NO.: 89980-1

SUPREME COURT
OF THE STATE OF WASHINGTON

RITH KOK, as Administrator of the Estate of SAMNANG KOK, deceased; MAKAI JOHNSON-KOK, as a beneficiary of the Estate of SAMNANG KOK; RORTH KOK, individually and as a beneficiary of the Estate of SAMNANG KOK; RY SOU KOK, individually and as a beneficiary of the Estate of SAMNANG KOK, individuals

Appellants/Petitioners,

v.

TACOMA SCHOOL DISTRICT NO. 10, a municipal entity under the laws of the State of Washington,

Respondent.

OBJECTION TO MOTION TO FILE AMICI CURIAE BRIEF (And to Amicus)

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I. INTRODUCTION

Taking a single sentence out of context from this Court's opinion in *In re Disciplinary Proceeding Against King*, 168 Wn.2d 888, 899, 232 P.3d 1095 (2010), amici curiae Mark and Carol DeCoursey ("the DeCourseys") argue that Division Two of the Court of Appeals erred in its opinion in *Kok v. Tacoma School District No. 10*, ___ Wn. App. ___, 317 P.3d 481, 487 (2014), when it stated, "We review a trial judge's decision whether to recuse herself to determine if the decision was manifestly unreasonable or based on untenable reasons or grounds."

Ignoring the law, the facts of each case, and the procedural history of each case, the DeCourseys place *Kok* in a procrustean bed, cutting, stretching, and re-shaping *Kok* in a self-serving effort[1] to raise a conflict with *In re King* under Rules of Appellate Procedure (RAP) 13.4(b)(1). But rather than assisting this Court, the DeCourseys' amici curiae brief obfuscates the arguments presented by the parties. For this reason, and the reasons set forth below, Tacoma School District No. 10 ("the District") respectfully requests that this Court deny the DeCourseys' motion to file an amici curiae brief.

[1] The DeCourseys' motion is nothing more than a thinly veiled attempt to have "two bites of the apple" with regard to their own appeal, which currently is pending before Division One of the Court of Appeals.

II. ARGUMENT

Contrary to what the DeCourseys argue, (Amici Curiae Brief at 1-5), the Court of Appeals in *Kok* applied the proper standard of review to the judge's decision not to recuse herself, as announced by this Court in *State v. Davis*, 175 Wn.2d 287, 305, 290 P.3d 43 (2012) ("A trial judge's decision of whether to recuse himself or herself is reviewed for abuse of discretion."), *cert denied*, 134 S. Ct. 62 (2013).

There is no conflict between the standard of review applied by Division One, Division Two, or Division Three of the Court of Appeals and the standard of review applied by this Court in reviewing a judge's decision whether to recuse himself or herself; the standard of review is for abuse of discretion. *See, e.g., Davis*, 175 Wn.2d at 305; *Kok*, 317 P.3d at 487; *Tatham v. Rogers*, 170 Wn. App. 76, 96, 283 P.3d 583 (2012); *State v. Leon*, 133 Wn. App. 810, 812-13, 138 P.3d 159 (2006), *review denied*, 159 Wn.2d 1022 (2007); *State v. Perala*, 132 Wn. App. 98, 110-11, 130 P.3d 852 (2006), *review denied*, 158 Wn.2d 1018 (2006); *Koenig v. City of Des Moines*, 123 Wn. App. 285, 305, 95 P.3d 777 (2004), *aff'd in part and rev'd in part*, 158 Wn.2d 173, 142 P.3d 162 (2006); *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 340, 54 P.3d 665 (2002); *In re Parentage of J.H.*, 112 Wn. App. 486, 496, 49 P.3d 154 (2002), *review denied*, 148 Wn.2d 1024 (2003); *Kauzlarich v. Yarbrough*, 105 Wn. App.

632, 20 P3d 946 (2001), *review denied*, 144 Wn.2d 1007 (2001), *cert. denied*, 534 U.S. 1090 (2002); *Wolfkill Feed & Fertilizer v. Martin*, 130 Wn. App. 836, 840, 14 P.3d 877 (2000); *In re Marriage of Farr*, 87 Wn. App. 177, 188, 940 P.2d 679 (1997), *review denied*, 134 Wn.2d 1014 (1998); *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674, *review denied*, 127 Wn.2d 1013 (1995). And the DeCourseys' self-serving argument that "*Kok* now stands as a precedent which will cause errors to be committed by the trial courts," (Motion at 2), is simply false and unfounded.[2]

Furthermore, contrary to what the DeCourseys argue, (Amici Curiae Brief at 1-5), *In re King* does not stand for the proposition that appellate courts must review *de novo* a trial judge's decision whether to recuse himself or herself. In *In re King*, the Washington State Bar Association charged a lawyer with 10 counts of violating the Rules of Professional Conduct. *In re King*, 168 Wn.2d at 892. After a hearing, the hearing officer entered findings of fact and conclusions of law, recommending the lawyer's disbarment to the disciplinary board. *In re*

[2] The DeCourseys boldly claim, "If Division One chooses to follow *Kok*, it may cause Division One to reject the DeCourseys' appeal." (Motion at 2). The DeCourseys conveniently ignore that Division One of the Court of Appeals already had ruled – well before *Kok* was decided – that recusal lies within the sound discretion of the trial court. *See Leon*, 133 Wn. App. at 812-13; *Koenig*, 123 Wn. App. at 305; *In re Marriage of Farr*, 87 Wn. App. at 188.

