SUPREME COURT NO.: 89980-1

NO.: 44517-4-II

COURT OF APPEALS STATE OF WASHINGTON
DIVISION II

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.

ANSWER TO PETITION FOR REVIEW

Michael A. Patterson, WSBA No. 7976
Charles P.E. Leitch, WSBA No. 25443
Daniel P. Crowner, WSBA No. 37136
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A. INTRODUCTION

Rith Kok, as Administrator of the Estate of Samnang Kok ("the Estate"), first sought direct review of the case on the grounds that it involved a "fundamental and urgent issue of broad public import which requires prompt and ultimate determination." RAP 4.2(a)(4). This Court denied the Estate's petition, transferring the case to Division Two of the Court of Appeals, which affirmed the trial court.

Now, the Estate seeks discretionary review of the decision of the Court of Appeals on the grounds that the Estate's petition involves "an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). But absent speculation, allegations, and conclusory statements, the Estate has failed to show how the facts and legal issues in this case are of substantial public interest. Therefore, this Court should deny review.

B. STATEMENT OF THE CASE

January 3, 2007, was the first day of school at Foss High School ("Foss"), a school in the Tacoma School District ("the District"), after a two-week winter break. That morning, administrators were in the hallways, welcoming students back to school. (Clerk's Papers (CP) at 160). Teachers also were present, opening classrooms and exchanging greetings. (CP at 162-63). At the time, it seemed like a typical first morning back from winter break. (CP at 167).

But then Douglas Chanthabouly ("Chanthabouly"), a student at Foss, walked across an alcove to a bank of lockers where Samnang Kok

("Kok") was standing. Without warning, Chanthabouly fatally shot Kok. (CP at 169-79, 183). It was 7:26 a.m. – the first bell after the two-week winter break was still four minutes away. (CP at 144, 181).

The Estate sued the District, claiming that it was negligent by failing to maintain a safe school environment and by enrolling Chanthabouly, whom the Estate claimed the District "knew or should have known had substantial mental illness and as a result, extremely dangerous propensities." (CP at 8-9).

In 2005, following a suicide attempt, Chanthabouly was diagnosed with paranoid schizophrenia. (CP at 455-62). After a brief hospitalization, Chanthabouly received 11 months of outpatient mental health care from Comprehensive Mental Health. (CP at 480-82). Chanthabouly's medical providers managed his medical condition and his medication. (CP at 202-08, 211-12). When Chanthabouly's care at Comprehensive Mental Health ended in January 2006, his case manager stated that he was stable while on his medication. (CP at 480). Chanthabouly occasionally heard voices, but these voices did not tell him to harm himself; moreover, Chanthabouly was able to separate reality from his hallucinations. (CP at 480).

Chanthabouly's medical records did not indicate that he was at risk for assaultive behavior. For instance, a 2005 Mental Health Assessment from Pierce County stated that Chanthabouly "has never been assaultive toward others." (CP at 114). While noting that Chanthabouly continued to experience hallucinations, his mental health

counselor noted that they were not "usually command or threatening." (CP at 112). And Chanthabouly's psychiatrist testified that she did not see any indication that he would harm others. (CP at 821).

In 2005, Foss determined that Chanthabouly was eligible for special education services to improve his social skills and written language skills. (CP at 93). As a student eligible for special education services, Chanthabouly could not be excluded from regular educational opportunities solely as a result of his diagnosis. *See* Revised Code of Washington (RCW) 28A.155.010; 20 U.S.C. § 1412(a)(1)(A). In fact, the law required the District to educate Chanthabouly to the maximum extent possible with non-disabled peers in the general education setting. *See* Washington Administrative Code (WAC) 392-172A-02050.

Under his Individualized Education Program (IEP), Chanthabouly attended one special education writing class each day. (CP at 95-103). During one of these classes, Chanthabouly completed a writing assignment in which he wrote the following: "I nevered [sic] try dirt. I know a sludge face named Sam. He loves dirt. He eats dirt and he's going to live in dirt. He says he's going to live there forever. I think sludge faces are weird." (CP at 215).

