89980-1

Supreme Court No.:

Court of Appeals State of Washington Division II - No.: 44517-4

Pierce County Superior Court No. . 08-2-10977-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

RITH KOK, individually and as Administrator of the Estate of SAMNANG KOK, deceased; et al,
Plaintiffs/Appellants,

v.

TACOMA SCHOOL DISTRICT NO. 10,
Defendant/Respondent

PETITION FOR REVIEW

Paul A. Lindenmuth, WSBA#15817
paul@benbarcus.com
Attorney for Plaintiffs/Appellants
Law Offices of Ben F. Barcus & Associates
4303 Ruston Way
Tacoma, WA 98402
Telephone: (253) 752-4444

Entire COA record located on T Drive
(COA2 Incoming Files)

ORIGINAL

I. TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

I. Federal Cases

II. Washington Cases

III. Rules of Appellate Procedure

I.IDENTITY OF PETITIONER

Rith Kok individually and as Administrator of the Estate of Samnang Kok is the Petitioner herein, and was the Plaintiff below.

II.COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals' decision, dated October 22, 2013, which affirmed the Trial Court's Summary Judgment Dismissal, (and denial of reconsideration related thereto), of the Estate of Samnang Kok's claims for wrongful death and survival brought against the Tacoma School District. Additionally, Petitioner seeks review of the Court of Appeals' affirmance of the Trial Court's Decision denying the Estate's Motion for Recusal. The Court of Appeals' initial unpublished decision is attached hereto as Appendices 1 through 15. Additionally, attached as

Appendices 16-17, is the Court of Appeals' Order Granting Motions to Publish, which was entered on January 22, 2014.

III. ISSUES PRESENTED FOR REVIEW

This Court has recognized that it is "well-established law in Washington that a school district has an enhanced and solemn duty to protect minor students in its care." The "solemn duty" of schools to protect students

within their care is part of a "special relationship," which obligates a school district to protect students "from reasonably anticipated dangers."[1] Tragically, and increasingly, children are being threatened from the "reasonably anticipated dangers" of student-on-student violence while at school. This case addresses the increasingly troubling phenomena of "school shootings" in the United States, and provides an opportunity to explore a school district's duty to prevent such tragedies given its current frequency and an ever-increasing understanding and awareness of such a phenomena.

IV.ISSUE STATEMENTS

1. What is the scope of a school district's duty to protect its students from student-on-student violence?

2. Did the Court of Appeals inappropriately allow the Tacoma School District to delegate its obligation to protect its students to third-party healthcare providers, despite the fact that this Court has previously held that such a duty of protection is "non-delegable?"

3. Given the well-documented recurrent problems relating to school violence and school shootings, are school shootings within the

[1] See, *Christensen v. Royal School District No. 160*, 156 Wn.2d 62, 70, 124 P.3d 283 (2005); *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 320, 255 P.2d 360 (1953).

"general field of danger" that a school district should reasonably anticipate and prevent?

4. Did the Trial Court and the Appellate Court violate the rules applicable to Motions for Summary Judgment by overemphasizing the notice that the school district did not have with respect to Douglas Chanthabouly's violent propensities, while at the same time discounting the notice that it did?

5. Does the school district, as a part of its duty to protect its students, have an obligation to follow up on information which suggests that a student may act out violently towards his fellow students due to a mental health condition, or other considerations?

6. Did the Appellate Court err by overemphasizing the shooter's right to a free public education without discrimination, against the security interest of his fellow students when there was no indication that the school district ever engaged in such an analysis, or balancing of interests prior to the events?

7. Did the Appellate Court err by overemphasizing the ultimate outcome of a case when addressing whether or not a Trial Judge should recuse itself out of appearance of fairness concerns due to potential economic interest and bias?

8. Is there an appearance of fairness issue sufficient to warrant recusal by a Trial Judge, when the Trial Judge has previously filed campaign disclosures which clearly indicated that her spouse regularly worked for the defendant entity, (Tacoma School District), that the spouse was actively involved in organizations advocating on behalf of school districts, (including an organization which filed a motion to publish in this case), and the judge who should have been well aware of the facts, but failed to disclose them to the parties?

V.STATEMENT OF THE CASE

A. The Shooter, Douglas Chanthabouly Had Exhibited Significant Behaviors From Which a Reasonable School Official Should Have Recognized That He Posed a Threat to the Safety of His Fellow Students.

On Juanuary 3, 2007, Douglas Chanthabouly shot and killed Samnang Kok, while he stood at his locker in the hallway of Foss High School. (CP 332-33). The Court of Appeals decision in this matter is deficient with respect to what information was available to members of the Tacoma School District regarding Douglas Chanthabouly's potential for violence. Unfortunately, without explanation or excuse, Mr. Chanthabouly's records with the Tacoma School District, in most part, were mysteriously missing by the time this case was filed. Based on what Plaintiff's counsel was able to

reconstruct during the course of discovery, Mr. Chanthabouly was an extremely ill and troubled young man whose illness manifested itself well before a January, 2005 suicide attempt, which ultimately resulted in him being diagnosed as a paranoid schizophrenic. (CP 426; 455; 457; 724-26). Even prior, Mr. Chanthabouly was transferred from high school to high school within the Tacoma School District because of academic problems and behavioral problems. (CP 347-48; 353; 460). Significantly, while attending Mount Tahoma High School in 2004, (the last high school attended prior to attendance at Foss High School, where the shooting occurred), Mr. Chanthabouly was exhibiting a number of aberrational and bizarre behaviors which would have been apparent to anyone paying attention. During this time, a delusional Mr. Chanthabouly began to believe that he was a member of a street gang, even though he's a loner, and had "a little entourage" in his imagination comprised of his imaginary street gang members, (who apparently were "Crips"). (CP 964-980). He became extremely paranoid, believing other individuals were out to get him because of his imaginary gang affiliation, and would blurt out things such as: "I know guys are out to get me," even though no one was saying anything to him. *Id.* He often would present himself at the nurse's office at Mount Tahoma High

School delusionally believing that he had lice in his hair, even though none were present. *Id.* (CP 965).

Due to his delusional state, while at Mount Tahoma High School Mr. Chanthabouly got into confrontations with other students who were actual gang members. At least on one occasion, on school grounds, he was subject to a physical assault by an apparent gang member whom he had offended. When Mr. Chanthabouly found himself in altercations, he would indicate that he was going to go back to "Hilltop" to get his friends, (gang members), in order to address the situation.[1] (CP 976).

