

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CONNIE L. POWELL,

No. 28960-5-III

Petitioner,

v.

**DEAN WHITE and VITA WHITE,
husband and wife, and the marital
community composed thereof; ROBERT
D. BLACK, a single man; and
PATRICK R. NYBERG and KRIS J.
NYBERG, and the marital community
composed thereof,**

Respondents.

Division Three

UNPUBLISHED OPINION

Per Curiam – This matter is before the court on a motion to modify a Commissioner’s Ruling granting discretionary review of the superior court’s order disqualifying the lawyer representing Connie Powell, the plaintiff below. Vita White, a defendant and counterplaintiff, asks us to reverse the Commissioner’s Ruling, which also denied her motion to strike pleadings submitted by the disqualified attorney, and granted

a stay of trial court proceedings.

The Commissioner granted discretionary review based on her determination that the superior court committed obvious or probable error when it disqualified Ms. Powell's counsel as a necessary witness without making the findings required by this court's decision in *American States Insurance Co. v. Nammathao*, 153 Wn. App. 461, 220 P.3d 1283 (2009). In that case, we held that before disqualifying counsel on grounds he or she is a necessary witness, the court must make appropriate findings that the motion is supported by a showing (1) that the attorney will give evidence material to the determination of the issues being litigated, (2) that the evidence is unobtainable elsewhere, and (3) that the testimony is or may be prejudicial to the testifying attorney's client. *Am. States Ins. Co.*, 153 Wn. App. at 467 (approving and adopting standards set forth in *Cottonwood Estates, Inc. v. Paradise Builders, Inc.*, 128 Ariz. 99, 105, 624 P.2d 296 (1981)).

The decision in *American States* was filed on December 10, 2009. The superior court's decision to disqualify Ms. Powell's counsel was orally announced a month earlier, on November 10, 2009. Although the ruling disqualifying Ms. Powell's counsel was reduced to a written order on December 29, 2009 and a further order on reconsideration on April 9, 2010, there is nothing in the record on discretionary review to suggest the intervening decision in *American States* was brought to the superior court's attention.

See Notice of Discretionary Review to Court of Appeals (Division III) filed herein on April 20, 2010, with its attached Order re Reconsideration and Stay of Proceedings filed April 12, 2010 and Nunc Pro Tunc Order Re: Motion to Discharge Counsel for Plaintiff; Motion to Compel Discovery; and Motion for Scheduling Order filed January 4, 2010.

We grant in part the motion to modify and remand the case to superior court for review of the evidence in light of *American States* and entry of a further order. Upon transmission of the order, our Commissioner will again consider the motion for discretionary review and may order additional briefing by the parties. Any party aggrieved by the Commissioner's Ruling may move to modify it. The stay of proceedings shall otherwise remain in effect.¹

A majority of the panel has determined that 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.

¹ We do not modify denial of the motion to strike or the stay granted by the Commissioner, but that decision should not be read to endorse the procedure followed in this case. Trial proceedings are not automatically stayed by filing a notice of discretionary review. See RAP 7.1, 8.3; *State v. Wilks*, 85 Wn. App. 303, 932 P.2d 687 (1997). In light of the superior court's unqualified orders disqualifying Ms. Powell's counsel "from all aspects of this case" and explicitly denying his motion to stay the disqualification order, see, e.g., Order Re: Reconsideration and Stay of Proceedings, at 7, ¶¶ 4.3, 4.4, a serious question is raised whether counsel should have first secured an emergency order staying the effectiveness of the order of disqualification before filing materials in support of the appeal.

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TERESA C. KULIK, Chief Judge