Chanthabouly's special education teacher wrote, "Good! Interesting," at the top of the page. (CP at 215). She did not know the identity of "Sam." (CP at 954). There was nothing about the assignment that alarmed her. (CP at 955).

In fact, Chanthabouly's school records did not contain any incidents of prior assaultive behavior.[1] (CP at 342, 1286). While Chanthabouly allegedly complained about being bullied while attending school at Mt. Tahoma High School "(Mt. Tahoma"),[2] there is no evidence that he ever took part in bullying others. (CP at 1375, 1386, 1391, 1429-30). Furthermore, none of the staff at Foss witnessed Chantabouly acting in a violent manner toward himself or others. (CP at 1402-03, 1408, 1413).

Nevertheless, in 2008, the Estate sued the District, and the case immediately was assigned to Pierce County Superior Court Judge Linda Lee. (CP at 3, 21).[3] In 2011, approximately two months before the close of discovery and more than three years after the case was filed, the District filed its Motion for Summary Judgment. (CP at 45). After multiple rounds of briefing and two CR 56(f) continuances, the trial court heard the District's motion. (CP at 1912-13). Following a lengthy

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[1] In 2002, Chanthabouly was suspended for "defiance of authority," essentially insubordination for refusing to follow a staff member's request; he was not suspended for fighting. (CP at 324).

[2] Chanthabouly attended Mt. Tahoma before being diagnosed with paranoid schizophrenia in 2005. (CP at 1300.) After his suicide attempt, Chanthabouly transferred to Foss. (CP at 88, 353).

[3] As the Estate notes, Judge Lee now is a member of Division Two of the Court of Appeals. (Petition for Review at 15). She was neither appointed to, nor a member of, the Court of Appeals when it issued its opinion in this case.

argument, the trial court granted the District's motion and dismissed the case. (CP at 1909-11).

The Estate filed a Motion for Reconsideration. (CP at 1914-59). But before it could be heard, the Estate also filed a Motion to Vacate, in part noting that Vandeberg Johnson & Gandara, LLP, the law firm where the judge's spouse is an attorney, had performed unrelated work for the District. (CP at 2123-30). The trial court heard the Estate's motion, taking it under advisement. (CP at 2547-48). After obtaining an opinion from the Washington State Ethics Advisory Committee on whether it was appropriate for her to hear the case, the judge denied the Estate's Motion to Vacate and the Motion for Reconsideration. (CP at 2549-55, 2568-69, 2571).

The Estate timely appealed. (CP at 2572-81).

C. ARGUMENT WHY REVIEW SHOULD BE DENIED

1. WHILE THE FACTS OF THIS CASE ARE TRAGIC, THE ESTATE FAILS TO RAISE AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST

In an attempt to bootstrap issues of substantial public interest into its Petition for Review, the Estate asks this Court to focus its attention on the particular type of incident that occurred in this case, i.e., a school shooting. (Pet. for Review at 15-17). For the first time on appeal,[4] the Estate proposes, in a footnote no less, that school shootings are an

[4] "This court does not generally consider issues raised for the first time in a petition for review." *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, 961 P.2d 350 (1998).

expectable harm. (Pet. for Review at 20 n.6). But the Estate's sensationalism and reduction of complex tort law into a simplistic maxim is, at best, misleading and self-serving.

Here, neither party disputes that the District has a duty to exercise reasonable care to protect students in its custody from reasonably foreseeable harm. *McLeod v. Grant County Sch. Dist No. 128*, 42 Wn.2d 316, 320, 255 P.2d 360 (1953); *see also Travis v. Bohannon*, 128 Wn. App. 231, 115 P.3d 342 (2005); *J.N. v. Bellingham Sch. Dist. No. 501*, 74 Wn. App. 49, 871 P.2d 1106 (1994); *Peck v. Siau*, 65 Wn. App. 285, 827 P.2d 1108, *review denied*, 120 Wn.2d 1005 (1992).[5] But the District is not an insurer of the safety of its students. *Travis*, 128 Wn. App. at 238. And the District is not liable merely because harm occurs. *Peck*, 65 Wn. App. at 293.

