

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

AMERICAN STATES INSURANCE)	No. 28078-1-III
COMPANY, on behalf of its insured,)	
KHENE K. KOMMAVONGSA,)	
)	
Respondent,)	
)	
v.)	Division Three
)	
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.)	UNPUBLISHED OPINION

Korsmo, A.C.J. — Attorney Graham Greenlee appeals the contempt ruling and accompanying sanctions imposed in the latest installment of this long-running legal saga. We uphold the contempt ruling and the daily sanction, but reverse the court’s punitive \$10,000 fine.

FACTS

This action is the latest arising from a tragic accident in 1995 that left Sivilay Nammathao in a persistent vegetative state and injured her daughter Napha.¹ Mr. Greenlee began representing the two women the following year. American States Insurance Company (ASIC) insured the driver, Khamchanh Soratsavong.

After its attempts to pay its policy limits were rejected, ASIC filed an interpleader action in 2007. The trial court granted a motion to disqualify Mr. Greenlee on the basis that he would be a necessary witness in the interpleader case. This court granted discretionary review of that ruling and ultimately reversed the disqualification order. *Am. States Ins. Co. v. Nammathao*, 153 Wn. App. 461, 220 P.3d 1283 (2009).

The disqualification order was entered August 22, 2008. Six days later the trial court appointed Cheryl Adamson to represent Sivilay Nammathao. Ms. Adamson was unable to contact her client and also was unable to obtain a copy of the client's file from Mr. Greenlee. She eventually filed a motion to show cause why Mr. Greenlee should not be held in contempt for failure to cooperate. The trial court held a hearing on November 4, 2008. The court declined to find Mr. Greenlee in contempt, but did order him to

¹ Details of the accident and the earlier procedural history of the case can be found in two published opinions dealing with legal malpractice claims. *Kommavongsa v. Haskell*, 149 Wn.2d 288, 67 P.3d 1068 (2003); *Soratsavong v. Haskell*, 133 Wn. App. 77, 134 P.3d 1172 (2006), *review denied*, 159 Wn.2d 1007 (2007).

immediately advise the clients to contact Ms. Adamson; Mr. Greenlee was also directed to provide contact information for them the following day and to provide a copy of his file.

Mr. Greenlee did not obey the order and the clients did not contact Ms. Adamson. A presentation hearing was held January 13, 2009. The court again ordered Mr. Greenlee to provide the information. Mr. Greenlee objected to the appointment of Ms. Adamson, arguing that her firm had previously represented ASIC in the case.² The court rejected the argument, noting that the prior representation had been disclosed and addressed on the record.

Ms. Adamson noted another show cause hearing for Mr. Greenlee's continued refusal to obey the court's orders. The court heard the motion telephonically on March 27, 2009. Mr. Greenlee asked the court to continue the matter while the Court of Appeals determined if it was going to hear the disqualification case. He also reiterated his concerns about Ms. Adamson's firm's prior involvement in the case. The court declined to continue the matter and determined that Mr. Greenlee was in contempt. Report of Proceedings (March 27, 2009) at 24. Noting that Mr. Greenlee had not sought to stay enforcement of the order, the court stated that Mr. Greenlee had been in contempt for at

² The firm had conducted an examination under oath of the driver, Mr. Kommavongsa, and advised ASIC that the victims were covered under the policy.

least seven months. *Id.* The court then concluded:

I'm going to impose sanctions of \$10,000 and \$500 a day from this day forward be payable to this Court. And if you don't deliver these files, I'm going put you in jail. Do you understand?

Id. at 25.

Mr. Greenlee filed a notice of discretionary review with this court May 7, 2009. This court treated the matter as an appeal of right. By order entered June 12, 2009, this court stayed enforcement of the contempt sanction and also stayed this appeal. After our decision in the disqualification case, Ms. Adamson withdrew from representation. Clerk's Papers at 182-183. This court eventually lifted its stay of this appeal and the matter proceeded to consideration by a panel without argument.

ANALYSIS

Contempt can be either coercive or punitive. While a court can impose coercive sanctions for contempt, punitive sanctions can only be imposed when the protections of our criminal law have been afforded. The record supports the contempt finding and the daily sanctions, but not the \$10,000 sanction.³

³ ASIC also moved to dismiss the appeal on the basis that the contempt order was not included among the designated clerk's papers. The order was attached to the notice of discretionary review that this court treated as a notice of appeal. While the notice should have been designated as a clerk's paper, the necessary document is properly before the court. The motion to dismiss is denied.

Contempt Ruling

Mr. Greenlee argues that the finding of contempt should be reversed because (1) Ms. Adamson did have a conflict and (2) this court reversed the disqualification order. Both arguments are without merit, but even if there had been any merit, Mr. Greenlee was still required to obey the court's order.

Contempt of court is the intentional disobedience of any lawful judgment, decree, order, or process of court. RCW 7.21.010(1)(b). An order is "lawful" if it issues from a court with jurisdiction over the parties and the subject matter, even if the order is in error or later invalidated. *Deskins v. Waldt*, 81 Wn.2d 1, 4-5, 499 P.2d 206 (1972); *State v. Breazeale*, 99 Wn. App. 400, 413, 994 P.2d 254 (2000), *aff'd in part, rev'd in part*, 144 Wn.2d 829, 31 P.3d 1155 (2001).

A contempt finding is reviewed for abuse of discretion. *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Here, the trial court found Mr. Greenlee in contempt because he repeatedly refused over a seven-month period to obey the court's order to ask his clients to contact Ms. Adamson, provide Ms. Adamson with the contact information for the clients, and turn

over a copy of his file to her. These were certainly tenable bases for finding that Mr. Greenlee had intentionally disobeyed the court's order.

