to, and/or his appeal of, the Order of Disqualification. It arose because he failed to comply with numerous lawful orders of the Superior Court, i.e., the orders that he provide the necessary assistance, information and documentation so that Ms. Adamson could adequately represent the client she had been appointed to represent. Under RAP 7.1 the trial court retained full authority to act on the case until the appellate court accepts review unless there has been some kind of motion to stay or injunction issued pursuant to RAP 8.3, which did not occur here prior to the entry of the

Contempt Order on April 10, 2009. The Court of Appeals did not accept review of the Order of Contempt until June 3, 2009, long after the Order of Contempt had been issued.

Even if the Order of Contempt was somehow based upon the Order of Disqualification, as argued by Mr. Greenlee, the Superior Court still had the authority to find him in contempt. Under RAP 7.2 the trial court always retains authority to enforce its orders issued prior to acceptance of review. Judge Matheson had verbally ordered Mr. Greenlee to produce the information and documentation on November 4, 2008 . VROP Vol III pp. 5, 9-15. Violation of an oral order of the court can be basis for a finding of contempt. *Stella Sales Inc. v. Johnson*, 97 Wash. App. 11, 20, 985 P.2d 391, 398 (1999), *review denied*, 132 Wn.2d 1012 (1999). In addition, the court issued its Order to Show Cause on January 16, 2009 and denied Mr. Greenlee's Motion for Reconsideration on January 22, 2009. The Court of Appeals accepted review of the Order of Disqualification on March 25, 2009. Even after that acceptance and even assuming that the Order of Disqualification was somehow the basis for Mr. Greenlee's contempt, the trial court retained jurisdiction under RAP 7.2 to enforce its earlier orders. Those earlier orders compelling Mr. Greenlee to turn over a copy of his file and to assist Ms. Adamson so that she could effectively represent her client were completely ignored by Mr. Greenlee. The trial court retained the

jurisdiction to enforce those orders even if Mr. Greenlee's assertions are accepted as true. "A court order which is merely erroneous must be obeyed and can not be collaterally attacked in a contempt proceeding." *State v. Turner*, 98 Wn.2d 731, 739, 658 P.2d 658 (1983). Mr. Greenlee had an obligation to obey the Orders of the trial court even if the Order Appointing Counsel was erroneous (which is not the case) and his contemptuous refusal to obey the court's orders did and should carry consequences.

An unbiased review of the record reflects the trial court's amazing patience with Defendants' counsel, multiple opportunities to cure his contemptuous conduct and months of notice regarding what the court expected of him. Mr. Greenlee was well aware of what was required of him as early as September 4, 2008. CP 93-112. He was found in contempt only after full and repeated airings of his unsubstantiated arguments and innuendos (which he renews here when Ms. Adamson is unavailable to defend her good name, as well as the reputation of her firm) regarding Ms. Adamson's fitness to represent Sivilay Nammathao. His arguments were fully briefed and fully aired during the hearings in November 2008, January 2009 and March 2009. Mr. Greenlee was repeatedly given the opportunity to comply with the court's orders, even after he had repeatedly missed earlier court established deadlines. Because he felt he was correct about Ms. Adamson's unfitness to act as counsel for one of his clients he apparently felt

free to show an absolute contempt for the trial court by adamantly refusing to comply with the previously issued Orders to Show Cause. One would be hard pressed to find a better example of conduct warranting an Order of Contempt. As counsel for the Plaintiff and an officer of the court I was personally offended by his conduct and believed the imposed sanctions were, if anything, long overdue and only minimally commensurate with his conduct.

**C. The imposition of sanctions by the trial court is not inequitable.**

Mr. Greenlee argues that his clients are not in favor of the contempt citation but this is hardly relevant. A party may well be impressed by their attorney's contemptuous disregard for adverse rulings from a trial court but more is required of an attorney than merely pleasing one's client. We are bound by professional standards requiring us to treat the court in a respectful manner. See Code of Professional Conduct, Preamble. The Code does not grant an exception for disrespectful conduct which is approved by one's client or is in pursuit of a legal theory which has been rejected by the court. Mr. Greenlee simply ignored Judge Matheson's orders, both verbal and written, because he disagreed with them. A lawyer is not entitled to take such action without accepting the consequences of his or her behavior.

Finally, Mr. Greenlee argues that it would be inequitable to enforce the Order of Contempt since his clients would have to bear the burden of this

of the fine imposed by Judge Matheson. First of all, the Defendants should not bear the burden of this fine. It was Mr. Greenlee who was guilty of contemptuous conduct and it is he, and he alone, who should bear this burden. Even if the Defendants are forced by Mr. Greenlee to bear this burden though, they can simply add it to a long list of damages which can most certainly be recovered in a malpractice action against the attorney who failed after nearly 15 years to resolve their relatively simple insurance claims.