The District's duty to exercise reasonable care extends only to such risks of harm that are foreseeable. *J.N.*, 74 Wn. App. at 57 (citing *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 933, 653 P.2d 280 (1982)). Thus, "'[t]he concept of foreseeability limits the scope of the duty owed'" by the District. *J.N.*, 74 Wn. App. at 57 (quoting *Christen v. Lee*, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989).

Contrary to what the Estate argues, (Petition for Review at 15-22), "the pertinent inquiry is not whether the actual harm was of a

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[5] "'The basic idea is that a school district has the power to control the conduct of its students while they are engaged in school activities, and with that power goes the responsibility of reasonable supervision.'" *J.N.*, 74 Wn. App. at 57 (quoting *Peck*, 65 Wn. App. at 292).

particular kind that was expectable." *McLeod*, 42 Wn.2d at 321. It is irrelevant to the inquiry on summary judgment that the particular incident that in fact occurred was a criminal assault or even a school shooting. *See J.N.*, 74 Wn. App. at 59. Rather, the question is whether the actual harm fell within a general field of danger which should have been anticipated." *McLeod*, 42 Wn.2d at 321; *see also Maltman v. Sauer*, 84 Wn.2d 975, 981, 530 P.2d 254 (1975); *J.N.*, 74 Wn. App. at 57; *Peck*, 65 Wn. App. at 293.

Based on the Estate's own briefing, (Br. of Appellant at 41-52), the Court of Appeals correctly defined the general field of danger in this case as follows: allowing a schizophrenic student in the general education population could be a violent danger to other students. *Kok v. Tacoma School Dist. No. 10*, ___ Wn. App. ___, 317 P.3d 481, 485 (2013). While the Estate now argues that this definition "is a mischaracterization of the record," (Petition for Review at 19), the Estate never tried to define the general field of danger nor tried to argue why this definition was incorrect. *Contra McLeod*, 42 Wn.2d at 323; *Travis*, 128 Wn. App. at 240; *J.N.*, 74 Wn. App. at 59.

In fact, the Estate never presented any evidence that the District knew or in exercise of reasonable care should have known of this general field of danger. *Kok*, 317 P.3d at 484 n.5. Given the Estate's utter failure to support an element essential to its claim, *see, e.g., Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989); *Las v. Yellow Front Stores Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744

(1992), reasonable minds could not differ: the harm was outside of the "general field of danger" that the District should have anticipated. *Compare J.N.*, 74 Wn. App. at 59-60.

In an attempt to excuse its failure, the Estate argues that summary judgment nevertheless was inappropriate because there was sufficient evidence from which the District had notice of the possibility of the specific harm inflicted.[6] (Petition for Review at 19). In fact, the Estate claims that "the Court of Appeals opinion seems to discount information available to the school district that otherwise would have led a reasonable person at least to further inquiry as to whether or not Mr. Chanthabouly posed a risk of danger to his fellow students." (Petition for Review at 19-20). But as the Court of Appeals correctly ruled, "Neither Chanthabouly's behavior at school nor his medical records indicated any assaultive behavior or tendencies. Moreover, the District did not have any information that Chanthabouly's diagnosis alone was an indication that he would be a danger to others if placed in the general education population." *Kok*, 317 P.3d at 485.

In responding to the District's summary judgment motion, the Estate could not merely rely on speculation, argumentative assertions

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[6] *See, e.g., Christen*, 113 Wn.2d at 498 (although criminal assault was not a foreseeable result of furnishing liquor to an obviously intoxicated person, tavern liable if it had notice of the possibility of such harm); *J.N.*, 74 Wn. App. at 60 (even assuming the harm was outside of the "general field of danger," summary judgment would be inappropriate if the school district had notice of the possibility of the specific harm inflicted).

that unresolved factual matters remained, or in having its affidavits considered at face value. *Halvorsen v. Ferguson*, 46 Wn. App. 708, 721, 735 P.2d 675 (1986), *review denied*, 108 Wn.2d 1008 (1987). As this Court has stated, "Ultimate facts or conclusions of fact are insufficient.... Likewise, conclusory statements of fact will not suffice." *Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988). Yet that is exactly what the Estate relied on – and continues to rely on – in this case.