Because of Mr. Chanthabouly's odd behaviors which resulted in confrontation with his fellow students at Mount Tahoma High School, his mother sought out the aid of Mount Tahoma High School officials believing that her son was being a victim of "bullying." Surprisingly there are no records of Mrs. Chanthabouly's efforts to intervene on behalf of her son, who was claiming that people were coming up behind him and hitting him in the head from behind. (CP 966; 977-80; 995-97).

[1] As best can be discerned, even though these events were occurring prior to the actual diagnosis of paranoid schizophrenia, Mr. Chanthabouly's belief that he was a member of a gang was a byproduct of his delusions. Otherwise, he appears to have been a "loner" who would wander the halls of Mount Tahoma High School, talking to himself because of his delusions and hallucinations.

At or around this time, Mr. Chanthabouly's medical records suggest that he was not permitted to transfer from Mount Tahoma to Stadium High School until he had the ability to "get along better." (CP 460). Upon efforts to transfer him from Mount Tahoma High School, following a January 2005 suicide attempt, the transfer was conditioned by the statement: "if any behavior or attendance problems student will be returned to Mount Tahoma." (CP 353). What, if any, behavior problems existed which would be sufficient to warrant a return to Mount Tahoma High School is unexplained by Mr. Chanthabouly's incomplete school files.

In January 2005, Mr. Chanthabouly made a significant suicide attempt because he was unhappy, and perceived himself as being bullied at school. Following that suicide attempt, he transferred to Foss High School where as noted on January 3, 2007, he ultimately shot and killed the Plaintiff's decedent Samnang Kok.

In April 2005, Douglas initially began attending classes at Foss High School. Upon his return to school following the suicide attempt, Mr. Chanthabouly had initial contact with school nurse, Donna Libby, and school counselor, Ricky Yates, both of who testified they did not know Douglas suffered from paranoid schizophrenia until the shooting. (CP 858-863; 1021). Mr. Chanthabouly's mother, however, indicates that she informed

both regarding the mental health condition. Neither the school security guard, nor the vice principal, who had authority over Mr. Chanthabouly, were made aware that he suffered paranoid schizophrenia and did not know of it until after Samnang Kok's death. (CP 269-70; 1053).

Apparently, in April 2005, Nurse Libby was under the impression that the only health issue Mr. Chanthabouly suffered from was a byproduct of a previous "head injury." (CP 446). Nurse Libby was provided a list of the medications Mr. Chanthabouly was taking, which included medications to "treat psychotic disorders and symptoms such as hallucinations, delusions and hostility." Other medications that were labeled "anti-psychotics" designed to "decrease abnormal excitement in the brain," and medications designed to treat the symptoms of schizophrenia, which is an illness manifested by "disturbed or unusual thinking ... and strong or inappropriate emotions ..."[2]

As part of Mr. Chanthabouly's return to school, a "safety plan" was recommended by his physicians where he was to go to the nurse's office should the manifestations of his paranoid schizophrenia become overwhelming. (CP 489-492; 1026-27; 1080-85). On a number of occasions, Mr. Chanthabouly went to the nurse's office in accordance with such a safety plan, but apparently the nurse had no idea why he was there. (CP 1022).

[2] A listing of such medications were within the Foss School nursing file including documentation describing the use of such medications and the above-referenced information.

Ultimately, she told him to leave the nurse's office, and after such a direction, he never returned. (CP 1877-1879).

In the fall of 2005, Mr. Chanthabouly was evaluated by school district personnel to make a determination as to whether or not he needed an IEP, (Individual Education Plan). During that evaluative process, the school psychologist, (Jan Rutledge), and other Foss personnel reviewed Mr. Chanthabouly's circumstances, including some of his medical records[3]. Significantly, in the evaluative forms related to Mr. Chanthabouly's IEP, Nurse Rutledge noted, among other things:

> *At that time, he was having intense visual hallucinations, command hallucinations telling him to kill himself, and feelings of thought broadcasting and thought blocking. He acknowledges delusions of control and thinking that people could read his mind as well as acknowledged delusions of persecutions,* ***saying that he gets into fights with a lot of people he does not know and feels that someone may be following him****. My physician's report comments his thoughts are illogical, his insight marginal and his judgment bad.* (Emphasis added) (CP 475).

In an addendum report, Rutledge noted that "... Douglas continued to have psychotic symptoms, although voices or hallucinations were not

[3] Again it is noted that the school nurse, Ms. Libby, was part of the IEP process which within its paperwork quite clearly shows that Mr. Chanthabouly suffered from paranoid schizophrenia. Yet it is again noted that Ms. Rutledge denies that she ever knew prior to the January 3, 2007 shooting that Mr. Chanthabouly suffered from such a disease.

usually commanding or threatening." (CP 476)[4]. According to Mr. Chanthabouly, he would hallucinate at school that people were pointing guns at him and were threatening him, and his little brother, who was also in attendance at the same school. He confessed to the police that, in order to protect himself, prior to the shooting, he would regularly bring a gun to school. (CP 1014-19).

In less than a month prior to the shooting of Samnang Kok, Mr. Chanthabouly made an indirect written threat to do violence towards someone named "Sam." This was in a school assignment by one of his teachers, a Ms. Kimmerling, his special education teacher, and who was involved in the IEP processes. The school assignment suggested that someone named "Sam" should, "... live in dirt ...," and that he should "... live there forever." As opposed to being alarmed by the school assignment, Ms. Kimmerling, who should have been aware of how Mr. Chanthabouly's paranoid schizophrenia manifested itself in paranoia and potential violence, wrote on the top of the paper "Good!" and "Interesting." (CP 928). Of course it was "Sam," (Samnang), who was shot and killed by Mr. Chanthabouly a few weeks later.

[4] At A-3of the Court of Appeals opinion, the Appellate Court pointed to this statement as being indicative that Mr. Chanthabouly was not dangerous.

Plaintiff presented expert testimony by a school security expert, and from a psychiatrist extremely familiar with paranoid schizophrenia. Plaintiff's school security expert opined, (without opposition), that because of the way Mr. Chanthabouly's mental illness had manifested in the past, school personnel including the school security officer, should have been made aware of his circumstances so when something like the above-referenced school assignment came about, it could have been appropriately evaluated as to whether or not it was intended to be a threat that needed to be acted upon in order to protect the target of such a threat. (CP 1114-1116). Additionally, it was undisputed by both Plaintiff's security expert, the former head of security for Foss High School, and the current head of security for the Tacoma School District, that the kind of information regarding Mr. Chanthabouly's condition, as reflected within the IEP documents, should have been shared with building personnel, as well as teachers, in order that they could maintain vigilance to ensure that Mr. Chanthabouly's delusional ideations did not manifest themselves into violent actions. (CP 1182; 1550;1885).