King, 168 Wn.2d at 898.[3] Thereafter, the lawyer appealed the hearing officer's decision, arguing that the disciplinary process was marred with due process and appearance of fairness violations. *In re King*, 168 Wn.2d at 892.

Contrary to what the DeCourseys imply by the conspicuous omissions in their briefing, (Amici Curiae Brief at 1-2), this Court's review in *In re King* was not *de novo* because of the appearance of fairness doctrine; rather, this Court's review in *In re King* was *de novo* because the lawyer: (1) failed to challenge any of the hearing officer's findings of fact; (2) failed to challenge any of the hearing officer's conclusions of law; and (3) failed to challenge any of the ethical violations that independently warranted disbarment. *In re King*, 168 Wn.2d at 892, 898, 906. The hearing officer's unchallenged findings of facts were treated by this Court as verities on appeal; the lawyer's assertions were meritless; and the lawyer's remaining accusations were not supported with any citations to the record or any coherent argument. *In re King*, 168 Wn.2d at 899, 904-06.

In an argument that defies common sense, the DeCourseys claim that *Kok* is somehow analogous to *In re King* simply because "the facts

[3] The disciplinary board adopted the hearing officer's recommendations. *In re King*, 168 Wn.2d at 898.

pertaining to the recusal motion were all undisputed." (Amici Curiae Brief at 2).[4] But this argument is specious. Unlike the hearing examiner in *In re King*, the trial judge in *Kok* was not asked to resolve issues of fact or to arrive at conclusions based thereon.[5] Unlike the hearing officer in *In re King*, the trial judge in *Kok* did not enter any findings of fact. Unlike the hearing officer in *In re King*, the trial judge in *Kok* did not enter any conclusions of law. And unlike *In re King*, there are no verities on appeal in *Kok*. Simply put, *In re King* is inapposite to *Kok*, and the DeCourseys' continued reliance on *In re King* is misplaced and ill-informed.

Furthermore, despite 10 pages of argument, the DeCourseys fail to disclose, recognize, or even acknowledge that, almost two years ago, this Court unequivocally ruled: "*A trial judge's decision of whether to recuse himself or herself is reviewed for abuse of discretion.*" *Davis*, 175 Wn.2d at 305 (emphasis added). While the DeCourseys suggest that this rule is

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[4] Under the DeCourseys' logic, the following facts from the trial judge's ruling should be undisputed as well: (1) the trial judge's attorney had no ownership interest, whether legal or equitably, in the District; (2) the trial judge's spouse had no economic interest in the outcome of the case; (3) the case before the trial judge was a negligence/wrongful death case; (4) the trial judge's spouse is an attorney practicing in the area of land use/real estate; (4) the trial judge's spouse made no appearance in the case; (5) the attorneys from the trial judge's spouse's law firm made no appearance, and had no involvement, in the case. (Clerk's Papers (CP) at 2549-52).

[5] In ruling on the District's summary judgment motion, the trial judge was entirely precluded from resolving issues of fact. As this Court has stated, "The function of a summary judgment proceeding ... is to determine whether a genuine issue of material fact exists, not to determine issues of fact." *State ex rel. Zempel v. Twitchell*, 59 Wn.2d 419, 424-25, 367 P.2d 9985 (1962).

"particularly ***in***appropriate," (Amici Curiae Briet at 2-5), their argument fails to appreciate the doctrine of stare decisis, which properly aims to ensure stability and predictability in the law. *See, e.g., Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 278, 208 P.3d 1092 (2009). This Court does not lightly set aside precedent. *See State v. Kier*, 164 Wn.2d 798, 804, 194 P.3d 212 (2008). The burden is on the party seeking to overrule a decision to clearly show that the established rule is both incorrect and harmful – not just "particularly ***in***appropriate," (Amici Curiae Brief at 2) – before it is abandoned. *Lunsford*, 166 Wn.2d at 278. Here, absent speculation, argumentative assertions, and conclusory statements, (Amici Curiae Brief at 2-5), the DeCourseys have utterly failed their burden to clearly show that this Court's rule in *Davis* – that a trial judge's decision of whether to recuse himself or herself is reviewed for abuse of discretion – is both incorrect and harmful.

Finally, in an attempt to bootstrap an issue for review under RAP 13.4(b), (Amici Curiae Brief at 5-9), the DeCourseys argue that *Kok* is in conflict with *Ward v. Village of Monroeville*, 409 U.S. 57, 61, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972), because the Court of Appeals simply concluded:

> In *Tatham*, a property division case, the trial judge had greater discretion in making his decision, and, on review, the appellate court would apply a deferential standard of

> review. By contrast, this case involved a summary judgment order, which appellate courts review de novo. Therefore, the increased risk of prejudice present in the *Tatham* case is not an issue here.