For instance, even now the Estate argues that the District should have known that Chanthabouly could be a violent danger to other students because he "was plagued by delusions, paranoia, and an irrational belief that he was a gang member, and ... had previously gotten into fights and confrontations with other students based on such delusions." (Petition for Review at 20). There is an allegation that Chanthabouly was involved in a *single* fight while attending school at Mt. Tahoma,[7] (CP at 976, 1429-30), but the evidence, even construed in the light most favorable to the Estate,[8] demonstrates that the District had no knowledge of this fight. (CP at 976, 1429-30).[9]

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[7] Chanthabouly's time at Mt. Tahoma is of little relevance to this case as it was before he was diagnosed with, and treated for, paranoid schizophrenia.

[8] *See Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

[9] The Estate also claims that Chanthabouly was "a victim of 'bullying'" while attending school at Mt. Tahoma, (Petition for Review at 6), but the Estate fails to argue how this fact alone posed a risk of danger to his

Moreover, the Estate cites to no evidence whatsoever that Chanthabouly was involved in a fight – or even an argument – while attending school at Foss. In fact, Bryon H.M. Bahr, an Assistant Principal at Foss, testified that he never interacted with Chanthabouly "in a disciplinary manner." (CP at 1408). Ricky Yates, Chanthabouly's guidance counselor, testified that Chanthabouly's teachers never came to him with any concerns or issues about Chanthabouly's behavior. (CP at 1402-03). Mitchel C. Herd, the security guard at Foss, testified that he never observed Chanthabouly being involved in any altercations, whether as the perpetrator or the victim. (CP at 1413). Finally, according to Mr. Herd, nobody – not even students, teachers, or parents – ever raised any concerns with him about Chanthabouly's behavior while attending school at Foss. (CP at 1418).[10]

Remarkably, the Estate faults the Court of Appeals for its "focus" on Chanthabouly's right to a public education, arguing that the Court of Appeals "struck an inappropriate balance that the Supreme Court should correct." (Petition for Review at 21). But the Estate misperceives the nature of the reasonable care inquiry undertaken by the Court of

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fellow students. As such, this Court does not need to consider this argument. *See Collins v. Clark County Fire Dist. No. 5*, 155 Wn. App. 48, 96, 231 P.3d 1211 (2010).

[10] With the exception of a short-term suspension in 2002 for defiance of authority (essentially insubordination for refusing to follow a staff member's request), (CP at 342), Chanthabouly did not receive any other suspensions or expulsions between 2002 and 2007. (CP at 1286).

Appeals. *See, e.g., J.N.*, 74 Wn. App. at 61. "Reasonable or ordinary care is that degree of care which an ordinarily careful and prudent person would exercise *under the same or similar circumstances or conditions*." *Gordon v. Deer Park Sch. Dist. 414*, 71 Wn.2d 119, 122, 426 P.2d 824 (1967) (emphasis added).[11] "In short, the amount of care exercised must be commensurate with the circumstances." *Ulve v. City of Raymond*, 51 Wn.2d 241, 246, 317 P.2d 908 (1957). And contrary to the Estate's unfounded argument that the Court of Appeals "placed abstract rights above very real safety concerns," (Petition for Review at 21), the Court of Appeals correctly ruled that the reasonable care inquiry in this case must be evaluated in light of the circumstances that "[b]oth federal and state laws require public school districts to provide appropriate education to students with disabilities." *Kok*, 317 P.3d at 486.[12]

Under his IEP, Chanthabouly attended one special education writing class each day; the rest of the time, he attended regular education (or mainstreamed) classes. (CP at 93, 95-103). In 2005, as part of his special education eligibility evaluation, Chanthabouly's teachers were asked to submit observation forms about his behavior and functioning in

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[11] Reasonable care is an external standard, based on what society demands. 16 DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE: TORT LAW AND PRACTICE, § 2.29, at 88-89 (4th ed. 2013)