According to Plaintiff's psychiatric expert, it was extremely questionable whether or not any effort should have been made to "mainstream" Mr. Chanthabouly, given that his illness may have been better

addressed by having him in a more structured, less chaotic environment than a high school setting[5]. (CP 797-99). The Court of Appeals provided the school district the benefit of an evaluative process, which it never engaged in.

Finally, even the school's own literature, which had been generated since the watershed Columbine shooting, indicate that Douglas Chanthabouly presented several features that should have been "warning signs" requiring a level of vigilance. Unfortunately the Court of Appeals opinion renders all such efforts at training and prevention to be for naught.

This case comes down to the simple question as to whether or not, based on what the Tacoma School District "knew or should have known," and that it was reasonable foreseeable that this gravely ill young man, (whose violence had manifested in violence directed toward himself and others), posed a threat to his peers at Foss High School. Had appropriate precautions been in place, the students at Foss High School would have been protected from this regularly armed paranoid schizophrenic, and Samnang's death could have been averted.

Predictably, as soon as the shooting occurred, staff at Foss High School had the immediate assumption that Mr. Chanthabouly's illness played

[5] The Court of Appeals disregarded plaintiff's psychiatric expert's opinions because he supposedly was not well versed in school issues. It is respectfully suggested that such an observation goes to the weight of his opinions, and not its substance.

a role. That prediction should have been made before the shooting.

B. Procedural History

This case was initially filed on July 31, 2008. The Honorable Linda C.J. Lee, Pierce County Superior Court Judge, was assigned to the case. After such assignment, Judge Lee retained the case, despite the fact that rotations were occurring amongst the Pierce County Superior Court Judges, which otherwise would have resulted in a reassignment of this case to a different judge.

After extensive pretrial discovery, on December 16, 2011, Judge Lee entered an Order Granting the School District's Motion for Summary Judgment. (RP 12-16-11, p., 46-47). In response, Plaintiff promptly filed a Motion for Reconsideration and, while such a Motion for Reconsideration was pending, learned through the community that Judge Lee's spouse, Mark Hood, was a partner in a local Tacoma law firm which regularly represents the Tacoma School District. (CP 1960-2021; 2125-2250). Upon learning such information, Plaintiff's counsel conducted an investigation, including review the Judge's spouse's law firm's web site, wherein it was indicated that part of Mr. Hood's professional practice was in the area of "school district real estate law," and found that he was listed as a member of the law firm's "school law practice group." (CP 2135). Additionally, it was learned that Mr. Hood had

membership in a group called the "Washington Council of School Attorneys," along with a number of colleagues in his law firm. (CP 2162; 2156-2169). It was noted that this particular professional organization was dominated by attorneys within defense counsel's current firm, with Mr. Hood's law firm having the second most membership. In his listing in a 2011 "membership roster" for that group, Mr. Hood referenced the Tacoma School District as one of his clients. (CP 2162).

Further, investigators revealed that Judge Lee's PDC disclosures relating to her initial election to the bench in 2008, that Scott Winship, another lawyer in her husband's law firm, was her campaign manager. (CP 2145; 2178). Also, within her PDC disclosure, she revealed the Tacoma School District was amongst the "public entities" clients paying in excess of $10,000.00 during 2007 to the "Vandenberg Johnson" law firm, of which her husband was a member. (CP 2188). After gathering this information, Plaintiff Filed a Motion to Vacate the Summary Judgment Order and for Recusal/disqualification of Judge Lee. Within such moving papers, counsel for the Plaintiff unequivocally stated that there was "not a shred of doubt" that had such information been disclosed at the outset, there would have been a request that the assigned Trial Judge recuse herself, and that the matter be reassigned to a different judge. (CP 2126; 2251-2264).

On January 27, 2012, Judge Lee heard Plaintiff's Motion to Disqualify. She took it under advisement, and held Plaintiff's pending Motion for Reconsideration in abeyance. Several months passed. On April 26, 2012, Judge Lee issued a letter decision Denying Plaintiff's Motion to Vacate and for Recusal. (CP 2549-2552; 2553-2555). On May 18, 2012, the Judge heard Plaintiff's Motion for Reconsideration, which was denied, and a Notice of Appeal was timely filed.

That appeal resulted in the now published Court of Appeals Division II opinion, which is attached hereto as Appendices 1-15. It is noted that, after the initial issuance of the unpublished opinion in this case, amongst others, the "Washington Council of School Attorneys" was amongst the third parties seeking publication of the previously unpublished decision. Since the initial issuance of the opinion in this case, Judge Lee has been appointed by the Governor to be a member of Division II of the Court of Appeals.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Court of Appeals Decision Fails to Adequately Protect Our Children by Setting the Standard of Care Applicable to School Officials to Protect our Children from Student on Student Violence So Low as to be Next to Meaningless, Increasing the Danger to Other Students.

Samnang's Kok's death occurred within the first 72 hours of the New Year in 2007. In the year 2002, in the case of *La Vine v. Blaine School*

District, 257 F.3d 981, 987 (9th Cir. 2011), the Ninth Circuit made the following observations, which are apropos to the facts and circumstances of this case:

> *As we noted at the outset, we live in a time when school violence is an unfortunate reality that educators must confront on an all too frequent basis. The recent spat of school shootings have put our nation on edge and have focused attention on what school officials, law enforcement and others can do or could have done to prevent these kinds of tragedies. After Columbine, Thurston, Santee and other school shootings, the questions have been asked about how teachers or administrators could have missed telltale "warning signs" why something was not done earlier, and what should be done to prevent such tragedies from happening again.*

The shooting in this case occurred some 5½ years after the *La Vine* case was published, and it occurred despite the presence of numerous "warning signs" which responsible school officials should have been aware of and for which training was available within the Tacoma School District. This shooting occurred despite the fact the Tacoma School Districts were aware of the information that should have resulted in the reasonable conclusion that Douglas Chanthabouly, the shooter, suffered from a grave psychiatric disorder, which manifests itself in a manner which posed a significant risk of harm to his fellow students.