Kok, 317 P.3d at 488. Relying on *Ward*, in which the United States Supreme Court held that a "[p]etitioner is entitled to a neutral and detached judge in the first instance," *Ward*, 409 U.S. at 61, the DeCourseys claim that the Court of Appeals in *Kok* "mistakenly confuses and equates the 'prejudice' of having the case decided incorrectly with the 'prejudice' of having the case decided by a judge who does not have the appearance of impartiality." (Amici Curiae Brief at 7).

But the Court of Appeals did nothing of the sort alleged by the DeCourseys. Contrary to what the DeCourseys argue, (Amici Curiae Brief at 7-9), the Court of Appeals unequivocally held, "Here, a reasonably prudent person would conclude that both parties obtained a fair hearing." *Kok*, 317 P.3d at 488. Contrary to what the DeCourseys argue, (Amici Curiae Brief at 8-9), the Court of Appeals did not condition its holding on any "cure" or "correction" of the alleged prejudice on appeal. *Kok*, 317 P.3d at 487-88. And contrary to what the DeCourseys argue, (Amici Curiae Brief at 9), the holding that "both parties obtained a fair hearing," *Kok*, 317 P.3d at 488, is entirely consistent with the United States Supreme Court's pronouncement that due process of law requires

that parties receive a "neutral and detached judge in the first instance." *Ward*, 490 U.S. at 62.

While the DeCourseys fault the Court of Appeals for its concluding remarks about reviewing *de novo* the trial court's summary judgment order, (Amici Curiae Brief at 5-9), the Court of Appeals simply was explaining that yet another protection against prejudice – besides the appearance of fairness doctrine – was available to the parties in the case. *Kok*, 317 P.3d at 488. Such remarks echo this Court's announcements in *State v. Chamberlin*, 161 Wn.2d 30, 41, 162 P.3d 389 (2007), that "[i]ndependent appellate review reduces the risk of error" and that "[o]ther protections against prejudice are available to parties."

Thus, unlike the DeCourseys, this Court has refused to look at the issue of prejudice solely in the vacuum of the appearance of fairness doctrine. *See Chamberlin*, 161 Wn.2d at 40-41.[6] In fact, far from being critical or disapproving of such reasoning by the Court of Appeals, this Court has endorsed it: "In short, independent appellate review, the right to file an affidavit of prejudice, and the Code of Judicial Conduct advance the parties' right to a fair and disinterested judiciary and reduce the risk of prejudice." *Chamberlin*, 161 Wn.2d at 41.

[6] *See also Tatham*, 170 Wn. App. at 105.

III. CONCLUSION

While the DeCourseys desperately try to cut, stretch, and re-shape *Kok* in a self-serving effort so that this Court will accept review of the case under RAP 13.4(b), the DeCourseys fail to disclose to this Court that there is no conflict between the standard of review applied by Division One, Division Two, or Division Three of the Court of Appeals and the standard of review applied by this Court in reviewing a judge's decision whether to recuse himself or herself. As this Court previously ruled, "A trial judge's decision of whether to recuse himself or herself is reviewed for abuse of discretion." *Davis*, 175 Wn.2d at 305.

Accordingly, the DeCourseys' argument that "*Kok* now stands as a precedent which will cause errors to be committed by the trial courts," (Motion at 2), simply is false and unfounded. As shown above, the basis for the DeCourseys' amici curiae brief is incorrect and ill-informed, such that it obfuscates the arguments presented by the parties. It is of no assistance to this Court.

Therefore, for the reasons set forth above, the District respectfully requests that this Court deny the DeCourseys' motion to file an amici curiae brief.

RESPECTFULLY SUBMITTED this 10 day of April, 2014.

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By: _____

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DECLARATION OF SERVICE

I, Jan Smith, hereby declare under penalty of perjury that the following statements are true and correct: I am over the age of 18 years old and am not a party to his case.

On April 24, 2014, I caused to be served on the following attorneys, a copy of the **Objection to Motion to File Amici Curiae Brief**, and caused those same documents to be filed with the Clerk of the above-captioned Court.

Filed with the Supreme Court in and For the State of Washington:
Via email (Supreme@courts.wa.gov):

Supreme Court, State of Washington
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The address to which these documents were provided to:

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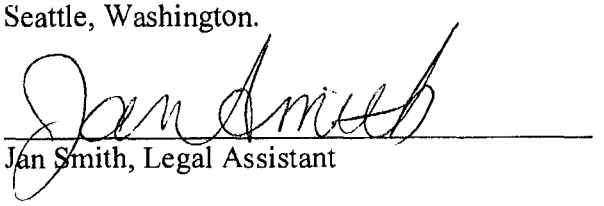
[X] Via Legal Messenger (ABC Messenger Service)

DATED April 24, 2014, at Seattle, Washington.



Jan Smith, Legal Assistant

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Clerk - Attached for filing with the Court, please find Objection to Motion to file Amici Curiae Brief. Thank you.

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