[12] Amazingly, the Estate ignored federal and state antidiscrimination laws in arguing that the District should have excluded Chanthabouly from the general education environment. *Kok*, 317 P.3d at 486.

the classroom. Jan Rutledge, the school psychologist at Foss, partly summarized the teachers' observations as follows:

> Three teachers indicated no significant behavioral concerns. Two teachers indicated concern regarding class participation. One teacher each indicated concern with work completion, on-task behavior, and persevering with difficult tasks. By teacher report, [Chanthabouly] is very quiet and does not interact with teachers or peers. He is described as polite and very cooperative. Additionally, [Chanthabouly] has generally shown improvement in his work completion and grades since the first progress report mid October.

(CP at 109, 128-32). A Crisis Plan,[13] which was developed by Comprehensive Mental Health and then included in Chanthabouly's records, indicated that he had no history of engaging in assaultive behavior toward others and no history of using weapons. (CP at 489).

Notably, a 2005 Mental Health Assessment from Pierce County stated that Chanthabouly "has never been assaultive toward others." (CP at 114). In 2005, Chanthabouly, his mother, and his uncle also completed the Ohio Youth Problem, Functioning, and Satisfaction Scales. (CP at 121-24). This instrument can be administered to youth who have severe emotional and behavioral problems.[14] The results of

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[13] The Estate gratuitously refers to this plan as the "safety plan," (Petition for Review at 8, 20), arguing that it "was ignored and undercut" by the District. (Petition for Review at 20). But the Estate fails to develop or support its argument on this point, and this Court does not need to consider it further. *See Collins*, 155 Wn. App. at 96.

[14] *See generally* BENJAMIN M. OGLES, PH. D., ET AL., THE OHIO YOUTH PROBLEMS, FUNCTIONING, AND SATISFACTION SCALES (SHORT FORM) (1999).

this instrument indicated that Chanthabouly had no problems at all with: (1) arguing with others; (2) getting into fights; (3) yelling, swearing, or screaming at others; or (4) fits of anger. (CP at 122-24). These results were consistent with Chanthabouly's educational history, which also revealed entirely no aggressive, violent, or assaultive behavior toward students or staff at Foss. Even the Court of Appeals agreed, correctly stating, "Neither Chanthabouly's behavior at school nor his medical records indicated any assaultive behavior or tendencies." *Kok*, 317 P.3d at 485.

In responding to the District's summary judgment motion, the Estate simply could not rely on unverified suspicions, broad generalizations, and vague conclusions for its claim that unresolved factual matters remained. *See Thompson v. Everett Clinic*, 71 Wn. App. 548, 555, 860 P.2d 104 (1993), *review denied*, 123 Wn.2d 1027 (1994); *see also Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). The Estate attempted to use "warning signs" for violent behavior as a checklist against which to match Chanthabouly. (Br. of Appellant at 36-38). But the literature, which was jointly published by the U.S. Department of Education and U.S. Department of Justice, specifically warns that it is "inappropriate – and potentially harmful" to use these "warning signs" to profile students. (CP at 657). The literature also cautions that "[s]uch signs may or may not indicate a serious problem – they do not necessarily mean that a child is prone to violence toward self or others." CP at 655.

As the Court of Appeals correctly concluded, the Estate "ignores the cautions in the literature and relies on warning signs that are not supported by the record." *Kok*, 317 P.3d at 486.[15] While the Estate would like this Court to believe that "Chanthabouly was left to wander the halls of Foss High School in his delusional state, and was a time bomb ready to explode," (Petition for Review at 20), "[m]ere allegations, argumentative assertions, conclusory statements, and speculation do not raise issues of material fact that preclude a grant of summary judgment." *Greenhalgh v. Dep't of Corrections*, 160 Wn. App. 706, 714, 248 P.3d 150 (2011). Instead, the evidence, as fittingly summarized by the Court of Appeals, is that:

> [Chanthabouly's] grades were improving, there are no written or verbal expressions of violence in the record, he had only one disciplinary problem back in 2002 and none of his teachers at Foss noted any disciplinary problems, he did not act violently toward others, and he was not in a gang.