**D. The alleged conflict did not exist and even if it had existed it would not have justified Appellant's conduct.**

Mr. Greenlee attempts to justify his contempt on the basis of a conflict he perceived between Ms. Adamson and the Defendants. First of all, the Order Appointing Cheryl Adamson as counsel for Sivilay Nammathao (CP 85) has never been appealed in a proper and/or timely manner. That Order was entered on August 28, 2008 and although an untimely appeal of that Order was attempted in this Court under Case Number 276414, the appeal was dismissed for lack of payment of the filing fee. Even the present appeal was commenced by the filing of Mr. Greenlee's Notice for Discretionary Review on September 29, 2008 and that pleading did not seek review of the Order appointing Ms. Adamson. CP 86-90. Mr. Greenlee therefore has no right to contest the Order Appointing Ms. Adamson, much

less to use his disagreement with the Order to somehow excuse his obviously contemptuous behavior.

Even if the Order Appointing Counsel had been properly appealed, however, there was no conflict here to support Mr. Greenlee's arguments. RPC 1.9 would govern representation which might affect a former client. The rule prevents an attorney who gained information through a prior representation from potentially using that information in the same or similar proceeding to the disadvantage of the former client. Ms. Adamson's firm represented the Plaintiff in the prior coverage determination vis a vis the Defendants' claims against the insurance policy issued by the Plaintiff. She had been uninvolved in that coverage determination and any file her firm may have had on the matter had long since been destroyed. Accordingly she had no information on that matter other than what was produced within the context of this lawsuit. These facts were brought to the attention of the trial court when Ms. Adamson was appointed and subsequently. VROP, Volume I, pp. 22-25 VROP, Vol II, pp. 5-6; 8-11; 22-24. Even if Ms. Adamson had had some information about that prior representation, however, the information could only have been used to the disadvantage of Plaintiff, not the Defendants. RPC 1.9 allows for a waiver of the conflict if one in fact exists and counsel for Plaintiff provided such waiver in open court. VROP, Volume I, pages 24-25. It should be noted that Ms. Adamson would have

had an obligation to notify the court and to withdraw if an actual conflict had come to light and a further obligation to act solely and exclusively for the benefit of her client. RPC 1.7, 8.3, 1.16. It is easy for Mr. Greenlee to besmirch this fine attorney's reputation when she is no longer available to defend herself. His delusions of a conspiracy between Plaintiff and Ms. Adamson are just that; delusions. He argues based upon total speculation that she must have been aware of an alleged malpractice exposure her firm supposedly had and would act in a completely unethical manner by refusing to pursue Mr. Greenlee's specious legal theories for interest in an alleged attempt to avoid the alleged exposure to her firm. (Appellant's Brief at pp. 20) He never provides any proof of her alleged intent but rather faults her for refusing to support his legal theories during court proceedings (Appellant's Brief at pp. 18-19) when to do so would have necessitated divulging her legal theories to opposing counsel who was present during said hearing. VROP, Volume II, pp. 1, 18. While Ms. Adamson may or may not have shared Mr. Greenlee's confidence in his rather bizarre interpretation of the law it clearly would have been inappropriate for her to share her assessment in front of the court and opposing counsel. Likewise his contention that Plaintiff and Ms. Adamson were working "in concert" (Appellant's Brief at p. 23) is no more than another paranoid delusion of Mr. Greenlee. He offers no proof that either Ms. Adamson or Plaintiff's counsel

would engage in such an unethical conspiracy and its very suggestion is no more than a thinly veiled and repugnant attempt to divert attention away from his own conduct which is the subject of this appeal. Finally, Mr. Greenlee faults Plaintiff's counsel (Appellant's Brief at pp. 19-20) for failing to disclose attorney-client protected documentation, but the fact is that he was never entitled to such materials and Ms. Adamson would not have been entitled to it the either. See *Cedell v. Farmers Ins. Co.*, 157 Wn. App. 267, 237 P. 3d 309 (2010).

The trial court considered Mr. Greenlee's arguments on the alleged conflict on November 4, 2008, January 13, 2009 and March 27, 2009. VROP, Volume I, pp. 22-25 VROP, Vol II pp. 5-6; 8-11; 22-24; CP 117-120, 123-145, 149-153. Even if this decision had been properly appealed it could not be overturned absent an abuse of discretion, *State v. Skuza*, supra, which clearly does not exist here.