Mr. Greenlee argues that he was entitled to disobey an erroneous order. He is incorrect. First, however, we will address his arguments concerning the merits of the trial court's order.

The argument concerning the disqualification ruling can be summarily resolved. The contempt order, attached to Mr. Greenlee's notice for discretionary review, clearly states (at page 2) that he was found in contempt because he refused to obey the trial court's directions to cooperate with Ms. Adamson. The fact that this court later overturned the disqualification ruling is irrelevant to whether Mr. Greenlee obeyed the rulings regarding cooperation.

The conflict of interest argument fares little better. Mr. Greenlee argues that Ms. Adamson had a conflict because an attorney in her firm had represented ASIC in determining coverage in this case 12 years earlier. Initially, this entire argument amounts to a collateral attack on the order appointing Ms. Adamson, a ruling that was never challenged via appeal to this court. Courts will not entertain collateral challenges to a court order in a contempt proceeding. *State v. Coe*, 101 Wn.2d 364, 369-370, 679 P.2d 353 (1984).

Second, the alleged conflict was brought to the court's attention. In cases involving a former client, an attorney cannot represent a party with an adverse interest unless the former client consents to the representation. RPC 1.9(a). Counsel also may not disclose the secrets of that client. RPC 1.9(c). Counsel for ASIC advised the court that it consented to Ms. Adamson's representation. The court was also advised that Ms. Adamson's firm had destroyed its file and had not represented ASIC in over a decade. She was not party to any secrets of ASIC. Given these facts, the trial court concluded that no conflict of interest existed.⁴ We agree.

The two bases for Mr. Greenlee's defense of his contempt are without merit. However, even if he had been correct, it would not matter. An erroneous court order must be obeyed; only an order from a court that lacks jurisdiction can be ignored. *Deskins*, 81 Wn.2d at 4-5. It is particularly egregious for a member of the bar to disregard a court order, even if he believed the order wrong. Mr. Greenlee has characterized the trial court's order as "a gross abuse of discretion" and (repeatedly) a "miscarriage of justice." *See* Reply Br. at 16. He has never contended, nor could he, that the trial court lacked jurisdiction to issue the order.

⁴ ASIC also correctly notes that it, not the Nammathaos, would be the injured party if Ms. Adamson had somehow violated her ethical obligations. The victims would not be prejudiced from the representation.

The contempt ruling was well-grounded in fact. The excuses are without merit and without legal justification. The contempt finding is affirmed.

Sanctions

The court imposed a \$10,000 sanction for the contempt to that point, and imposed a daily sanction of \$500 until the order was obeyed. We believe the first sanction was punitive and imposed without proper procedures; we are required to reverse that portion of the order. However, the daily sanction was coercive in nature and properly imposed.

Contempt sanctions are reviewed for abuse of discretion. *State v. Berty*, 136 Wn. App. 74, 83, 147 P.3d 1004 (2006). Contempt was at one time considered either civil or criminal, and criminal contempt required “the constitutional safeguards extended to other criminal defendants.” *Id.* at 84. Currently, the statutes distinguish contempt into categories of “punitive” or “remedial.” *Id.*; RCW 7.21.010(2), (3). A “punitive sanction” is “imposed to punish a past contempt of court.” RCW 7.21.010(2). A “remedial sanction” is “imposed for the purpose of coercing performance” that is still “in the person’s power to perform.” RCW 7.21.010(3). A punitive contempt sanction is the equivalent of a criminal contempt sanction, while a remedial contempt sanction is considered a civil sanction. *In re Marriage of Didier*, 134 Wn. App. 490, 500-501, 140 P.3d 607 (2006), *review denied*, 160 Wn.2d 1012 (2007).

Remedial sanctions must be imposed in accordance with the requirements of RCW 7.21.030. After notice and hearing, the court has several options available to remedy the contempt. *Id.* Punitive sanctions must be imposed in accordance with RCW 7.21.040. The procedural requirements of that section include formal criminal charging by a prosecutor and the right to trial. *Id.*⁵

Application of these statutes leads to the inescapable conclusion that the \$10,000 sanction was punitive in nature because it attempted to redress Mr. Greenlee's failure to comply over the previous seven months. There was nothing conditional that would have allowed him to turn over the materials and avoid the sanction; it was solely for past conduct. That sanction, however, was not imposed after the filing of criminal charges and trial. Accordingly, we reverse that sanction.

It is a different story for the daily sanction. That sanction, which was conditioned on continued failure to cooperate, was remedial in nature; Mr. Greenlee could comply with the court's order and be relieved of paying the daily sanction. RCW 7.21.030(2)(c). The daily sanction was well within the statutory maximum amount. RCW 7.21.030(2)(b). Accordingly, we have no hesitation in affirming that sanction.

⁵ Punitive sanctions are also available in a summary proceeding when the contempt occurs in the courtroom in the presence of the judge. RCW 7.21.050. That section is not at issue in this proceeding.

As an attorney, Mr. Greenlee knew how to address the situation. If he chose the risky path of disobedience, his remedy was to ask for a stay of the court's order and appeal it to this court. He ultimately did so, but was not able to stay enforcement until two months had passed. He will now pay the consequences of that decision.

We expect better of counsel. Court orders must be obeyed, whether one agrees with them or not. This matter is remanded for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, A.C.J.

WE CONCUR:

Sweeney, J.

Siddoway, J.

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