Experience shows us that schools can be places of "special danger." See, *Ponce v. Soccorro Independent School District*, 508 F.3d 765 (5th Cir. 2007); see also, *Boim v. Fulton County School District*, 494 F.3d 978, 983-84 (11th Cir. 2007) (the phenomena of a high school shooting is well recognized as historical fact). See also, *http://en.wikipediea.org/wiki/List_of_school_shootings_in_the United_States*. (Listing school shootings from the mid-1700s to the present, showing a ever increasing accelerating patterns of such events).

In recognition of the "special relationship" that a school district holds with its pupils, this Court has been more than willing to extend a protective veil over students while they are at school, and corresponding duties upon the school districts to ensure the safety of children. See, *Christiansen v. Royal School District No. 160*, 56 Wn.2d 622, 627, 124 P.3d 283 (2005); *McLeod v. Grant County School District No. 128*, 42 Wn.2d 316, 321, 255 P.2d 360 (1953); *J. N. by Hagar v. Bellingham School District*, 174 Wn. App. 49, 871 P.2d 1106 (1994).

Presumptively, such a duty has been imposed with the understanding "that tort liability will have a salutary effect on the seriousness with which the [school district] executes its responsibilities." See, *Yonker by and Through Snudden v. DSHS*, 85 Wn. App. 71, 81, 930 P.2d 958 (1997). Presumptively,

such a duty has been imposed upon school districts because "the existence of some tort liability will encourage" school districts from avoiding negligent conduct, and will assure that those injured by a school district's negligence can recover. *Id.*

The seriousness of the duty that the Supreme Court intended to impose upon school districts within the State of Washington is further emphasized by the fact that such a duty is intended to be "non-delegable." *Carabba v. Anacortes School District No. 103*, 72 Wn.2d 939, 948, 435 P.2d 936 (1997). See also, *Travis v. Bohnnon*, 128 Wn. App. 231, 1115 P.3d 342 (2005).

Yet, despite the fact that school districts have such a solemn and well-recognized duty to protect children, and despite the fact that the proliferation of school violence, has become epidemic the Court of Appeals opinion in this matter sets the bar so low that, effectively, a school district has no duty at all to be vigilant and to take heed of the "warning signs" of school violence which by now should be readily understood. Unfortunately, the Court of Appeals opinion overly dwells on what information was not available to the school district, as opposed to that which ultimately was available or could have been known. What is most troubling, is that the Court of Appeals opinion emphasizes the failure of any of Mr. Chanthabouly's healthcare

providers to provide notice to the school district as being a valid justification for the school district's failure to act or understand that Mr. Chanthabouly posed a special danger to students at Foss High School. By emphasizing what information was not provided by third parties, as opposed to focusing in on what was known to the school, is the *de facto* delegation of the school district's responsibility to protect the safety of its children to third party healthcare providers. That, it is respectfully suggested, was and is erroneous.

It is further respectfully suggested that the position taken by the Court of Appeals, that Plaintiff was merely contending that, because Mr. Chanthabouly suffered from paranoid schizophrenia and would automatically be suspect for potential violence is a mischaracterization of the record. What is at issue is whether or not Mr. Chanthabouly's mental illness manifests itself in a manner which could be predictive of future violent behavior. It further begs the question as to whether or not school officials knew, or should have known, how Mr. Chanthabouly's mental illness was manifesting based on their training and experience, particularly training relating to how to recognize the existence of such "warning signs."

Here, 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[6]. Here, had the officials at the Tacoma School District simply been paying attention, they would have known that Mr. Chanthabouly's attendance within the Tacoma School District, at least as of 2004, was plagued by delusions, paranoia, and an irrational belief that he was a gang member, and being pursued by rival gangs. It should have known that Mr. Chanthabouly had previously gotten into fights and confrontations with other students based on such delusions.

In this case, the undisputed facts establish that Mr. Chanthabouly told the school psychologist he was getting into fights with people he does not know, and on some occasions, suffers from threatening hallucinations. He indicated that he was paranoid. Yet, despite the fact a safety plan was in place, that safety plan was ignored and undercut by the very school officials who were supposed to be implementing it. Mr. Chanthabouly was left to wander the halls of Foss High School in his delusional state, and was a time bomb ready to explode.

It is respectfully suggested that there were ample facts from which it

---

[6] Given the proliferation of school shootings, it is respectfully suggested that the possibility of school violence including school shootings must always be considered within the "field of danger" which exists when one attends school. See *J. N. by*, 74 Wn. App. at 57. Again it is noted that an intentional or criminal conduct may have been foreseeable unless it is "so highly extraordinary or improbable as to be wholly beyond the range of expectability." *Johnson v. State*, 77 Wn. App. 93, 942, 984 P.2d 1366 (1995). Given such a standard, it is hard to imagine that a school shooting, particularly in modern times, could ever be deemed to be "highly extraordinary" or "improbable."

could be concluded that the school district had an obligation to at least evaluate whether or not Mr. Chanthabouly posed a risk to its other students, and to act accordingly.

The Court of Appeals' willingness to focus on Mr. Chanthabouly's right to an education, as opposed to the right of his peers to be safe, struck an inappropriate balance that the Supreme Court should correct. There is not a shred of doubt that Mr. Chanthabouly is entitled to all of his educational rights. However, such rights are not without their limits, and it is well-established that a right to an education must give way to security and safety concepts. See generally, *Hutton v. Elf Atocam North America, Inc.*, 273 F.3d 883 (9th Cir. 2001) (when disability is a "direct threat" to the health and safety of the individual or others then a disabled individual's rights can be subordinate); *Ponce v. Socorro Independent School District*, *supra*, (First Amendment rights in a school setting are trumped by safety and security concerns when speech threatens safety and security). Simply stated, an individual's right to an education does not trump an entire school population's right to be free from violence and to be safe. Unfortunately, the Court of Appeals opinion improperly strikes the balance between these two competing interests, and placed abstract rights above very real safety concerns.

What is at issue in this case is the safety of potentially all children who are attending school within the State of Washington. School violence is epidemic. If school officials are not held responsible for their failure to heed the warning signs, then the existence of a protective duty becomes meaningless and absolutely loses its protective value.

This case involves an issue of extreme "public importance" within the meaning of RAP 13.4(b)(4) (an issue of substantial public interest that should be determined by the Supreme Court). It is hard to imagine that there are any more important interests within the state than the protection and safety of our children while in attendance at public schools.

B. The Appellate Court's Analysis of Plaintiff's "Appearance of Fairness"/Recusal Issue Could Serve to Undermine Public Confidence in the Judiciary.