**E. The Contempt Order was not punitive and was entered with due process.**

Astoundingly Mr. Greenlee claims a lack of due process in this situation in order to support his statutory arguments. First of all, it should be pointed out that the court has not only statutory authority to issue contempt orders but also has inherent authority to do so as well. *In re Marriage of Nielson*, 38 Wash. App. 586, 587, 687 P. 2d 877 (1984) and *State v. Heiner*,

29 Wash. App. 193, 198, 627 P. 2d 983, *review denied*, 97 Wn. 2d 1009 (1981).

An unbiased review of the record reveals the court's amazing patience with Defendants' counsel, multiple opportunities to cure his contemptuous conduct and months of notice regarding what the court expected of him. Mr. Greenlee was well aware of what was required of him as early as September 4, 2008. CP 93-112. He was found in contempt only after full and repeated airings of his unsubstantiated arguments and innuendos (which he renews here when Ms. Adamson is unavailable to defend herself and her firm) regarding Ms. Adamson's fitness to represent Sivilay Nammathao. His arguments were fully briefed and fully aired during the hearings in November 2008, January 2009 and March 2009. Mr. Greenlee was repeatedly given the opportunity to comply with the court's orders, even after he had repeatedly missed earlier court established deadlines. Because he felt he was correct about Ms. Adamson's unfitness to act as counsel for one of his clients he apparently felt free to show an absolute contempt for the trial court by adamantly refusing to comply with the previously issued Orders to Show Cause. One would be hard pressed to find a better example of conduct warranting an Order of Contempt. As counsel for the Plaintiff and an officer of the court I was personally offended by his conduct and believed the

imposed sanctions were, if anything, long overdue and only minimally commensurate with his conduct.

Although Mr. Greenlee argues that the Contempt Order was punitive in nature all Judge Matheson was doing was trying to coerce the long-delayed production of the information and documentation in the possession of Mr. Greenlee. Judge Matheson also wished to avoid incarcerating Mr. Greenlee for his continuing contemptuous behavior. VROP; Volume II, pp. 23-28. Counsel's absolute disrespect for the court and its rulings left Judge Matheson with little alternative but to issue the Order of Contempt.

Mr. Greenlee finally argues that the trial court could not issue a Contempt Order with punitive sanctions since the only way in which such sanctions can be levied is by following the procedure set forth in RCW 7.21.040. First of all, he ignores the inherent authority of the courts with regard to contempt powers. Second, RCW 7.21.050 acknowledges the court's authority to impose even punitive sanctions without the need for full prosecutorial involvement and the resultant constitutional protections raised by Mr. Greenlee. He is, after all, part of a profession which has a responsibility to respect to the courts of this state even when he disagrees with their rulings. The court has always had the authority to deal with direct contempt of the type which occurred in this case during the hearings of November 2008, January 2009 and March of 2000, E.g., *State v. Buddress*,

63 Wash. 26, 114 Pac. 879 (1911). The court must have the authority to deal with the kind of recalcitrant and contemptuous behavior displayed by Mr. Greenlee during the hearings of November 4, 2008 VROP, Vol III, pp. 1-18 and March 27, 2009, VROP, Vol II, pp 18-28. While appearing before Judge Matheson Mr. Greenlee refused to even suggest to the court that he would obey the court's instructions to turn over information and documentation to Ms. Adamson, much less purge his contempt by providing everything he knew he was supposed to provide since September 2008. Again, Judge Matheson had little alternative but to enter the Order in light of an affront to the court's authority.

Lastly, Mr. Greenlee neglects to mention the portion of the Order imposing a sanction of \$500 per day until he obeyed the court's order by producing the information and documentation in his possession. He provided neither the trial court nor this court with any evidence that his contempt was ever purged. Even if the \$10,000 sanction were somehow to be judged "punitive" the second sanction of \$500 per day could only have had the purpose of coercing appropriate behavior and the Order was consistent with RCW 7.21.030 (2) (b). At the very least that sanction would be applicable from the date of the Order of Contempt, i.e., April 10, 2009 until this Court's stayed enforcement, i.e., June 12, 2019.

## **VI. CONCLUSION**

Mr. Greenlee should be held responsible for his contemptuous conduct toward the trial court. The Order of Contempt should be affirmed and Mr. Greenlee should be ordered to immediately pay all of the sanctions imposed upon him.

DATED this 26 day of April, 2011.

MORRISON & ASSOCIATES, P.C.

By:   
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CERTIFICATE OF TRANSMITTAL

I hereby certify that a true and correct copy of the foregoing Response Brief as well as a true and correct copy of Volume III of the Verbatim Report of Proceedings (Transcript of 11-04-08) were, on the 26<sup>th</sup> day of April, 2011,

- hand delivered
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