Kok, 317 P.3d at 487.

Yet the Estate continues to argue about the supposed "very real safety concerns" and the District's alleged "failure to heed the warning signs," (Petition for Review at 21-22). But simply – and repeatedly – pointing to Chanthabouly's 2002 suspension for defiance of authority,

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[15] Even now, many of the Estate's arguments lack reference to the relevant portions of the record, as required by RAP 10.3(a)(5).

his frequent school transfers,[16] a line from the school psychologist in his IEP file stating that he gets into fights with people he does not know, and a school writing assignment referencing a person named "Sam" was not – and is not – sufficient evidence that the District had notice of the possibility of the specific harm inflicted by Chanthabouly in this case. *See J.N.*, 74 Wn. App. at 60 (evidence of a person's antisocial, unruly, or hostile behavior generally is insufficient to establish that a defendant with a supervisory duty should reasonably have anticipated a more serious misdeed); *see also Moore v. Mayfair Tavern, Inc.*, 75 Wn.2d 401, 405-06, 451 P.2d 669 (1969) (while there was evidence that a tortfeasor had been noisy and profane, there was no evidence that he had said or done anything that would serve as a warning that he was likely to commit an act of violence). As the Court of Appeals correctly concluded, "None of these facts gave the District notice that Chanthabouly might act violently at school. There was no indication that he might attempt to physically harm someone, let alone with a weapon." *Kok*, 317 P.3d at 485.[17]

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[16] As the District noted, the reasons for Chanthabouly's transfers were easily understood and not uncommon, e.g., moving family residences, addressing problems with attendance and grades, etc. (CP at 457, 1361-62, 1367)

[17] While the Estate may argue that all reasonable inferences from the facts must be construed in its favor, a summary judgment motion nevertheless will not be denied on the basis of unreasonable inferences. *See Scott v. Blanchet High Sch.*, 50 Wn. App. 37, 47, 747 P.2d 1124 (1987), *review denied*, 110 Wn.2d 1016 (1988).

Despite the Estate's rhetoric, this was not a school shooting. It was a shooting that happened at school, at 7:26 a.m., on the first day back from a two-week winter break. Chanthabouly's medical providers, who were the experts responsible for his medical care, did not view him at any time as a violent danger to others.[18] The District did not have any notice, either through his medical diagnosis or through his behavior, that Chanthabouly could be a violent danger to others. And as the Court of Appeals astutely ruled, "Here, the Estate has failed to show that the harm caused by Chanthabouly was foreseeable." *Kok*, 317 P.3d at 485. Undeniably, Kok's death was tragic; but the Estate's petition fails to raise an issue of substantial public interest that should be determined by this Court under RAP 13.4(b)(4).

2. DESPITE CLAIMING THAT THE COURT OF APPEALS "SIDESTEPPED" THE APPEARANCE OF FAIRNESS ISSUE, THE ESTATE FAILS TO RAISE AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST

Other than a gratuitous remark that "[w]hat happened here has the grave potential of shaking public confidence in our judiciary," (Petition for Review at 25), the Estate fails to explain why, under RAP 13.4(b)(4), this Court, instead of the Court of Appeals, should determine the appearance of fairness issue in this case.

As the Court of Appeals correctly noted, "A judicial proceeding satisfies the appearance of fairness doctrine if a reasonably prudent and

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[18] Interestingly, the Estate sued Chanthabouly and the District, but did not sue Chanthabouly's medical providers.

disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing." *Kok*, 317 P.3d at 487 (citing *Tatham v. Rogers*, 170 Wn. App. 76, 96, 283 P.3d 583 (2012)).[19] While a party does not have to show evidence of an actual bias, it still must show evidence of a potential bias. *Tatham*, 170 Wn. App. at 95. Mere speculation of bias is not enough. *See In re Pers. Restraint of Haynes*, 100 Wn. App. 366, 377 n.23, 996 P.2d 637 (2000); *see also State v. Post*, 118 Wn.2d 596, 618-19, 826 P.2d 172, 837 P.2d 599 (1992) ("without evidence of actual or potential bias, an appearance of fairness claim cannot succeed and is without merit").