As recognized by the Court of Appeals, a judicial proceeding satisfies the appearance of fairness doctrine if a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial and neutral hearing. *Tatham v. Rogers*, 170 Wn. App. 76, 96, 283 P.3d 583 (2012). "The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that "a reasonable person knows and understands all the relevant facts." *Tatham*, 170 Wn. App. at 96. The asserting party does not have to show actual bias, it is enough to present

evidence of potential bias. *Tatham*, 170 Wn. App. at 95. The party must produce sufficient evidence demonstrating actual and potential bias such as personal or pecuniary interest on the part of the judge, mere speculation is not enough.

Typically, when the issue is the judge's prior professional or personal connections to one of the parties, such parties are dealt with requiring disclosure, but not necessarily recusal by the trial judge. *Tatham*, 70 Wn. App. at 103.

In this case, without citation to authority, it appears that the Appellate Court sidestepped the issue of appearance of fairness based simply on the fact that, ultimately, the Trial Court's decision was affirmed following a *de novo* review on appeal. It is respectfully suggested that the Appellate Court's decision improperly assumes that an "appearance of fairness" cannot taint proceedings which result in what can be characterized as a correct decision. It is also respectfully suggested that "appearance of fairness" is a question of maintaining public confidence in the judiciary, as opposed to a determination as to whether or not one party or another received a right decision.

In this case, Judge Lee, who presumptively knew of her husband's relationship with the Tacoma School District, which appears to be extensive, failed to disclose such relationship at the outset of litigation. Judge Lee could

not deny the existence of such a relationship, having under oath signed PDC documents recognizing the same. Ironically, such appearance of fairness concerns have not been assuaged over time. Even after the Court of Appeals issued an unpublished decision in this case, the very organization of which her husband is a member, and which represents school districts across this state, filed a motion to publish the opinion in this matter.[7]

While it is true that Judge Lee's interests would be indirect in the form of income coming into her household ,when her husband represents the Tacoma School District on other matters what is at issue when "appearance of fairness" is of concern, is how the public would perceive the propriety of the circumstances. The appearance of bias or prejudice can be as damaging to public confidence in the administration of justice and would be the actual presence of bias or prejudice." See, *GMAC v. Everett Chevrolet, Inc.*, WL288997 (1/27/14) , citing to, *State v. Madry*, 8 Wn. App. 61, 70, 540 P.2d 1156 (1972). The law goes farther than requiring an impartial judge, it also requires that a judge appear to be impartial. *Id.*

The Court of Appeals opinion has this issue turning on the question of whether or not it agreed or disagreed with the ultimate decision made by the trial judge. This was erroneous because it simply assumes that something

[7] It is also noted that coincidentally Judge Lee was appointed by the Governor to the very Appellate Court which found that she had not abused her discretion in addressing such issues.

can only "appear" unfair if an improper decision has been reached. Such a proposition appears to be unprecedented and unwarranted, and is another issue of public importance of which the Supreme Court should examine. What happened here has the grave potential of shaking public confidence in our judiciary.

VII.CONCLUSION

For the reasons stated above, it is respectfully suggested that this Petition for Review should be granted.

DATED this 21st day of February, 2014.

Paul Lindenmuth, WSBA#: 15817
Of Attorney for Appellants

DECLARATION OF SERVICE

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

On February 21, 2014, I caused to be served delivered to the attorney for the Defendant/Respondent, a copy of the **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:

Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

*Court of Appeals, Division II will forward to:
Supreme Court, State of Washington
Temple of justice
PO Box 40929
Olympia, WA 98504
Phone: 360-357-2077
supreme@courts.wa.gov

The address to which these documents were provided to Defendant/Respondent's attorney:

Charles P.E. Leitch
Michael A. Patterson
Sarah Heineman
Patterson Buchanan Fobes Leitch & Kalzer, PS
2112 Third Ave., Suite 500
Seattle, WA 98121

[X] via legal messenger (ABC Messenger Service)
[X] via email

DATED February 21, 2014, at Tacoma, Pierce County, Washington.

Marilyn DeLucia, Paralegal
The Law Offices of Ben F. Barcus & Associates, PLLC

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RITH KOK, individually and as administrator of the Estate of SAMNANG KOK, deceased; MAKAI JOHNSON-KOK, individually and 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; KOSAL KOK, individually and as a beneficiary of the Estate of SAMNANG KOK; and LISA KOK, individually and as a beneficiary of the Estate of SAMNANG KOK;

Appellants,

v.

TACOMA SCHOOL DISTRICT NO. 10, A MUNICIPAL ENTITY UNDER THE LAWS OF THE State of Washington; and DOUGLAS SENGSABONG CHANTHABOULY and "JANE DOE" CHANTHABOULY, individually and the marital community composed thereof;

Respondents.

No. 44517-4-II

UNPUBLISHED OPINION

PENOYAR, J. — The estate of Samnang Kok (Estate) sued the Tacoma School District (District) for negligence after Douglas Chanthabouly shot Kok in the hallway at Foss High School. To prevail in its negligence action, the Estate had the burden to show that the District had some reason to believe Chanthabouly might be dangerous. The trial court granted summary judgment for the District, finding that Chanthabouly's actions were not foreseeable. The Estate appeals, arguing that foreseeability is an issue for the jury and that the trial judge, whose spouse had previously represented the District on unrelated issues, should have recused herself under the appearance of fairness doctrine. Because Chanthabouly's behavior and medical records did not

indicate that he was at risk for harming other students, we hold that the trial court did not err in finding that his actions were not foreseeable by the District. Additionally, the trial judge did not err by denying the Estate's recusal motion because neither she nor her spouse has an interest in the outcome of the present case. We affirm.

FACTS

On January 3, 2007, Chanthabouly fatally shot Kok in the hallway at Foss High School. The Estate brought this claim against the District, arguing that it was negligent by failing to maintain a safe school environment and by enrolling a student with a severe mental illness.

I. MEDICAL HISTORY

Chanthabouly was diagnosed with paranoid schizophrenia following a suicide attempt in January 2005. At the time of his suicide attempt, doctors noted that he was hearing voices, that he claimed to get into fights with people he did not know, and that his thoughts were illogical and his judgment bad. After a brief hospitalization, Chanthabouly received 11 months of outpatient mental health care from Comprehensive Mental Health.[1] His psychiatrists prescribed him antipsychotics, which he took in the morning and at night, to combat his auditory hallucinations. When Chanthabouly's care at Comprehensive Mental Health ended in January 2006, his case manager stated that he was stable while on his medication; he occasionally heard voices, but they did not tell him to harm himself and he was able to separate reality from hallucinations.

Chanthabouly's medical records do not indicate that he was at risk for assaultive behavior. His mental health assessment, completed while he was receiving treatment following his suicide attempt, states that he "has never been assaultive towards others." Clerk's Papers

[1] Foss requested Chanthabouly's records from the hospital and Comprehensive Mental Health.

(CP) at 114. His mental health counselor noted that while he continued to have post-treatment auditory hallucinations, they were not usually commanding or threatening. His psychiatrist testified that she did not see any indication that he would harm others. His medical records also contain assessments from Chanthabouly and his mother. Both of them indicated that he was lonely and had difficulty getting along with his peers but that he did not get into fights or arguments.

II. SCHOOL HISTORY

Chanthabouly attended several high schools within the District. He started the 2002-03 school year at Stadium High School, and then transferred to Foss, where his siblings were enrolled. Chanthabouly began the 2003-04 school year at Mount Tahoma High School because his family had moved into Mount Tahoma's attendance area. He transferred from Mount Tahoma to Oakland High School mid-school year, and remained at Oakland for the rest of the year.[2] Chanthabouly began the 2004-05 school year back at Mount Tahoma, but, after his suicide attempt, he transferred to Foss, where his younger brother was enrolled.[3] He remained at Foss from April 2005 until January 2007.

Chanthabouly's school record does not contain any incidents of prior assaultive behavior. His suspension at Stadium was for "defiance of authority" and not for fighting. CP at 342. He complained of bullying while at Mount Tahoma, but his record does not show any acts on his

[2] Chanthabouly's mother told his doctor that she moved him to Oakland after a gang of students hit him in the back of the head. His sister testified that he transferred to Oakland because he was having trouble with his school work.

[3] The transfer request form states, "If any behavior or attendance problems student will return to Mt Tahoma." CP at 353. The Estate points to this as evidence of Chanthabouly's behavior problems. But the note does not say that Chanthabouly's problems involved fighting or violent acts, and, since Chanthabouly was not transferred back to Mount Tahoma, it appears that he did not have any behavior problems while attending Foss.

part. Additionally, none of the staff noticed any violent behavior while Chanthabouly was at Foss. His principal testified that Chanthabouly was never referred to him for disciplinary issues. Similarly, his counselor stated that teachers would approach him if they were concerned about a student and that no teachers approached him about Chanthabouly. Chanthabouly's teachers reported that, although he had difficulty participating in class and finishing his assignments, he was cooperative and polite. The school security officer testified that he did not have any concerns about Chanthabouly prior to January 2007 and that, while he noticed Chanthabouly talking and laughing to himself, he never witnessed Chanthabouly getting in fights with other students or being bullied.

In 2005, Chanthabouly's mother requested that Foss test him for special education eligibility because he was struggling academically. Foss determined that Chanthabouly was "Emotionally/Behaviorally Disabled" and qualified for special education services to improve his classroom participation and written language skills. CP at 93. As a result, he attended a daily, one hour written language class with a special education instructor. He wrote the following paragraph as a writing assignment for that class: "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. His teacher wrote, "Good! Interesting." at the top of the page. CP at 215. She testified that she did not know who Sam was and that there was nothing about the assignment that alarmed her.

III. PROCEDURE

The Estate filed a complaint against the District, alleging that it "was negligent by failing to use reasonable care in maintaining a safe school environment" and by "enrolling an individual whom they knew or should have known had substantial mental illness and as a result, extremely dangerous propensities."[4] CP at 8.

The District moved for summary judgment, arguing that Chanthabouly's actions were not foreseeable. The trial court granted the District's summary judgment motion and dismissed the Estate's claims. The Estate filed a motion for reconsideration, arguing that there were material facts at issue regarding foreseeability. While that motion was pending, the Estate's attorneys discovered that the trial judge's spouse and his firm had represented the District in unrelated matters. The Estate filed a motion for recusal. The trial court denied the Estate's motions for recusal and reconsideration. The Estate appealed both denials directly to the Supreme Court. That court denied direct review and transferred the case to this court.

ANALYSIS

I. SUMMARY JUDGMENT

We review an order granting or denying summary judgment de novo and perform the same inquiry as the trial court. *Aba Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). "A motion for summary judgment is properly granted where 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003) (quoting CR 56(c)). We view the facts and any reasonable inferences in the light most favorable to the nonmoving party. *Michak*, 148 Wn.2d at 794.

[4] The other parties and claims were dismissed during the course of the suit.

II. FORESEEABILITY

The Estate argues that the trial court erred by granting the District's summary judgment motion because forseeability is generally a question for the jury.[5] Because reasonable minds would not differ in concluding that Chanthabouly's acts were not foreseeable by the District, we affirm the trial court.

A school district is required to exercise reasonable care—that of a reasonably prudent person under similar circumstances—when supervising students within its custody. *J.N. v. Bellingham Sch. Dist. No. 501*, 74 Wn. App. 49, 57, 871 P.2d 1106 (1994). "[A] school district has the power to control the conduct of its students while they are in school or engaged in school activities, and with that power goes the responsibility of reasonable supervision." *Peck v. Siau*, 65 Wn. App. 285, 292, 827 P.2d 1108 (1992).

But the duty to exercise reasonable care extends only to risks of harm that are foreseeable. *J.N.*, 74 Wn. App. at 57. A risk of harm is foreseeable if it is within the "general field of danger covered by the specific duty owed by the defendant." *J.N.*, 74 Wn. App. at 57 (quoting *Maltman v. Sauer*, 84 Wn.2d 975, 981, 530 P.2d 254 (1975)). Intentional or criminal conduct may be foreseeable unless it is "so highly extraordinary or improbable as to be wholly beyond the range of expectability." *Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 50, 929 P.2d 420 (1997) (quoting *Johnson v. State*, 77 Wn. App. 934, 942, 894 P.2d 1366 (1995)). Foreseeability is normally a jury question, but it may be decided as a matter of law where reasonable minds cannot differ. *J.N.*, 74 Wn. App. at 57.

[5] The Estate also argues that the trial court misinterpreted the scope of the District's duty. But it does not define the scope used by the trial court or argue why the scope was incorrect. Rather, the Estate's argument in this section appears to be that it produced evidence sufficient to show that the District should have known that Chanthabouly was dangerous. That argument is addressed in this section.