The Estate claims that the Court of Appeals "sidestepped" the appearance of fairness issue. (Petition for Review at 23). But the Court of Appeals specifically reviewed the facts in this case, finding, among other things, that: (1) the judge ruled in favor of the Estate on some of its motions; (2) the Estate did not show that the judge, her spouse, or her spouse's law firm had any interest in the outcome of the case[20]; (3) the Estate did not show that the judge, the parties, or the parties' counsel had any direct professional or personal connections; (4) the Estate did not

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[19] This test is an objective one, which assumes that a reasonable person knows and understands all the relevant facts. *Tatham*, 170 Wn. App. at 96.

[20] The Court of Appeals noted, "Neither the judge's spouse nor his firm has any interest in the outcome of this proceeding – they are not involved in any way in litigating the present case and they will not receive any fees relating to the case." *Kok*, 317 P.3d at 488.

show that the judge violated the Code of Judicial Conduct (CJC); and (5) the Estate did not show that the judge or her spouse had either "an economic interest"[21] or a "more than de minimis interest"[22] in the case. *Kok*, 317 P.3d at 488.

The Court of Appeals correctly ruled that a reasonably prudent and disinterested person would conclude that the Estate obtained a fair, impartial, and neutral hearing. *Kok*, 317 P.3d at 488. Here, the evidence, as opposed to the Estate's mere speculation, "demonstrates without question that the judge's previous decision had not been based on any bias, prejudice or personal knowledge of disputed evidentiary facts, but rather was based on [her] evaluation that the record was without any issue of material fact." *See Turngren v. King County*, 33 Wn. App. 78, 86-87, 649 P.2d 153 (1992).[23]

A judge's decision whether to recuse herself from a case is reviewed for abuse of discretion. *State v. Davis*, 175 Wn.2d 287, 305, 290 P.3d 43 (2012); *Tatham v. Rogers*, 170 Wn. App. 76, 283 P.3d 583 (2012). An abuse of discretion will be found only when the judge's decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12,

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[21] *See* CJC 2.11(A)(2)(c).

[22] *See* CJC 2.11(A)(3).

[23] Of course, after reviewing the judge's summary judgment decision *de novo*, the Court of Appeals also affirmed this decision. *Kok*, 317 P.3d at 484.

26, 482 P.2d 775 (1971); *State v. Leon*, 133 Wn. App. 810, 138 P.3d 159 (2006), *review denied*, 159 Wn.2d 1022 (2007).

For the above reasons, the judge's denial of the Estate's request that she disqualify or recuse herself was in accordance with established law and was not an abuse of discretion. It was not, as the Estate claims, "unprecedented and unwarranted." (Petition for Review at 25). And it is not an issue of substantial public interest that should be determined by this Court under RAP 13.4(b)(4).

D. CONCLUSION

While the Estate desperately tries to re-shape its case to present issues of urgency and substantial public interest, this case is a straightforward negligence case that was decided on well-established law. There is nothing in the opinion from the Court of Appeals that merits this Court's review. It is in exact step with long-standing precedent regarding negligence, summary judgment, and the appearance of fairness doctrine. Absent speculation, allegations, and conclusory statements, the Estate has failed to show how the facts and legal issues decided in this case are of substantial public interest under RAP 13.4(b)(4). Therefore, this Court should deny review.

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RESPECTFULLY SUBMITTED this 21 day of March, 2014.

PATTERSON BUCHANAN
FOBES & LEITCH, INC., P.S.

By: _____

Michael A. Patterson, WSBA No. 7976
Charles P.E. Leitch, WSBA No. 25443
Daniel P. Crowner, WSBA No. 37136
Of Attorneys for Respondent

DECLARATION OF SERVICE

I, Rachel West, 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 March 21, 2014, I caused to be served to the attorney for the Appellant, a copy of the **ANSWER TO PETITION FOR REVIEW**, 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 Legal Messenger to:

Supreme Court, State of Washington
415 12th Ave SW
Olympia, WA 98501
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The address to which these documents were provided to Appellant:

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