Division One of this court held that summary judgment was inappropriate where the plaintiff had established that the harm was within the general field of danger and the defendant school district could reasonably have anticipated the offending student's actions. *J.N.*, 74 Wn. App. at 62. In *J.N.*, a student was sexually assaulted by another student in the bathroom during recess. 74 Wn. App. at 51. The court held that the general field of danger—harm by one student to another in accessible and unsupervised restrooms—was reasonably foreseeable by the district. *J.N.*, 74 Wn. App. at 59-60. Additionally, there was evidence that the district knew of the assaulting student's dangerous propensities. *J.N.*, 74 Wn. App. at 60. The district knew that the student had significant behavioral problems, including physically assaulting other students; had a possible family history of sexual abuse; used inappropriately sexual language; and was determined to be "severely behaviorally disabled" by the school psychologist. *J.N.*, 74 Wn. App. at 52-53.

By contrast, we have held that summary judgment is appropriate where there is no reason to believe that a school district should have known of a risk to students. *Peck*, 65 Wn. App. at 287, 293. In *Peck*, a librarian sexually assaulted a student. 65 Wn. App. at 287. We held that there was nothing in the record to indicate that the district knew the librarian was a threat to students. *Peck*, 65 Wn. App. at 293. We noted that a school district is required to protect students from third parties' harmful actions, but it is not liable merely because such actions occur. *Peck*, 65 Wn. App. at 293. Instead, the harmful activities must be foreseeable. *Peck*, 65 Wn. App. at 293.

Here, the Estate has failed to show that the harm caused by Chanthabouly was foreseeable. It appears to argue that the general field of danger was allowing a schizophrenic student in the general education population. The Estate contends that Chanthabouly's behavior at school and his schizophrenia diagnosis presented evidence from which the District should have reasonably anticipated that he would engage in a violent act on school grounds. 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.

Unlike the student in *J.N.*, Chanthabouly's behavior at school did not put the District on notice that he would act violently toward another student.[6] The Estate lists many facts which, it argues, show Chanthabouly's "Violent Propensities." Appellant's Br. at 14. They point to Chanthabouly's 2002 suspension for defiance of authority, his being attacked by a group of students at Mount Tahoma, his frequent school transfers, a line from the school psychologist in his IEP file stating that he gets into fights with people he does not know, reports of him talking and laughing to himself during school hours, a confrontation with a stranger at Sears, and a

[6] The Estate repeatedly refers to the lack of school records in this case, apparently based on information it thinks *should* be in the records and a note from a Foss counselor in Chanthabouly's IEP folder stating that his file contains only enrollment paperwork and a few other papers and that she was unable to find his cumulative file at his other schools. However, the record in this case contains his high school grades, enrollment information, and disciplinary actions. Further, there is no evidence that the District purposefully destroyed or withheld any of Chanthabouly's records.

school writing assignment referencing a person named "Sam." 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, and many of these events took place before his diagnosis or while health care providers were still adjusting his treatment.

Moreover, Chanthabouly's schizophrenia diagnosis was not sufficient to place the District on notice that he may act violently. First, the District is not Chanthabouly's medical provider. As the Foss psychologist testified, "In a school setting we deal with the behaviors, not necessarily the diagnosis." CP at 891. Before January 2007, Chanthabouly's behavior was not assaultive, and the District could not reasonably anticipate that he would act violently at school. Second, even his medical providers felt that he was not at risk for harming others. His medical records state that his hallucinations were "not usually command or threatening." CP at 112. Although he had tried to harm himself, before January 2007, Chanthabouly had not tried to harm another person, and his psychiatrist did not believe he was a threat to others.

Further, as the District points out, his diagnosis alone is not a reason to exclude him from a public education. Both federal and state laws require public school districts to provide appropriate education to students with disabilities. *See* Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12132 ("no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity");

Rehabilitation Act, 29 U.S.C. § 794(a) ("No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance"); Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400(d)(1)(A) (one of the purposes of this chapter is "to ensure that all children with disabilities have available to them a free appropriate public education"); RCW 28A.155.010 ("It is the purpose of [this chapter] to ensure that all children with disabilities . . . shall have the opportunity for an appropriate education at public expense as guaranteed to them by the Constitution of this state and applicable federal laws."). To the maximum extent appropriate, the District shall educate children with disabilities in the general education environment.[7] WAC 392-172A-02050(1); WAC 392-172A-03090(1)(d) and (e); 20 U.S.C. § 1412(a)(5)(A). Because the standard of reasonable care is that of a reasonably prudent person *in similar circumstances*, these duties are relevant to whether the District exercised reasonable care.

The Estate argues that Chanthabouly should not have been placed in the general education environment. This contention ignores state and federal antidiscrimination laws and the District's duty to Chanthabouly. The Estate emphasizes the deposition of Dr. Hamm, who opined that Chanthabouly was a "high-risk individual" who should not have been in the general

[7] Chanthabouly qualifies as an individual or student with a disability. Under the ADA and the Rehabilitation Act, "disability" is defined as "a physical or mental impairment that substantially limits one or more of the major life activities." 28 C.F.R. § 35.104; 29 U.S.C. § 705(20)(B); 42 U.S.C. § 12102(1). Schizophrenia is a mental impairment that substantially limits brain function. 29 C.F.R. § 1630.2(j)(3)(iii); *Garner v. Chevron Phillips Chem. Co.*, 834 F. Supp. 2d 528, 539 (S.D. Tex. 2011). Under the IDEA, a "child with a disability" includes a child with a serious emotional disturbance who, because of the disability, requires special education and related services. 20 U.S.C. § 1401(3). Under state law, a "student with a disability" means a student who, through an evaluation process, is determined to be eligible for special education due to a disability. RCW 28A.155.020. Foss determined that Chanthabouly was eligible for special education because he was emotionally and behaviorally disabled.

education population. CP at 697. But Dr. Hamm stated that he had only general knowledge of a school's legal obligations and that he had not worked within the public school system. Thus, his opinion does not take into account the District's duties to Chanthabouly.

The Estate also relies on literature describing warning signs for violent behavior and argues that Chanthabouly exhibited many of the signs. In doing so, it ignores the cautions in the literature and relies on warning signs that are not supported by the record. The "Early Warning Signs" suggested by the Department of Education caution 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," and that "it is important to avoid inappropriately labeling or stigmatizing individual students because they appear to fit a specific profile." CP at 655. Further, it warns that "it is inappropriate—and potentially harmful—to use the early warning signs as a checklist against which to match individual children." CP at 657.

Additionally, some of the warning signs that the Estate claims are met are not supported by evidence in the record. The Estate argues that Chanthabouly exhibited the following warning signs: social withdrawal, feelings of isolation, being a victim of violence, little interest in school and poor academic performance, written and verbal expressions of violence, a history of discipline problems, a history of violent and aggressive behavior, and gang affiliations. There is evidence that Chanthabouly was withdrawn and isolated and that he may have been the victim of bullying, but his 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.

The District did not have evidence through either Chanthabouly's behavior or his diagnosis that he would act violently. Although the Estate argues that his diagnosis alone should

have alerted the District to the possibility of violent acts, this argument is not persuasive where the District is staffed by educators, not medical professionals, and where the District owed a duty to Chanthabouly to educate him with his peers. We affirm the trial court.

III. RECUSAL

Finally, the Estate argues that the trial court judge should have recused herself under the appearance of fairness doctrine. Because a reasonably prudent and disinterested person would conclude that all parties received a fair, impartial, and neutral hearing, we affirm the trial judge's decision that recusal was not necessary.

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. *State v. Davis*, 175 Wn.2d 287, 305, 290 P.3d 43 (2012); *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A judicial proceeding satisfies the appearance of fairness doctrine if a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing. *Tatham v. Rogers*, 170 Wn. App. 76, 96, 283 P.3d 583 (2012). "The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that 'a reasonable person knows and understands all the relevant facts.'" *Tatham*, 170 Wn. App. at 96 (quoting *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995) (quoting *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d cir. 1988)). The asserting party does not have to show actual bias; it is enough to present evidence of potential bias. *Tatham*, 170 Wn. App. at 95. The party must produce sufficient evidence demonstrating actual or potential bias, such as personal or pecuniary interest on the part of the judge; mere speculation is not enough. *In re Pers. Restraint of Haynes*, 100 Wn. App. 366, 377 n.23, 996 P.2d 637 (2000).

The Estate argues that this case is similar to *Tatham*. In *Tatham*, Division Three of this court held that the trial judge in a property distribution case should have recused himself on appearance of fairness grounds where the judge and one of the attorneys had prior professional and personal connections. 170 Wn. App. at 103, 107. After the judgment, one of the parties discovered that the attorney for the opposing party was a partner in the judge's former firm, may have represented the judge during a DUI arrest, served as the judge's campaign manager, designated the judge her attorney-in-fact, and was appointed county court commissioner by the judge. *Tatham*, 170 Wn. App. at 85. Division Three noted that most of these dealings required disclosure, but not recusal, by the trial judge. *Tatham*, 170 Wn. App. at 103. But, the trial judge's continuing service as the attorney's attorney-in-fact was a violation of the code of judicial conduct (CJC) and presented a reasonable concern about the judge's impartiality. *Tatham*, 170 Wn. App. at 104. Additionally, the court noted that any prejudice was amplified by the discretionary nature of a property distribution proceeding. *Tatham*, 170 Wn.2d at 104-05. The court held that the challenging party demonstrated a violation of the appearance of fairness doctrine and was entitled to a new trial before a different judge. *Tatham*, 170 Wn.2d 107.

Here, a reasonably prudent person would conclude that both parties obtained a fair hearing. Although the trial judge ultimately dismissed the Estate's complaint, she did enter some orders in its favor during the proceedings. For example, she granted the Estate's motions for continuance and to compel Chanthabouly's deposition. Further, the trial judge is not directly connected to the District, and the Estate has not shown that her spouse or his firm has any interest in the outcome of the instant proceeding.

Additionally, this case is distinguishable from *Tatham*. First, the connection between the parties and the trial judge is more tenuous in this case. In *Tatham*, the trial judge had direct connections to an attorney appearing before the judge. Here, the Estate does not allege a direct connection between the judge and the parties or their counsel; rather, it alleges that the trial judge's spouse had previously represented the District.

Second, the trial judge in this case did not violate the CJC. In *Tatham*, the trial judge acted as attorney-in-fact for one of the attorneys despite a CJC provision stating, "Judges shall not serve as executors . . . or other fiduciaries, except for the estate, trust or person of members of their families, and then only if such service will not interfere with the proper performance of their judicial duties." Former CJC Canon 5(D) 1995. Here, although the Estate argued below that the trial judge violated CJC 2.11(A)(2)(c) and (3), which require a judge to disqualify herself if she knows that she or her spouse have an interest that could be substantially effected by the proceeding or an economic interest in the subject matter or parties to the proceeding, it did not show that the judge's spouse's interest was more than de minimis.[8] The trial judge's spouse—whose area of concentration is real estate law—and his firm had represented the District only on unrelated issues. 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.

[8] Under CJC 2.11(A)(2)(c), the interest must be more than de minimis, and comment 6 to CJC 2.11 defines "economic interest" as more than a de minimis legal or equitable interest. According to the CJC terminology, "de minimis" means "an insignificant interest that could not raise a reasonable question regarding the judge's impartiality."

Finally, the nature of the proceedings was different in each case. 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.

Neither the trial judge nor her spouse has an interest in the outcome of the present case and a disinterested person would conclude that the parties received a fair and impartial hearing. We hold that the trial judge did not err by denying the Estate's recusal motion.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Johanson, A.C.J.

Bjorgen, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RITH KOK, individually and as administrator of the Estate of SAMNANG KOK, deceased; MAKAI JOHNSON-KOK, individually and 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; KOSAL KOK, individually and as a beneficiary of the Estate of SAMNANG KOK; and LISA KOK, individually and as a beneficiary of the Estate of SAMNANG KOK;

Appellants,

v.

TACOMA SCHOOL DISTRICT NO. 10, A MUNICIPAL ENTITY UNDER THE LAWS OF THE State of Washington; and DOUGLAS SENGSABONG CHANTHABOULY and "JANE DOE" CHANTHABOULY, individually and the marital community composed thereof;

Respondents.

No. 44517-4-II

ORDER GRANTING MOTIONS TO PUBLISH

Respondent, Tacoma School District No. 10, and a non-moving party filed separate motions to publish our October 22, 2013 opinion in this matter. After review of the records and files herein, we grant the motions.

It is ORDERED that the final paragraph that reads "A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered." is deleted.

It is further ORDERED that the opinion is now published.

DATED: this 22ND day of JANUARY, 2014.

PANEL: Jj. Penoyar, Johanson, Bjorgen

FOR THE COURT:

Johanson, A.C.J.
Acting Chief Judge